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Nicholas J. Johnson

Fordham University School of Law, njohnson@law.fordham.edu

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ADMINISTERING THE SECOND AMENDMENT: LAW, POLITICS, AND TAXONOMY

Nicholas J. Johnson*

INTRODUCTION

Predicting the trajectory of the right to keep and bear arms is difficult. The task will become even harder if, as I expect, the United States Supreme Court applies the Second Amendment to the states in *McDonald v. Chicago*.¹ This article anticipates the post-*McDonald* landscape by assessing the right to arms in the context of several state regulations and the arguments that might be employed as challenges to them unfold.

So far, the core test for determining the scope of the individual right to arms is the common use standard articulated in *District of Columbia v. Heller*.² Measured against that, standard firearm regulations fit into three categories. The first category contains laws that are easily administered under the common use standard.³

The second category—and the primary focus of this article—consists of laws that can be approached but not fully resolved under the common use standard.⁴ These laws pose challenges of taxonomy⁵ that invite embellishment and manipulation of the common use standard.

Some regulations fit into a third category that is entirely

*Professor of Law, Fordham University School of Law, J.D. Harvard Law School, 1984. Thanks to Gene Hoffman for his comments and Tameem Zainulbhai for his research and editing.

1. *McDonald v. City of Chicago*, 130 S. Ct. 1317 (2010).

2. *Dist. of Columbia v. Heller*, 128 S. Ct. 2783, 2817 (2008) (holding that firearms in common use for lawful self-defense are constitutionally protected).

3. See *infra* Part I.

4. See *infra* Part II.

5. I use the term “taxonomy” loosely to incorporate both substantive and political variables.

outside the range of the common use standard but still burdens firearms ownership in a way that demands attention.⁶ Challenges to these regulations will require some species of interest balancing, levels of scrutiny analysis, or, as I will suggest, analogies to doctrines like regulatory takings. It is difficult to predict precisely how the decisions will develop here. My aim for this category is to describe the spectrum of regulations that fit within it and to highlight one of the most difficult problems in the category—regulation of guns outside the home.

I. THE EASY FITS

Heller's common use standard gives straightforward answers to a number of questions. It tells us explicitly that handguns commonly owned for self-defense are constitutionally protected.⁷ It suggests that other commonly owned firearms are protected, including commonly owned long guns.⁸ So obviously blanket gun bans of the Washington D.C. variety are prohibited. Also, the validation of self-defense firearms seems to moot the sporting use filter that seeped into the conversation about firearms legitimacy when the Gun Control Act of 1968 used it to screen out certain imported firearms. Armed self-defense, stigmatized under the sporting use standard, is at the core of the right to arms articulated in *Heller*.

One example of state legislation that should not survive under the common use standard is New Jersey's Smart Gun legislation.⁹ This legislation will outlaw the retail sale of ordinary handguns once user restricted "smart guns" are commercially available.¹⁰ Ordinary handguns are widely used, and explicitly protected under *Heller*.¹¹

Also vulnerable are regulations requiring loaded chamber

6. See *infra* Part III.

7. *Heller*, 128 S. Ct. at 2817.

8. See *id.* at 2818 ("It is no answer to say . . . that it is permissible to ban the possession of handguns so long as the possession of other firearms (i.e., long guns) is allowed.").

9. See S. 573, 210th Leg., Reg. Sess. (N.J. 2002); A. 700, 210th Leg., Reg. Sess., at 9–12 (N.J. 2002).

10. Jerry Gray, *New Jersey Senate Passes Bill Requiring 'Smart Gun' Devices*, N.Y. TIMES, July 2, 1999, at B5.

11. *Heller*, 128 S. Ct. at 2818.

indicators, integral trigger locks, or magazine safeties.¹² These measures flow from the effort to regulate guns under consumer product safety standards. Most guns do not have loaded chamber indicators or magazine disconnects. Guns without these features are undeniably common self-defense guns. Indeed, some have argued that these safety features substantially diminish the utility of the gun for self-defense.¹³ Where this is true, the regulation would also defy *Heller's* conclusion that armed self-defense is at the core of the right to arms.¹⁴

In a slightly different analytical category, blanket ammunition bans seem pretty clearly prohibited as an implication of *Heller*. Even though *Heller* did not explicitly address ammunition, it would eviscerate the right to say that guns are protected but ammunition is not. However, certain types of ammunition bans seem easily sustained under the common use standard. Dramatic innovations like distance-measuring exploding projectiles are a good example.¹⁵ This sort of dramatic innovation seems easily captured by the common use standard. These examples show that the common use standard works well to resolve a range of questions with a high level of predictability.

II. THE COMMON USE STANDARD AND THE INVITATION TO MANIPULATION

A variety of problems are not so easily resolved under the common use standard. These problems arise where the common use standard seems to fit the dispute but predictions about outcomes are complicated because the taxonomy is

12. See sources cited *supra* note 9.

13. Cynthia Leonardatos, Paul H. Blackman & David B. Kopel, *Smart Guns/Foolish Legislators: Finding the Right Public Safety Laws, and Avoiding the Wrong Ones*, 34 CONN. L. REV. 157, 170–72 (2001).

14. *Heller*, 128 S. Ct. at 2821 (“And whatever else it leaves to future evaluation, [the Second Amendment] elevates above all other interests the right of law-abiding, responsible citizens to use arms in defense of hearth and home.”).

15. *XM25 Counter Defilade Target Engagement System: a Bullet They Can't Dodge*, POPULAR SCI., Dec 2009, at 51, available at <http://www.popsci.com/bown/2009/product/xm25-counter-defilade-target-engagement-system>. See also ATK: A Premier Aerospace and Defense Company, <http://www.atk.com> (last visited Apr. 10, 2010). The website provides information about distance-measuring air-bursting projectiles. ATK, Air Bursting Munition, http://www.atk.com/capabilities_defense/cs_as_ma_abm.asp (last visited Apr. 10, 2010).

distorted by politics, mythology and symbolism. I will illustrate this in context of laws banning assault weapons and hollow point ammunition.

I use the term “distorted taxonomy” to capture the idea that the enterprise of creating categories follows some basic rules and that gun regulation is afflicted by politics and mythology that tempt manipulation of those rules. At the most basic level, a subcategory will display the same properties as its super type, as well as some differences. In undistorted cases it is easy to have a principled discussion about what constitutes a substantive distinction and a legitimate subcategory. But in the gun debate, some distinctions are mainly political or symbolic. This distorts the delineation of legitimate substantive categories and complicates extrapolations from the common use standard.

State laws banning “assault weapons” illustrate the problem. Within the category “firearm” we can legitimately create the subcategory “rifle” and from there, the subcategory “semiautomatic rifle.” These all reflect easily defensible substantive distinctions. The federal government and some states have attempted to define and outlaw a subcategory of semiautomatic rifles called “assault weapons.”¹⁶ The Federal Assault Weapons Ban (AWB) has expired, but several state bans remain in place and those raise interesting questions that transfer to other problems.¹⁷

I have argued elsewhere that semiautomatic rifles as a category are difficult to reduce further, that legislative distinctions between legitimate and illegitimate semiautomatic rifles are incoherent, and that compared to other multi-shot technologies, semiautomatics are unexceptional.¹⁸ Nonetheless, the assault weapons category

16. Public Safety and Recreational Firearms Use Protection Act (Assault Weapons Ban), Pub. L. No. 104-322, 108 Stat. 1996 (1994) (expired in 2004). See, e.g., Frequently Asked Questions: Assault Weapons Registration, <http://ag.ca.gov/firearms/regagunfaqs.php> (last visited Apr. 10, 2010) (describing California Assault Weapons regulations); see also CAL. PENAL CODE § 12276 (West 2006).

17. See *infra* text accompanying notes 42–44 (discussing hollow point ammunition regulations).

18. 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 Johnson, *Supply Restrictions*]; Nicholas J. Johnson, *Shots Across No Man's Land: A Response to Handgun Control, Inc.'s, Richard Aborn*, 22 FORDHAM URB. L.J. 441

has undeniable political and symbolic resonance. Indeed, the category is so wrapped in mythology¹⁹ that states, municipalities, and perhaps even courts will feel especially pressured to uphold those distinctions.²⁰ It is fair then to predict that challenges to state assault weapons bans will not proceed under pristine exercises of logic or empirical analysis. Instead, these cases will likely invite aggressive, creative manipulation of the common use standard and basic principles of taxonomy toward the goal of upholding assault weapons restrictions.

There is precedent for this. Similar manipulation occurred on the heels of *United States v. Miller*,²¹ where very quickly in *Cases v. United States* and *United States v. Tot*, lower courts embellished what the Supreme Court actually said with additional, more restrictive layers and rhetoric that was used by subsequent courts to support restrictive interpretations of *Miller*.²² This resulted in the near-

(1995).

19. For many years I have conducted a survey of the students in my gun control seminar. One of the questions asks the students to define assault weapons. These definitions reflect the various, wildly inaccurate impressions about the capabilities of this amorphous classification. I have argued elsewhere that these guns are unexceptional in every functional category. See Johnson, *Supply Restrictions*, *supra* note 18, at 1289–1302.

20. From the perspective of neutral legal analysis, such pressure should be irrelevant. However, the view among many political scientists who advance the Attitudinalist critique is that extrapolation from neutral principles does not predict judicial decisions as effectively as do estimates based on political influences. See generally Theodore W. Ruger et al., *The Supreme Court Forecasting Project: Legal and Political Science Approaches to Predicting Supreme Court Decisionmaking*, 104 COLUM. L. REV. 1150 (2004).

21. *United States v. Miller*, 307 U.S. 174 (1939).

22. See *Cases v. United States*, 131 F.2d 916, 922 (1st Cir. 1942) (“[I]f the rule of the *Miller* case is general and complete, the result would follow that, under present day conditions, the federal government would be empowered only to regulate the possession or use of weapons such as a flintlock musket or a matchlock harquebus.”); *United States v. Tot*, 131 F.2d 261, 266 (3d Cir. 1942) (“The Court said that in the absence of evidence tending to show that possession of such a gun at the time has some reasonable relationship to the preservation or efficiency of a well regulated militia, it could not be said that the Second Amendment guarantees the right to keep such an instrument.”); see also Brannon P. Denning, *Gun Shy: The Second Amendment as an “Underenforced Constitutional Norm”*, 21 HARV. J.L. & PUB. POL’Y 719, 733–34 (1998) [hereinafter Denning, *Gun Shy*]; Brannon 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, 962–63 (1996) [hereinafter Denning, *Simple Cite*]; Nicholas J. Johnson, *Testing the States’ Rights Second Amendment for Content: A Showdown Between Federal Environmental Closure of Firing Ranges*

unanimous view of lower federal courts that *Miller* had unambiguously rejected the individual rights view of the Second Amendment.²³

Brannon Denning has detailed how many of the lower federal court cases that claimed *Miller* only protected a collective right were actually grounded on the embellishments added by *Cases* and *Tot*.²⁴ It is fair to worry that something similar will follow *Heller* and *McDonald*—that lower courts will be tempted to diminish those cases and the Supreme Court will respond or not depending on its political makeup at the time.

So how precisely might this unfold? One fairly obvious response to an assault weapons ban challenge is the local community standards argument where the state acknowledges that *Heller* protects guns in common use but contends that “these guns are not common *here in New Jersey*.” A long standing ban might allow the state to make a plausible empirical case on this point.²⁵

To buttress the argument, the state might advance an analogy to the pornography filter under the First Amendment. In that context, the Court has employed a local community standards test for determining whether materials constitute pornography and thus fall outside the scope of First Amendment protection.²⁶

If courts play fair, the decisive rebuttal to this argument is that it is no different from the District of Columbia’s failed claim in *Heller*. There, legal handguns were uncommon in the District but common outside it.²⁷ The idea that the District could configure its own local version of the right to

and *Protective State Legislation*, 38 IND. L. REV. 689, 690–91 (2005) [hereinafter Johnson, *Testing*].

23. See *Cases*, 131 F.2d at 922; *Tot*, 131 F.2d at 266; see also Denning, *Gun Shy*, *supra* note 22, at 733–34; Denning, *Simple Cite*, *supra* note 22, at 962–63; Johnson, *Testing*, *supra* note 22, at 690–91.

24. See *Cases*, 131 F.2d at 922; *Tot*, 131 F.2d 266; see also Denning, *Gun Shy*, *supra* note 22, at 733–34; Denning, *Simple Cite*, *supra* note 22, at 962–63; Johnson, *Testing*, *supra* note 22, at 690–91.

25. The empirical demands may indeed limit this argument to states that have longstanding regulatory filters excluding particular weapons. See Nicholas J. Johnson, *The Second Amendment in the States and the Limits of the Common Use Standard*, 33 HARV. J.L. & PUB. POL’Y (forthcoming 2010).

26. *Miller v. California*, 413 U.S. 15, 36–37 (1973).

27. See *Dist. of Columbia v. Heller*, 128 S. Ct. 2783 (2008).

keep and bear arms was decisively rejected.²⁸ The local community standards argument renders precisely the outcome urged in Justice Breyer's dissent.²⁹ Breyer would have given communities the discretion to decide that their situation was special and therefore to constrict the constitutional right to some fraction of what is enjoyed by the rest of the country.³⁰ Any court that exhibits even a modicum of respect for the *Heller* precedent should flatly reject the local community standards argument.³¹

Losing the local community standards argument would push states and municipalities to play a new taxonomical game. If forced to respect the national inventory as a measure of guns in common use, states will find it very hard to sustain their current assault weapons bans. The reason is that it is very difficult under any circumstances to maintain bans on rifles that use the AR-15 platform.³² The AR-15 is the semi-automatic version of the U.S. Army infantry rifle and the quintessential "assault rifle."³³ The ubiquity of the AR-15 blocks any honest argument that semiautomatic rifles with pistol grips or other "AW features" are uncommon.

For most of the last decade, the AR-15 was the best

28. *Id.* at 2821–22.

29. *Id.* at 2847–48 (Breyer, J., dissenting) ("The law is tailored to the urban crime problem in that it is local in scope and thus affects only a geographic area both limited in size and entirely urban; the law concerns handguns, which are specially linked to urban gun deaths and injuries, and which are overwhelmingly the favorite weapon of armed criminals; and at the same time, the law imposes a burden upon gun owners that seems proportionately no greater than restrictions in existence at the time the Second Amendment was adopted."); *id.* at 2855 ("The District did not seek to prohibit possession of other sorts of weapons deemed more suitable for an 'urban area.'"); *id.* at 2860–61 ("In fact, deference to legislative judgment seems particularly appropriate here, where the judgment has been made by a local legislature, with particular knowledge of local problems and insight into appropriate local solutions. Different localities may seek to solve similar problems in different ways, and a 'city must be allowed a reasonable opportunity to experiment with solutions to admittedly serious problems.'" (citations omitted)).

30. *Id.* at 2860–61.

31. The City of Chicago made a similar argument in *McDonald* that generated an informative exchange with the Court. Transcript of Oral Argument at 52–55, *McDonald v. Chicago*, 138 S. Ct. 1317 (2009) (No. 08-1521).

32. See Johnson, *Supply Restrictions*, *supra* note 18, at 1321.

33. *Id.* at 1303. These rifles have all of the features—pistol grips, bayonet lugs, collapsing stocks, and detachable box magazines—used to define the category of "assault weapons." For an image see, San Francisco Murder Prevention: Buy Back the AR-15s and Uzis, http://blogs.sfweekly.com/thesnitch/2007/07/san_francisco_murder_preventio.php (July 31 2007, 18:01 PST).

selling rifle type in the country.³⁴ Scores of companies, many of which did not exist ten years ago,³⁵ now make guns in this configuration. Nearly all of the major manufacturers now make AR platform guns.³⁶ The platform is widely employed in hunting rifles, and it is the favored platform for Civilian Marksmanship Program (CMP) competitions.³⁷ Within gun culture the AR-15 is known as “America’s rifle.”³⁸ It is a tremendously versatile gun whose component construction allows it to be customized for a wide range of sporting and self-defense uses.³⁹

Lumping AR-15 style guns together with other guns on the typical ban list produces a very large category of “common firearms” protected under *Heller*. Consequently, states or municipalities that want to preserve their assault weapons bans will have to draw the category more finely so as to carve off the AR-15. By whittling down the category, states may be able to salvage their assault weapons legislation. But rather

34. *Id.* at 1296. See also The Congressional Sportsmen’s Foundation, NSSF Campaign to Educate America on AR-15 Rifles, http://www.sportsmenslink.org/media_room/in_the_news/NSSF-Campaign-to-Educate-America-On-AR-15-Rifles (last visited Apr. 26, 2010).

“The best-selling rifles in America today are those based on the AR-15 platform—they are today’s modern sporting rifles—yet they remain America’s most misunderstood firearm because of confusion caused by their cosmetic features,” said Steve Sanetti, president of the National Shooting Sports Foundation, trade association for the firearms industry.

Id.

35. See AR15.com, Industry, <http://www.ar15.com/forums/board.html?b=2> (last visited Apr. 26, 2010).

36. Johnson, *Supply Restrictions*, *supra* note 18, at 1296.

37. See Civilian Marksmanship Program, <http://www.odcmp.com> (last visited Apr. 26, 2010). Civilian Marksmanship Program was previously a part of the Department of the Army. It was reconstituted in 1996 under Title 36 U. S. Code, §40701–40733 which created the Corporation for the Promotion of Rifle Practice and Firearms Safety, Inc. (CPRPFS, the formal legal name of the CMP) for the purposes of instructing citizens in marksmanship; promoting practice and firearms safety through competitions, support of gun clubs and sales of firearms (including semiautomatic battle rifles) to private citizens. For decades it was directly funded and supported by the United States Government. See also Johnson, *Testing*, *supra* note 22, at 717–18.

38. Johnson, *Supply Restrictions*, *supra* note 18, at 1296 n.84.

39. The ubiquity of the AR-15 is one of the unintended consequences of the Federal Assault Weapons Ban. The Ban stimulated demand for these guns generally and the AR-15 especially. See Johnson, *Supply Restrictions*, *supra* note 18, at 1305–09; Nicholas J. Johnson, *A Second Amendment Moment: The Constitutional Politics of Gun Control*, 71 BROOK. L. REV. 715, 781–784 (2005) [hereinafter Johnson, *Second Amendment Moment*].

than attempting to ban all guns with pistol grips and other “assault weapons” features, they will be forced to draw more detailed categories capturing fewer, more obscure semiautomatic guns. This will maintain the political and symbolic benefits that have always been the primary value of such laws.⁴⁰

Certain types of ammunition restrictions invite a similar exercise. New Jersey, for example, bans hollow point handgun ammunition.⁴¹ Hollow point bullets are designed to expand in the target and are undeniably common. Still, mythology and political symbolism surround the issue, such that there will be tremendous resistance to overturning the New Jersey ban. It is fair to expect the same two-stage response to a constitutional challenge. First, the state will make unsustainable arguments that hollow points are not common “here”; second, it will attempt to show distinctions within the category that permit continuation of the ban in some reduced form.

The second stage response—i.e., carving out obscure new subcategories in order to sustain the ban—is more difficult here. Unlike the assault weapons category, hollow point ammunition is less susceptible to further distinctions based on appearance. So the technique that might save an AWB—i.e., carving off some large sub-category while maintaining the ban against the obscure remainder—is harder to sustain in the ammunition context. It is just harder to support distinctions between common hollow point ammunition and exotics, ammunition at the edges of the category.

Also, for any particular caliber (which roughly means bullet diameter measured in hundredths of an inch) the argument that any expanding bullet is exotic is thwarted by comparison to larger calibers.⁴² A hollow point projectile in any given caliber will expand to approximate the size and destructive capacity of a non-hollow point in a higher caliber. Assume that the maximum expansion of a .25 caliber hollow point is less than .40 caliber. Assume also that the state allows non-hollow point ammunition exceeding .40 caliber. Here, the banned hollow point ammunition will be less

40. Johnson, *Supply Restrictions*, *supra* note 18, at 1290–91.

41. N.J. STAT. ANN. § 2C:39-3(f) (West 2010).

42. Expansion of the projectile is achieved through hollow point design.

destructive than the permitted non-hollow point. On this evidence, the ban should not survive even rational basis scrutiny.⁴³

It may well turn out that only bans on true technological innovations, like the distance-measuring exploding projectiles, can be sustained. But that sort of innovation recall is already easily captured by the common use test.⁴⁴ This suggests that ammunition restrictions are less susceptible than assault weapons bans to taxonomical manipulation.

Still, the broader point is that *Heller* invites this kind of manipulation. The open question is how far courts will credit the fine distinctions that are necessary to maintain restrictions on particular categories of technology. How small a difference in appearance, mechanics, or ballistics will sustain a separate regulated category? Spinning the analysis hard enough eventually makes every gun or brand of ammunition a category unto itself resulting in fewer categories large enough to satisfy the common use standard. Some will object that these distinctions are irrational and elevate form over function. I acknowledge that objection.⁴⁵ But my operating assumption has been that the taxonomy here is prone to this type of distortion.

How much work will the Supreme Court do to build on the common use standard so as to thwart this kind of manipulation? That depends on how the Court evolves politically. If the Court neglects the standard, it is easy to anticipate ongoing manipulation of regulated categories, weakening of the common use standard, and consequent weakening of the right to keep and bear arms.

43. For example, if the maximum allowable diameter is .45 caliber (45/100 of an inch), hollow point ammunition designed to expand beyond that diameter might rationally be banned. But even then, banning .25 caliber hollow points would be questionable because .25 caliber hollow points will not expand to .45 caliber and do not approach .45 ball (i.e., non hollow point) ammunition in destructiveness. Also, setting a maximum diameter still does not address the primary question: is the ammunition type generally "common"?

44. Still, that may be enough to permit the state to reap continued political benefit by fashioning a criminologically irrelevant—but constitutionally defensible—regulation that scores political points.

45. Johnson, *Supply Restrictions*, *supra* note 18, at 1321.

III. BEYOND COMMON USE: REGULATORY BURDEN, TAKINGS, AND REASONABLENESS

A third category of regulations exist entirely outside the reach of the common use standard. These regulations do not ban guns. They simply add friction to keeping and bearing firearms. The common use standard, even with embellishments, does not capture these regulations.

Anticipating challenges to these regulations prompts thinking about the places where the Court has employed levels of scrutiny or interest balancing to resolve conflicts between the government and the right bearer.⁴⁶ However, reservations expressed by Chief Justice Roberts at oral argument in *Heller* suggest that the Court might resist layering its Second Amendment analysis with such extra-constitutional constructs.⁴⁷ If so, decision making in this third category might proceed by analogy to the Court's regulatory takings jurisprudence.⁴⁸ This is an apt and predictable methodology because the test is whether the regulation essentially consumes the right.⁴⁹ The suggestion

46. Andrew R. Gould, *The Hidden Second Amendment Framework Within District of Columbia v. Heller*, 62 VAND. L. REV. 1535, 1548–50 (2009). Justice Breyer's dissent in *Heller* criticizes the majority for failing to adopt such a standard. Breyer contends that the proper level of scrutiny under the Second Amendment is the interest-balancing approach that he advocates. *Dist. of Columbia v. Heller*, 128 S. Ct. 2783, 2852 (2008) (Breyer, J., dissenting).

47. Transcript of Oral Argument at 44, *Heller*, 128 S. Ct. 2783 (2008) (No. 7-290).

Well, these various phrases under the different standards that are proposed, 'compelling interest,' 'significant interest,' 'narrowly tailored,' none of them appear in the Constitution; and I wonder why in this case we have to articulate an all-encompassing standard. Isn't it enough to determine the scope of the existing right that the amendment refers to, look at the various regulations that were available at the time, including you can't take the gun to the marketplace and all that, and determine how these. . . how this restriction and the scope of this right looks in relation to those? I'm not sure why we have to articulate some very intricate standard. I mean, these standards that apply in the First Amendment just kind of developed over the years as sort of baggage that the First Amendment picked up. But I don't know why when we are starting afresh, we would try to articulate a whole standard that would apply in every case?

Id.

48. *See id.*

49. *See Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1019 (1992) ("[W]hen the owner of real property has been called upon to sacrifice *all* economically beneficial uses in the name of the common good, . . . he has suffered a taking.");

in *Heller* that many of the gun regulations now in place do not violate the Second Amendment⁵⁰ signals that the Court will tolerate significant regulatory friction in the process of acquiring guns, so long as the core right is ultimately respected. The regulatory taking threshold seems like a fair model for predicting how these challenges will turn out.

Imagine a law that says you can buy a new gun, but only after you jump through what turns out to be an infinite series of hoops and that, practically speaking, means you can never own a gun. Such regulation consumes the right to own a gun, so it is easy to imagine a court striking it down. On the other hand, a variety of regulatory measures that introduce minor taxes, processing fees, or short delays in acquiring firearms seem well within constitutional norms under this analogy.⁵¹ Several of the administrative rules that the *Heller* Court suggested were presumptively a valid fit here.⁵² Still within this category, some existing regulations are suspect and some pose very difficult problems.⁵³ The most interesting and toughest of these are regulations governing possession of firearms outside the home.

The language of the Second Amendment guarantees a right to *keep and bear* arms. The question is whether states can entirely ban citizens from bearing arms outside the home for self-defense. Have states violated the Second Amendment if they fail to establish some sort of system for permitting trustworthy people to carry defensive firearms in public? There are at least two versions of the question.

The first is easier to answer. Over the last twenty years, the vast majority of states have enacted non-discretionary concealed carry laws.⁵⁴ The open issue is how an incorporated Second Amendment will affect questions of reciprocity or issuance of carry permits to out-of-state applicants. It is fair to predict that this will be resolved in a

Pa. Coal Co. v. Mahon, 260 U.S. 393, 415 (1922) (“[I]f regulation goes too far it will be recognized as a taking.”).

50. *Heller*, 128 S. Ct. at 2844–45 & n.38 (2008) (Stevens, J., dissenting).

51. *See id.* (Stevens, J., dissenting).

52. *See id.* (Stevens, J., dissenting).

53. “Safe” or “smart” gun mandates, and one-gun-a-month laws pose tough questions for a court intent on balancing competing interests. *See* Nicholas J. Johnson, *Imagining Gun Control in America: Understanding the Remainder Problem*, 43 WAKE FOREST L. REV. 837, 880–885 (2008).

54. Johnson, *Second Amendment Moment*, *supra* note 39, at 865.

way that treats residents and nonresidents equally in terms of access to carry permits. The arguments for and against such treatment would be grounded on the Fourteenth Amendment equal protection clause, or even the commerce clause (tracking claims about discrimination against out of state actors).⁵⁵

The second and harder question arises in the relatively few places where citizens cannot obtain carry permits under any circumstances. Even though it is easy to say that states that refuse to design a scheme for licensed carry have violated the right to bear arms, it is a fair bet that courts in those jurisdictions will try very hard to limit *Heller's* holding to its facts—i.e., protection of the right to keep a firearm for self-defense in the home. As far as the Supreme Court's ultimate treatment of the question, consider that one of the glib critiques of *Heller* (and Supreme Court decisions generally) is that the Court seeks to reflect, and will not stray far from, the American consensus. Under that critique, *Heller* then just reflects the majority view in America about the right to arms—a large number of people have guns and most people believe you have a right to have a gun in the home for self-defense.

If this is the measure, it complicates the question of a right to arms outside the home. While it is true that nondiscretionary concealed carry is the norm in the vast majority of states, there is a lack of uniformity in the details.⁵⁶ There is also tremendous variation between states on questions like open carry, hunting use, transportation to and from shooting ranges, vehicle carry, and mitigation of penalties for legitimate self-defense with an illegally carried gun. These examples illustrate substantial variations in customs and perceptions about bearing arms outside the home.

Treatment of the “right to bear arms” question is likely to run one of two ways. If faced with the question under the current circumstances, the Court will likely duck it and pass it to state legislatures. That will not be a satisfactory

55. See *C & A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383, 390 (1994) (“We have interpreted the Commerce Clause to invalidate local laws that impose commercial barriers or discriminate against an article of commerce by reason of its origin or destination out of State.”).

56. Johnson, *Second Amendment Moment*, *supra* note 39, at 725–44.

constitutional response, but it will be a tempting political response. However, if there is more work done on this front in terms of national reciprocity and if the empirical results continue to show concealed carry to be either good or benign policy, then it might develop into a norm that some members of the Supreme Court would be willing to enforce.

CONCLUSION

This article is predictive, not normative. It credits the political impulses that afflict gun rights jurisprudence. There is no doubt that in some circles, gun bans and talk of rolling back *Heller* are very popular and good politics. Justice Ginsberg recently commented on the importance of dissenting opinions and how dissents can evolve into the majority view of a “future, wiser court.”⁵⁷ She noted that the dissents in *Heller* are good and proper examples of where this might occur. She probably is not alone in this view.

So even though the individual right to arms is likely to be extended to the states in *McDonald*, one cannot simply reason forward to firm predictions about the boundaries of the Second Amendment. Lower courts are likely to play very rough with *McDonald* and *Heller*. They cannot be counted on to nurture the Second Amendment with the same care and rights-affirming bias generally applied to more favored constitutional rights.

57. Posting of David Kopel to The Volokh Conspiracy, <http://volokh.com/2009/12/20/justice-ginsburg-supreme-court-may-eventually-overrule-heller> (Dec. 20, 2009, 12:58 EST).