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Inspiration for the title of this Article, and much of my initial thinking on this subject, comes from Darrell A.H. Miller, *Guns as Smut: Defending the Home-Bound Second Amendment*, 109 COLUM. L. REV. 1278 (2009) (arguing that all firearms should be treated as obscenity).

INTRODUCTION

The nation has engaged in a spirited debate over the types of firearms and accessories that should be available for civilian ownership.[1] Spurred primarily by the horrendous tragedy at Sandy Hook Elementary School,[2] gun control advocates pushed for a renewed federal ban on certain semiautomatic firearms and ammunition feeding devices.[3] These efforts ultimately failed,[4] but several states—namely New York,[5] Colorado,[6] Maryland,[7] Connecticut,[8] and California[9]—enacted restrictions of their own. Supporters of these legislative initiatives claimed that they were necessary to reduce the risk of mass killings,[10] while opponents

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1. Josh Richmond, *One year after Newtown, the gun control debate rages on*, SAN JOSE MERCURY NEWS (Dec. 12, 2013, 5:37 PM), http://www.mercurynews.com/nation-world/ci_24713959/one-year-after-newton-gun-control-debate-rages.

2. I imagine that even decades from now most readers will be familiar with the massacre, in which a gunman armed with a semiautomatic rifle murdered his mother, twenty children, and six school employees before killing himself. For an account written on the day of the tragedy, see James Barron, *Nation Reels After Gunman Massacres 20 Children at School in Connecticut*, N.Y. TIMES (Dec. 14, 2012), http://www.nytimes.com/2012/12/15/nyregion/shooting-reported-at-connecticut-elementary-school.html.

3. Senator Diane Feinstein introduced a comprehensive bill entitled the "Assault Weapons Ban of 2013," while Representative Carolyn McCarthy introduced a companion bill—as well as a bill that specifically targeted ammunition feeding devices—in the House. Assault Weapons Ban of 2013, S. 150, 113th Cong. (2013); Large Capacity Ammunition Feeding Device Act, H.R. 138, 113th Cong. (2013); Assault Weapons Ban of 2013, H.R. 437, 113th Cong. (2013).

4. *See* Sabrina Siddiqui, *Assault Weapons Ban, High-Capacity Magazine Measures Fail in Senate Vote*, HUFFINGTON POST (Apr. 17, 2013, 6:27 PM), http://www.huffingtonpost.com/2013/04/17/assault-weapons-ban_n_3103120.html; Richard Simon, *Senate votes down Feinstein's assault weapons ban*, L.A. TIMES (Apr. 17, 2013), http://articles.latimes.com/2013/apr/17/news/la-pn-dianne-feinstein-assault-weapons-vote-20130417.

5. 2013 N.Y. Sess. Laws Ch. 1 (S. 2230) (McKinney) (known as the NY Secure Ammunition and Firearms Enforcement (SAFE) Act of 2013).

6. COLO. REV. STAT. §§ 18-12-301-302 (2013).

7. MD. CODE ANN., CRIM. LAW § 4-305(b) (West 2013).

8. 2013 Conn. Pub. Acts No. 13-3 (SB 1160).

9. CA. PENAL CODE §§ 32310-32311 (A.B. 48).

10. *See, e.g.*, Thomas Kaplan, *Sweeping Limits on Guns Become Law in New York*, N.Y. TIMES (Jan. 15, 2013), http://www.nytimes.com/2013/01/16/nyregion/tougher-gun-law-in-new-york.html (noting that New York's highly restrictive new laws were passed "in response to the mass shooting" at Sandy Hook Elementary).

argued that they drew arbitrary distinctions and would serve as platforms for more restrictive future legislation.[11]

This national debate did not occur in a constitutional vacuum but instead happened in the shadow of the Supreme Court's modern Second Amendment decisions, *District of Columbia v. Heller*[12] and *McDonald v. City of Chicago*.[13] Of course, *Heller* and *McDonald* did not "clarify the entire field" of the newly revived right to keep and bear arms.[14] They did, however, offer some guidance for evaluating gun-type restrictions: in accordance with a historical tradition of prohibiting the carry of "dangerous and unusual weapons," the Second Amendment only protects weapons "in common use . . . for lawful purposes like self-defense."[15] As examples of firearms that would not qualify for constitutional protection, the Court listed "short-barreled shotguns" and "machineguns" such as "M–16 rifles."[16] These uncommon firearms stand in stark contrast to handguns, the "quintessential self-defense weapon,"[17] which the District of Columbia and the city of Chicago could not prohibit.[18] But aside from these brief illustrations and this narrow holding, the Court left the issue largely up to "future evaluation."[19]

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11. *See, e.g.*, Erica Goode, *Even Defining 'Assault Rifles' Is Complicated*, N.Y. TIMES (Jan. 16, 2013), http://www.nytimes.com/2013/01/17/us/even-defining-assault-weapons-is-complicated.html (noting that opponents of so-called "assault weapon" bans contend that they draw distinctions among semiautomatic firearms based merely on "cosmetic" features and that banned firearms are "mechanically identical" to non-banned firearms).

12. 554 U.S. 570 (2008).

13. 130 S. Ct. 3020 (2010).

14. *Heller*, 554 U.S. at 635; *see also McDonald*, 130 S. Ct. at 3026 (holding only "that the Second Amendment right is fully applicable to the States").

15. *Heller*, 554 U.S. at 624, 627 (internal quotation marks omitted). Stated another way, "the Second Amendment does not protect those weapons not typically possessed by law-abiding citizens for lawful purposes." *Id.* at 625. This Article focuses on *fire*arms, but other types of weapons will be considered "arms" within the meaning of the Second Amendment. *See generally* David Kopel et al., *Knives and the Second Amendment*, 47 U. MICH. J.L. REFORM 167 (2013) (demonstrating that knives are "arms" and concluding that many knife regulations are unconstitutional under the Second Amendment).

16. *Heller*, 554 U.S. at 625, 627.

17. *Id.* at 629.

18. *Id.* ("Whatever the reason, handguns are the most popular weapon chosen by Americans for self-defense in the home, and a complete prohibition of their use is invalid."); *McDonald*, 130 S. Ct. at 3036 (reiterating that the right to armed, individual self-defense "applies to handguns").

19. *Heller*, 554 U.S. at 635.

Heller's common use test raises a number of doctrinal puzzles. For example, the test fails to account for the fact that weapon ownership trends are often themselves the result of burdensome regulations, and the test also puts tension on *Heller*'s assertion that the Second Amendment protects modern weapons.[20] Many weapons that are uncommon today might well have fallen into widespread use had they not been heavily regulated or banned shortly after their invention. And if the government can ban any weapon that has no tradition of widespread civilian ownership, then it can freeze the right to keep and bear arms to a moment in time—even while weapons technology progresses and renders common arms obsolete—because newly developed arms will always lack a tradition of widespread ownership.[21] *Heller* did not explain how a test that

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20. *See id.* at 582 ("Just as the First Amendment protects modern forms of communications and the Fourth Amendment applies to modern forms of search, the Second Amendment extends, prima facie, to all instruments that constitute bearable arms, even those that were not in existence at the time of the founding.") (internal citations omitted).

21. *Cf. Heller*, 554 U.S. at 721 (Breyer, J., dissenting) (pointing out that under the "circular reasoning" of the common use test, "the majority determines what regulations are permissible by looking to see what existing regulations permit"); Heller v. District of Columbia, 670 F.3d 1244, 1275 (D.C. Cir. 2011) (Kavanaugh, J., dissenting) (noting that new weapons have no tradition of either ownership or regulation and arguing that the common use test will have to rely on analogies to history and tradition to assess bans on new weapons); Mark Tushnet, *Permissible Gun Regulations After* Heller*: Speculations About Method and Outcomes*, 56 UCLA L. REV. 1425, 1440 (2009) ("A weapon might be unusual and (if dangerous) subject to a ban consistent with the Second Amendment if it was not in wide enough use when the ban was adopted."). Indeed, scholars have questioned whether the common use test focuses on gun ownership patterns, or rather patterns in the existing regulatory landscape. *See, e.g.*, Joseph Blocher, *Firearm Localism*, 123 YALE L.J. 82, 142–43 (2013).

Assuming that the common use test rests upon prevailing norms of gun ownership rather than existing regulations, *Heller* also did not specify whether the common use test allows courts to analyze the numerical commonality of a particular firearm model or instead requires them to group firearms into categories on the basis of shared characteristics. And if the latter is true, which characteristics are relevant to the common use analysis and which are not? For thoughtful explorations of this taxonomy problem, see Nicholas Johnson, *Administering the Second Amendment: Law, Politics, and Taxonomy*, 50 SANTA CLARA L. REV. 1263, 1263, 1265–72 (2010) [hereinafter *Johnson I*] (explaining how some gun-type restrictions "pose challenges of taxonomy that invite embellishment and manipulation of the common use standard"); Nicholas 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, 1289–1302 (2009) [hereinafter *Johnson II*]

focuses on ownership trends can make sense of the causal relationship between those trends and the laws that the test is used to evaluate. Nor did it explain how such a test can be applied to restrictions on new weapons technology. Unless the common use test evolves to incorporate some inquiry unrelated to a weapon's numerical commonality, it will involve a degree of circular reasoning and will also eventually prove insufficient to honor *Heller*'s promise that the Second Amendment contemplates technological change.

Heller's common use test left several other important questions unanswered. At a general level, how stringent is the common use test? Does the test set a uniform standard for the entire country, or does it account for local variations in the American gun culture?[22] Should the determination of whether a gun is in common use be reviewed as a factual finding or instead as a legal conclusion? And finally, although uncommon firearms are apparently a Second Amendment exception, can the government completely prohibit their private possession in the home?

In thinking about possible answers to these questions, the First Amendment may provide a useful starting point.[23] As a practical matter, the Supreme Court has already opened the door to First Amendment analogies. *Heller* repeatedly looked to the First Amendment as a guidepost,[24] and so too did *McDonald*.[25] That the

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(explaining how "assault weapon" bans in particular pose taxonomy challenges); Eugene Volokh, *Implementing the Right to Keep and Bear Arms for Self-Defense: An Analytical Framework and a Research Agenda*, 56 UCLA L. REV. 1443, 1479 (2009) (observing that "[h]ow common a weapon is depends on how specifically it is defined").

22. Professor Joseph Blocher has already argued that the common use test will account for local variations in the gun culture, and especially the urban-rural divide. *See* Blocher, *supra* note 21, at 140–44. This Article will build on Blocher's analysis both by providing more justification for the obscenity-uncommon firearms analogy and by showcasing three other implications of the analogy.

23. Another contributor to this Symposium agrees that First Amendment analogies can help mark the contours of the post-*Heller* Second Amendment, and he has offered a thoughtful exploration of the First Amendment–Second Amendment connection. *See* David Kopel, *First Amendment Guide to the Second Amendment*, 81 TENN. L. REV. 417 (2014).

24. *See Heller*, 554 U.S. at 579 (noting a textual similarity between the First and Second Amendments—both codify a "right of the people"); *id.* at 582 (finding that the Second Amendment protects modern weapons just as the First Amendment protects modern forms of communication); *id.* at 591 (noting that the right to keep and bear arms is not a term of art or singular right because the "right of the people" is not given a unitary meaning in the First Amendment context); *id.* at 592 (finding that like the First Amendment, the Second Amendment "codified a *pre-existing*

Court would search for familiar doctrinal ground when marking the contours of a newly recognized right is certainly understandable, especially since First Amendment doctrine is comparatively so well-developed. But even apart from their pragmatic appeal, there is reason to think that First Amendment analogies are justified in principle. By placing individual self-defense at the epicenter of the Second Amendment and distancing the right from its insurrectionist roots, *Heller* "modernized" the Second Amendment to protect a value more consistent with the First Amendment's veneration of democratic self-governance.[26] Furthermore, the regulation of armed self-defense and free expression can trigger similar constitutional concerns,[27] and to the degree that the First Amendment protects

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right") (emphasis in original); *id.* at 595 (holding that the Second Amendment, like the First Amendment, does not guarantee an unlimited right that can be exercised for any purpose); *id.* at 606 (noting that St. George Tucker "grouped the right [to keep and bear arms] with some of the individual rights included in the First Amendment"); *id.* at 625–26 (pointing out that it should be unsurprising that the Court declined to address the meaning of the Second Amendment until *Heller* because the Court did not invalidate a law under the freedom of speech guarantee until 1931 and did not address the scope of proscribable libel until 1964); *id.* at 635 (noting that the First Amendment, as originally understood by the ratifying public, contained exceptions, and "[t]he Second Amendment is no different"); *id.* at 635 (clarifying that like the Court's "first in-depth Free Exercise Clause case," *Heller* would not "clarify the entire field").

25. *See McDonald v. City of Chicago*, 130 S. Ct. 3020, 3043 (2010) (the Fourteenth Amendment's incorporation of the First Amendment prohibits more than simply discrimination; so too does Fourteenth Amendment's incorporation of the Second Amendment); *id.* at 3044 (plurality opinion) (stating that the Second Amendment is not a "second-class right, subject to an entirely different body of rules than the other Bill of Rights guarantees that we have held to be incorporated into the Due Process Clause"); *id.* at 3055 (Scalia, J., concurring) (arguing that the Second Amendment carries risks of harm just like the First Amendment does); *id.* at 3056 (contending that like the First Amendment right, the Second Amendment right is not absolute); *id.* at 3058–88 (Thomas, J., concurring in part and concurring in the judgment) (agreeing with the plurality that the right to keep and bear arms is not a second-class right).

26. *See* Glenn H. Reynolds & Brannon P. Denning, *How to Stop Worrying and Learn to Love the Second Amendment: A Reply to Professor Magarian*, 91 TEX. L. REV. SEE ALSO 89 (2013) ("The Court's efforts [to modernize the Second Amendment by emphasizing individual self-defense], we argue, dissolve any ostensible tension between the rights guaranteed by the First and Second Amendments . . . ."); *see also* ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT 26–27 (arguing that freedom of speech "is a deduction from the basic American agreement that public issues shall be decided by universal suffrage").

27. *See, e.g.*, Kwong v. Bloomberg, 723 F.3d 160, 165 (2d Cir. 2013) (applying

individual autonomy, the speech–arms analogy is particularly apt.[28] "Self-preservation,"[29] whatever else it may be, is certainly an exercise of autonomy.[30] Finally, at a fundamental level, declaring that the Second Amendment guarantees an individual right while at the same time treating it much less seriously than the First would make little sense in the post-*Heller* and *McDonald* world. The Second Amendment "is now part of ordinary constitutional law,"[31] and subjecting it to "an entirely different body of rules than the other Bill of Rights guarantees"[32] would tarnish our important constitutional tradition of circumscribing the political will by rigorous judicial enforcement of liberty guarantees.[33] While this sea change in Second Amendment law does not counsel the wholesale importation of substantive First Amendment doctrines,[34] it does

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First Amendment fee jurisprudence to a Second Amendment challenge to New York's gun licensing fees). *See generally* Volokh, *supra* note 21 (noting that "[m]any of the disputes that arise in the context of gun control debates are similar to those arising in other fields, such as free speech" and detailing several parallels between concerns raised by speech restrictions and concerns raised by gun restrictions).

28. *See* Martin Redish, *The Value of Free Speech*, 130 U. PA. L. REV. 591, 591 (1982) (arguing that "individual self-realization" is the First Amendment's exclusive value).

29. *Heller*, 554 U.S. at 594–95 (asserting that the ratifying public understood the Second Amendment to codify a pre-existing, natural right to "self-preservation").

30. *Cf.* Blocher, *supra* note 21, at 84 (noting that "[t]he image of hardy, frontier-dwelling Americans defending themselves and their families with guns" has influenced the political and legal debate over the right to keep and bear arms); Robert Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 25 (1971) (arguing that the autonomy rationale for the First Amendment "do[es] not distinguish speech from any other human activity").

31. Brannon P. Denning & Glenn H. Reynolds, *Five Takes on* McDonald v. Chicago, 26 J.L. & POL. 273, 274 (2011).

32. McDonald v. City of Chicago, 130 S. Ct. 3020, 3044 (2010) (plurality opinion) (stating that the Second Amendment is not a "second-class right, subject to an entirely different body of rules than the other Bill of Rights guarantees that we have held to be incorporated into the Due Process Clause"); *id.* at 3058–88 (Thomas, J., concurring in part and concurring in the judgment) (like the plurality, declining to treat the right to keep and bear arms as a second-class right).

33. *Cf.* Denning & Reynolds, *supra* note 31, at 299–300 (noting that *Heller* held "that the Second Amendment protects an individual right to arms *that is judicially enforceable after the fashion of other individual rights*," and that *McDonald* made the right fully enforceable against state and local governments) (emphasis added)).

34. *See* Kachalsky v. Cnty. of Westchester, 701 F.3d 81, 91 (2d Cir. 2012), *cert. denied* 133 S. Ct. 1806 (expressing hesitancy "to import *substantive* First Amendment principles wholesale into Second Amendment jurisprudence" and declining to apply prior-restraint doctrine to Second Amendment claims) (emphasis

suggest that the First and Second Amendments share some doctrinally relevant traits.[35]

Starting from the premise that appropriately tailored First Amendment analogies can offer general guidance when exploring the Second Amendment, this Article proposes that obscenity law, in particular, can offer important insights for mapping out the general constitutional boundaries of the modern debate over gun-type restrictions. So far, most courts and scholars have only briefly touched on the possible intersection between guns and obscenity.[36] And while at least one scholar has argued that obscenity can provide an analogue for *all* firearms,[37] this Article departs from that view by offering a more tailored alternative that treats only *uncommon* firearms as obscenity. This Article also adds to the literature on the intersection between guns and obscenity by providing detailed justification for the tailored analogy that it proposes and by exploring several novel ways in which the analogy can illuminate *Heller*'s common use standard.

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in original)).

35. *See id.* at 91–94 (cautioning against the wholesale importation of "*substantive* First Amendment principles," but nonetheless looking to obscenity doctrine, among other things, for the proposition that the right to bear arms should receive substantially less protection outside the home) (emphasis in original)); Kwong v. Bloomberg, 723 F.3d 160, 165 (2d. Cir. 2013) (applying First Amendment fee jurisprudence to a Second Amendment challenge to New York's gun licensing fees); Ezell v. City of Chicago, 651 F.3d 684, 708 (7th Cir. 2011) ("Labels aside, we can distill this First Amendment doctrine and extrapolate a few *general* principles to the Second Amendment context.") (emphasis added)).

36. *See, e.g.*, *Ezell*, 651 F.3d at 702 (noting that "free-speech jurisprudence contains a parallel for [the] threshold 'scope' inquiry" presented by the Second Amendment, and citing the First Amendment's categorical exceptions—including obscenity); Nelson Lund, *The Past and Future of the Individual's Right to Arms*, 31 GA. L. REV. 1, n.139 (1996) (arguing that not all gun rights claims should be treated like pornography because "a Court that can make distinctions between protected pornography and unprotected obscenity should have no difficulty in seeing the difference between keeping a weapon to protect oneself from criminals and keeping a weapon in order to pursue criminal activities"); Nelson Lund, *The Second Amendment, Political Liberty, and the Right to Self-Preservation*, 39 ALA. L. REV. 103, 104 (1988) ("The claim to the tools needed for exercising one's lawful right to protect himself . . . from criminal violence should be given at least as respectful a hearing as the First Amendment claims of . . . pornographers . . . .").

37. *See* Darrell A.H. Miller, *Guns as Smut: Defending the Home-Bound Second Amendment*, 109 COLUM. L. REV. 1278, 1278 (2009) (arguing that all firearms should be treated as obscenity).

At first glance, obscenity and uncommon firearms may seem unusual bedfellows, but Part I observes that they share significant, doctrinally relevant similarities that might justify treating them alike. Both are low-value categorical exceptions, and both involve line-drawing tests that focus on common usage. Additionally, both obscenity and uncommon firearms straddle the fences of longstanding cultural divides. Finally, unlike most of the First Amendment's other exceptions, obscenity and uncommon firearms are material objects whose possession frequently does not involve an actual or intended harm to others.

Part II concludes that, due to these similarities, an obscenity analogy might trigger four developments in Second Amendment doctrine. *First*, the common use test should set a relatively high national bar for gun-type restrictions by incorporating a prong that asks whether a firearm lacks serious Second Amendment value, regardless of whether it is numerically common. This addition would solve the greatest drawback to the common use test by allowing the test to account both for future advances in weapons technology and for current weapons that would have become common had they not been restricted or banned soon after their development. *Second*, above this high national bar, the common use test should be locally tailored to allow room for different communities' divergent gun cultures. This would be accomplished by asking whether a firearm is common in a given community, rather than the nation as a whole. *Third*, the fact-finder should determine whether a gun is in common use, subject to limiting instructions and general guidance from appellate courts. *Fourth*, even though uncommon firearms may be considered a Second Amendment exception, there may be a limited right to possess them in the home.

I. OBSCENITY AND UNCOMMON FIREARMS: CLOSE CONSTITUTIONAL COUSINS

This Part makes descriptive observations about the similarities between obscenity and uncommon firearms to set the stage for the normative, doctrinal argument that follows in Part II. Before making these observations, however, it is necessary to provide a brief discussion of how and why this Article offers an alternative to the most well-known proposal for treating guns as obscenity.

Several years ago, Professor Darrell Miller generated quite a bit of discussion with his innovative "guns as smut" hypothesis.[38] In his

38. *Id.*

article, Miller argued that various constitutional doctrines—and particularly the doctrine of obscenity—might lay the foundation for a home-bound Second Amendment.[39] In Miller's view, courts should treat *all* guns just like they treat smut, confining them to the place where the Constitution's other embarrassing rights hide: the privacy of the home.[40]

As with any analogy, the strength of Professor Miller's "guns as smut" hypothesis depends on the degree of relevant similarity between the objects of comparison.[41] By this measure, Miller overextended the obscenity analogue.[42] Obscenity lies at the *outermost fringe* of the First Amendment's protections, while *Heller* made clear that at least some firearms—those widely used for self-defense—lie at the *core* of the Second Amendment.[43] Additionally, the Court in *Heller*, and again in *McDonald*, strongly implied that this core right of armed self-defense extends beyond the home.[44] At the very least, it recognized a penumbral right to acquire defensive firearms and ammunition outside the home.[45] In contrast, as Miller notes, obscenity receives no such protection; its receipt, distribution, and possession beyond the doorstep may be completely proscribed.[46] At bottom, Miller's comparison of all firearms to a narrow, barely-protected category of speech amounts to the contention that when it comes to the embarrassing Second Amendment,[47] the exception

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39. *Id.*

40. *Id.* at 1280 (describing his "modest proposal").

41. *See* Joseph Blocher, *Second Things First: What Free Speech Can and Can't Say About Guns*, 91 TEX. L. REV. SEE ALSO 37, 39 (2012) ("[D]octrinal analogies are useful only to the degree that they are premised on relevant similarities.").

42. For a more complete critique of Miller's argument, see Eugene Volokh, *The First and Second Amendments*, 109 COLUM. L. REV. SIDEBAR 97 (2009) (responding to Miller's "guns as smut" argument).

43. District of Columbia v. Heller, 554 U.S. 570, 629 (2008) (striking down the District of Columbia's handgun ban because "the American people have considered the handgun to be the quintessential self-defense weapon").

44. *See* Jordan Pratt, *A First Amendment-Inspired Approach to* Heller's *"Schools" and "Government Buildings"*, 92 NEB. L. REV. (forthcoming 2014).

45. *See* Glenn H. Reynolds, *Second Amendment Penumbras: Some Preliminary Observations*, 85 S. CAL. L. REV. 247, 249–50 (2012) (penumbral rights needed to make *Heller*'s right effective "include such auxiliaries as the right to buy firearms and ammunition [and] the right to transport them between gun stores, one's home, and such other places—such as gunsmith shops, shooting ranges, and the like—that are a natural and reasonable part of firearms ownership and proficiency").

46. Miller, *supra* note 37, at 1297, 1299.

47. *See* Sanford Levinson, *The Embarrassing Second Amendment*, 99 YALE L.J. 637, 639–42 (1989) (exploring why, at the time, most academics had ignored the

should serve as the rule. It is the Second-Amendment equivalent of treating all speech—including political speech[48]—like obscenity. Miller even seems to concede this weakness in his argument, pitching his proposal as a "politically palatable" "fix" that a prodigal Supreme Court might offer if it ever chooses to admit the error of its wayward decision in *Heller*.[49]

Despite this overextension of the obscenity analogy, Professor Miller was not entirely off-target in his general point that obscenity law—"a mature jurisprudence now forty years old"[50]—can provide useful lessons for the development of Second Amendment doctrine. While it would make little sense to treat the self-defense core of the right like obscenity, as this Part describes, obscenity law is an appropriate guidepost for marking the boundaries of the Second Amendment's more fringe protections. In particular, this Part argues that obscenity is an especially appropriate analogue for *uncommon*

Second Amendment altogether); Lund, *Self-Preservation*, *supra* note 36, at 103 ("The Second Amendment to the United States Constitution has become the most embarrassing provision of the Bill of Rights."). Professor Levinson concluded that academia's neglectful attitude toward the Second Amendment "derived from a mixture of sheer opposition to the idea of private ownership of guns and the perhaps subconscious fear that altogether plausible, perhaps even 'winning,' interpretations of the Second Amendment would present real hurdles to those of us supporting prohibitory regulation." Levinson, *Embarrassing Second Amendment*, *supra* note 47, at 642. Levinson continued: "For too long, most members of the legal academy have treated the Second Amendment as the equivalent of an embarrassing relative, whose mention brings a quick change of subject to other, more respectable, family members." *Id.* at 658.

Much has changed, of course, since Professor Levinson authored that article, and the legal academy must now accept its embarrassing relative. *See* McDonald v. City of Chicago, 130 S. Ct. 3020, 3044 (2010) (plurality opinion) (stating that the Second Amendment is not a "second-class right"); *id.* at 3058–88 (Thomas, J., concurring in part and concurring in the judgment) (like the plurality, declining to treat the right to keep and bear arms as a second-class right). This is so even though the reunion may be "too awkward and complicated to inspire a passionate embrace." Blocher, *supra* note 41, at 40 (observing that some First Amendment-Second Amendment analogies, though useful, can be "awkward and complicated").

48. *Heller* teaches that armed self-defense is at the "core" of the Second Amendment. *Heller*, 554 U.S. at 630. In like manner, the Supreme Court has treated political speech as a core First Amendment right. New York Times v. Sullivan, 376 U.S. 254, 273 (1964) (noting that the right to criticize government and government officers is "the central meaning of the First Amendment").

49. Miller, *supra* note 37, at 1297–1303 (describing the "obscenity fix" to *Heller*'s individual right).

50. *Id.* at 1297.

firearms because obscenity and uncommon firearms share five doctrinally relevant traits.

A. *Low-Value Categorical Exceptions*

Any First Amendment analogy to uncommon firearms must focus, at the most basic level, on unprotected speech. Just as it would make little sense to equate a First Amendment exception with the Second Amendment's core right to armed self-defense, it would make little sense to equate uncommon weapons—a Second Amendment exception—with the First Amendment's core.

The Supreme Court has recognized many exceptions to the First Amendment,[51] and obscenity is among them.[52] The Court treats obscenity as an exception because the ratifying public understood the First Amendment to exclude it.[53] But the Court has also observed that this is so because obscenity serves no core First Amendment purpose: "'[lewd and obscene] utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.'"[54]

In like manner, *Heller* teaches that the Second Amendment, as originally understood, excludes uncommon firearms because they do

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51. *See, e.g.*, Virginia v. Black, 538 U.S. 343 (2003) (true threats); Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 771 (1976) (fraud); Brandenburg v. Ohio, 395 U.S. 444, 447 (1969) (per curiam) (incitement to unlawful action); Beauharnais v. Illinois, 343 U.S. 250, 254–55 (1952) (defamation); Giboney v. Empire Storage & Ice Co., 336 U.S. 490, 498 (1949) (speech integral to criminal conduct).

52. Roth v. United States, 354 U.S. 476, 485 (1957).

53. United States v. Stevens, 559 U.S. 460, 468–72 (2009). It is debatable whether this modern take accurately describes how the First Amendment's categorical exceptions developed. *See* Joseph Blocher, *Categoricalism and Balancing in First and Second Amendment Analysis*, 84 N.Y.U. L. REV. 375, 387–89 (2009) (arguing that the First Amendment's categorical exceptions evolved from interest-balancing rather than simply an original-meaning inquiry).

54. *Roth*, 354 U.S. at 485 (quoting Chaplinsky v. New Hampshire, 315 U.S. 568, 571–72 (1942)); *cf.* Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) ("[T]he ultimate good desired is better reached by free trade in ideas . . . the best test of truth is the power of the thought to get itself accepted in the competition of the market, and . . . truth is the only ground upon which [the ultimate good desired] safely can be carried out. That at any rate is the theory of our Constitution.").

not serve the Amendment's core self-defense purpose.[55] Short-barreled shotguns are "not typically possessed by law-abiding citizens for lawful purposes,"[56] and "M–16 rifles" are not "the sort[] of lawful weapons" that Americans keep at home for protection.[57] *Heller* might instead have claimed that these uncommon firearms "are no essential part of" self-defense, and any slight defensive advantage they offer is "clearly outweighed by the social interest in order" and safety.[58] Fully automatic weapons offer defensive advantages only in situations that involve multiple threats at very close range or the need for suppressive, high volume fire in military combat, and the U.S. Army Field Manual instructs that infantry rifles should rarely be used in automatic mode.[59] Tellingly, the military opted to place a three-round burst limitation on the M–16 for general infantry soldiers when it updated the rifle in the 1980s.[60] This choice apparently recognized that in many firefights, the costs and risks of fully automatic fire outweigh its limited tactical advantages.[61] *A priori*, then, fully automatic machineguns offer little utility in the vast majority of private self-defense scenarios.

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55. District of Columbia v. Heller, 554 U.S. 570, 625, 627 (2008).

56. *Id.* at 625.

57. *Id.* at 627.

58. *Roth*, 354 U.S. at 485 (internal quotation marks omitted); *cf. Johnson II*, *supra* note 21, at 1292 (admitting that while there is room for debate whether fully automatic infantry rifles would prove useful in private self-defense situations, *Heller* settled that question as a practical matter); Blocher, *supra* note 53, at 388 (observing that "the boundaries of . . . categorical exclusions may be a result of balancing").

59. *See* U.S. Army Field Manual 3-22.9, *Rifle Marksmanship M16-/M4-Series Weapons*, at 7–13 (instructing that infantry rifles "should normally be employed in the semiautomatic fire mode," and fully automatic or burst fire should be used only in certain combat situations, such as "[c]learing buildings, final assaults, . . . and ambushes"); *id.* at 7–16 (instructing that some suppressive fire is aimed only at a general area—as opposed to a particular point—and "[s]oldiers may need to fire full automatic or bursts (13 rounds per second) for a few seconds to gain initial fire superiority"); *cf.* Arthur D. Osborne & Seward Smith, *Analysis of M16A2 Rifle Characteristics and Recommended Improvements*, February 1986, at 7–8, *available at* http://www.dtic.mil/dtic/tr/fulltext/u2/a168577.pdf (last visited Dec. 29, 2013) [hereinafter "Osborne-Smith Report"] (noting that fully automatic fire is useful "to clear and defend buildings, to conduct final assaults on enemy positions, to defend against an enemy final assault, to conduct an ambush," and "to react to an enemy ambush"); *id.* at 11 (high-volume suppressive fire more useful at close-range when closing in on "an enemy position").

60. *See* Osborne-Smith Report, *supra* note 59, at 2–3 (describing the differences between the M-16A1 and the M-16A2).

61. *See id.* at 3 (reporting that the U.S. Marine Corps found the three-round

Calling uncommon firearms a low-value exception is admittedly more difficult in the context of short-barreled shotguns. While short shotguns are more concealable than longer ones (and therefore presumably more adaptable for use in illicit activities), they are not nearly as concealable as handguns, the preferred choice of violent criminals.[62] Additionally, *Heller* itself recognized that portability increases a weapon's utility in defensive situations when it explained why Americans favor handguns for self-defense:

> There are many reasons that a citizen may prefer a handgun for home defense: It is easier to store in a location that is readily accessible in an emergency; it cannot easily be redirected or wrestled away by an attacker; it is easier to use for those without the upper-body strength to lift and aim a long gun; it can be pointed at a burglar with one hand while the other hand dials the police.[63]

If this is true, then it naturally follows that short shotguns are more useful for self-defense than long ones. Of course, *Heller* squarely held that the Second Amendment does not protect short-barreled shotguns.[64] This holding, however, might be understood to express a debatable judgment that their public safety risk outweighs their defensive utility. After all, *Heller* derived the common use test from a longstanding tradition of regulating "*dangerous* and unusual" weapons.[65]

At this juncture, one might object that the *Heller* majority rejected "freestanding interest-balancing" inquiries.[66] This is a fair point, but as section II.A. demonstrates, the common use test will likely have to incorporate some form of interest-balancing to account for the causal relationship between ownership trends and existing

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burst feature preferable to unlimited automatic fire because it "[r]educed barrel jump and muzzle climb" and "[i]ncreased ammunition conservation and more effective[ly] use[d] . . . ammunition"). The Osborne-Smith report questioned whether the three-round burst feature was as appropriate for the Army as it was for the Marines, given their different training philosophies and combat techniques. *Id.* at 9–11. But the military's choice to retain the three-round burst limiter in the updated M-16A2 expressed a judgment that the feature was, on balance, a positive development.

62. BUREAU OF JUSTICE STATISTICS, PUB. NO. 194820, WEAPON USE AND VIOLENT CRIME 3 (2003) (handguns used in 87% of violent crimes committed with firearms between 1993 and 2001).

63. District of Columbia v. Heller, 554 U.S. 570, 629 (2008).

64. *Id.* at 625.

65. *Id.* at 627 (emphasis added) (internal quotation marks omitted).

66. *Id.* at 634 (internal quotation marks omitted).

regulations, and also to fulfill *Heller*'s promise that the Second Amendment reaches modern weapons. Furthermore, it is worth noting that *Heller* went out of its way to explain why handguns, the "quintessential self-defense weapon," are useful for private self-defense.[67] Given *Heller*'s assertion that modern arms are protected and the ink that the Court spilled explaining the unique defensive utility of handguns, *Heller*'s rejection of "freestanding interest-balancing inquiries" should not prevent us from conceptualizing uncommon firearms as a low-value exception. In sum, while there may be room for debate, obscenity and uncommon firearms appear to share the most important, basic doctrinal similarity: the Constitution, as originally understood, excludes them because they do not meaningfully advance its core values.

B. Line-Drawing Tests that Focus on Common Usage

The First Amendment has many categorical exceptions, so while looking exclusively at these exceptions narrows the field of candidates, it marks only the beginning of the search for an appropriate analogue. The formulation of the common use test itself provides the key needed to choose among the contenders. *Heller*'s focus on common usage suggests that when determining whether a type of weapon counts as an "arm" within the meaning of the Second Amendment, one must look outward toward ownership norms in contemporary society.[68] While several First Amendment exceptions—such as incitement, fighting words, and true threats—obliquely relate to common usage and contemporary norms,[69] the test for obscenity does so most explicitly.

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67. *Id.* at 629.

68. Another possibility might be looking toward norms in existing gun regulations rather than gun ownership patterns. *See* Blocher, *supra* note 21, at 143. But this would involve quite a bit of "circular reasoning." *Heller*, 554 U.S. at 721 (Breyer, J., dissenting) (pointing out that determining "what regulations are permissible by looking to see what existing regulations permit" involves "circular reasoning"). Focusing on actual gun ownership patterns rather than norms in the existing legal landscape seems more consistent with *Heller*'s focus on common *usage*, although the circular relationship between gun ownership patterns and what existing regulations permit cannot be denied. Section II.A. proposes a fix for this circularity problem.

69. *Cf.* Brandenburg v. Ohio, 395 U.S. 444, 447 (1969) (per curiam) (First Amendment "do[es] not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is *likely* to incite or produce such action")

In *Miller v. California*, the Supreme Court held that the trier of fact must determine whether a work is obscene by answering the following three inquiries in the affirmative:

> (a) whether the *average* person, applying *contemporary community standards* would find that the work, taken as a whole, appeals to the prurient interest; (b) whether the work depicts or describes, in a *patently offensive* way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.[70]

While the third prong does not directly relate to contemporary norms of sexual expression, the first and second clearly do.[71] Under the first and second prongs of the *Miller* test, to constitute obscenity, something must be, among other things, extraordinarily *uncommon* in the community.[72] This focus on contemporary norms of expression mirrors the common use test's focus on contemporary norms of weapon ownership, providing another reason to think that obscenity doctrine can help us better understand the Second Amendment's exclusion of "uncommon" firearms.

C. Subjects of Longstanding Cultural Divides

Another feature of obscenity makes it stand out among the crowd of unprotected speech as a viable analogue for uncommon firearms. To a greater degree than perhaps any other First Amendment exception, obscenity straddles the fence of a stark cultural divide. Morally conservative areas of the country generally tolerate less sexualized expression than do more permissive centers like San

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(emphasis added)); Watts v. United States, 394 U.S. 705, 708 (1969) (per curiam) ("true threat" does not occur when accompanied by "political hyperbole" that, "[t]aken in context," cannot be interpreted as a serious expression of intent to harm); Chaplinsky v. New Hampshire, 315 U.S. 568, 572, 574 (1942) ("fighting words" defined as words "which by their very utterance inflict injury or *tend* to incite an immediate breach of the peace" because they are "likely to provoke the *average* person to retaliation") (emphasis added)).

70. Miller v. California, 413 U.S. 15, 24 (1973) (emphases added) (internal quotation marks and citations omitted).

71. *See* Smith v. United States, 431 U.S. 291, 300–01 (1977) (clarifying that both the first *and* second prongs of the *Miller* test rest on contemporary community standards).

72. *Miller*, 413 U.S. at 24.

Francisco and Las Vegas.[73] While some communities believe that sexualized expression communicates a valuable message,[74] others see it as a form of "pollution" to the moral atmosphere of society.[75]

This dynamic is somewhat evident in America's gun culture generally,[76] but it is especially pronounced as to uncommon firearms. Many states broadly permit private ownership of precisely the same guns that *Heller* declared uncommon—short-barreled shotguns and fully automatic machineguns[77]—while other jurisdictions completely prohibit citizens from owning these weapons.[78] And like obscenity, this stark divide in America's gun culture largely follows the liberal–conservative dichotomy, though in a different direction.[79] Politically

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73. *Id.* at 32–33. San Francisco did not enact a public nudity ban until November of 2012, and despite very modest penalty provisions, it met fierce opposition. *See San Francisco Bans Public Nudity: Supervisors Make Historic Vote*, HUFFINGTON POST (Nov. 20, 2012), http://www.huffingtonpost.com/2012/11/20/san-francisco-bans-public-nudity_n_2165847.html?. Additionally, Las Vegas has been described as the "true strip club capital of the world," although that claim has been debated. *Is Tampa the 'strip club capital of the world'?*, POLITIFACT, http://www.politifact.com/florida/statements/2012/jan/13/ellyn-bogdanoff/tampa-strip-club-capital-world/ (quoting a spokeswoman for the adult entertainment industry and analyzing data). The cultural divide between these cities and much of America is undeniable.

74. *See* Bret Boyce, *Obscenity and Community Standards*, YALE J. INT'L L. 299, 344 (2008) (arguing that pornography, even when obscene, "may transmit important artistic, social, and political messages").

75. *See generally* John C. Nagle, *Pornography as Pollution*, 70 MD. L. REV. 939 (2011) (demonstrating how an understanding of pornography as a form of pollution to the moral atmosphere suggests that containment strategies are the best response).

76. *See* Blocher, *supra* note 21, at 90–103; Miller, *supra* note 37, at 1354–55. *But see* Pratt, *supra* note 44, at n.4 (noting that forty-two U.S. jurisdictions have liberalized concealed-carry regimes).

77. For example, Alabama, Alaska, Arizona, Arkansas, Colorado, Florida, Georgia, and Tennessee all allow private ownership of machine guns and short-barreled shotguns if they are registered in accordance with federal law. ALA. CODE § 13A-11-63(a) (criminalizing possession of short-barreled shotgun only when "in violation of federal law"); ALASKA STAT. § 11.61.200(c); ARIZ. REV. STAT. ANN. § 13-3102(E); ARK. CODE ANN. § 5-73-204 (criminalizing possession and use of machine guns only for "offensive or aggressive purpose"); COLO. REV. STAT. § 18-12-102(5); FLA. STAT. § 790.221(3); GA. CODE ANN. § 16-11-124(4); TENN. CODE ANN. § 39-17-1302(b)(7). Alaska and Tennessee even require state officials to facilitate applications to acquire these firearms. *See* ALASKA STAT. § 18.65.810; TENN. CODE ANN. § 39-17-1361.

78. Illinois, New York, and Rhode Island, for example, completely prohibit civilian ownership of these types of firearms. 720 ILL. COMP. STAT. 5/24-1(a)(7); N.Y. PENAL LAW §§ 265.00(3), 265.02(2); R.I. GEN. LAWS § 11-47-8.

79. *Compare* sources *supra* note 77 (listing rural states with lax laws

conservative states with permissive gun-type restrictions have made the judgment that uncommon firearms serve a valuable purpose, while urban centers and liberal states with more stringent laws see uncommon firearms as a poison to be eradicated.

Much of the Supreme Court's modern obscenity doctrine attempts to leave undisturbed these types of delicate cultural lines.[80] Any effort to move these lines too far in either direction could turn them into *battle* lines, and the Court has perhaps acquired at least a mild distaste for increasing its role in the culture wars.[81] Because the Second Amendment's most heated battleground—gun-type restrictions—lies at the crossroads of a similar cultural divide, obscenity doctrine provides a suitable lens through which to view *Heller*'s common use test.

D. Material Objects that One Possesses

Although both actual conduct and the spoken word can be obscene, perhaps more often than any other First Amendment exception, obscenity presents itself in the form of graphic material that one can possess.[82] This characteristic of obscenity stands in

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pertaining to uncommon firearms), *with* Blocher, *supra* note 21, at 90–103 (summarizing the rural-urban divide in America's gun culture).

80. *See* discussion *infra* section II.B.

81. *Cf.* Hollingsworth v. Perry, 133 S. Ct. 2652, 2659 (2013) (refusing, for lack of standing, to weigh on the constitutionality of a state constitutional amendment that defined marriage as the union of one man and one woman); Nat'l Federation of Ind. Business v. Sebelius, 132 S. Ct. 2566, 2608 (2012) (upholding, under Congress's taxing power, a requirement that most Americans purchase and maintain health insurance); Planned Parenthood v. Casey, 505 U.S. 833, 846 (1992) (abandoning *Roe*'s trimester framework in favor of a viability and "undue burden" standard, leaving intact only *Roe*'s "essential" holding); *but cf.* United States v. Windsor, 133 S. Ct. 2675, 2682 (2013) (striking down federal statute that defined marriage as the union of one man and one woman for purposes of federal law).

82. *Cf.* Kaplan v. California, 413 U.S. 115, 118–20 (1973) (recognizing that although obscenity is traditionally found in actual conduct or in pictures, films, paintings, drawings, and engravings that depict conduct, obscenity can also present itself in the spoken or written word). Indeed, most of the Court's landmark obscenity decisions involved not the spoken word, but rather visual materials that could be (and were) possessed. *See, e.g.*, Miller v. California, 413 U.S. 15 (1973) (involving a brochure that contained pictorial depictions of sexual activity); Paris Adult Theatre I v. Slaton, 413 U.S. 49 (1973) (involving "hard core" pornographic films); Stanley v. Georgia, 394 U.S. 557 (1969) (involving pornographic films); Roth v. United States, 354 U.S. 476 (1957) (involving circulars, advertising, and a book).

stark contrast to many of the First Amendment's other exceptions, which frequently travel through the medium of spoken expression.[83]

At an abstract level, physical objects tend to implicate different government interests than do non-physical things. Physical objects, as opposed to spoken words, can fall into the wrong hands or be viewed by the wrong eyes if not securely stored or contained.[84] On this score, obscenity doctrine—in comparison to other First Amendment exceptions—is an especially useful tool to explore the Second Amendment's exclusion of uncommon firearms. The Second Amendment right to keep and bear "arms" deals primarily with a right to possess material objects, and to determine which kinds of arms fall outside its guarantee, a doctrine that deals primarily with material objects can provide special insights. In the First Amendment context, the doctrine that best fits this bill is obscenity.

Of course, to be fair, firearms and obscenity do not necessarily implicate the *same* government interests, although frequently they might.[85] The government's interest in regulating the right to keep

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83. For example, many of the Supreme Court's classic incitement to unlawful action, fighting words, hostile audience, and threat cases involved the spoken word. *See, e.g.*, Brandenburg v. Ohio, 395 U.S. 444 (1969) (per curiam) (words spoken at a Klu Klux Klan rally); Watts v. United States, 394 U.S. 705 (1969) (words spoken at a protest held not to constitute a true threat); Terminiello v. Chicago, 337 U.S. 1 (1949) (hostile audience, but speech protected); Chaplinsky v. New Hampshire, 315 U.S. 568 (1942) (fighting words spoken to police officers). Likewise, perjury, defamation (slander), and treason are often spoken words, and they receive no First Amendment protection. *See, e.g.*, *Heller*, 554 U.S. at 635 (holding that the "disclosure of state secrets" is not protected by First Amendment); Konigsberg v. State Bar, 366 U.S. 36, 50 n.10 (1961) (holding that perjury and slander receive no First Amendment protection).

84. A large feature of the doctrine for obscenity and other sexual expression is the government's interest in shielding unwilling viewers and children from explicit materials. *See, e.g.*, *Miller*, 413 U.S. at 18–19 ("This Court has recognized that the States have a legitimate interest in prohibiting dissemination or exhibition of obscene material when the mode of dissemination carries with it a significant danger of offending the sensibilities of unwilling recipients or of exposure to juveniles.") (footnote omitted)). This is also why restrictive zoning of non-obscene sexual expression is permissible. *See* Young v. Am. Mini Theatres, Inc., 427 U.S. 50, 70–73, n.34 (1976) (holding that adult theater zoning laws that limit number of theaters permitted in a geographic area and target only their "secondary effect" are perfectly acceptable under the First and Fourteenth Amendments). Like strip club zoning, firearm zoning laws, especially for shooting ranges, are commonplace and serve a similar function. *See* Ezell v. City of Chicago, 651 F.3d 684, 709–10 (7th Cir. 2011) (comparing strip club zoning laws to shooting range zoning laws).

85. *See Paris Adult Theatre I*, 413 U.S. at 58, n.8 (1973) (noting that obscenity

and bear arms will almost always deal with public order, public safety, and the prevention of violence. To the degree that this interest diverges from those advanced by regulations on obscenity,[86] the fit will be imperfect, and other First Amendment exceptions might have some guidance to offer.[87] Nevertheless, because uncommon firearms share more doctrinally relevant characteristics overall with obscenity than with other First Amendment exceptions, the imperfection of the fit between these constitutional cousins does not unravel the analogy.

E. Not Always Possessed for Harmful Purposes

Uncommon firearms and obscenity share yet another doctrinally relevant similarity: their private possession often does not entail an intended or actual harm to others. In contrast, many of the First Amendment's other exceptions bear a direct relationship with injury to the public.[88] Incitement to unlawful action, fighting words, true threats, treason, and perjury, for example, necessarily involve an intent to harm others, the public safety, or the public order.[89]

Not so with obscenity. As the Supreme Court has observed, the mere possession of obscenity—as opposed to its exhibition and distribution—bears only an *indirect* connection with public order and safety.[90] According to the Court, one can possess obscenity simply to

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implicates "the interest of the public in the quality of life and the total community environment, the tone of commerce in the great city centers, and, possibly, the public safety itself," for "there is at least an arguable correlation between obscene materials and crime").

86. Obscenity regulations primarily aim to prevent moral harm to those who view, watch, or read obscene material. *See* Andrew Koppelman, *Does Obscenity Cause Moral Harm?*, 105 COLUM. L. REV. 1635 (2005).

87. Take, for example, true threats and incitement to unlawful, violent action. These First Amendment categories have a clear connection with public order and safety. *See infra* section I.E. As explained in section I.E, however, their connection to violence is more direct than the connection between uncommon firearms and violence because the mere possession of uncommon firearms does not always entail a desire to inflict harm.

88. Koppelman, *supra* note 86, at 1637 (observing that, in contrast with obscenity, the First Amendment's exceptions for defamation with actual malice, false or misleading commercial advertising, fraudulent solicitation, incitement, and true threats all "rest on fraud or harm to third parties").

89. *Cf. id.* Second-Amendment analogues to these sorts of unprotected speech might be armed robbery and assault with a deadly weapon, for example.

90. *See* Stanley v. Georgia, 394 U.S. 557, 565–67 (1969).

"satisfy his intellectual and emotional needs."[91] Those who collect obscenity for their own personal use and enjoyment, despite the harm they might inflict on themselves,[92] often do not wish to inflict harm on others. And, according to the Court, often this private possession does not result in any such harm.[93] Obscenity has a sort of "collector value" for those who possess it, and this collector interest bears only an indirect relationship with the public safety, order, and morality.

The same may be said of uncommon firearms. As mentioned earlier, many states allow private ownership of exactly the same firearms that *Heller* identified as uncommon. Legal owners of such firearms go through great hassle and expense to obtain them. To acquire the uncommon firearms that *Heller* mentioned—short-barreled shotguns and machine guns—federal law requires the filing of applications with the Bureau of Alcohol, Tobacco, Firearms, and Explosives ("ATF") and the payment of $200 taxes.[94] Only after the applicant passes a background check and ATF approves the application, registers the firearm to the owner, and issues a stamp, can the applicant take possession of—or build—the firearm for which he or she applied.[95] Currently, this process takes anywhere from six to twelve months.[96] Additionally, because federal law has

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91. *Id.* at 565 (1969).

92. Koppelman, *supra* note 86, at 1636 (conceding that obscenity law "tries to prevent a genuine evil"—moral harm to the viewer).

93. *Id.* at 1637 ("Material can be obscene even if it has no likelihood of inciting anyone to unlawful conduct, and even if no unwilling viewer is ever likely to see and thereby be offended by it."); *id.* at 1673 (describing how the Supreme Court's "erogenous zoning" cases allow the government to geographically confine sexually explicit expression to minimize moral harm to others). There are compelling arguments, however, that obscenity can—and sometimes does—cause harm to "the broader cultural environment," much like pollution harms the natural environment. *E.g.*, Nagle, *supra* note 75, at 940–50. This harm to others is, of course, only indirect.

Finally, I note that despite the *Stanley* Court's suggestion to the contrary, scholars have persuasively argued that the private possession of obscenity frequently *does* result in a direct harm to others—and in particular, those whom it depicts. *See generally, e.g.*, Catharine A. MacKinnon, *Pornography as Trafficking*, 26 MICH. J. INT'L L. 993, 993–1001 (2005). This type of harm, however, has no analogue in the context of uncommon firearms, since the possession of guns does not victimize those involved in their production.

94. 26 U.S.C. §§ 5811–12, 5821–22 (2012); *see also* 26 U.S.C. § 5845(a) (2011) (defining "firearm" within the National Firearms Act to include "machineguns" and shotguns having barrels less than eighteen inches in length).

95. 26 U.S.C. §§ 5811–12, 5821–22.

96. *See Trend Graph*, NFA TRACKER, http://www.nfatracker.com/TrendGraph

frozen the supply of civilian-transferable machine guns,[97] they cost many thousands of dollars. *Heller*'s "M–16 rifles," for instance, currently command an average market price of $24,000 to $31,500, depending on the particular model and configuration.[98] Other machine guns can cost more,[99] and their appreciation has fared better in the past decade than the stock market due to their scarcity and high consumer demand.[100] Perhaps that is one reason why, despite high barriers to ownership, the popularity of these types of firearms has soared in recent years.[101]

The apparent motivation for legal ownership of these uncommon firearms is a mixture of personal enjoyment, collection, and investment.[102] In fact, the Director of ATF testified before Congress

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All.aspx (reporting wait times for applications approved in March 2013, which appear to average just under 300 days, and indicating that, since mid-2011, several approvals have taken almost a full year); *see also* Bureau of Alcohol, Tobacco, Firearms, & Explosives, *National Firearms Act (NFA) – Processing Times*, http://www.atf.gov/firearms/faq/national-firearms-act-processing-times.html (stating that ATF's "customer service goal" is currently six months).

97. 18 U.S.C. § 922(o) (2012).

98. *See Machine Guns*, MACHINE GUN PRICE GUIDE, http://www.machinegunpriceguide.com/html/machine_guns.html (reporting price trends from October 2003 to June 2013).

99. For example, the current market price of a civilian-transferable M60 belt-fed machine gun hovers around $43,000. *See Beltfed Weapons*, MACHINE GUN PRICE GUIDE, http://www.machinegunpriceguide.com/html/machine_guns.html (price current as of June 2013).

100. The average market price for a civilian-transferable M–16A1 has gone from about $11,000 in October of 2003 to $24,000 in June of 2013. *See Machine Guns*, *supra* note 98. That represents a 118 percent rate-of-return over the course of only 10 years. In contrast, given the past "decade of poor returns by stocks," the traditional "rule of thumb that stocks return 10% a year" is now "considered heresy." Matt Krantz, *Investors question wisdom of 10% rate of return rule*, USA TODAY (OCT. 17, 2011, 9:08 PM), http://usatoday30.usatoday.com/money/perfi/columnist/krantz/story/2011-10-17/rate-of-return-for-stocks/50807868/1. It looks like the market for "bearing" arms has not been much of a bear market lately!

101. In 2005, ATF processed 41,579 NFA applications of all types. In 2011, ATF processed 105,373 applications. Bureau of Alcohol, Tobacco, Firearms, & Explosives, *supra* note 96.

102. *See* NAT'L FIREARMS ACT TRADE & COLLECTORS ASS'N, NFATCA.ORG (last visited Dec. 6, 2013) (association for collectors and dealers); *see also National Firearms Act Handbook*, BUREAU OF ALCOHOL, TOBACCO, FIREARMS, AND EXPLOSIVES, *available at* http://www.atf.gov/files/publications/download/p/atf-p-5320-8/atf-p-5320-8.pdf (last visited Dec. 6, 2013) (published to assist, among other persons, "*collectors* of NFA firearms" and thanking the National Firearms Act Trade & Collectors Association for its "assistance in writing and making this publication

that the criminal use of legally registered machine guns by their owners is virtually non-existent.[103] Given the acquisition process, this makes sense. Someone looking to obtain an uncommon firearm for use in illegal activities would certainly not wish to register with the federal government beforehand and pay the inflated market price for legal versions when he or she could simply turn to the black market or illegally convert an existing firearm.[104] Additionally, given the time and expense that legal owners have invested, they have great incentive to safeguard their collections from theft and criminal misuse.

I provide this information not to make an empirical argument about the complicated relationship between gun ownership and violent crime. Rather, this section has proffered support for a much more modest, intuitive claim: like obscenity and unlike many of the First Amendment's other exceptions, the mere private possession of uncommon firearms need not entail an intended or actual harm to others. This doctrinally relevant similarity provides yet another basis for treating uncommon firearms and obscenity alike.

II. OBSCENITY'S FOUR LESSONS FOR SECOND AMENDMENT DOCTRINE

In the last Part, I observed that uncommon firearms and obscenity share significant, doctrinally relevant similarities that might justify treating them alike. With this justification for the analogy laid, this Part demonstrates several lessons that obscenity

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possible") (emphasis added)).

103. In 1984, the Director of ATF testified before Congress that "it is highly unusual—and in fact, it is very, very rare" for a legally owned machinegun or silencer to be used in a violent crime, and that "[r]egistered machineguns which are involved in crimes are so minimal so as not to be considered a law enforcement problem." *Armor Piercing Ammunition and the Criminal Misuse and Availability of Machineguns and Silencers: Hearing Before the Subcomm. on Crime of the H. Comm. on the Judiciary*, 98th Cong. 117, 208 (1984) (statement of Stephen E. Higgins, Director of ATF). The handful of crimes committed with registered machineguns and silencers likely included non-violent regulatory violations. GARY KLECK, TARGETING GUNS: FIREARMS AND THEIR CONTROL 108–09 (1997).

104. *Hearing Before Subcomm.*, *supra* note 103, at 119, 128, 132 (statement of Stephen E. Higgins, Director of ATF) (describing the seizure of machine guns that had been made by illegally converting semiautomatic firearms, stating that most illegal machineguns are semiautomatic conversions, and demonstrating an example of a "semiautomatic weapon that can be easily converted to an automatic weapon"); *id.* at 128 (Congressman Shaw stated "someone who has a felony record would probably stay shy of [ATF] anyway, wouldn't they? . . . And go [through] the illegal channels rather than legal channels.").

law might have to teach us about *Heller*'s common use test. These lessons relate to how the test can evolve to accommodate future technological advancements, how high a bar the test sets for gun-type restrictions, whether this bar will be uniform across the country, who should make the determination that the test requires, and whether *Heller*'s exclusion of uncommon firearms encompasses their private possession in the home.

A. High National Bar for Gun-Type Restrictions that Does Not Rest on Gun Ownership Patterns

The *Miller* test attempts—albeit imperfectly[105]—to cabin obscenity to a "well-defined and narrowly limited" kind of speech, "the prevention and punishment of which have never been thought to raise any Constitutional problem."[106] Most notably, the test requires that a work, taken as a whole, lack serious literary, artistic, political, or scientific value.[107] This sets a relatively high national bar that, unlike the other prongs of the *Miller* test, does not vary according to contemporary norms of expression.[108] For example, despite its arguable lack of communicative value and historical protection,[109] even nude dancing falls within the sweep of the First Amendment.[110] "Bare" nudity (pardon the pun) cannot qualify as

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105. For scholarly criticism arguing that the *Miller* obscenity test is too malleable and protective of censorship, see generally Rodric B. Schoen, *Billy Jenkins and Eternal Verities: The 1973 Obscenity Cases*, 50 N.D. L. REV. 567 (1974).

106. Roth v. United States, 354 U.S. 476, 485 (1957) (quoting Chaplinsky v. New Hampshire, 315 U.S. 568, 571–72 (1942)) (internal quotation marks omitted).

107. Pope v. Illinois, 481 U.S. 497, 500 (1987).

108. *See id.* at 500–01 (noting that the value of a work does not "vary from community to community based on the degree of local acceptance it has won," and "[t]he proper inquiry is not whether an ordinary member of any given community would find serious literary, artistic, political, or scientific value in allegedly obscene material, but whether a reasonable person would find such value in the material, taken as a whole").

109. *See* Barnes v. Glen Theatre, Inc., 501 U.S. 560, 573 (1991) (Scalia, J., concurring in the judgment) (observing that the challenged ban on completely nude dancing "is in the line of a long tradition of laws against public nudity, which have never been thought to run afoul of traditional understanding of 'the freedom of speech'").

110. *See, e.g.*, *id.* at 566 (plurality opinion) (observing that totally nude dancing "is expressive conduct within the outer perimeters of the First Amendment, though we view it as only marginally so"); *id.* at 581 (Souter, J., concurring in the judgment) (agreeing that totally nude dancing receives some First Amendment protection); *id.* at 587 (White, J., dissenting) (same).

obscenity,[111] and under the high bar that the First Amendment sets, only "hard-core" pornography can be flatly proscribed.[112] This is true even in morally conservative communities that might otherwise consider nudity offensive and prurient. The Court's reluctance to slap the "smut" label on expression stems from a recognition of the gravity and difficulty of this line-drawing exercise.[113]

The first lesson that obscenity doctrine teaches us is that the bar for gun-type restrictions should be high. Much like in the First Amendment context, "[c]easeless vigilance is the watchword to prevent . . . erosion" of the Second Amendment,[114] and "[t]he door barring federal and state intrusion"[115] into gun ownership must not be opened widely enough to permit encroachment upon armed self-defense by "law-abiding, responsible citizens."[116] Obscenity doctrine also suggests that a standard based entirely on prevailing norms of gun ownership is insufficient to create a high, enforceable line between protected and unprotected arms. By incorporating a prong that ensures the protection of speech that advances First Amendment values regardless of contemporary community norms,

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111. Jenkins v. Georgia, 418 U.S. 153, 161 (1974) ("[N]udity alone is not enough to make material legally obscene under the *Miller* standards.").

112. Miller v. California, 413 U.S. 15, 27–29 ("Under the holdings announced today, no one will be subject to prosecution for the sale or exposure of obscene materials unless these materials depict or describe patently offensive 'hard core' sexual conduct . . . . [T]oday . . . a majority of this Court has agreed on concrete guidelines to isolate 'hard core' pornography from expression protected by the First Amendment."); *see also* Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring) (in a pre-*Miller* case, concluding from the Court's post-*Roth* precedents that "criminal laws in this area are constitutionally limited to hard-core pornography"); *cf.* FW/PBS, Inc. v. City of Dallas, 493 U.S. 215, 252 (1990) (Scalia, J., concurring in part and dissenting in part) (observing that pornography, "so long as it does not cross the distant line of obscenity, is protected").

113. Roth v. United States, 354 U.S. 476, 488 (1957) (explaining how the obscenity line must be drawn carefully to protect speech).

114. *Id.*

115. *Id.*

116. District of Columbia v. Heller, 554 U.S. 570, 635 (2008); *cf.* Drake v. Filko, 724 F.3d 426, 452 (3d Cir. 2013) (Hardiman, J., dissenting) ("As we and other courts have stated, we must be cautious in recognizing new exceptions to the Second Amendment. After all, finding that a regulation is longstanding insulates it from Second Amendment scrutiny altogether."); United States v. Marzzarella, 614 F.3d 85, 93 (3d Cir. 2010), *cert. denied*, 131 S. Ct. 958 (2011) (finding that just as restraint is necessary when extending the logic of First Amendment exceptions to new types of speech, "prudence counsels caution when extending [*Heller*'s] recognized exceptions to novel regulations unmentioned by *Heller*").

the *Miller* test provides some insulation from changes in norms of sexual expression. If *Miller* had not incorporated a value-based prong, the line between protected and unprotected speech would have been left entirely adrift in the sea of social change.

The common use test will likely have to incorporate a similar value-based prong not only to avoid the enforceability and arbitrariness problems associated with norm-based standards, but also to fulfill *Heller*'s promise that the Second Amendment will reach future weapons and to account for current weapons that are uncommon only because they have always been banned or restricted. As noted earlier, *Heller* asserts that the Second Amendment protects modern weapons just as the First Amendment protects modern forms of communication.[117] But a standard that rests entirely on gun ownership norms is inconsistent with this assertion. By focusing entirely on a weapon's numerical commonality, the common use test, in its present form, allows the government to freeze the right to keep and bear arms to a moment in time by banning new weapons before they reach the civilian market.[118] Obscenity doctrine suggests that, to account for weapons that are uncommon solely because of existing regulations, and to fulfill *Heller*'s promise that the Second Amendment contemplates technological change, the common use test might evolve to incorporate a prong that protects arms based on their Second Amendment value, regardless of their numerical commonality. As one scholar has already noted, this added prong might ask, in part, whether a weapon lacks "serious value for self-defense."[119]

B. Localized Tailoring Above the National Bar Based on Local Gun Ownership Patterns

Obscenity doctrine suggests that above a high national bar, however, the common use test should account for localized variations in gun ownership norms. In *Miller*, the Supreme Court faced a

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117. *Heller*, 554 U.S. at 582.

118. *Cf. id.* at 721 (Breyer, J., dissenting) (pointing out that under the "circular reasoning" of the common use test, "the majority determines what regulations are permissible by looking to see what existing regulations permit"); Heller v. District of Columbia, 670 F.3d 1244, 1275 (D.C. Cir. 2011) (Kavanaugh, J., dissenting) (noting that new weapons have no tradition of either ownership or regulation); Tushnet, *Permissible Gun Regulations*, *supra* note 21, at 1440 ("A weapon might be unusual and (if dangerous) subject to a ban consistent with the Second Amendment if it was not in wide enough use when the ban was adopted.").

119. Blocher, *supra* note 21, at 90 n.33.

choice: adopt or reject a national standard for obscenity.[120] Although a plurality of the Court had previously advocated for a uniform standard,[121] the *Miller* Court instead chose a more federalism-friendly test that allowed room for "contemporary *community* standards."[122] The Court acknowledged that "fundamental First Amendment limitations on the powers of the States do not vary from community to community,"[123] but it held that the same does not hold true for the right's outer fringes. "It is neither realistic nor constitutionally sound to read the First Amendment as requiring that the people of Maine or Mississippi accept public depiction of conduct found tolerable in Las Vegas or New York City."[124] The Court continued, "[p]eople in different States vary in their tastes and attitudes, and this diversity is not to be strangled by the absolutism of imposed uniformity."[125] Under *Miller*'s "community standards" test, something considered obscene in San Antonio might be protected speech in San Francisco.[126]

An obscenity analogy suggests that the common use test will contemplate a similar dynamic with respect to gun-type restrictions by asking whether a weapon is common in a given community, not the country as a whole. While the self-defense core of the Second Amendment will undoubtedly "not vary from community to community," the outer fringe of the right to keep and bear arms—and particularly the determination of whether a weapon is uncommon—need not blur community lines. Given the longstanding divide in America's gun culture, especially between rural and urban areas,[127] one could easily say that "to require a State to structure

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120. Miller v. California, 413 U.S. 15, 19–20 (1973).

121. *See* Memoirs v. Massachusetts, 383 U.S. 413, 418 (1966) (stringently interpreting *Roth* to require the government to prove that material is, among other things, "utterly without redeeming social value").

122. *Miller*, 413 U.S. at 24 (emphasis added); *see also* Smith v. United States, 431 U.S. 291, 300–01 (1977) (clarifying that both the first *and* second prongs of the *Miller* test rest on contemporary community standards); Hamling v. United States, 418 U.S. 87, 104 (1974) ("*Miller* rejected the view that the First and Fourteenth Amendments require that the proscription of obscenity be based on uniform nationwide standards of what is obscene . . . .").

123. *Miller*, 413 U.S. at 30.

124. *Id.* at 32.

125. *Id.* at 33.

126. *Id.* at 32 ("It is neither realistic nor constitutionally sound to read the First Amendment as requiring that the people of Maine or Mississippi accept public depiction of conduct found tolerable in Las Vegas, or New York City.").

127. *See* Blocher, *supra* note 21, at 90–103.

[common-use] proceedings around evidence of a *national* 'community standard' would be an exercise in futility."[128] Under a *Miller*-inspired, community-based standard, something considered an unprotected arm in one state or region of the country might nonetheless receive Second Amendment protection elsewhere. Drawing on the previous example, a firearm considered uncommon in San Francisco might be common in San Antonio. This lesson from obscenity doctrine accounts for the rural–urban divide in America's gun culture, which, as Professor Joseph Blocher has insightfully demonstrated, may have a role to play in sketching the outer contours of the right to keep and bear arms.[129]

The federalism-sensitive, non-uniform application of constitutional rights is not uncontroversial,[130] but the originalist interpretive method that *Heller* employed might actually command it in this instance. To support its adoption of the common use test, *Heller* observed that "'[o]rdinarily when called for [militia] service [able-bodied] men were expected to appear bearing arms supplied by themselves and of the kind in common use at the time.'"[131] Framing-era militias were not originally organized on a national scale; their existence predated the Revolution and stretched back well into the colonial period.[132] During the colonial period, militias were by nature

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128. *Miller*, 413 U.S. at 30.

129. *See* Blocher, *supra* note 21, at 107–32.

130. *See, e.g.*, HARRY M. CLOR, OBSCENITY AND PUBLIC MORALITY: CENSORSHIP IN A LIBERAL SOCIETY 74 (1969) (arguing that community standards can result in the suppression of valuable speech); BOB WOODWARD & SCOTT ARMSTRONG, THE BRETHREN: INSIDE THE SUPREME COURT 250 (1981) (arguing that under the *Miller* test, "the First Amendment would be Balkanized into fifty separate doctrines"); Rodric B. Schoen, *Billy Jenkins and Eternal Verities: The 1973 Obscenity Cases*, 50 N.D. L. REV. 567, 582–84 (1974) (arguing that First Amendment rights should be uniform across the country).

131. District of Columbia v. Heller, 554 U.S. 570, 624 (2008) (quoting United States v. Miller, 307 U.S. 174, 179 (1939)) (second and third alterations supplied by *Heller*).

132. The Constitution itself recognizes this fact, vesting in Congress the power to "provide for calling forth the militia." U.S. CONST. art I, § 8, cl. 15. This power, unlike the power to "raise" armies and "provide" a navy, presupposes the existence of its object. U.S. CONST. art. I, § 8, cls. 12–13; *see also Heller*, 554 U.S. at 596 (describing this difference between the militia clause and the army and navy clauses). In fact, the Articles of Confederation had largely left intact the localized authority structure of the militia, obligating the states to provide and regulate their own militias. ARTICLES OF CONFEDERATION, art. VI, para. 4. And let's not forget, local colonial militias confronted British adversaries at Lexington and Concord before the formation of the Continental Army. *See generally* ALLEN FRENCH, THE DAY OF

community organizations with localized authority structures, and they made *local* decisions about the types of arms that members needed to bear.[133] The historical record, therefore, supports the notion that as to the types of "arms" it protects, the Second Amendment should account for local, state, and regional differences in America's gun culture.

Professor Nicholas Johnson has argued that *Heller* rejected a community-based common use test because "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."[134] This objection, however, might be better encapsulated by the aspect of obscenity doctrine discussed in the previous section: the test for obscenity sets a very high national bar and does not exclusively rest on community standards. Even though the test for obscenity is partially community-based and allows room for federalism, it does not give the most sensitive communities carte blanche to ban anything and everything they deem offensive, even if the material is in fact highly uncommon in those communities. For example, a town with a predominately Amish population cannot outlaw images of women in bikinis even though those types of images might be highly unusual and sexualized for the area.[135] The District of Columbia's handgun ban, by prohibiting "the quintessential self-defense weapon,"[136] went far beyond this example and was the Second-Amendment equivalent of banning political speech.[137] A federalism-sensitive common use test does not mean unfettered governmental discretion with regard to gun-type restrictions. A flat handgun ban, whether or not "longstanding" in a given community, will fall because handguns do not lack serious Second Amendment value.

Professor Johnson's treatment of so-called "assault weapons" raises another interesting example. As Johnson notes,

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LEXINGTON AND CONCORD (1925).

133. VICTOR BROOKS, THE BOSTON CAMPAIGN 30–31 (1999) (describing how the Massachusetts militia, like most colonial militias, had formed under the jurisdiction of local governing authorities).

134. *Johnson I*, *supra* note 21, at 1268.

135. *Cf.* Jenkins v. Georgia, 418 U.S. 153, 161 (1974) ("[N]udity alone is not enough to make material legally obscene under the *Miller* standards.").

136. *Heller*, 554 U.S. at 629.

137. *Heller* teaches that armed self-defense is at the "core" of the Second Amendment. *Id.* at 630. In like manner, the Supreme Court has treated political speech as a core First Amendment right. New York Times v. Sullivan, 376 U.S. 254, 273 (1964) (finding that the right to criticize government and government officers is "the central meaning of the First Amendment").

semiautomatic firearms with detachable box magazines have been in the hands of American civilians since the turn of the last century.[138] To my knowledge, no state has ever flatly banned this technology, although the California legislature unsuccessfully tried to do so last year.[139] The National Rifle Association claims that semiautomatic firearms account for roughly 20% of all guns in private American hands and 50% of recent firearms purchases.[140] If this is true, a flat ban on semiautomatic firearms is likely unconstitutional, as the technology has been present in the country for over 100 years and now reportedly accounts for about half of modern-day gun purchases.

Where this gets interesting is that in recent decades, some jurisdictions have seen fit to carve out a sub-category of these weapons for restrictive legislation. These "assault weapon" bans prohibit semiautomatic firearms with detachable box magazines that have certain characteristics, such as adjustable buttstocks, pistol grips, and bayonet attachment points.[141] As Johnson observes, assuming that assault weapons as a narrow category are not sufficiently common,[142] whether an assault weapon ban can survive a Second Amendment challenge may depend on the degree of taxonomy that the common use test permits.[143] Johnson goes on to make a colorable argument that even if the common use test allows some creative taxonomy, governments cannot meaningfully distinguish so-called "assault weapons" from other semiautomatic firearms with detachable magazines, and the availability of other

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138. *Johnson II*, *supra* note 21, at 1293–98.

139. S.B. 374, 2013-2014 Reg. Sess. (Cal. 2013) (vetoed by governor); *see also* Governor's Veto Message (Oct. 11, 2013), http://gov.ca.gov/docs/SB_374_2013_Veto_Message.pdf.

140. *See Semi-Automatic Firearms and the "Assault Weapon" Issue Overview*, NRA-ILA (Feb. 15, 2013), http://www.nraila.org/news-issues/fact-sheets/2013/assault-weapons-overview.aspx.

141. *See, e.g.*, CAL. PENAL CODE §§ 30515(a), 30605; N.Y. PENAL LAW §§ 265.00(22), 265.02(7); Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 110102 (1994) (federal assault weapon ban that was effective from 1994 to 2004).

142. This is debatable. As Judge Brett Kavanaugh has noted, the AR–15 *alone* accounted for 5.5 % of *all* firearms and 14.4% of *all* rifles produced in 2007. Heller v. District of Columbia, 670 F.3d 1244, 1287 (D.C. Cir. 2011) (Kavanaugh, J., dissenting). The AR–15, of course, is the "quintessential" assault weapon. *Id.* at 1288. Furthermore, semiautomatic rifles have long been popular, and "[t]he AR-15 is the most popular semi-automatic rifle; since 1986, about two million semi-automatic AR-15 rifles have been manufactured." *Id.* at 1287.

143. *See Johnson I*, *supra* note 21.

semiautomatics cannot salvage the arbitrary distinction.[144] But an obscenity analogy provides another means to question the constitutionality of a ban on assault weapons by simply asking whether they lack serious Second Amendment value, regardless of their numerical commonality.

In any event, an obscenity analogy is not inconsistent with *Heller*'s invalidation of a flat handgun ban, and it might provide a useful tool to evaluate the kinds of gun-type restrictions that Professor Johnson has addressed in his scholarship. Of course, gun-type restrictions vary widely in this country and cover a litany of subjects. I will not attempt to address them exhaustively in this Article. I use the previous examples merely to demonstrate that an obscenity-inspired common use test will account for community differences in America's gun culture, but it will not provide a safe harbor anytime the government can argue that a particular type of firearm is uncommon "here in [our community]."[145] As explained in the previous section, an obscenity-inspired common use test would set a high national bar below which community standards cannot go.

C. The Fact-Finder Determines Whether a Firearm Is Common

The Supreme Court's discomfort with the line-drawing that obscenity requires, along with the Court's choice to adopt a community-based definition, led the Court to pass the hot potato to the one better suited to hold it: the fact-finder. In *Miller*, the Court held that whether material appeals to the "prurient interest" and is "patently offensive" in light of contemporary community standards are "essentially questions of fact."[146] Even *Miller*'s third prong—whether a work lacks serious literary, artistic, political, or scientific value—is entrusted to the fact-finder.[147] Thus, in the first instance, it is usually jurors, not judges, who determine whether material is obscene. The *Miller* Court bolstered this pass of the buck by noting that "[t]he adversary system, with lay jurors as the usual ultimate factfinders in criminal prosecutions, has historically permitted triers

144. *See generally Johnson II*, *supra* note 21 (arguing that assault weapons are "in common use" and that an analogy to the Supreme Court's abortion jurisprudence—in which the Court protects procedures with special marginal utilities—would suggest that the availability of other semiautomatic firearms cannot salvage an assault weapon ban).

145. *Johnson I*, *supra* note 21, at 1268.

146. Miller v. California, 413 U.S. 15, 30 (1973).

147. Pope v. Illinois, 481 U.S. 497, 498 (1987).

of fact to draw on the standards of their community, guided always by limiting instructions on the law."[148]

As with *Miller*'s test for obscenity, the same community dynamic and distaste for line-drawing that might animate *Heller*'s common use test suggest that juries and trial judges are more competent than appellate judges to conduct the analysis. Whether a firearm is in common use in the community and lacks serious value for self-defense are "essentially questions of fact."[149] And if *Heller* requires us to wade through conflicting empirical data on gun ownership and usage trends, fact-finders will be especially well-positioned to choose which sources to credit. Obscenity's third lesson, therefore, teaches that juries and trial judges, guided by limiting instructions and pronouncements from appellate courts,[150] are best equipped to "know it when [they] see it."[151]

D. A Fringe Right to Possess Uncommon Firearms in the Home?

Heller did not mince words when describing the arms that the Second Amendment protects: only those in common use for lawful purposes.[152] But does this categorical treatment squarely foreclose a limited right to possess uncommon firearms in the home? Obscenity doctrine suggests not. Twelve years after declaring obscenity an unqualified categorical exception,[153] the Supreme Court held, in *Stanley v. Georgia*, that the First Amendment—amplified by the right to privacy—guarantees to adults a right to possess obscene

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148. *Miller*, 413 U.S. at 30.

149. *Id.*

150. Legal issues that will necessitate clarification by appellate courts include the amount of taxonomy that the common use test permits. *See Johnson I*, *supra* note 21, at 1265–72.

151. Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring) (famously stating, as to obscenity, that "I know it when I see it, and the motion picture involved in this case is not that").

152. District of Columbia v. Heller, 554 U.S. 570, 624, 627 (2008).

153. Roth v. United States, 354 U.S. 476, 482–85 (1957) (holding that in light of founding-era history and tradition, "obscenity is not within the area of constitutionally protected speech or press"); *see also* Smith v. California, 361 U.S. 147, 152 (1959) (reaffirming *Roth*'s holding). The Court has continued to use unqualified language when describing obscenity. *See, e.g.*, Brown v. Entertainment Merchants Ass'n, 131 S. Ct. 2729, 2733 (2011) (calling obscenity a First Amendment "exception"); Heller, 554 U.S. at 635 ("The First Amendment contains the freedom-of-speech guarantee that the people ratified, which included *exceptions for obscenity*, libel, and disclosure of state secrets, but not for the expression of extremely unpopular and wrongheaded views.") (emphasis added)).

materials in the home.[154] Exceptions are exceptions, except when they are not. "Unprotected" obscenity finds sanctuary in the home, where governmental intrusions most often brush up against "the right to be let alone—the most comprehensive of rights and the right most valued by civilized man."[155]

An obscenity analogy may suggest a limited right to possess uncommon firearms in the home, depending on the theory one uses to explain the Court's home-bound protection of obscenity. If the Court protects the private possession of obscenity because it poses no risk at all to the public, then it seems unlikely that the Second Amendment would guarantee a right to possess uncommon firearms in the home. All firearms pose some risk of public harm.[156] *Stanley* did seem to rely on a no-harm rationale, briefly expressing doubt about the asserted link between sexual crimes and the viewing of obscenity.[157] This did not appear to be of primary importance to the *Stanley* Court, however, because the Court stressed that even if such a link existed, the state still could not justify its complete obscenity ban.[158] Furthermore, in a later case, the Court recognized that "there is at least an arguable correlation between obscene materials and crime."[159] This observation did not lead the Court to overturn *Stanley*.[160]

If, on the other hand, the Court protects obscenity in the home because it serves a First Amendment value, then the Second Amendment may protect uncommon firearms in the home if they serve some Second Amendment value. This value-based justification for the right to privately possess obscenity emerges in *Stanley*, in which the Court emphasized that the First Amendment protects the "right to receive information and ideas, regardless of their social worth,"[161] and this guarantee "is not confined to the expression of ideas that are conventional or shared by a majority."[162] For the

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154. Stanley v. Georgia, 394 U.S. 557, 568 (1969).

155. *Id.* at 564 (quoting Olmstead v. United States, 277 U.S. 438, 478 (1928)) (internal quotation marks omitted).

156. *But see* Josh Blackman, *The Constitutionality of Social Cost*, 34 HARV. J. L. & PUB. POL'Y 951, 953–55 (2011) (arguing that many constitutional rights force society to bear serious social risks, and the Second Amendment is no different in this regard).

157. *Stanley*, 394 U.S. at 566 n.9.

158. *Id.* at 566–67.

159. Paris Adult Theatre I v. Slaton, 413 U.S. 49, 58 n.8 (1973).

160. *Id.*

161. *Stanley*, 394 U.S. at 564.

162. *Id.* at 566.

Stanley Court, it was enough that obscenity might serve a marginal First Amendment purpose—the satisfaction of one's "intellectual and emotional needs."[163] At this stage, it remains unclear exactly what peripheral values the Second Amendment protects. *Heller* teaches that individual self-defense is the "*central component*" of the right to keep and bear arms,[164] and the Court's short, categorical treatment of uncommon firearms—and especially the link that it drew between them and their employment in military combat[165]—strongly indicates that they do not serve this core purpose. But whether the private possession of uncommon firearms in the home might serve a more marginal Second Amendment value, such as deterring tyranny,[166] is open to speculation.

If, however, obscenity's protection results from a broader presumption in favor of individual liberty, then the Second Amendment might similarly protect uncommon firearms in the home as a buffer to guard against infringements on the right to keep and bear arms. Throughout *Stanley*, we see a Court that eschews line-drawing and presumes liberty because doing otherwise would place First Amendment rights in jeopardy. The Court, quoting a previous decision, observed that "[c]easeless vigilance is the watchword to prevent . . . erosion [of First Amendment rights] . . . . The door barring federal and state intrusion into this area cannot be left ajar; it must be kept tightly closed and opened only the slightest crack necessary to prevent encroachment upon more important

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163. *Id.* at 565.

164. District of Columbia v. Heller, 554 U.S. 570, 599 (2008) (emphasis in original).

165. *Id.* at 627 (describing uncommon firearms as encompassing "weapons that are most useful in military service").

166. Professor Joseph Blocher has observed that although the Constitution cannot logically guarantee a direct right to its own destruction, the Second Amendment might still guarantee an "auxiliary" right to insurrection. *See, e.g.*, Blocher, *supra* note 41, at 44–46. As Blocher notes, such an auxiliary right might encompass the accumulation of arms in preparation for the prospect of resisting tyranny or (better) for the purpose of deterring tyranny in the first place. *Id.* at 45. In the words of Justice Story: "The right of the citizens to keep and bear arms has justly been considered as the palladium of the liberties of a republic, since it offers a strong moral check against the usurpation and arbitrary power of rulers, and will generally, even if these are successful in the first instance, enable the people to resist and triumph over them." JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1897, 620–21 (4th ed. 1873). If the Second Amendment does guarantee this type of auxiliary right, then uncommon firearms would undoubtedly serve a Second Amendment value. The more antiquated the weaponry in civilian hands, the lesser the deterrent against tyranny.

interests."[167] The *Stanley* Court further asserted that obscenity's arguable lack of ideological content did not place it outside the First Amendment's reach because "[t]he line between the transmission of ideas and mere entertainment is much too elusive for this Court to draw, if indeed such a line can be drawn at all."[168] If this fear of line-drawing and presumption in favor of liberty lie at the heart of the right to obscenity,[169] then an obscenity analogy might counsel similar distaste for line-drawing when it comes to the Second Amendment. This would suggest a fringe right to possess uncommon firearms in the privacy of the home.

Finally, to the extent that *Stanley*'s holding rests simply on the notion that constitutional rights are at their zenith in the home, *Heller* and *McDonald* themselves suggest that the Second Amendment is no different.[170] The "need for defense of self, family, and property," they teach, is "most acute" in the home.[171] This recognition of the privacy of the home is consistent with the idea that protected "arms" might mean one thing in public but another thing in the home.

Perhaps most importantly, the historical record that *Heller* relied upon reinforces the notion that the Second Amendment might protect more advanced weaponry in the home than in public. To justify the common use test, *Heller* noted that a "tradition of prohibiting the *carrying* of 'dangerous and unusual weapons'" predates the Second Amendment.[172] As the sources that *Heller* cited for this proposition make clear,[173] historical prohibitions on

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167. *Stanley*, 394 U.S. at 563 (quoting Roth v. United States, 354 U.S. 476, 488 (1957)) (first and second alterations in original) (internal quotations marks omitted).

168. *Id.* at 566.

169. The Supreme Court has subsequently found in the Constitution a general presumption in favor of autonomy. *See* Lawrence v. Texas, 539 U.S. 558, 562 (2003) ("Liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct."). This presumption involves both "spatial and . . . more transcendent dimensions." *Id.* What this means, however, is entirely unclear. *See* Nelson Lund & John McGinnis, *Lawrence v. Texas and Judicial Hubris*, 102 MICH. L. REV. 1555, 1557, 1575–78 (2004) (arguing that "[t]he *Lawrence* opinion is a tissue of sophistries embroidered with a bit of sophomoric philosophizing" and it used rhetoric that "has no obvious determinate meaning at all").

170. *See* McDonald v. City of Chicago, 130 S. Ct. 3020, 3036 (2010); District of Columbia v. Heller, 554 U.S. 570, 628 (2008).

171. *McDonald*, 130 S. Ct. at 3036; *Heller*, 554 U.S. at 628.

172. *Heller*, 554 U.S. at 627 (emphasis added).

173. For a more complete analysis, see Nelson Lund, *The Second Amendment, Heller, and Originalist Jurisprudence*, 56 UCLA L. REV. 1343, 1362–67 (2009) (pointing out that *Heller* likely overstated the scope of founding-era regulations on

dangerous and unusual arms related only to the *carry* of those arms *in public* and did not reach into the privacy of the home.[174] In the words of William Blackstone, "[t]he offence of *riding or going armed*, with dangerous or unusual weapons, is a crime against the *public* peace, *by terrifying the good people of the land*; and is particularly prohibited."[175] And as Cecil Humphreys added, although "riding or going armed" with dangerous or unusual weapons could be prohibited, "here it should be remembered, that in this country the constitution guarranties to all persons the right to bear arms; then it can only be a crime to exercise this right in such a manner, *as to terrify the people unnecessarily*."[176] In contrast to an assault, which could occur both in public and in private, an "affray without actual

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"dangerous and unusual" weapons).

174. *See, e.g.*, JOHN A. DUNLAP, THE NEW-YORK JUSTICE: OR, A DIGEST OF THE LAW RELATIVE TO JUSTICES OF THE PEACE IN THE STATE OF NEW-YORK 8 (1815) ("It is likewise said to be an affray, at common law, for a man to *arm himself* with dangerous and unusual weapons, *in such manner as will naturally cause terror to the people*.") (emphases added)); 1 WILLIAM RUSSELL, A TREATISE ON CRIMES AND INDICTABLE MISDEMEANORS 270–72 (1831) (asserting that, by definition, an affray cannot occur in a private place, and nor can the public "wearing [of] common weapons" amount to an affray); HENRY STEPHEN, SUMMARY OF THE CRIMINAL LAW 48 (1840) (summarizing statute that made it a misdemeanor to "*rid[e] or go[] armed* with dangerous or unusual weapons") (emphasis added)); FRANCIS WHARTON, A TREATISE ON THE CRIMINAL LAW OF THE UNITED STATES 726 (1852) (reciting a similar definition of an "affray" without actual violence); 3 JAMES WILSON, WORKS OF THE HONOURABLE JAMES WILSON 79 (1804) (defining an "affray" as "a fighting of persons in a *publick place*, to the terrour of the citizens" and asserting that "[i]n some cases, there may be an affray, where there is no actual violence; as where a man *arms himself* with dangerous and unusual weapons, *in such a manner, as will naturally diffuse a terrour among the people*") (emphases added)); *see also* O'Neill v. State, 16 Ala. 65, 67 (1849) (distinguishing an assault, which can occur in a private place, from an affray, which can only occur in a public place); State v. Langford, 10 N.C. 381, 383–84 (1824) (upholding convictions of defendants who terrified a widow by shooting and killing her dog at her house, citing the generally accepted definition of an "affray"); English v. State, 35 Tex. 473, 476 (1871) (upholding, under the Second Amendment and a state constitution's analogue, a statute that prohibited the wearing of dangerous and unusual weapons in public). *Heller* cited all of these sources to support its discussion of "dangerous and unusual" weapons. *See Heller*, 554 U.S. at 627.

175. 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 148–49 (1769) (emphases added). *Heller* cited this source to support its discussion of "dangerous and unusual" weapons. *See Heller*, 554 U.S. at 627.

176. CECIL HUMPHREYS, A COMPENDIUM OF THE COMMON LAW IN FORCE IN KENTUCKY 482 (1822) (emphasis added). *Heller* cited this source to support its discussion of "dangerous and unusual" weapons. *See Heller*, 554 U.S. at 627.

violence"—causing public alarm by carrying dangerous and unusual weapons—by definition could occur only in a public place.[177] As with obscenity, the justification for prohibiting dangerous and uncommon weapons rested in the tendency of these weapons to inflict emotional harm on others when carried *in public*.[178] An originalist approach, therefore, would seem to point in the same direction as an obscenity analogy, given that historical prohibitions on Second Amendment smut stopped at the front door of one's home.

This implication of obscenity doctrine will undoubtedly raise eyebrows, but two observations might make a fringe right to Second Amendment smut seem more palatable. First, even if the Second Amendment protects a right to possess uncommon firearms in the home, the right would have limited practical application. In *Stanley*, while the Court prevented the government from criminalizing the private *possession* of obscene materials, the Court never questioned the government's authority to criminalize their *receipt and distribution*.[179] So what if the same were true for uncommon guns? Individuals can, consistent with federal law, manufacture their own firearms for personal use.[180] But the process requires more resources and expertise than are required to create obscene materials. Obscenity may be a camera-click away, but a firearm does not appear at the touch of a button, at least not with the kind of technology located in most homes.[181] Perhaps a home-bound right to

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177. *See* RUSSELL, *supra* note 174, at 270–72; *O'Neill*, 16 Ala. 65, 67.

178. The Supreme Court, after *Stanley*, reiterated that the Constitution allows the prohibition of obscenity outside the home because of the harm it inflicts in public. *See* Paris Adult Theatre I v. Slaton, 413 U.S. 49, 58 (1973) (stating that, in public, obscenity implicates "the interest of the public in the quality of life and the total community environment, the tone of commerce in the great city centers, and, possibly, the public safety itself").

179. *Stanley*, 394 U.S. at 561, 563–64, 567 (distinguishing prior cases that upheld obscenity distribution convictions and emphasizing that distribution of obscenity poses more concrete risks than mere private possession); *see also* JOHN NOWAK & RONALD ROTUNDA, CONSTITUTIONAL LAW § 16.61 (7th ed. 2004) ("Though the private possession of obscene materials in the home is protected activity, virtually any process that leads to such possession may be declared illegal.").

180. *See* Bureau of Alcohol, Tobacco, Firearms, & Explosives, *Firearms Technology*, http://www.atf.gov/firearms/faq/firearms-technology.html (stating that under federal law, "an unlicensed individual may make a 'firearm' as defined in [federal law] for his own personal use, *but not for sale or distribution*.") (emphasis in original)); *see also* 18 U.S.C. § 922(a)(1)(A) (requiring a federal license to engage in the business of manufacturing firearms, but not to make firearms for personal use).

181. *But cf.* Konrad Krawczyk, *Texas firm makes world's first 3D-printed metal gun*, FOX NEWS (Nov. 8, 2013), http://www.foxnews.com/tech/2013/11/08/texas-firm-

uncommon firearms might be invoked by individuals who modify existing, common firearms in the privacy of their homes. Take the classic case of shortening a shotgun's barrel with a saw, for example. However, to the extent that more extensive modifications would necessitate the receipt of parts from sources outside the home, it seems unlikely that the Second Amendment would offer any protection. Apart from the few modifications possible with simple tools and elbow-grease, skilled machinists might be the only beneficiaries of a right to Second Amendment smut.

Secondly, and more importantly, the right to obscenity has a ceiling. According to modern obscenity doctrine, while the First Amendment shields the possession of obscenity that depicts *adults*, it does not shield the possession of obscenity that depicts *children*.[182] The Supreme Court has made abundantly clear that due to the acute harm that it inflicts on the most vulnerable in our society, child pornography lies completely outside the sweep of the First Amendment.[183] If the Second Amendment also guarantees a right to home possession of "smut," the right will surely be subject to a similar ceiling. Those uncommon arms that pose a unique and demonstrable threat to public safety even when privately possessed in the home will find no solace in the post-*Heller* Second Amendment.

In sum, while an obscenity analogy may suggest a theoretical right to keep uncommon firearms in the home, the right would only apply in narrow circumstances. Even so, this possible lesson from obscenity doctrine may merit further analysis. And to the extent that a limited right to possess uncommon firearms seems counterintuitive, perhaps that is a reflection of the dissonance

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makes-worlds-first-3d-printed-metal-gun/ (reporting that a Texas company manufactured an all-metal 1911-style semiautomatic pistol entirely through the use of a 3-D printer). One of the authors in this Symposium Issue toured the Texas 3-D printing facility and has contributed a fascinating Article based in part on knowledge gained from that experience. *See* Josh Blackman, *1st Amendment, 2nd Amendment, and 3D Printed Guns*, 81 TENN. L. REV. 479 (2014).

182. *See* Osborne v. Ohio, 495 U.S. 103, 109–10 (1990) (government may completely prohibit child pornography "to destroy a market for the exploitative use of children"); New York v. Ferber, 458 U.S. 747, 774 (1982) (child pornography is not entitled to First Amendment protection). *But see* Ashcroft v. Free Speech Coal., 535 U.S. 234, 248–51 (2003) (holding that *Osborne* does not apply to depictions of "virtual" children or of young adults portrayed as children).

183. *Ferber*, 458 U.S. at 757 (child pornography can be prohibited because, among other things, "[t]he prevention of sexual exploitation and abuse of children constitutes a government objective of surpassing importance").

between the Court's simultaneous treatment of obscenity as both a categorical exception and a fringe right. If *Heller*'s majority opinion marks an originalist return to categoricalism in constitutional law, as some scholars and judges have observed that it may,[184] then the Court's future rejection of a fringe right to uncommon firearms would contrast markedly with the special solicitude that it has granted to a supposed First Amendment exception: obscenity.[185]

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184. *See, e.g.*, Heller v. District of Columbia, 670 F.3d 1244, 1271–85 (D.C. Cir. 2011) (Kavanaugh, J., dissenting) (arguing that *Heller* requires a categorical approach to Second Amendment claims that steers clear of the "levels of scrutiny" interest-balancing minefield and instead focuses on text, history, and tradition); Houston v. City of new Orleans, 675 F.3d 441, 451–52 (5th Cir. 2012) (Elrod, J., dissenting), *majority opinion withdrawn and superseded on reh'g by* 682 F.3d 361 (5th Cir. 2012) (agreeing with Judge Kavanaugh's approach); Blocher, *supra* note 53, at 379 (observing that the *Heller* majority rejected a balancing approach to the Second Amendment in favor of categoricalism, and the debate between the majority opinion and dissent by Justice Breyer echoed the categoricalism vs. balancing debate that had occurred decades beforehand in the development of First Amendment doctrine). The Court itself seems to recognize that, in recent years, it has begun to revisit the categorical approach. *See, e.g.*, United States v. Stevens, 559 U.S. 460, 470 (2009) ("The First Amendment's guarantee of free speech does not extend only to categories of speech that survive an ad hoc balancing of relative social costs and benefits. The First Amendment itself reflects a judgment by the American people that the benefits of its restrictions on the Government outweigh the costs. Our Constitution forecloses any attempt to revise that judgment simply on the basis that some speech is not worth it."); District of Columbia v. Heller, 554 U.S. 570, 628 (2008) (rejecting "freestanding 'interest-balancing' approach" because "[w]e know of no other enumerated constitutional right whose core protection has been subjected" to one); *cf. Heller*, 554 U.S. at 635 (describing First Amendment exceptions as history-based categorical exclusions, not the results of balancing).

185. It is beyond the scope of this Article to comment on the relative merits of the categorical and balancing approaches in constitutional law (or, for that matter, the Court's obscenity doctrine). For a review of the debate over whether pornography (whether or not obscene) qualifies as "speech" under the First Amendment, see Andrew Koppelmann, *Is Pornography "Speech?"*, 14 LEGAL THEORY 71 (2008). For a summary of how First Amendment doctrine developed into a mix of both categorical and balancing approaches, and a prediction that the Second Amendment will travel a similar path, see Joseph Blocher, *supra* note 53. For eloquent defenses of Second Amendment categoricalism and balancing, respectively, see Heller v. District of Columbia, 670 F.3d 1244, 1271–85 (D.C. Cir. 2011) (Kavanaugh, J., dissenting); District of Columbia v. Heller, 554 U.S. 570, 681–723 (2008) (Breyer, J., dissenting).

CONCLUSION

With the Supreme Court's determination that the Second Amendment guarantees an individual right fully applicable against state and local governments, courts must now confront challenges to gun-type restrictions across the country. *Heller* provided the most basic guidance on how courts should resolve these challenges, but it left a number of questions unanswered. How can a test that focuses on common usage account for the fact that ownership trends are often themselves the result of burdensome regulations, and how can such a test apply to bans on newly developed weapons? How stringent is the common use test? Does it set a uniform standard for the entire country? Who conducts the test? And can the government prohibit the private possession of *all* uncommon firearms in the home?

Until the Court provides further clarification, obscenity law is a good place to begin thinking about solutions to these unresolved issues. An obscenity analogue suggests answers to all of these questions. Time will tell whether these answers are accepted by the courts, but for now, they offer the benefit of familiarity and inter-doctrinal coherence.