

**The Second Amendment in the States
and the Limits of the Common Use Standard**

Nicholas J. Johnson^{*}

INTRODUCTION

In *McDonald v. City of Chicago*, now before the Supreme Court, petitioners claim that Chicago's decades-old handgun ban is a violation of the Second Amendment right to keep and bear arms. The Supreme Court's recent affirmation in *District of Columbia v. Heller* that the Second Amendment protects an individual right to arms leaves little mystery about the likely outcome of *McDonald*. *Heller* struck down a federal handgun ban within the boundaries of the District of Columbia. *McDonald* will decide if the Second Amendment applies to state and local governments.

It is difficult to imagine that any of the five justices in the *Heller* majority will refuse to apply the Second Amendment to the states—either on the view that it is a fundamental right incorporated under the Due Process Clause of the Fourteenth Amendment or as one of the basic rights of citizenship protected under a revived Privileges or Immunities Clause.¹ Indeed it is fair to speculate that the *Heller* majority

^{*} Professor of Law, Fordham University School of Law. J.D., Harvard Law School, 1984.

¹*Heller* pressed the question whether the language of the Second Amendment ratified in the eighteenth century established an individual right to arms. *McDonald* asks whether an individual right to arms is a fundamental right incorporated as a limitation on state action under the Due Process Clause of the Fourteenth Amendment, or whether it can be recognized under a reinvigorated Privileges or Immunities Clause. Under the due process standard, the question is whether the Court will deem the right to arms a fundamental right. The *Heller* opinion suggests that at least five justices think it is. “The inherent right of self-defense has been central to the Second Amendment right.” *District of Columbia v. Heller*, 128 S. Ct. 2783, 2818 (2008). I have shown elsewhere that the ancient right to self-defense is a cornerstone on which the Court and scholars have constructed and elaborated a variety of fundamental constitutional rights, including the Fourth Amendment and the right to abortion. See Nicholas J. Johnson, *Self Defense?* 2 J.L. ECON. & POL'Y 187 (2006).

might pick up an extra vote in *McDonald* with an opinion that breathes life into the Privileges or Immunities Clause.² The more significant and tougher issue is how the

On the second question, there is very strong evidence that one aim of the Fourteenth Amendment was to prevent state governments from infringing the rights guaranteed by the Bill of Rights that was widely understood to include an individual right to keep and bear arms. See Clayton E. Cramer, Nicholas J. Johnson & George A. Mocsary, *This Right is Not Allowed by Governments that are Afraid of the People: The Public Meaning of the Second Amendment When the Fourteenth Amendment was Ratified*, 17 GEO. MASON L. REV. ____ (forthcoming 2010), available at <http://ssrn.com/abstract=1491365>. The evidence on this point is actually stronger than the evidence supporting the individual right as affirmed in *Heller*. The bulk of the brief for petitioner in *McDonald v. City of Chicago* is devoted to the Privileges or Immunities argument. See Brief of Petitioner-Appellant, *McDonald v. City of Chicago*, No. 08-1521 (argued Mar. 2, 2010).

Also, it is plausible to speculate that justices who object to the individual rights interpretation of the Second Amendment might still join an opinion that revived the Privileges or Immunities Clause. The appeal of this approach is that it presents a better platform for building unenumerated rights than the concept of substantive due process, and would offer more guidelines than the Ninth Amendment.

² Although the colloquy at oral argument suggests the Court is unlikely to revive the Privileges or Immunities Clause, this argument dominates the Petitioner's Brief in *McDonald*. One strand of the discussions and predictions surrounding *McDonald* focuses on the appeal that a revived Privileges or Immunities Clause has to those interested in constructing progressive, unenumerated rights claims. Doug Kendall and David Gans write this:

For the last forty years, the Court's fundamental rights jurisprudence developed under the Due Process Clause has been dogged by persistent claims of illegitimacy. *Roe v. Wade* has been the target of most of these attacks, but the claims made by *Roe*'s attackers go well beyond *Roe* or even abortion rights. Justice Scalia—the most fervent of the challengers—argues that the protection of unwritten fundamental rights is simply not lawyer's work. "The tools of this job," he says "are not to be found in the lawyer's—and hence not the judge's—workbox." But one need not reach for tools beyond Scalia's favorites—text and history—to see that judges properly protect substantive fundamental rights not enumerated elsewhere in the Constitution. On Scalia's own terms, his objections fall flat when faced with the text and history of the Privileges or Immunities Clause.

The list of fundamental rights the Privileges or Immunities Clause was designed to protect began with those in the Bill of Rights, but it did not end there. In discussing the fundamental rights of citizenship, the framers regularly included a long list of fundamental rights—such as the right of access to the courts, the right to freedom of movement, the right to bodily

integrity, and the right to have a family and direct the upbringing of one's children—that have no obvious textual basis in the Bill of Rights. These were core rights of personal liberty and personal security that belong to “citizens of all free governments;” it did not matter that they were not enumerated elsewhere in the Constitution. The framers' thinking should hardly be surprising. The Ninth Amendment affirms that the Constitution protects unenumerated rights; as Steven Calabresi reports, more than three-quarters of state constitutions at the time of the ratification of the Fourteenth Amendment did the same.

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There is an important lesson here. For too long, progressives have ceded the Constitution's text and history to conservatives, staking their claim more on the Supreme Court's interpretation of the Constitution than the document itself. This has been doubly damning. On the Court, Justice Scalia has gotten far too little push back on his reading of the Constitution's text and history—a reading that views the Reconstruction Amendments as minor tinkering around the edges of our original Constitution. No one on the Court consistently challenges Scalia on how to read the Constitution's text and history. Off the Court, Republican presidents and politicians argue that we need more Justices like Scalia who are committed to the Constitution's text and history, while Democratic politicians all too often talk about the results of cases they care about, not the Constitution. For many, this leaves the impression that progressives don't care about the Constitution's text and history.

That is why it is so important for progressives to engage in the coming debates about the Privileges or Immunities Clause, and its role in protecting substantive fundamental rights. Progressives may not like the individual, Second Amendment right recognized in *Heller*, but they cannot afford to sit out the upcoming fight over the incorporation of the Second Amendment. Instead, progressives should treat these incorporation cases as a tremendous opportunity. For years, debates over the Fourteenth Amendment's protections have run aground, a casualty of persistent attacks that the Court had no basis to use the Due Process Clause to protect fundamental rights. Now is the chance to change the American constitutional conversation about fundamental human and civil rights. Progressives have the chance to rejuvenate the Clause in the Fourteenth Amendment that was meant to protect the substantive liberty of all Americans, and to show how the Constitution's text and history support the Supreme Court's existing fundamental rights jurisprudence. With a text that explicitly protects the substantive liberties of all Americans finally back in the Constitution, claims that the Court has no textual basis to safeguard substantive constitutional rights would lose their force, and

individual right to arms will unfold in challenges to particular types of state and local gun laws.

To the question “what is protected under the Second Amendment?”, *Heller* answers: those firearms in “common use for lawful purposes like self-defense.”³ “Common use” suggests two possibilities. One is a narrow, numerical standard that would protect best-selling models from popular manufacturers but allow prohibitions on obscure brands of essentially the same gun. The other view is that “common use” means functionally common. This view would protect the entire class of similarly functioning guns regardless of whether millions were sold by popular makers.

Functional commonality is the better and really the only defensible view for two reasons. First, the cribbed numerical approach produces the same kind of equal protection problem that prompted challenges and then amendments to California’s assault weapons ban.⁴ It is difficult to justify drastically different treatment of owners and manufacturers of functionally identical guns.

The second objection is that the common use standard derives from the eighteenth-century understanding that citizens were expected to answer the militia call with arms “*provided by themselves in common use at the time for lawful purposes like self defense.*”⁵ Gun manufacturing at the time was pre-assembly line. Most private firearms were functionally similar, but every gun was essentially custom-made.⁶ So, the common use standard was not and is not source specific.

This resolves some things, but even under the “functionally common” standard there is a great deal left to contest. One reason is that functionality is complicated. It

the protection of fundamental constitutional rights would be on secure textual footing.

Posting of Doug Kendall and David H. Gans to Text & History, <http://theconstitution.org/blog/history/?p=469> (Dec. 15, 2008, 04:58 EST).

³ *Heller*, 128 S. Ct. at 2817-18. The common use standard is entirely adequate for resolving a broad category of claims. It is especially suited to resolving challenges to supply restrictions—i.e., gun bans of various types. On the other hand, *Heller*’s common use standard is insufficient for evaluating regulations that just add friction to exercise of the right. It is at this stage pure speculation how the jurisprudence for resolving those types of questions will evolve. For discussion of the possibilities see Nicholas J. Johnson, *Administering the Second Amendment: Law, Politics and Taxonomy*, 50 SANTA CLARA L. REV. (forthcoming 2010) [hereinafter *Administering*].

⁴ See STEPHEN P. HALBROOK, FIREARMS LAW DESKBOOK 10:10 (2007).

⁵ *Heller*, 128 S.Ct at 2815.

⁶ See ALEXANDER ROSE, AMERICAN RIFLE (2008) for a nice rendition of this story. Rose explains, for example, that guns of nominally the same caliber would actually have had different bore diameters because tooling was handmade and non-standardized.

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breaks down into several subcategories. The basic ones are ballistics, ammunition feeding, dimensions (i.e., both size and power to size ratio), and ammunition type (which is complicated because some will argue it is not directly addressed under *Heller*). These variables prompt a variety of questions about the “functionally common” standard and the kinds of regulation that it allows.

Resolution of these questions will unfold within a broader context that highlights resource allocation issues for those who anticipate spending political capital on gun control. I have demonstrated in detail elsewhere that supply side gun control laws can generate only negligible reductions in violence because Americans already own 300 million guns.⁷ Also, most gun crime is handgun crime, and handguns are now explicitly constitutionally protected under *Heller*.⁸ Still, it is plain that supply restrictions have a powerful political and symbolic resonance for both sides of the gun control debate. This means that battles implicating the common use standard will play out in earnest and that the often-ignored details of firearms functionality will take center stage.

This article shows how mechanical functionality and existing regulatory norms will shape the resolution disputes rooted in the common use standard. Sections A-D will focus on ballistic norms, ammunition feeding mechanisms, ammunition type and dimensional norms in that order.⁹ This article will conclude with a brief treatment of the regulatory and violence policy options that will remain viable after *McDonald*.

A. *Ballistically Common Guns and Background Regulatory Norms*

Ballistics, meaning destructive energy, is a function of several factors that are ultimately interrelated. The main factors are 1) muzzle diameter or caliber; 2) chamber dimensions—sometimes connoted by loose references to caliber but more accurately identified by the cartridge designation;¹⁰ 3) propellant chemistry; and 4) projectile type.¹¹

⁷ Nicholas J. Johnson, *Imagining Gun Control in America: Understanding the Remainder Problem*, 43 WAKE FOREST L. REV. 837 (2008) (broadly evaluating the viability of various gun control measures on the assumption that *Heller* is overturned). See also NAT’L RESEARCH COUNCIL OF THE NAT’L ACADEMIES, FIREARMS AND VIOLENCE: A CRITICAL REVIEW (2005), for an agnostic assessment of the effectiveness of existing gun regulations.

⁸ See Johnson, *supra* note 7, at 838.

⁹ For detailed illustrations of firearms parts see <http://www.gunparts.com> and <http://www.brownells.com> (search for name of firearm).

¹⁰ For example, the .308 Winchester, .30-06 Springfield and .300 Winchester magnum all have a 30 caliber (or .308 inch) bore diameter and will fire identical bullets. However, the chambers of these guns and the brass cases (holding the powder and the bullet) that fits into the chamber are different sizes. So the destructive energy of the .30-06 is greater than that of the .308 and the 300 magnum is more destructive than both of them.

Muzzle diameter and chamber dimensions are integral to the gun and might therefore be analyzed differently from propellant chemistry and projectile type¹² on the view that *Heller* extends more robustly to the gun than to ammunition variations.¹³

All of these variables are interrelated in ways that render regulatory focus on any one of them incomplete. However, a somewhat simplistic focus on individual variables is unavoidable because existing regulations have taken that focus, and those regulations have helped define the inventory of guns in common use.

1. National Firearms Act Norms

One good illustration of this kind of imprecise regulatory norm is the muzzle diameter filter established under the 1934 National Firearms Act (NFA).¹⁴ NFA regulations have set one half-inch muzzle diameter (or fifty caliber) as the threshold above which guns are regulated under the very stringent set of rules¹⁵ that govern machine guns and other “destructive devices.” On the other hand, rifled barrel guns—i.e., those with grooves that spin and stabilize the projectile—fifty caliber and below, long have been widely available and are subject to no special regulation. So as a threshold matter, guns fifty caliber and below should fit within the common use standard. Arguably, any gun above fifty caliber is uncommon because it has been deemed exotic by regulatory fiat for generations.¹⁶

Notice, however, that this is a technically impure determination of functionality. Many guns over fifty caliber are indistinct from sub-fifty caliber guns. The decision to make fifty caliber a regulatory threshold was arbitrary and artificially elevates a variable that on the margin will produce little if any difference in destructiveness. Still, it is

¹¹ For detailed and illustrated description of these terms see Hornaday Company Ballistics Resource Guide, <http://www.hornady.com/ballistics-resource> (last visited April 2, 2010).

¹² Composition of the case might sometimes be considered a separate variable. See for example the Voere rifle platform that uses caseless ammunition. Voere, <http://www.voere.com>.

¹³ Consider for example the New Jersey ban on hollow point handgun ammunition, *infra*.

¹⁴ Again caliber/muzzle diameter alone does not dictate ballistic energy. Two .30 caliber rifles (three-tenths of an inch) can produce dramatically different ballistic energy depending on the size of the chamber/case dimensions. So a very precise analysis might strictly account for both muzzle diameter and chamber dimensions; some of the standards that are useful for addressing the common use question have failed to incorporate this detail.

¹⁵ See 26 U.S.C. § 53 (1987).

¹⁶ See Machine Guns, Destructive Devices, and Certain Other Firearms, 27 C.F.R. 479 (2003).

undeniable that the fifty caliber filter has taken hold politically, practically, and in the marketplace. Guns above fifty caliber are numerically rare and conceptually (though not functionally) distinct, so much so that it is easy to imagine courts concluding that NFA regulated guns are outside the protection of the Second Amendment. Indeed, *Heller* explicitly suggests that NFA regulated machine guns are not constitutionally protected.¹⁷

This shows that we can expect renderings of functionality that range beyond a purely mechanical assessment. Faced with difficult cases, courts will be tempted to adopt distinctions drawn from long-standing regulatory barriers like the NFA. Still, *Heller* makes plain that we cannot credit every regulatory distinction; the whole point of *Heller* was that the regulatory corral erected around handguns was illegitimate.

But *Heller* gives no plain basis for deciding which regulatory distinctions to credit, and this injects substantial uncertainty into the standard. So while *Heller* makes clear that handguns are constitutionally protected, and a broad view of functionality might say that all handguns are basically the same, there are undeniably regulatory and popular cultural distinctions within that category. Those distinctions are sometimes reflected in state firearms regulations. And that produces significant uncertainty about the outcome of Second Amendment challenges to certain state firearms restrictions.

2. Problems of Simplistic Regulatory Norms

The temptation to layer the common use standard with background regulatory norms poses another type of problem. Consider again the fifty caliber filter established by the NFA. It is easy to say that guns under this ballistic curve are functionally common, at least on that single variable. This is so even for guns that are newly developed, obscure, or unpopular and thus rare. Compare the cribbed numerical standard under which the prototype .345 Whizbanger might be banned as uncommon because it is the only one of its “type” in the world. The functionally common standard would say that the Whizbanger’s ballistic performance is the test. So if it fell under the curve of fifty caliber ballistics then it would be ballistically common and nominally protected.

But for some questions, the ballistic filter is incomplete because functionality can be a factor of several variables and sometimes of their interrelationships. So a different kind of question arises when we layer the ballistically common standard with the dimensional variable. Consider, for example, the relatively new class of super-short magnum rifles. Through innovations in chamber dimensions/case design and propellant chemistry, they produce more destructive energy from a smaller platform with less recoil. Their performance is within the traditional ballistic spectrum—i.e., they are nothing new in terms of down-range destructiveness. But the guns are more compact and easier to handle and shoot.

One can anticipate the argument that this improvement has produced a qualitatively more lethal gun. Transfer this story to the handgun context, and some will say that there is a politically compelling argument for banning this new uncommonly

¹⁷ *Heller*, 128 S. Ct. at 2817.

dangerous innovation.¹⁸ Depending on how we slice the categories, the gun is either common (mechanically it is ordinary) or it is not (improvements in design details make it more efficient). There is no background regulatory guidance about which view to privilege nor is there anything instructive in *Heller*. It is likely that such questions will turn on whatever bias courts bring to the issue.

B. *Ammunition Feeding*

The closest thing to a true gun ban ever attempted by Congress focused on ammunition feeding. The 1994 Federal Assault Weapons Ban¹⁹ instituted a prospective ban on certain configurations of semiautomatic rifles that resembled fully automatic military rifles.²⁰ One of the common features of the banned guns was the capacity to accept a detachable box magazine—i.e., the component that stores and feeds ammunition. The ban expired in 2004 and bills to renew it stalled in Congress.²¹ Several states also

¹⁸ Imagine a handgun that put the energy of the powerful (for a handgun) .45 ACP in the platform of a relatively anemic .32 auto while generating no additional recoil. The downrange performance of the gun would be undeniably common. So ballistically it would be no more deadly than guns made 100 years ago. The platform from which it is launched is common in terms of its basic mechanics. But ergonomically it would be much more effective. Practically speaking the opportunity for this argument is limited, because developments in firearms technology tend to be evolutionary rather than revolutionary. If the improvements continue to unfold in very small steps that filter into the market over time, the pool of common firearms will grow apace with the evolution of gun technology.

Moreover, it is easy to anticipate fights about what is evolutionary and what is revolutionary. Again I think that decision turns largely on one's starting bias. One example of the question in the military context is how to characterize the move from the hand-cranked technology of the Gatling gun to the recoil operated repeating technology of the Maxim machine gun (Hiram Maxim WWI). This was evolutionary in the sense that it was a different variation on repeating technology. It was revolutionary in that the methodology, recoil operation, was very different mechanically. So depending on which view of such stories we privilege, the level of protection *Heller* offers to the new technology will vary.

¹⁹ Act of Sept. 13, 1994, Pub. L. 103-322, § 110105, 108 Stat. 1796 (*expired* Sept. 13, 2004).

²⁰ *See id.* The law also banned pistol magazines with a capacity in excess of ten rounds. David Kopel provides a detailed description and analysis of the ban and the assault weapons question generally in David B. Kopel, GUNS: WHO SHOULD HAVE THEM 159-232 (1995).

²¹ For treatment of the effect of the 1994 ban and the politics surrounding its expiration, see Nicholas J. Johnson, *A Second Amendment Moment: The Constitutional Politics of Gun Control*, 71 BROOK L. REV. 715, 781-785 (2005) [hereinafter *Constitutional*

enacted assault weapons bans that remain in force. Assuming *McDonald* applies the Second Amendment to the states, what happens to these state assault weapons bans? What does the common use standard say about the ammunition feeding variable and the particular case of semiautomatic rifles?

Semiautomatic technology is more than a century old. Multi-projectile and other repeating technologies that exhibit similar and sometimes more destructive capabilities are even older.²² Distinctions between legitimate and illegitimate ammunition feeding technology pressed under the 1994 assault weapons ban were incoherent from the perspective of functionality.²³ Moreover, an honest assessment of the utilities and externalities of different sorts of firearms and different sorts of repeating technologies renders the differences insufficient to sustain compelling distinctions between them.²⁴ Whether it is the revolver, the pump action, the lever action, the semiautomatic, or the multi-projectile shotgun (in a variety of action types), repeating technology is ubiquitous and it is difficult to sustain regulatory distinctions between the subcategories.²⁵

Still, if the focus on semiautomatics persists, it is clear that, as a type, they are widely owned and easily fit within the common use standard. Civilians have owned semiautomatics without restriction for more than a century. David Hemenway, a long-time advocate of stringent gun laws, estimates that at least sixty percent of gun owners possess at least one semiautomatic firearm.²⁶

Other counts confirm the wide ownership of semiautomatics. Recent industry sales figures show that the AR-15²⁷ is now the best selling rifle type in the country.²⁸

Politics]. For treatment of semiautomatic as a category, see Nicholas J. Johnson, *Supply Restrictions at the Margins of Heller and the Abortion Analogue: Stenberg Principles, Assault Weapons and the Attitudinalist Critique*, 60 HASTINGS L.J. 1285 (2009) [hereinafter *Supply Restrictions*].

²² See Johnson, *Supply Restrictions*, *supra* note 21.

²³ See Nicholas J. Johnson, *Shots Across No Man's Land: A Response to Handgun Control, Inc.'s Richard Aborn*, 22 FORD. URB. L.J. 441 (1995).

²⁴ *Id.* See also Johnson, *Supply Restrictions*, *supra* note 21.

²⁵ See Johnson, *Supply Restrictions*, *supra* note 21. For a detailed description of shotgun performance and a graphic illustration of shotgun wounding capacity that some will find disturbing, see Firearmsid.com Shotgun Pattern Testing, http://www.firearmsid.com/A_distshotpatt.htm (last visited Mar. 29, 2010).

²⁶ David Hemenway and Elizabeth Richardson, *Characteristics of Automatic or Semiautomatic Firearm Ownership in the United States*, 87 AM. J. PUB. HEALTH 286, 287 (1997).

²⁷ In appearance, the AR-15 resembles the fully automatic M-16 that is the standard infantry rifle of the U.S. military. Images are available at

This is one of the unintended consequences of the 1994 federal ban,²⁹ and it convincingly renders the AR-15 family of semiautomatic rifles common firearms under *Heller*.³⁰

Still, it is undeniable that the assault weapons question evokes visceral reactions and therefore the possibility of analytical cheating. There is no reason to think that judges are immune to this pressure. Consequently, we can anticipate a certain level of dishonesty on the semiautomatics question. It is easy to anticipate challenges to state and local assault weapons bans generating a variety of lower court decisions that roughly handle or dilute the common use standard.

That is what happened in the wake of *United States v. Miller*,³¹ the 1938 Supreme Court decision that left the neutral observer unsure whether the Court endorsed an individual or collective rights view of the Second Amendment.³² Reacting against its unsettling policy implications, lower courts layered *Miller* with embellishments that morphed into a body of precedent asserting that the Second Amendment does not protect an individual right to arms.³³

http://images.google.com/images?hl=en&rls=com.microsoft%3Aen-US&rlz=117HPIC_en&um=1&sa=1&q=ar+15&aq=f&oq=&aqi=g10&start=0.

²⁸ See Johnson, *Supply Restrictions*, *supra* note 21, at 1295-96.

²⁹ See Johnson, *Supply Restrictions*, *supra* note 21, at 1295.

³⁰ One can imagine restrictions that would try to distinguish between the widely owned semiautomatics and those that are obscure. Such an analysis would turn on points of judgment that will be tempered by the bias that decision makers bring to the question. Those arguments would attempt to distinguish between the ubiquitous AR-15 and some other more obscure semiautomatic rifle on grounds of peripheral functional differences. Honest application of the common use standard makes those arguments difficult to sustain. We witnessed these types of distinctions under the 1994 Assault Weapons Ban and it took a decade for mainstream commentators to appreciate that most of those distinctions were unhelpful.

³¹ *U.S. v. Miller*, 307 U.S. 174 (1938).

³² *Miller*'s statement that the arms protected by the Second Amendment must bear some reasonable relationship to the preservation or efficiency of the militia was elevated by the collective rights advocates. *Miller*'s embrace of the traditional view of the militia as the body of the people bearing their own private firearms was elevated by individual rights advocates.

³³ See Brandon P. Denning, *Can the Simple Cite be Trusted?: Lower Court Interpretations of United States v. Miller and the Second Amendment*, 26 CUMB. L. REV. 961 (1996); Nicholas J. Johnson, *Testing The States' Rights Second Amendment for Content: A Showdown Between Federal Environmental Closure of Firing Ranges and Protective State Legislation*, 38 IND. L. REV. 689 (2005).

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On the heels of *McDonald*, it is easy to anticipate lower courts in politically combustible cases layering the common use standard with new and restrictive criteria. This is especially likely in the context of political hot potatoes like assault weapons bans.

It is easy to anticipate the arguments that state and local governments and ultimately judges will advance. An obvious one is something like, “*Heller* only protects guns in common use and *these guns* are not common *here in Massachusetts*.” On that foundation, the state would claim that the basic right to arms is respected (because some guns are permitted), but that common use is a question of state, local, or community standards—perhaps with a nod to the local community standards test the Court has used to distinguish between pornography and protected speech under the First Amendment.³⁴ The outcome of this argument would be essentially the deference to local governments urged by Justice Breyer’s dissent in *Heller*. It is not hard to imagine a differently configured Supreme Court embracing such arguments as a way of nominally respecting, but ultimately diminishing *Heller*.³⁵

Overall, this view would be inconsistent with the treatment of other rights. The character of constitutional rights does not vary by venue and the pornography analogy is troublesome at several levels.³⁶ But on gun issues, analytical purity is often trumped by other considerations.³⁷

³⁴ See *Miller v. California*, 413 U.S. 15 (1973).

³⁵ It is interesting to consider that under this approach states might claim more discretion than Congress to regulate around the edges of *Heller*.

³⁶ First, adoption of the pornography analogy would repudiate the *Heller* decision and elevate Justice Breyer’s dissent. Second, gun ban legislation typically keys on the fact that particular guns are alleged to be especially effective. I have argued in detail that the special marginal utility standard that the Court has employed in abortion cases is the most apt methodology for addressing these questions. Under that standard, if a methodology has peculiar utility for the preservation of life or health of the mother, it is robustly protected. In the firearms context, regulations that key on the special effectiveness of certain guns in common use are highly suspect because the same functions that drive the gun ban are also valuable for self-defense. These types of gun bans labor under a regulatory paradox—the features that make the gun problematic in the hands of criminals make it especially useful for legitimate self-defense. So the argument that guns like the AR-15 impose special externalities is also an admission that they have special marginal utility for self-defense and therefore deserve robust constitutional protection. See Johnson, *Supply Restrictions*, *supra* note 21. Contrast this with the pornography standard, which seeks to identify content that has no redeeming social value.

³⁷ See, e.g., Nelson Lund, *The Second Amendment, Heller, and Originalist Jurisprudence*, UCLA L. REV. (forthcoming 2010), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1324757&rec=1&srcabs=1369783.

C. *Ammunition Restrictions and Common Use*

Ammunition restrictions raise an arguably distinct sub-issue under the common use standard. *Heller* did not speak explicitly to ammunition restrictions and there is no reason to expect that *McDonald* will. So while it would be absurd to say that guns in common use are protected but ammunition for them is not, the fact that ammunition is a distinct variable poses different analytical challenges.

New Jersey’s ban on hollow point handgun ammunition provides an interesting example. Hollow point ammunition is extremely common and may even dominate ammunition sales. It is simply not plausible to say that it is unusual or exotic. But like assault weapons, hollow point ammunition is draped in mythology and evokes visceral reactions in some venues. So it is easy to imagine lower court resistance to ammunition ban challenges. Will it be enough to deny that hollow point ammunition is generally ubiquitous? Again, we can anticipate the argument that as a consequence of longstanding state regulation, “hollow point ammunition is not common *here*.”

D. *The Dimensional Variable and Regulatory Norms*

We already discussed the dimensional variable as a complication to the question of ballistically common guns. Approaching the dimensional variable head-on incorporates another interesting regulatory overlay. Determining which guns are dimensionally common is complicated. There is some temptation to draw norms from existing regulations. The Gun Control Act of 1968 imposed import restrictions on very small handguns—e.g., the Baby Browning .25 pocket pistol.³⁸ The complication is that these import restrictions did not stop and may have even encouraged domestic producers to make and sell guns that are indistinguishable from the banned imports.

This has several analytical consequences. First, it illustrates that in some contexts it is unproblematic to regulate functionally identical guns differently. Restrictions on imports avoid the equal protection objection and seem peripheral to the core right of citizens to keep and bear arms. However, for grandfathered guns and domestic copies, the impact of the regulatory overlay is uncertain. A pure and robust application of the “functionally common” standard would conclude that these diminutive guns are prosaic and even antiquated. Still, it is undeniable that the regulatory overlay reflects a cultural bias (though perhaps only a regional one) that stigmatizes these guns. The elusive label “Saturday Night Special”³⁹ might stick to some of them.⁴⁰ So again it is fair to anticipate some level of judicial creativity that credits the regulatory and social stigma.

One final and problematic variation on the dimensional variable is disguised guns. These guns are configured to look like other things—e.g., the cane gun.⁴¹ They

³⁸ Images available at <http://www.google.com/> (search “baby browning”).

³⁹ See Patrick S. Davies, *Saturday Night Specials: A “Special” Exception in Strict Liability Law*, 61 NOTRE DAME L. REV. 478 (1986).

⁴⁰ *Id.* at 770-77.

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arguably pose just another version of the questions that accompany the dimensional variable. But in some ways, disguised guns are different. Some are regulated by the stringent NFA under rules governing silencers, short-barreled rifles, and other “destructive devices”.⁴² For this reason, and perhaps because of their limited practical utility, many of these guns are numerically quite rare.

But in terms of pure functionality these guns are extremely ordinary. Most of them are at the bottom of the ballistic range—appearing in recreational calibers like .22 rimfire or .25 or .32 caliber. These are calibers that Jeff Cooper⁴³ famously said are inferior to a good hatchet for self-defense. Most of them are single shots, which is the most primitive type of ammunition feeding. Most of them must also be manually cocked—e.g., a hammer, striker, or spring mechanism must be set by hand before tripping the trigger. Some of them actually have to be disassembled before they can be reloaded, making them slower than an eighteenth century musket for repeat shots.

But even though these guns employ the most basic firearms technology, they are deemed exotic by regulatory fiat. And that regulation arguably reflects a practical political and cultural bias that has real power on gun questions. Some will recoil at the idea of the cane gun, attributing sinister purposes to the disguise feature. Others will consider it an interesting but marginal self-defense gun. Regulatory assessment of it depends in part on the range of self-defense scenarios we are willing to credit. Is the gun especially suited for illicit activity? Or, is it really no different from any other concealed carry gun? If so, it would be rendered normal by the fact that the vast majority of states have enacted “shall issue” concealed carry statutes.⁴⁴

These questions take us beyond the common use standard and suggest that adequate treatment of the full range of constitutional and violence policy questions opened by *McDonald* will require a more nuanced framework than the Court provided in *Heller*.⁴⁵

⁴¹ For an illustration see <http://www.google.com/> (search “cane gun”).

⁴² *Supra* note 15.

⁴³ Colonel Jeff Cooper, USMC, (Ret.) was an iconic firearms instructor and writer, who developed the “Modern Technique of the Pistol.” See GREGORY B. MORRISON & JEFF COOPER, *THE MODERN TECHNIQUE OF THE PISTOL* (1991).

⁴⁴ See Johnson, *Constitutional Politics*, *supra* note 21 at 747-64. “Shall issue” statutes remove the discretion from the permitting officer. If the applicant qualifies under the terms of the statute, the administrator shall issue the permit.

⁴⁵ I have argued in detail elsewhere that the common use standard could be properly and usefully supplemented with the “special marginal utility” filter the Court has employed in the abortion cases. See Johnson, *Supply Restrictions*, *supra* note 21. Under that standard, if a methodology has peculiar utility for preservation of life or health of the mother, it is robustly protected. Applied to the firearms self-defense case, this permits the argument that the state might properly restrict certain technologies that 1) impose special public risks or externalities and 2) are never the best firearms technology for preserving life.

CONCLUSION: THE BIGGER PICTURE

I have concentrated here on particular questions and acts of legislation that are likely to be impacted by *Heller* and *McDonald*, and I have suggested places where the common use standard generates analytical puzzles or low predictability. These issues will consume time and energy but will be peripheral in terms of violence policy consequences. The reason is that gun prohibition is basically an all-or-nothing proposition. It rests on the logic that no guns equals no gun crime. No one expects the inventory to go to zero, but results depend on reductions that get relatively close to it. So supply-side regulations only make sense if we think that eventually they will make guns or the elusive subcategory “crime guns” relatively scarce. *Heller* makes that constitutionally impermissible. Most “crime guns” are ordinary handguns. Ordinary handguns kept for self-defense are explicitly protected under *Heller*.⁴⁶

Gun prohibition post-*Heller* really just means working around the edges to ban obscure, exotic guns that can be carved away from the common use standard. This will be a waste of time and energy. I have demonstrated elsewhere that even absent *Heller*, supply controls cannot work because we have so many private guns already.⁴⁷ Americans own nearly half the private firearms on the planet. The civilian inventory approaches 300 million guns. If the international experience is any indication, getting 300 million firearms away from people who believe their guns are constitutionally protected, liberty preserving, life saving tools is simply impossible—and the failed attempt would likely make things worse.⁴⁸ The international defiance ratio in places that

This standard has something for both sides to love and hate. Consider first the cheap, poorly made, and poorly functioning gun that is a hazard to the user—e.g., the poorly defined “Saturday night special” or particular diminutive guns banned from importation under the 1968 Gun Control Act. By some estimates, those guns are more likely to become crime guns. Under the special marginal utility filter these guns might be banned on the argument that they are never the best tool for self-defense. However, this same principle also allows the argument that guns like the AR-15 have true special marginal utility in a range of self-defense scenarios and therefore deserve robust constitutional protection. *Id.*

⁴⁶ Constitutional protection of guns in common use for self-defense puts an end to the *legitimate sporting use* filter, which was introduced by the 1968 Gun Control Act at the behest of domestic gun makers to reduce competition from imported guns. The standard trickled into the general pre-*Heller* debate about what guns were legitimate. Now that *Heller* has placed self-defense at the core of the constitutional right, the sporting use question is irrelevant. See Johnson, *Supply Restrictions*, *supra* note 21; Johnson, *Imagining Gun Control*, *supra* note 7.

⁴⁷ Johnson, *Imagining Gun Control*, *supra* note 7.

⁴⁸ Additionally there are good reasons to believe that the failed attempt generally will make things worse. *Id.*

LIMITS OF THE COMMON USE STANDARD

have tried gun bans or registration is 2.6 illegal guns for every legal one; this is in countries that have nothing approaching our robust gun culture and constitutional right to arms claims.⁴⁹ So reducing gun crime through supply controls was impossible as a practical matter long before *Heller*.

Of course my assessment here is unlikely to dissuade true believers or those who think that supply restrictions are just good or correct politics. It is fair to expect legislation, challenges, and conflict contesting the boundaries of the common use standard. But the only dramatic results will be that the few jurisdictions that have pursued sweeping gun bans will have to abandon those. Skirmishes over politically vulnerable guns—random rare and exotic guns—will produce a scattered and uncertain jurisprudence.⁵⁰ Laws that restrict untrustworthy people from having guns will remain undiminished.⁵¹ The validity of political gestures, like one-gun-a-month-laws, will not be resolved within the framework of *Heller* and will require supplemental standards that identify constitutionally acceptable regulatory burdens. This may be interesting jurisprudentially, but the practical impact will be minimal because one-gun-a-month and other prospective restrictions that affect only a handful of guns are mere window dressing from a violence policy perspective.⁵²

⁴⁹ It is possible to imagine future scenarios where supply restrictions actually might generate real benefits in anti-violence policy. For example, one can imagine that new firearms technologies might emerge that would give law enforcement the edge in confrontations with criminals. This would in turn generate arguments that the technology should be and can be prohibited to civilians. Such prohibitions would not eliminate or really even reduce conventional gun crime, but would not be a complete waste of time.

⁵⁰ See Johnson, *Administering*, *supra* note 3.

⁵¹ “Although we do not undertake an exhaustive historical analysis today of the full scope of the Second Amendment, nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms.” *Heller*, 128 S. Ct. at 2816-17. For an assessment of gun control laws that might have real effect in the current environment see Johnson, *Imagining Gun Control*, *supra* note 7. For an assessment of gun control laws that are likely to survive challenges under *Heller*, some that are unlikely to survive, and some that raise tough questions that go beyond *Heller*, see Johnson, *Administering*, *supra* note 3.

⁵² On average, the civilian inventory of 300 million guns grows at about one percent per year. Between 500,000 and one million guns are stolen from the existing inventory each year. Johnson, *Imagining Gun Control*, *supra* note 7, at 857.

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Overall, *Heller* and *McDonald* simply affirm the reality of our armed society. The only people who should really be unhappy about the implications of these decisions are those still clutching the pipe dream that “gun control” might someday morph into sweeping bans on private firearms.