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Supply Restrictions at the Margins of \textit{Heller} and the Abortion Analogue: \textit{Stenberg} Principles, Assault Weapons, and the Attitudinalist Critique

\textbf{Nicholas J. Johnson*}

\section*{INTRODUCTION}

With close to 300 million guns in the civilian inventory,\textsuperscript{1} and confirmation of the right to keep and bear arms in \textit{District of Columbia v. Heller},\textsuperscript{2} the United States is well past the point where firearms supply restrictions can be effective.\textsuperscript{3} Nonetheless, proposals for supply restrictions at the margins of the individual right continue.\textsuperscript{4} Recent proposals for renewal of the 1994 Assault Weapons Ban, and the corresponding market response, suggest that people on both sides of the issue think \textit{Heller} might not protect assault weapons.\textsuperscript{5}

\textit{Heller} established that citizens have a constitutional right to possess guns that are in common use for ordinary purposes like self-defense.\textsuperscript{6} Like any first effort, \textit{Heller} leaves many issues unsettled. The common-use test might generate either empirical filters or categories of functionality that could protect guns labeled assault weapons. However, \textit{Heller} does not promise that everything nominally protected is always

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4. See id.
6. 128 S. Ct. at 2817–18.

[1285]
protected. There are many different types of guns, each with distinct utilities to the user and correspondingly distinct externalities that the government might want to control. As the majority acknowledged and dissenters criticized, Heller provides no obvious standard for determining whether some guns and some circumstances get more protection than others. The assault weapons question prompts the search for an appropriate standard. What should happen when a state asserts that assault weapons must be banned because they impose peculiar externalities and that the ban is constitutional because many other guns remain available?

We are not working on a blank slate. It is a common problem that protected rights are exercised in a variety of ways, employing different methodologies and technologies that raise distinct constitutional questions. We might employ something like the broad protection granted to alternative methodologies under the First Amendment. It is not just traditional printing presses, but an endless variety of communications methodologies that are protected. On that principle, all guns satisfying the Heller common-use test might enjoy equally robust protection. The obvious objection is that guns are different. The gun right poses risks of a different character and magnitude. We need something that acknowledges that both the right, and the restriction of it, put human life in play. On that count, the Court’s abortion jurisprudence is uniquely-suited for building foundation on which to build a standard for resolving the assault weapons question.

Over a decade ago I argued that there is a broad analytical intersection between abortion and gun-rights claims. The threshold analogy is apt because both situations pit the right-claimant against substantial competing life-interests. I illustrated the intersection primarily through the work of abortion rights commentators who repeatedly use self-defense themes to construct the abortion right. That broad intersection remains. And within it, on the particular question of

7. See id. at 2817.
8. Id. at 2816-17; id. at 2846 (Breyer, J., dissenting).
10. See id. ("[M]otion pictures, programs broadcast by radio and television, and live entertainment, such as musical and dramatic works fall within the First Amendment guarantee.").
11. See Heller, 128 S. Ct. at 2817. Some will criticize this distinction as more practical and political than constitutional. Ideally, we might all agree that constitutional rights must be equally protected, and rhetorically the Court has affirmed this idea. See, e.g., Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc., 454 U.S. 464, 484 (1982) ("[W]e know of no principled basis on which to create a hierarchy of constitutional values . . . .").
12. Nicholas J. Johnson, Principles and Passions; The Intersection of Abortion and Gun Rights, 50 Rutgers L. Rev. 97, 98-99 (1997). Core arguments from that article are summarized in the text of this Article. See infra notes 196-221 and accompanying text.
"partial-birth abortion," there is a compelling analogue to the assault weapons question.

In *Stenberg v. Carhart*, the Supreme Court engaged an abortion claim that closely tracks the assault weapons question. *Stenberg* dealt with a challenge to Nebraska's partial-birth abortion ban. The question was whether a woman could demand access to a particular abortion methodology known alternately as dilation and extraction ("D&X") or intact dilation and evacuation ("intact D&E"). The majority decision, advanced by the liberal wing of the Court, affirmed a woman's right to the abortion methodology best suited to protect life and health, even when lesser but still safe alternatives are available. This, in principle, is the assault weapons question. Particularly, can the state ban guns that in some circumstances are the best self-defense options, on the excuse that other guns remain available?

The Court addressed the partial-birth abortion question again in *Gonzales v. Carhart*, upholding a federal ban on the same procedure protected in *Stenberg*. *Gonzales* was in many ways the conservative's repudiation of *Stenberg*. It distinguished but did not overturn *Stenberg*, which remains an important model for our purposes. The statute in *Gonzales* rested on explicit congressional findings that partial-birth abortion "is never medically necessary." *Stenberg*, in contrast, was grounded on findings that the contested methodology sometimes was the best available procedure for preserving the life or health of the mother. This "best available methodology" claim is where the partial-birth abortion/assault weapons comparison is most apt.

Of equal importance, *Stenberg*, more so than *Gonzales*, frames the attitudinalist critique that is the subtext of this Article.

15. Id. at 921–22.
16. See id. at 929–30. The Nebraska statute contrasted the illegal D&X procedure with the legal D&E procedure. Id. at 923–29. Subsequently, in *Gonzales v. Carhart*, 127 S. Ct. 1610, 1621 (2007), the term "intact D&E" was used synonymously with D&X.
19. See id.
20. Id. at 1638 (emphasis added). While the Court did not entirely defer to those findings, its standards for evaluating those findings make *Gonzales* a more complicated comparison than *Stenberg*. See id. at 1638–39.
22. See, e.g., Theodore W. Ruger et al., *The Supreme Court Forecasting Project: Legal and Political Science Approaches to Predicting Supreme Court Decisionmaking*, 104 COLUM. L. REV. 1150, 1152–55 (2004). Michael Dorf summarizes and brings a degree of skepticism to the attitudinalist model:

Political scientists who study the Supreme Court do not take legal doctrine very seriously. According to the leading view of the political scientists—the "attitudinal model"—the attitudes of individual Justices are a better predictor of how the Court will resolve contested cases than is the sort of reasoning one finds in briefs and opinions...
"Attitudinalism," widely endorsed by political scientists, argues that legal scholars erroneously focus on what justices say to explain and predict the Court's decisions.\textsuperscript{23} Attitudinalists argue that this law talk is "worse than useless."\textsuperscript{24} They say it is not the words and principles articulated in published opinions that dictate outcomes, but rather the \textit{passions}\textsuperscript{25} that drive Justices' preferences for particular outcomes that control results.\textsuperscript{26} Just knowing whether a judge is liberal or conservative, and her general policy preferences and biases, say attitudinalists, better explains and predicts her votes than anything written in the United States Reports.\textsuperscript{27}

\textit{Stenberg} presents a better test of the attitudinalist critique than \textit{Gonzales}. It pits Court liberals' constitutional protection of better methodologies to protect life or health in the abortion case against their nascent disparagement of the parallel gun claim through the series of dissents in \textit{Heller}—views that prefigure a rejection of arguments that assault weapons are sometimes the better self-defense tools.\textsuperscript{28} While \textit{Gonzales} juxtaposed with \textit{Heller} presents for the conservative wing similar tests of principle, those turn out to be quantitatively lighter burdens. As I show throughout this Article, conservatives could, on a principled basis, apply \textit{Stenberg} standards to uphold a claim to better methodologies in the assault weapons case even after rejecting some of those same principles in \textit{Gonzales}. So while both wings of the Court are exposed to the attitudinalist critique, Court conservatives can more easily justify their position on points of principle.

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\ldots [T]he political scientist employs Occam's razor to dispense with the metaphysical nonsense of law as a category independent of values, ideology and preferences, at least in the sorts of hard cases that reach the Supreme Court. Most spectacularly, she can point to the results of a recent experiment—the "Supreme Court Forecasting Project"—in which a cousin of the attitudinal model was matched against a battery of legal experts, each of whom was asked to predict the outcomes of then-pending cases in their respective fields of expertise: The statistical model correctly predicted the outcome in seventy-five percent of the cases, while the human team was right in only fifty-nine percent. Thus, armed with her statistics and regression analyses, the political scientist can dismiss most talk of "law" as worse than useless.


23. Ruger et al., \textit{supra} note 22, at 1154.
25. I use "passions" here roughly in the sense that James Madison employed to describe the political interests and connections that generate factions: "By a faction, I understand a number of citizens, whether amounting to a majority or minority of the whole, who are united and actuated by some common impulse of \textit{passion}, or of interest, adverse to the rights of other citizens." \textsc{The Federalist No.} 10, at 130 (James Madison) (E. H. Scott ed., 1808) (emphasis added).
26. Dorf, \textit{supra} note 22, at 499–500. This criticism was at the core of my first elaboration of the "standard position" more than a decade ago. \textit{See Johnson}, \textit{supra} note 12, at 99–100.
This Article will show how assault weapons might be protected under \textit{Heller} as a threshold matter, how \textit{Stenberg}'s guarantee of better methodologies to protect life or health applies just as easily to the assault weapons question, and how the response of Court liberals to an assault weapons case will be an important test of the attitudinalist critique. Part I will show how the assault weapons question emerged, and position it in the context of gun-control politics. Part II will show how assault weapons fit within the category of firearms protected under \textit{Heller}'s common-use test, and how assault weapons, like all firearms, exhibit special marginal utilities (SMUs) that make them especially effective in certain categories of self-defense. Part III will show that the principles rendered in \textit{Stenberg} apply just as easily, and sometimes more so, to assault weapons, putting the liberal wing of the Court to a test of principle that is much tougher to overcome than the roughly parallel burden that \textit{Gonzales} poses for Court conservatives.

I. ASSAULT WEAPONS AND MODERN POLITICS

The first fight is about definitions. Some people still believe the assault weapons debate is about machine guns.\textsuperscript{29} This is not surprising given that proponents of the 1994 ban were counting on precisely that confusion.\textsuperscript{30} The calculation was political. Josh Sugarman of the Violence Policy Center argued in 1989 that the public had lost interest in handgun control.\textsuperscript{31} He counseled the anti-gun lobby to switch to the "assault weapon issue,"\textsuperscript{32} which they did in 1989 to great success.\textsuperscript{33} In Sugarman's words:

Although handguns claim more than 20,000 lives a year, the issue of handgun restriction consistently remains a non-issue with the vast majority of legislators, the press, and public... Assault weapons... are a \textit{new} topic. The weapons' menacing looks, coupled with the public's confusion over fully automatic machine guns versus semi-automatic assault weapons—anything that looks like a machine gun is assumed to be a machine gun—can only increase the chance of public support for restrictions on these weapons.\textsuperscript{34}

\begin{footnotes}
\item[29.] For example, every year in my Gun Control seminar, I conduct a survey on the first day of class. I have always gotten at least one response reflecting the belief that assault weapons are machine guns.
\item[30.] \textit{Violence Policy Ctr., Assault Weapons and Accessories in America} (1988), available at \url{www.vpc.org/studies/awacont.htm} (follow "Conclusion" hyperlink).
\item[31.] \textit{Id.}
\item[32.] \textit{Id.}
\item[34.] \textit{Violence Policy Ctr., supra} note 30.
\end{footnotes}
One of the most salient descriptions of this maneuver is actually quoted by Justice Thomas in his *Stenberg* dissent. Commenting on the legislative use of technically inaccurate pejoratives to label regulated activity (e.g., "partial-birth abortion"), Justice Thomas quotes an analysis of the assault weapons legislation:

Prior to 1989, the term "assault weapon" did not exist in the lexicon of firearms. It is a political term, developed by anti-gun publicists to expand the category of "assault rifles" so as to allow an attack on as many additional firearms as possible on the basis of undefined "evil" appearance.

Steven Halbrook clarifies that after World War II, "assault rifle" (compare "assault weapon") became a standard military term to describe a specific type of machine gun:

The official U.S. Department of Defense manual on Communist small arms states: "Assault rifles are short, compact, selective-fire weapons [i.e., machineguns] that fire a cartridge intermediate in power between submachine-gun and rifle cartridges. Assault rifles have mild recoil characteristics and, because of this, are capable of delivering effective full automatic fire at ranges up to 300 meters." The usage became so accepted that the U.S. Supreme Court referred to the American Armed Forces M-16 selective fire rifle as the "standard assault rifle."

Despite its dubious origin, the assault weapon designation is now a fixture in the gun-control debate. So while there are disagreements about what, if anything, constitutes an assault weapon, I will use the 1994 ban classifications to talk about them here. Under that legislation, assault weapons are principally semiautomatic rifles, with features like pistol grips, folding stocks, and bayonet lugs, that feed ammunition through a detachable box magazine (DBM).

From a crime-control perspective, the regulation of assault weapons is mainly symbolic. I have demonstrated previously that supply

36. *Id.* (quoting Kobayashi & Olson, *supra* note 33, at 43).
39. This means they fire one shot with each pull of the trigger. See Merriam-Webster Online Dictionary, http://www.merriam-webster.com/dictionary/semiautomatic (last visited June 10, 2009) (“[A]ble to fire repeatedly but requiring release and another pressure of the trigger for each successive shot.”).
restrictions ranging from one-gun-a-month schemes to flat gun bans cannot work without a willingness and ability to reduce supply to levels approaching zero—an impossible feat in a country with 300 million guns tightly held by people who think they are uniquely important tools. Internationally, the defiance ratio in places that have attempted confiscation and registration is 2.6 illegal guns for every legal one. That is just the average. In many countries defiance is far higher. And none of those countries has as deep and entrenched a gun culture as the United States. This remainder problem and defiance impulse mean that we are far past the point where supply restrictions can work.

Moreover, post-
*Heller*, taking the supply to zero is explicitly constitutionally prohibited. This means that prospective supply restrictions on the roughly 1.5% increase in the civilian inventory that occurs each year—some fraction of which are assault weapons—are worse than ineffective because they fuel delusions that something important has happened on the violence policy front. They are worse still where they amount to pandering by people who understand the problem well enough to know that restrictions just on certain guns will consume our energy, but will not reduce gun crime. That said, campaigning for assault weapons bans persists.\^40

Charles Krauthammer, who favors banning gun possession by civilians, conceded that the arguments advanced by supporters of the ‘assault weapon’ ban were ‘laughable.’ The ‘only real justification’ for the law, he said, ‘is not to reduce crime but to desensitize the public to the regulation of weapons in preparation for their ultimate confiscation.’\^42

42. Johnson, *supra* note 1, at 842. It is undeniable that a sealed room with no guns in it will have no gun crime. That simple idea, extrapolated to society at large, is the impulse for the view that supply restrictions are the answer to gun crime in America. *Id.* at 844.

43. *See id.* at 839.
44. *Id.* at 853 (citing Small Arms Survey, *supra* note 1, at 55).
45. *Id.*
46. *See id.* at 853–56.
47. *Id.* at 855–56.
48. *Id.* at 848 n.44 (citing Comm. to Improve Research Info. & Data on Firearms, Nat’l Research Council, Firearms and Violence: A Critical Review 73 (Charles F. Wellford et al. eds., 2004)).


II. HELLER'S COMMONLY-OWNED FIREARMS AND THE SPECTRUM OF SELF-DEFENSE UTILITIES

A. HELLER'S COMMON FIREARMS FOR PRIVATE SELF-DEFENSE

Although Heller has been criticized for failing to resolve all of the questions that swirl around the newly clarified Second Amendment, it does offer a formula for establishing the rough boundaries of protected firearms. Noting that the Court's previous effort in United States v. Miller focused less on who is protected and more on what weapons are protected by the Second Amendment, the Heller Court highlights the problematic results of Miller's suggestion that "only those weapons useful in warfare are protected." The Heller majority writes: "We think that Miller's 'ordinary military equipment' language must be read in tandem with what comes after: '[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']... for lawful purposes like self-defense." With this elaboration, the Court defines the boundaries of constitutionally protected arms.

As a threshold matter, in contrast to the ambiguous implications of Miller, Heller's common-use formula provides a relatively narrow range of protection that easily excludes the vast majority of military arms. Excluded by definition are possibilities that, pre-Heller, were snidely advanced to undercut the individual-rights view—for example, does the Second Amendment mean you can have tactical nuclear weapons and stinger missiles? By definition, any device that would destroy both the self-defender and the attacker in situations that satisfy the imminent threat requirement are outside the envelope. So no, you do not have a Second Amendment right to a nuke, a howitzer, or a stinger, because within the boundaries of private self-defense, they would blow you up too. This does leave room for dispute about fully-automatic infantry rifles. But as a practical matter that question is essentially settled. The Court already has said that machine guns might be excluded. They are

51. Much of this criticism is captured by Justice Breyer's dissent. See Heller, 128 S. Ct. at 2869-70 (Breyer, J., dissenting).
52. Id. at 2816-17 (majority opinion).
54. Heller, 128 S. Ct. at 2815.
55. Id. at 2815 (first, second, and third alterations in original) (quoting United States v. Miller, 307 U.S. 174, 179 (1939)).
56. See id. at 2817 (referencing the "historical tradition of prohibiting the carrying of 'dangerous and unusual weapons'").
58. Heller, 128 S. Ct. at 2817.
numerically uncommon, have been regulated as an exceptional category for decades, and introduction of new ones is barred by law. So if machine guns can be restricted, what about assault weapons? Heller suggests criteria for answering at least part of that question. First, Heller's explicit validation of firearms for self-defense shows that the visceral reaction some people have to guns that seem built for fighting rather than sport is no longer a sufficient gauge of legitimacy. Second, Heller's common self-defense criteria suggests at least two obvious ways to qualify: A gun might be common because it is widely owned—for example, a Remington shotgun with sales in the millions. A gun might also be common because it is functionally the same as other common guns—for example, a custom-made shotgun that operates just like the widely-owned Remington.

I. Are Assault Weapons Numerically Common?

Fundamentally, assault weapons are semiautomatic firearms, distinctions among which border on incoherent. As a type,


63. A 1994 open letter critical of the Second Amendment published in several national periodicals is a perfect example. See Albert W. Alschular et al., Does the 2nd Amendment Mean We Must Tolerate This?, Am. Lawyer, June 1994, at 96. The graphic backdrop of the letter is an INTRATEC "TEC-9." The TEC-9 is an ugly, menacing-looking gun. The letter suggests that by appearance alone, without any critique of relative functionality, thoughtful people should all agree that the TEC-9 is illegitimate. See id. But ironically, from a functional viewpoint, it is an absurdly sub-optimal gun. Though it is a handgun, it sacrifices the concealability that is the main SMU of the handgun. Though it is a semiautomatic, it fires not even the intermediate rifle round, but a pistol round that has less range and less inherent accuracy. GunsLot.com, Intratec TEC-9, http://www.gunslot.com/guns/intratec-tec-9 (as of June 20, 2009). It is generally unreliable, with feeding problems being the main difficulty. Id. Because it is extremely heavy for a handgun, it is difficult to fire accurately and difficult even to hold in firing position. Id. Demonstration of it compared to most other guns leaves observers wondering what rationale produced the distinction that labels the shotgun legitimate but stigmatizes the TEC-9. See id.


65. The California Attorney General's chief firearms expert reflected this in his argument for either banning all semiautomatics or banning none of them. See Kopel, supra note 38, at 403; see also Nicholas J. Johnson, Shots Across No Man's Land: A Response to Handgun Control, Inc.'s Richard Aborn, 22 Fordham Urb. L.J. 441, 445 (1995) (explaining that criminals can switch from banned guns to acceptable guns that still accept thirty-round-plus magazines and actually have deadlier higher-velocity rifle cartridges but simply lack pistol grips and bayonet lugs—esthetic features targeted by
semiautomatics are quite common.66 The technology is at least a century old in both handguns and long guns (including rifles and shotguns).67 For example, the Browning Auto-5 semiautomatic shotgun was introduced in 1902.68 The Colt 1911 .45-caliber semiautomatic pistol was adopted as the U.S. military sidearm in 1911.69 The Remington Model 8 semiautomatic rifle was patented in 1900.70 Even today, with its magazine protruding below the breech, the Model 8 is roughly an assault weapon type.71 These guns and millions of other semiautomatic rifles, pistols, and shotguns, have circulated in the civilian inventory for generations.72

Estimating the total number of semiautomatics in the private inventory is difficult. Many were sold before even nominal record-keeping was required under federal law.73 Many others were sold by the U.S. government under the now-century-old Civilian Marksmanship

66. See infra text accompanying note 78 (noting that 60% of gun owners have some sort of semiautomatic gun).


69. The GUN DIGEST: 1944 FIRST ANNUAL EDITION 60 (Charles Richmond Jacobs et al. eds., 1944) [hereinafter GUN DIGEST FIRST ED.] (“The development of the automatic pistol between 1895 and 1911, and its adoption as the standard sidearm of most governments, have determined the general type of most of the pistol cartridges in present use.”).


71. See supra note 40 and accompanying text. Winchester produced the earliest automatic .22 put out in this country, the Model of 1903. Charles T. Haven, Our Small Arms and Their Makers, in GUN DIGEST FIRST ED., supra note 69, at 7. Heavier automatics (read: semiautomatics) for hunting purposes were brought out in 1905 and 1907 and since, in typical deer hunting cartridges. Id. Automatic and repeating shotguns were also brought out before the First World War. Id. The Winchester 1907, like the typical assault weapon, accommodates a detachable box magazine. See Phil Davis, Winchester 1907 Self Loader: 100 Year Old “Evil Assault Rifle,” GunNews, June 2007, http://sangamonconifileassociation.org/phildavis/winchester1907selfloader.html. It fires a 351 Winchester cartridge that at 180 grains is more than three times heavier than the typical 55 grain .223 round of the AR-15 from available fifteen-round magazines. Id.


Program. Still, it is evident that semiautomatics are widely owned. In the early debate over the 1994 ban, researchers from the Harvard School of Public Health surveyed whether people who owned semiautomatic firearms exhibited personal characteristics different from other gun owners. This study reflected the subtext of the 1994 ban that something about the appearance of assault weapons attracted worrisome people, and the researchers pressed this point with the argument that owners of semiautomatic guns reported binge drinking more often than other gun owners. For our purposes, the most significant finding was that sixty percent of gun owners reported owning some type of semiautomatic firearm. This does not mean they all owned the archetypal AR-15. However, it does suggest that a clear majority of gun owners have at least one gun that will fire as fast as they can pull the trigger. So it is just not credible to say that semiautomatic technology is unusual or uncommon.

There is still the question whether the appearance of particular guns somehow makes a difference. I have argued elsewhere that the focus on things like pistol grips, ignoring functionality, borders on the absurd. Even ardent gun-control advocates have called the distinctions "laughable." Groups like the Brady Campaign to Prevent Gun Violence make perfunctory attempts to sustain these distinctions, and the

75. See David Hemenway & Elizabeth Richardson, Characteristics of Automatic or Semiautomatic Firearm Ownership in the United States, 87 AM. J. PUB. HEALTH 286, 287 (1997); NRA INST. FOR LEGISLATIVE ACTION, supra note 72.
76. See, e.g., Hemenway & Richardson, supra note 75, at 286.
77. Id. at 287.
78. Id.
79. See infra note 143 and accompanying text; see also Michael Bane, The World's Most Versatile Rifle, OUTDOOR LIFE, Aug. 2007, at 58-59 ("[T]he AR has matured into one of the most versatile, accurate and easy-to-shoot platforms in the world.").
80. Johnson, supra note 65.
81. See, e.g., Sullum, supra note 41.
82. See BRADY CAMPAIGN TO PREVENT GUN VIOLENCE, THE TOP 10 NRA MYTHS ABOUT ASSAULT WEAPONS, http://www.bradycampaign.org/issues/assaultweapons/nramyths/ (last visited June 10, 2009). The Brady Center's commentary on assault weapons makes the argument that the military features of semiautomatic assault weapons are designed to enhance their capacity to shoot multiple targets very rapidly. For example, assault weapons are typically equipped with large-capacity ammunition magazines that allow the shooter to fire 20, 50, or even more than 100 rounds without having to reload. Pistol grips on assault rifles and shotguns help stabilize the weapon during rapid fire and allow the shooter to spray-fire from the hip position. Barrel shrouds on assault pistols protect the shooter's hands from the heat generated by firing many rounds in rapid succession. Far from being simply "cosmetic," these features all contribute to the unique function of any assault weapon to deliver extraordinary firepower. They are uniquely military features, with no sporting purpose whatsoever.

...[These weapons] "are not generally recognized as particularly suitable for or readily
discussion below will address those efforts.\textsuperscript{83} But for now, realize that semiautomatics with military features (e.g., pistol grips and bayonet lugs) have dominated firearms sales in recent years, with the AR-15 (the archetypal assault weapon) now the best-selling rifle type in the United States.\textsuperscript{84} With Democrats in control of Congress and the White House, it is widely reported that overall sales of semiautomatic rifles have escalated to record levels.\textsuperscript{85}

2. Are Assault Weapons Functionally Common?

Deciding whether a gun is functionally common requires some context. All guns have SMUs that make them better or worse options as self-defense scenarios shift.\textsuperscript{86} The two basic categories of civilian firearms, long guns and handguns, exhibit respective SMUs of superior adaptable to sporting purposes" and instead "are attractive to certain criminals."

\ldots

The firepower of assault weapons makes them especially desired by violent criminals and especially lethal in their hands.

\textit{Id.} (footnote omitted) (quoting \textsc{Dep't of Treasury, Study on the Sporting Suitability of Modified Semiautomatic Assault Rifles 38 (1998)}).

\textit{83. See infra Part II.A.2.}

\textit{84. See} Chuck Karwan, \textit{America's Rifle: The AR-15 Has Weathered a 50 Year History of Controversy, Survived a Federal Ban and Fought in Everything from Steaming Jungles to Sandboxes. Now It's the Single Most Popular Centerfire Rifle in the U.S. Who Would've Guessed, Combat Tactics, Guns \& Ammo, Feb. 2009, at 24; Jeff Knox, \textit{The Year of the AR and FUD, Shotgun News}, Mar. 17, 2008, at 9 ("The AR-15 is the fastest selling firearm in the country and it appears that everyone in the industry is anxious to get in on the rush."). Citations to \textit{Shotgun News} and similar publications may raise eyebrows. However, for industry news these are standard publications. Serious studies, like the congressionally-mandated evaluation of the impact of the 1994 ban, cite \textit{Shotgun News} extensively on the point of sales and pricing. See Jeffrey A. Roth et al., \textit{The Urban Inst., Impact Evaluation of the Public Safety and Recreational Firearms Use Protection Act of 1994 passim (1997)}.


\textit{86. See} Johnson, supra note 65, at 446-48.
ballistics\textsuperscript{87} and concealability.\textsuperscript{88} The handgun’s concealability also produces the greatest externalities.\textsuperscript{89} Most gun crime is handgun crime.\textsuperscript{90}

Cutting the categories more finely, both long guns and handguns come in a range of ballistic variations (firing low, intermediate, or high-powered ammunition)\textsuperscript{91} and a variety of repeating technologies. Fully automatic repeaters (true machine guns) are rare in civilian hands.\textsuperscript{92} Semiautomatics, including assault weapons, use part of the energy from the fired cartridge to reset the firing mechanism.\textsuperscript{93} Other sorts of repeating technologies use a combination of muscle and mechanical power.\textsuperscript{94} Some of these technologies are exactly as fast as semiautomatic technology. For example, double-action revolver technology (in both handguns and some long guns) fires with each pull of the trigger like a semiautomatic.\textsuperscript{95} Manual repeaters—for example, cowboy-style lever actions, pump actions, and bolt actions—will be slower than semiautomatics by fractions of seconds to multiple seconds, depending in part on the proficiency of the user.\textsuperscript{96} Multi-barrel technology may be

\begin{itemize}
\item \textsuperscript{87} For a detailed discussion of comparative ballistics, see infra notes 142–71 and accompanying text. Long guns, with their longer barrels, stronger chambers (accommodating larger cartridges and thus larger powder charges), and design facilitating large-muscle-group support of the gun, are generally more effective at distances where the handgun is nearly irrelevant. Carbine vs. Shotgun vs. Pistol for Home Defense, Monster Hunter Nation, http://larrycorreia.wordpress.com/2007/09/20/carbine-vs-shotgun-vs-pistol-for-home-defense/ (last visited June 10, 2009). The late Lieutenant Colonel Jeff Cooper, founder of Gunsite Training Center and vociferous advocate for major calibers in defensive handguns, famously said that for self-defense he would rather have a hatchet than a 9mm at intimate range. R.K. Campbell, The Army Pistol (Apr. 22, 2005), http://www.gunblast.com/RKCampbell_ArmyPistol.htm.

\item \textsuperscript{88} See Kopel, supra note 38, at 404.

\item \textsuperscript{89} See id. at 386.

\item \textsuperscript{90} See supra note 49.

\item \textsuperscript{91} Armchairgunshow.com, Winchester Lever Action Rifles, http://www.armchairgunshow.com/WinLever-info.html (last visited June 10, 2009); FirearmsPrimer.com, Rifle Cartridge Selection, http://www.firearmsprimer.com/cartridges/cartridges_2.htm (last visited June 10, 2009). There is no distinct number for either velocity or energy, but generally rifle cartridges that fire a 150 grain projectile close to 3000 feet per second would be considered high power. Also “High Power” is the title of a very popular type of rifle competition. But to provide examples, a .30-06 Springfield or a .300 Winchester Magnum would be considered high power. The 7.62 x 39 (the cartridge most often used in the SS and AK-47 variants) and the 5.56 x 45 (very similar, but not identical, to the .223 Remington and used in most AR-15 type rifles) would be considered intermediate cartridges. Publicola, Coming to Terms with Gun Control, http://publicola.mu.nu/archives/2004/11/28/coming_to_terms_with_gun_control.html (last visited June 10, 2009).

\item \textsuperscript{92} See supra note 59.

\item \textsuperscript{93} See Kopel, supra note 40, at 164 (“[T]he energy created by the explosion of gunpowder . . . is used to reload the next cartridge into the firing chamber.”).

\item \textsuperscript{94} See GUN DIGEST 2009: THE WORLD’S GREATEST GUN BOOK (Ken Ramage ed., 63rd ed. 2008) (illustrating guns of all types including lever actions, bolt actions, pump actions, revolver actions and semiautomatics firearms).

\item \textsuperscript{95} See Kopel, supra note 40, at 164.

faster than semiautomatic but typically with fewer shots available before reloading. Finally, repeating multi-projectile technology (i.e., semiautomatic, pump, or lever-action shotguns) actually fires more projectiles faster than any of the rifles designated as assault weapons.98

Granting the assault weapons designation a rational construction, the objection must be to multishot capability.99 The DBM ammunition feeding device is central to the designation.100 For policymakers who seem to have devised ban lists by searching picture books for guns that looked scary,101 it is understandable that the DBM, a visually distinct multishot feature, would stand out. But is it unusual enough to fail Heller’s common-use test?

Semiautomatic guns employing the DBM are a century old.102 Many DBM guns avoid the assault weapons designation because they do not have pistol grips, adjustable stocks, or bayonet lugs.103 I criticized early on that such distinctions are functionally incoherent.104 For example, under the 1994 ban, the very same DBM gun was both legal and illegal depending on whether someone dropped it into a different stock.105 There is no empirical evidence, and it is hard even to imagine plausible arguments, that features like pistol grips, bayonet lugs, and folding stocks produce different—let alone special or extraordinary—externalities.106
The better explanation for these distinctions is symbolism. The objection was that assault weapon features were combat features; assault weapons were illegitimate because they were openly geared for gun fighting. Before *Heller*, such distinctions could be explained by the formulation that the only legitimate guns were “sporting” guns. As a matter of policy, self-defense was submerged and even stigmatized. Guns purely for defense against human aggressors, signaled in the minds of some by bayonet lugs and adjustable stocks, could be marginalized and outlawed. With *Heller*’s explicit protection of handguns and other common self-defense guns, the “sporting use” filter and corresponding distinctions based on appearance cannot be sustained. So not only are these distinctions in appearance functionally irrelevant, post-*Heller* they are impermissible.

This still leaves the question whether semiautomatics, and particularly semiautomatics that use DBMs, are functionally distinct. The contention is these guns have exceptional multishot capabilities. This is just wrong. Multishot utility does not distinguish the assault weapon. The assault weapon is surpassed in this category by a class of indisputably common guns that fire multiple projectiles per trigger pull and can be continuously reloaded without disabling the weapon. The category is the ubiquitous shotgun, in either semiautomatic or manual repeating mode.

The assault weapon has been identified as a “spray-fire” weapon designed for shooting multiple projectiles without aiming. This is assault weapons . . . .” *Roth*, supra note 84, at 2. The focus on accoutrements might be understood as rooted in the “sporting use” importation standard under the Gun Control Act of 1968, which is an interesting story of public and private motivations. See Nicholas J. Johnson, *A Second Amendment Moment: The Constitutional Politics of Gun Control*, 71 Brook. L. Rev. 715, 771-73 (2005) (describing the trade protectionism of the New England gun manufacturers as an impulse for the sporting-use filter in the 1968 Gun Control Act).

107. See, e.g., *BRADY CAMPAIGN TO PREVENT GUN VIOLENCE*, supra note 82 (claiming that guns with assault weapon features have only military application).


111. Kopel argues that even pre-*Heller*, the assault weapons distinction could not pass a seriously administered rational-basis test. *Kopel, supra note 38, at 417.

112. See, e.g., *CAL. PENAL CODE* § 12275.5 (West 2008) (“The Legislature has restricted the assault weapons . . . based upon finding that each firearm has such a high rate of fire and capacity for firepower that its function as a legitimate sports or recreational firearm is substantially outweighed by the danger that it can be used to kill and injure human beings.”).


114. See, e.g., *BRADY CAMPAIGN TO PREVENT GUN VIOLENCE*, *ASSAULT WEAPONS THREATEN OUR SAFETY AND SECURITY*, http://www.bradycampaign.org/issues/assaultweapons/awoverview/ (last visited June 10, 2009) (“Pistol grips on assault rifles and shotguns help stabilize the weapon during rapid fire and allow the shooter to spray-fire from the hip position.”); *LEGAL COMMUNITY AGAINST VIOLENCE*,
false." The shotgun better fits that description. It is designed to hit moving or multiple targets with a cloud of projectiles, a stream of spherical "shot." Depending on the loading, the number of projectiles will range from six large projectiles to hundreds of tiny spheres smaller than a BB. Shotguns do not require traditional "aiming" and do not even have traditional sights (i.e., a rear sight through which one aligns with the front sight to ensure a straight line between shooter's eye and the target). Most shotguns have a simple bead at the front. Shotgunners will comment that they never noticed that the bead was missing, because shotguns fire to, and impact, a visual swath rather than a precise point of aim. In contrast, a rifle without its sights is relatively nonfunctional. All common rifles of every configuration shoot a single projectile per cycle in a straight path. No matter how quickly they cycle, hitting targets reliably requires aiming.

Another distinction between assault weapons and the shotgun is that the shotgun ammunition supply can be "topped off." Most repeating shotguns store ammunition in a tube magazine directly below the barrel. The next round is moved from the tube into the chamber either

BANNING ASSAULT WEAPONS—A LEGAL PRIMER FOR STATE AND LOCAL ACTION I (reprint 2005), available at http://www.lcav.org/library/reports_analyses/Banning_Assault_Weapons_A_Legal_Primer_8.05_entire.pdf ("Key assault weapon features include...pistol grips...facilitating spray firing from the hip."); VIOLENCE POLICY CTR., BULLET HOSES: SEMIAUTOMATIC ASSAULT WEAPONS—WHAT ARE THEY? WHAT'S SO BAD ABOUT THEM? (2003), available at http://www.vpc.org/studies/hosecont.htm (follow "Ten Key Points about What Assault Weapons Are and Why They Are So Deadly" hyperlink) ("'Spray-firing' from the hip, a widely recognized technique for the use of assault weapons in certain combat situations, has no place in civil society."). To justify the claim, the publication includes photographs of military personnel firing machine guns in this manner. Id. (follow "The Gun Industry's Lies" hyperlink).

115. See Kopel, supra note 38, at 388 ("[A]lthough gun prohibition advocates sometimes use the catch-phrase 'spray-fire,' a semiautomatic firearm, unlike a machine gun, cannot 'spray fire,' because the shooter must press the trigger for each shot.").


117. See Kopel, supra note 40, at 164-67.

118. GREENER, supra note 116, at 434-68.

119. Id.

120. Id. at 351-52.


122. See id.

123. See, e.g., O.F. MOSSBERG & SONS, INC., OWNERS MANUAL FOR 500®, 835® AND 590® MODEL PUMP ACTION SHOTGUNS 6, available at http://zugzwanged.org/dat/weapons/docs/man/mossberg_500.pdf. Many shotguns are semiautomatic, though typically these have been excluded from assault weapon designation. See Kopel, supra note 40, at 164-65. A greater number are pump action, which typically have also been excluded from assault weapon designation. Id. Guns of each type have been made with detachable magazines. See Saiga-12.com, IZHMASH Saiga-12 Shotguns, http://www.saiga-12.com/ (last visited June 10, 2009). A few shotguns have been made using revolver technology. See HALLBRUCK, supra note 37, at 538-39. In a curious exercise of logic, though understandable symbolically, the ATF reclassified one of these revolver style guns—the menacingly-named Streetsweeper—as a class III destructive device (the same regulatory category as machine
by recoil energy (for semiautomatics), or manually for pump or slide actions.\textsuperscript{124} While the gun is deployed, the ammunition tube may be continuously refreshed with new rounds.\textsuperscript{125} There is no downtime to reload.\textsuperscript{126} So not only are assault weapons unexceptional in multishot utility, they are demonstrably inferior to the ubiquitous shotgun.\textsuperscript{127}

Comparisons between assault weapons and other repeating technologies produce similar conclusions. DBM semiautomatics like the AR-15 are reloaded from the bottom of the breech by replacing the spent magazine with a new one.\textsuperscript{128} In contrast, the top-loading block clip employed by the semiautomatic M1 Garand (and also by one of the very first semiautomatic rifles, the Mannlicher Model 1886) will achieve roughly the same practical rate of fire in addition to firing a more powerful cartridge than the typical assault weapon.\textsuperscript{129} After all the rounds are fired, the block clip ejects automatically from the top of the breech, and the shooter inserts a new clip into the open breech.\textsuperscript{130} The Garand was the standard World War II battle rifle and surplus Garands have been sold directly to private citizens by the U.S. government for decades through the Civilian Marksman Program.\textsuperscript{131}

Lever action rifles, familiar emblems of the Old West with typical ammunition capacity from ten to sixteen rounds, predate semiautomatic technology but are only slightly slower in multishot capability.\textsuperscript{132} They also are continuously reloadable.\textsuperscript{133} Revolver technology of the same

\textsuperscript{124} See Mossberg, supra note 123.

\textsuperscript{125} Id.

\textsuperscript{126} Id.

\textsuperscript{127} Shotguns do exhibit the ballistic disadvantage that the projectiles are round and fired from an un rifled barrel, are thus less aerodynamic than the spinning rifle projectile, and therefore lose velocity more quickly. See Greener, supra note 116, at 351-404. So, depending upon size, shotgun projectiles will have lost most of their energy within 100 to 200 yards. Id. However, within its range, the shotgun firing various loads inflicts far more destruction on soft targets than the typical assault weapon. Id.


\textsuperscript{129} See U.S. Army, Department of the Army Field Manual: FM 23-5 (1965), available at http://biggerhammer.net/manuals/garand/m1.htm; see also Austro-Hungarian Army, supra note 70 (describing the Mannlicher's block clip feeding device).

\textsuperscript{130} See U.S. Army, supra note 129.

\textsuperscript{131} The Civilian Marksman Program website gives a detailed history of the military use of the M1 Garand and the current requirements for purchasing one through the Civilian Marksmanship Program. See Civilian Marksmanship Program Sales, Eligibility Requirements, http://www.thecmp.org/eligibility.htm (last visited June 10, 2009); Civilian Marksmanship Program Sales, M1 Garand Sales, http://www.thecmp.org/m1garand.htm (last visited June 10, 2009).

\textsuperscript{132} See, e.g., Lee, supra note 96. For aimed fire there are nominal distinctions in speed. See supra note 40 and accompanying text.

vintage is essentially indistinguishable from semiautomatic in terms of practical rate of fire (one shot for every trigger pull).\textsuperscript{134}

So in context, it is difficult to say that assault weapons impose multishot capabilities that are functionally distinct from many other guns in the inventory of common firearms. Moreover, the entire focus on multishot capacity is undercut by the fact that all guns are deadly, all guns have distinct SMUs, and those utilities produce their own distinct externalities. The handgun, which is explicitly protected by \textit{Heller}, accounts for most gun crime.\textsuperscript{135} Assault weapons, in contrast, are very rarely used in crime.\textsuperscript{136} So on this measure as well, the assault weapon is easily within the boundaries of protected firearms.

B. THE REGULATORY PARADOX: SPECIAL MARGINAL UTILITIES AND PECULIAR EXTERNALITIES

Within the inventory of common firearms, each gun type has distinct utilities at the margin that make it more or less suitable as self-defense scenarios shift. These differences in SMUs are crucial to the assault weapons distinction, but they also present a paradox. To satisfy even a threshold rational-basis analysis, the state must show that banned assault weapons have some identifiable SMUs that produces special externalities when abused.\textsuperscript{137} Thus the paradox: if the distinction is sound—if the ban is rational—it also is an admission of special utility. And that paradox poses a pivotal constitutional question. As Justice Breyer and others have criticized, \textit{Heller} does not tell us how to cut such knots.\textsuperscript{138} But \textit{Stenberg} does.

The controlling question in \textit{Stenberg} was whether the banned D\&X abortion procedure was \textit{sometimes the better methodology for preservation of the life or health of the mother}.\textsuperscript{139} Because D\&X was found to be necessary in rare cases to preserve the life or health of the mother, the ban was deemed unconstitutional.\textsuperscript{140} This section will examine the parallel assault weapons question: do the SMUs exhibited by assault weapons make them better alternatives than other common guns in a particular spectrum of self-defense scenarios, where by
definition the life of the right-bearer is at stake? Subsection 1 will describe purely objective SMUs—physical measures that can be precisely calculated. Subsection 2 will summarize "tactical" SMUs—more subjective assessments that rely on human judgments about the relative effectiveness of different technologies.

1. Objectively Measurable Utility

The typical assault weapon fires an intermediate power cartridge that is less destructive than cartridges employed in sporting rifles (many of them semiautomatics) used for hunting medium to large game. So on this criteria the typical assault weapon actually complements the state’s interest in reducing firearms externalities. An explicit comparison is helpful.

Consider first the AR-15. It is the quintessential assault weapon. It exhibits all of the objectionable features identified in the 1994 ban. It typically fires a lightweight 55 to 62 grain, .223 caliber/5.56MM projectile. In contrast, most hunting rifles that were broadly exempted from the 1994 ban are ballistically far superior to the AR-15. Many of them are DBM, semiautomatic repeaters chambered for cartridges like the .30-06 Springfield, which fires bullets three to four times heavier than the .223. Two prominent examples are the Remington 7400 and the Browning BAR, both explicitly excluded from the 1994 ban. Also excluded was the M1 Garand, the U.S. Army battle rifle used in World War II and featured prominently in the film Saving Private Ryan. In
appearance the Garand seems closer to the Remington or the Browning. It features a traditional wood stock and has none of the typical assault weapon features except for an unobtrusive bayonet lug.\(^\text{154}\)

The .30-06 cartridge, fired by the Remington, the Browning, and the Garand as fast as one can pull the trigger, propels a 150-grain bullet (nearly three times heavier than the 55-grain projectile typical for the AR-15) at 3100 feet per second producing muzzle energy of 3200 foot-pounds.\(^\text{153}\) At 400 yards it is still traveling at 2058 feet per second, carrying 1410 foot-pounds of energy.\(^\text{154}\) In contrast, the far smaller and lighter .223 fired by the aggressively-styled AR-15 produces 1282 foot-pounds of energy at the muzzle and 296 foot-pounds at 400 yards.\(^\text{155}\) These measures for the .223 are from a test barrel that is typically six to eight inches longer than the sixteen-inch barrel of the most aggressively styled "M4 clone" version of the AR-15 (distinguished by the shorter barrel and adjustable stock).\(^\text{156}\) As barrel length decreases, so does destructive energy because the pressure in the short barrel is dissipated in the atmosphere instead of building behind the bullet for a longer time and space.\(^\text{157}\)

The physics are plain. The 1994 ban outlawed guns that are demonstrably less lethal than millions of government-approved "sporting" guns and countless actual military rifles that just do not look very dangerous. The ballistic superiority of many sporting guns is not a function of more recent or more advanced technology; some of the earliest semiautomatic "sporting" rifles manufactured in America produce more destructive energy than the AR-15.\(^\text{158}\) Moreover, many exempt semiautomatic "sporting" rifles are available in cartridges that are ballistically superior even to the .30-06. For example, the previously-discussed Remington and Browning semiautomatics are available in

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Garand Rifle, http://www.pattonhq.com/garand.html (last visited June 10, 2009). It is an actual government-issued infantry rifle—a military weapon that General George S. Patton, Jr. called the "greatest battle implement ever devised." \(^\text{152}\)

152. The United States Civilian Marksmanship Program web site offers multiple illustrations and a detailed description of the Garand. See supra note 131; see also The Patton Soc'y, supra note 151.

153. Average Centerfire Rifle Cartridge Ballistics and Prices [hereinafter Ballistics and Prices], in GUN DIGEST 2007: THE WORLD'S GREATEST GUN BOOK 229, 232 (Ken Ramage ed., 61st ed. 2006); see also Haven, supra note 69, at 55 ("[T]he powerful .30-06 rifle cartridge developed by the United States Government during the year 1906.... is one of the best military rifle cartridges in use in the world today.... [A]ccurate shooting can be done with it in a rifle at over 1,000 yards.").


155. \textit{Id.} at 229.

156. \textit{Id.}

157. See GREENER, supra note 116, at 566.

158. The Remington Model 8 (first sold in 1906) chambered in .35 Remington fires a 200-grain bullet and produces 1921 foot-pounds of energy at the muzzle. Ballistics and Prices, supra note 153, at 233; Remington.com, supra note 70. Compare the 1282 foot-pounds of muzzle energy from the AR-15 firing the .223. See Ballistics and Prices, supra note 153, at 229.
magnum calibers like the .338 Winchester Magnum, which generates nearly double the ballistic energy of .30-06 (again, firing as fast as one can pull the trigger).159

True, at some point discussions about muzzle energy become moot. The practical difference between the .30-06 and the .338 in terms of lethality at usable distances may be negligible. But that is because both calibers are in the same ballistic category.160 However, the intermediate cartridges fired by the typical assault weapon are in a lower power class.161 They are less lethal across their entire ballistic range.162 Indeed, as a hunting cartridge, the .223 (the AR-15 cartridge) is widely considered suitable only for “varmints” (e.g., ground squirrels or prairie dogs). In many places it is illegal for hunting deer or other medium-to-large game because it tends just to wound rather than cleanly kill the animal.163

The ballistic inferiority of the assault weapon is a matter of conscious design.164 The typical assault weapon cartridge is explicitly intended to wound rather than kill.165 So ballistically, not only is the AR-15 not exceptionally dangerous, its lower lethality actually complements the state interest in controlling negative externalities. And from the perspective of the gun user, these ballistic characteristics translate into another important utility.

For many older, weaker, or smaller people, the relatively low-powered assault weapon offers an easier learning curve, less punishing practice, and an ease of use that is unmatched by other choices. The semiautomatic configuration, whose repeating mechanism uses some of the energy that otherwise would contribute to recoil, makes the gun more manageable than other technologies firing the same cartridge.166

159. See supra note 153.
160. Ballistics and Prices, supra note 153, at 231–33.
161. Id. at 229.
162. See Kopel, supra note 40, at 168–70.
164. Kopel, supra note 40, at 169 (“The great irony . . . is that [assault weapons] are the only rifles that have ever been designed not to kill. The semi-automatic rifles use the same ammunition as battlefield weapons such as the M16, which deliberately use intermediate-power ammunition intended to wound rather than to kill. The theory is that wounding an enemy soldier uses up more of his side’s resources (to haul him off the battlefield and then care for him) than does killing an enemy.”).
165. Id.
166. See, e.g., ShotgunLife.com, Women and Shotguns, Good Form and Shotgun Recoil, http://www.shotgunlife.com/Women-Shooters/women-and-shotguns.html (last visited June 10, 2009) (“Semi-automatic shotguns—or autoloaders as they're also known—are prized for their low felt recoil compared with over/unders. A semi-automatic uses some of the expanding gases from the fired shell to cycle the next one into the chamber. So rather than you absorbing the full force of the shot, a semi-
Comparatively, the substantial recoil from the shotgun disqualifies it as a defensive tool for many people. The same is true for medium-to-large game sporting rifles. The recoil from many of these is punishing, bruising, and makes practice, and therefore proficiency, difficult. Even the M1 Garand, though its recoil is reduced by its semiautomatic design, produces comparatively much greater recoil because it fires the powerful .30-06 cartridge. The Garand is also relatively heavy and long, making it generally difficult for smaller people to manipulate.

Assault weapons also present ergonomic and operational advantages over alternatives. The typical assault weapon is easily fixed with optics that enhance aiming and accuracy. The carbine length of the typical automatic puts that energy to good use."

167. See id. Expert gun fitters address part of the problem, but for people who cannot afford or do not even know about such services, "an ill-fitting shotgun heightens felt recoil. If you’re unable to properly press the shotgun against your shoulder and face, the felt recoil could hurt like crazy." Id. at 2; see also Diane Campbell, Shotgun Training Tips for Female and Smaller Officers, POLICEONE.COM, July 6, 2007, http://www.policeone.com/police-products/firearms/shotguns/articles/1287382-Shotgun-training-tips-for-female-and-smaller-officers/ ("Let’s face it. Many officers, particularly female and smaller officers, may be just plain afraid of shotguns. Whether real or imagined, the shotgun has a reputation for being painful. Often this reputation comes from poor training, too heavy a load or just incorrect handling. This really is a shame, since the shotgun is such a versatile use-of-force tool for law enforcement as well as home defense.").

168. Chuck Hawks, Remington Managed-Recoil Cartridges, http://www.chuckhawks.com/remington Managed-recoil.htm (last visited June 10, 2009) [hereinafter Hawks, Remington] ("Although many will not admit it, most hunters find cartridges on the order of the .270, 7mm Magnum, .308, and .30-06 somewhat intimidating to shoot. And very few shooters are really comfortable shooting a .300 Magnum."); see also Chuck Hawks, The Powerful .300 Magnums, http://www.chuckhawks.com/300magnum.htm (last visited June 10, 2009) ("The .300 Magnums are generally regarded as suitable for game from the size of deer and antelope to the largest thin-skinned game worldwide.... The main drawback to any of the .300 Magnums is recoil, which is more than most shooters can handle.... Many professional guides in North America are suspicious of customers who show up with .300 Mag. rifles until they prove they can shoot their formidable rifles accurately.").

169. See supra note 168.

170. See supra note 153 and accompanying text.

171. See, e.g., All Things Considered, Book Explores History of the American Rifle (NPR radio broadcast Dec. 21, 2008) (transcript available at http://www.npr.org/templates/story/story.php?storyId=98578531). The difference is illustrated anecdotally in this interview with Alexander Rose, author of American Rifle: A Biography. The interviewer, a young woman, fires an M1 Garand and then an AR-15. She comments unenthusiastically that the Garand is “heavy.” Id. There is no on-air comment about the recoil but people who have fired the Garand can imagine that interesting things did not make it on air. The Garand hurts to shoot. Her comment about the AR-15 puts things in perspective. “It’s a scary looking black thing,” she says. Id. Then after firing it, “That was easy. It does not kick back at you.” Id. This last comment was obviously in contrast to the heavy-recoiling Garand. This difference is the essence of controllability. As a self-defense gun, the Garand (and many more powerful, heavier hunting guns) by many estimates would be too much gun for a woman of average strength and build, and perhaps many others. See id. The AR-15 in contrast would not.

172. See Hawks, Remington, supra note 168. While many sporting long guns also employ optics, those guns typically are heavier, longer, more powerful, and thus more punishing to practice with. Id. Shotguns similarly can be fitted with optics, but present similar disadvantages in terms of recoil, weight, and length. Id.
assault weapon exploits the long-gun's more stable sighting platform (the shooter stabilizes the gun at four contact points—two hands, the shoulder pocket, and the cheek weld).

The handgun, in contrast, is more difficult to hold steady. Even with a two-handed hold it enjoys half the contact points of the long gun, and then requires the user to employ open sights, which means aligning three different planes of sight (rear sight, front sight, and target). This is harder to do as people age. Moreover, at any age, proficiency with the handgun requires more practice and a higher level of skill and dexterity. In fact, some double action revolvers have such heavy trigger pulls that many adults cannot operate them.

2. Tactical (Subjective) Special Marginal Utilities

Some assault weapon SMUs are more subjective in the sense that users, both ordinary and expert, will exhibit different personal preferences for them as self-defense scenarios shift. Among professional trainers of both police and civilians, the assault weapon is widely recommended as the most versatile and effective self-defense tool. Professional instructors list ruggedness, ergonomics, accuracy, low recoil, versatility, and other tactical advantages that make the assault weapon a premium self-defense technology. This is especially true for the AR-15, whose military and law enforcement pedigree means that "the top tactical minds of our generation have figured out the best ways to use AR-platform guns in all sorts of scenarios." Because the assault weapon typically fires a ballistically intermediate round, it recoils less

174. See id.
175. See, e.g., Donald L. MacDaniel, Pistol Shooter's Rx for Tired Eyes, AM. RIFLEMAN, May 1984, at 37; Robert B. Pomeranz, Aging Eyes and Iron Sights, AM. RIFLEMAN, Sept. 1995, at 34.
176. For example, a nineteen-year-old student of mine, who had aspirations to join the state police, found it impossible to complete the double action trigger pull on a Smith and Wesson Model 28 "Highway Patrolman" revolver double action. He was 5'9" and weighed 140 pounds. He was an athlete and a very good runner, but he did not have the hand strength to fire the gun without first cocking it into single action mode.
177. Preference for the AR-15, for example, has been driven by popular firearms trainer Clint Smith's development of the "Urban Rifle" doctrine. Tiger McKee, Simplify for Success: The Basic AR Fighting Rifle, GUNS MAG., COMBAT SPECIAL EDITION 2009, at 44, 46.
178. See, e.g., Bane, supra note 79, at 58–61 ("The numbers are staggering. AR-platform guns are approaching handgun-level sales....[E]rgonomics, coupled with ease of operation, light weight and the negligible recoil from the 5.56 cartridge, make AR-platform guns a blast to shoot. As an instructor, ....[n]ow I use an AR[...] for totally new shooters....The more I've worked with the carbine, the more I've found myself 'defaulting' to the AR for a self-defense role."). Bane says the only reason he needs a handgun is to get to his rifle. Id. Over the past twenty years, I have taken scores of novices to the shooting range. Without exception, they find the low-powered semi-automatic rifle easier to shoot than the handgun.
179. Id.
180. Id. at 60.
than high-power or magnum guns. So owners of assault weapons will tend to practice more and thus should be more capable in emergencies. A separate utility appears in the militia context. As elaborated in Heller, the Second Amendment protects the armed citizenry from which the militia may be drawn. In emergencies, citizens appearing with their own guns become a public resource. People will dispute the usefulness of the unorganized militia in modern America, but with its constitutional pedigree established in Heller, it is an important question whether certain types of guns serve that interest more than others.

The assault weapon is the quintessential militia rifle. The AR-15, for example, is a semiautomatic rendition of the U.S. military infantry rifle, with the important difference that it does not have automatic or burst-fire capability. But otherwise, the mechanics and controls are the same and it uses the same magazines and ammunition. In emergencies where the militia becomes an important resource, civilians who are familiar with or own such guns will be more useful than others as adjuncts to public security forces.

While the militia utility anticipates a community response to public emergencies, public emergencies also generate private risks. In other work, I have described private guns held for these occasions as “stormy-day” guns — firearms held for episodes like those anticipated by the National Governors Association when it complained that the heavy use of the National Guard in war fighting leaves states vulnerable in an array of public emergencies. The assault weapon is the model stormy-day gun. Its multishot capability neutralizes the numerical advantage of multiple aggressors or a mob. The intermediate cartridge operates to

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181. See HALBROOK, supra note 37; Kopel, supra note 40, at 168–69.
182. See supra Part II.B.1 for discussion of intermediate ballistics.
183. District of Columbia v. Heller, 128 S. Ct. 2783, 2815 (“The traditional militia was formed from a pool of men bringing arms ‘in common use at the time’ for lawful purposes like self-defense.”).
184. See, e.g., Kopel, supra note 40, at 194–95 (describing situations where armed citizens helped restore public order after disasters).
186. See BUSHMASTER, supra note 128.
188. See, e.g., Robert Pear, Bush Policies Are Weakening National Guard, Governors Say, N.Y. TIMES, Feb. 27, 2006, available at http://www.nytimes.com/2006/02/27/politics/27govs.html (“Governors of both parties said Sunday that Bush administration policies were stripping the National Guard of equipment and personnel needed to respond to hurricanes, floods, tornadoes, forest fires and other emergencies.”).
189. Kopel, supra note 40, at 175.
neutralize both a wounded attacker and his caretakers.\textsuperscript{99} This same feature lessens the burden on innocents when the gun is abused.\textsuperscript{101} The appearance of the assault weapon is distinct enough even at a distance to achieve deterrence by brandishing.\textsuperscript{92} Other guns are decidedly inferior stormy-day options. The handgun, by definition a last-ditch tool limited essentially to contact distance, would be useful only at distances where it may be too late to fight back.\textsuperscript{93} Shotguns and hunting-caliber rifles are inferior because they recoil harder and thus are harder—and for some, impossible—to use.\textsuperscript{94} The rational actor, thinking about self-defense under a range of circumstances, has sound reasons to count the assault weapon as the best alternative in the inventory of common firearms.

III. ASSAULT WEAPON BANS AND THE STENBERG STANDARD

The discussion so far shows that assault weapons fit comfortably within the category of common firearms nominally protected under \textit{Heller}\textsuperscript{105} and that they exhibit SMUs that are especially important to particular types of people and in particular categories of self-defense. But what happens when the SMUs of common firearms are claimed to produce peculiar externalities that the state wants to combat by banning them? The question takes us beyond \textit{Heller}. But it is the core of \textit{Stenberg}. Substituting firearms "technologies" for abortion "methodologies," whether to protect the special life-saving utilities of assault weapons against a government ban that forces reliance on lesser alternatives, is the question of principle answered in \textit{Stenberg}.

At first glance the assertion of broad parallels between abortion and gun rights jurisprudence seems odd. However, on core principles there is a broad intersection between the two claims. This is evident from the many treatments that build the abortion right on the self-defense principles that undergird \textit{Heller}.

More than a decade ago, I showed that the ideas and principles used by the Court and scholars to draw the unenumerated right to abortion out of the Constitution run remarkably parallel to, and in core cases build directly upon, arguments and principles supporting a constitutional

\textsuperscript{190} \textit{Id.} at 168.
\textsuperscript{191} See \textit{supra} note 164 and accompanying text.
\textsuperscript{192} See Gary Kleck & Marc Gertz, \textit{Armed Resistance to Crime: The Prevalence and Nature of Self-Defense with a Gun}, 86 J. CRIM. L. & CRIMINOLOGY 150, tbl.3 at 185 (1995) (indicating that the vast majority of civilian defensive gun uses are brandishing scenarios where the gun is not fired).
\textsuperscript{193} See FBI, U.S. DEP’T OF JUSTICE, LAW ENFORCEMENT OFFICERS KILLED AND ASSAULTED 2004, at 6 (2005), \textit{available at} http://www.fbi.gov/ucr/killed/2004/downloads/LEOKA04.pdf (indicating that confrontations with handguns occur at very close distances where few shots are fired and the person involved often misses).
\textsuperscript{194} See \textit{supra} notes 167–71 and accompanying text.
\textsuperscript{195} See 128 S. CT. 2783, 2717–22 (2008).
right to arms for self-defense.196 That article, Principles and Passions, argued that the "standard position of the left" perversely disparages claims of a right to armed self-defense under the Second Amendment, but exalts a derivative and relatively weaker unenumerated right to abortion.197 As the analysis here will show, the standard position endures and is reflected in the abortion and gun jurisprudence of the Court's liberal wing. This, attitudinalists will say, is exactly what we should expect.198

I will show here how the assault weapons question raises parallel issues of special self-defense utility and how the Court's treatments of the abortion and gun questions invoke the attitudinalist critique. Section A summarizes the argument that there are controlling parallels between the abortion and gun rights claims. Section B extends that argument to the particular parallels between assault weapons and partial-birth abortion as evaluated under Stenberg, and illustrates the burden of principle Stenberg poses for the liberal wing of the Court. Section C incorporates the Court's treatment of partial-birth abortion in Gonzales which, in its constriction of Stenberg, poses for Court conservatives a similar but lesser rendition of the attitudinalist challenge.

A. SELF-DEFENSE AND THE DERIVATIVE RIGHT TO ABORTION

As I highlighted in Principles and Passions, one of the obvious illustrations of the abortion/gun rights parallel is Donald Regan's effort to situate the abortion right within the spectrum of permissible self-defense scenarios.199 Regan begins with the model case of self-defense against a willful criminal attacker.200 After many contortions, he plots at the far end of the self-defense spectrum several weaker scenarios he says are analogous to the self-defense claim of a woman who chooses abortion in order to avoid the physical trauma of child birth.201 Regan's analysis is particularly important because it shows the relative strengths of the abortion and self-defense claims. The strongest abortion claim is where the mother risks death or serious injury by continuing the pregnancy. In those narrow circumstances, abortion is just like the model self-defense case.202 But in the vast majority of abortions there is no

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198. See Dorf, supra note 22, at 498–99.
199. Johnson, supra note 12, at 102–09 (critiquing Donald H. Regan, Rewriting Roe v. Wade, 77 Mich. L. Rev. 1569 (1979)).
200. Regan, supra note 199, at 1611.
201. Id. at 1611–13.
202. Id. at 1613–16.
threat to the life of the mother. So under Regan's analysis, most abortion claims are qualitatively weaker than most self-defense claims.

Regan's arguments have generated a wide following, and were even invoked by Justice (then Judge) Ginsburg in her own commentary supporting the abortion right. Regan's is one of many essays and articles that I critiqued in *Principles and Passions*. A second is Judith Thomson's effort to justify abortion as a matter of moral philosophy. Cass Sunstein has said that Thomson and Regan provide the strongest justifications for a constitutional right to abortion.

Through a series of self-defense analogies, Thomson argues that, even conceding that the fetus is a person at conception, with a life-interest equal to the mother's, abortion still can be justified. She posits the case of a mother trapped in a very small house with a rapidly growing child. The child is growing at such a rate that it threatens to crush the mother against the walls of the house. Here, she insists, we cannot say that the mother "can do nothing, that [the mother] cannot attack it to save [her] life." Her analysis rests on a right of self-defense that she presumes is a universal value so fundamental that it can carry by slim analogy a broad right to abortion.

In 1989, Susan Estrich and Kathleen Sullivan argued, among other things, that abortion was at the heart of constitutionally protected choices because "few decisions can more importantly alter the course of one's life than the decision to bring a child into the world." The self-
defense choice presents obviously higher stakes. It is not the course of one’s life, but one’s very existence that is at stake.

Estrich and Sullivan presented their arguments explicitly as an appeal to Justice O’Connor, at the time the only woman on the Court. By 1992, Justice O’Connor stood with the majority in Planned Parenthood of Southeastern Pennsylvania v. Casey, concluding that the abortion right involves choices “central to personal dignity and autonomy, [that] are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one’s own concept of existence, of meaning, of the universe, and of the mystery of human life.” Liberty, said the Court, includes more than those rights already guaranteed by the first eight Amendments to the Constitution. The Court further explained that the full scope of the liberty guaranteed by the Due Process Clause cannot be found in or limited by the precise terms of the specific guarantees elsewhere provided in the Constitution. This “liberty” is not a series of isolated points pricked out in terms of the taking of property; the freedom of speech, press, and religion; the right to keep and bear arms; the freedom from unreasonable searches and seizures; and so on.

It is fair then to consider the first eight Amendments—including a right to arms now affirmed in Heller—as the foundation of liberty guaranteed by the Fourteenth Amendment. The abortion right, plainly unenumerated, may be harder to extract but still can be plausibly inferred. The irony of the standard position is the suggestion that the Constitution inferentially protects the abortion right, but not the gun right that is rooted explicitly in the text.

Within the broader abortion/gun rights intersection, the comparison between partial-birth abortion and assault weapons claims is apt, both analytically and politically. From the view of the opposition, both assault weapons and partial-birth abortion are extreme manifestations of the contested right. Both are contrasted to other less controversial manifestations of the broader right and those alternatives feed arguments that the right can be respected without permitting these especially aggressive, unnecessary, or unjustifiable renditions of it. As a quantitative matter, both represent a fraction of what opponents object

215. Id. at 122–23.
217. Id. at 847.
218. Id. at 848 (emphasis added) (quoting Poe v. Ullman, 367 U.S. 497, 543 (1961) (Harlan, J., dissenting)).
219. See, e.g., Stenberg v. Carhart, 530 U.S. 914, 983 (2000) (Thomas, J., dissenting) (“From reading the majority’s sanitized description, one would think that this case involves state regulation of a widely accepted routine medical procedure. Nothing could be further from the truth. The most widely used method of abortion during this stage of pregnancy is so gruesome that its use can be traumatic even for the physicians and medical staff who perform it.”); supra note 63.
to. Both present a tragedy of competing interests—neither the mother nor the self-defender wants to destroy another life-interest and each is pushed by exigency to the decision. Both are vigorously defended by supporters on the view that the constitutional protection is fragile and that defeat in this limited context would not end the controversy, but just embolden opponents who oppose the right absolutely. Both demand analysis that many people find repugnant—for example, the graphic comparisons of late term abortion procedures or discussions of relative wound ballistics between assault weapons and hunting rifles.

B. A Right to Better Methodologies for Preserving Life and Health: *Stenberg, Gonzales,* and the Attitudinalist Challenge

Dissenting in *Heller,* Justice Breyer complained that the majority failed to supply a standard of review for future cases. Ironically, on the discrete question of assault weapons, Justice Breyer’s majority opinion in *Stenberg* provides an especially apt methodology for administering the competing interests of the right-bearer and the state.

*Stenberg* involved a challenge to Nebraska’s ban on the controversial D&X abortion procedure, described by the statute as “partial birth abortion.” The Court held the statute unconstitutional because it failed to include an exception where the doctor judged the procedure necessary to protect the life or health of the mother. A very similar procedure, D&E (which Justice Stevens argued is nearly indistinguishable from D&X) remained legal, as did the full range of less controversial, earlier-term abortion procedures. So, just like the assault weapons case, the Court already had recognized the core right (abortion) but now wrestled with the right-bearer’s claim to a particular controversial variation.

*Stenberg*’s protection of methodological variations best suited to saving the life of the right-bearer extends smoothly to the assault weapons question, and on several points actually applies more easily to the assault weapons case. This raises for the *Stenberg* majority the attitudinalist challenge. Is *Stenberg* advanced on a point of principle? If so, then it should extend to the demonstrably easier case of assault weapons. Perhaps, though, *Stenberg* just confirms the attitudinalist proposition and is a predictable manifestation of the standard position—unprincipled, political, a mere reflection of tribal allegiances. If so, then

220. See, e.g., *supra* notes 72, 203 and accompanying text.
221. See *Johnson,* supra note 12, at 170–74.
223. 530 U.S. at 921–22.
224. Id. at 937–38.
225. Id. at 946–47 (Stevens, J., concurring).
226. Id. at 938 (majority opinion).
the assault weapons claim, though stronger, will be denied the protections Court liberals established for partial-birth abortion.227

As summarized in the Introduction, the Court treated the partial-birth abortion question again in Gonzales v. Carhart.228 This time, Court conservatives were in the majority and they predictably resurrected several of the arguments from their dissents in Stenberg—arguments that weaken Stenberg and diminish the support the assault weapons claim draws from it.229 Gonzales, for example, gives the state more leeway to restrict methodologies “necessary” to protect the life of the right-bearer, where adequate alternatives are available.230 This and other arguments advanced in Gonzales may ultimately expose Court conservatives to the attitudinalist challenge.

Subsection 1 will elaborate the parallels between the assault weapons and partial-birth abortion claims, apply the principles developed by the Stenberg majority to the assault weapons claim, and elaborate the attitudinalists’ challenge that Stenberg poses for Court liberals. Subsection 2 will focus on the dissenters’ criticisms of Stenberg to show how the parallel assault weapons question avoids those objections and is thus the stronger claim. Subsection 3 will evaluate how Gonzales, which diminishes Stenberg in key areas, raises the attitudinalist challenge for Court conservatives.

1. Stenberg Principles and the Assault Weapons Intersection

Stenberg protects the right-bearer’s access to marginally better methods of abortion where her life or health is at stake.231 This right to “better” variations of the broadly protected right to abortion prevails in the face of empirical dispute over whether the methodology really is better,232 over empirical objections that it is actually worse (riskier),233 over objections that it cannot really be distinguished from other available methodologies,234 and over objections that the state’s interest in regulating the procedure is extraordinarily powerful, because it borders

227. Justice Breyer, for example, seems stuck with his commitment in Stenberg to robust protection of even marginally better methods for exercising the contested right, where the life or health of the right-bearer is on the line. But his dissent in Heller emphatically rejects this same essential argument and advances instead the view that certain types of guns pose externalities (gun crime) that justify banning the entire category (handguns, seemingly regardless of their defensive utility), and not to worry because any individual right to arms is respected by allowing citizens to have some type of gun. See 128 S. Ct. at 2863–66 (Breyer, J., dissenting).
229. Stenberg, 530 U.S. at 958–59 (Kennedy, J., dissenting).
230. 127 S. Ct. at 1638.
231. 530 U.S. at 929–30.
232. Id. at 933–37.
233. Id. at 933–35.
234. Id. at 946–47 (Stevens, J., concurring).
on infanticide.\textsuperscript{235} These positions and the principles that support them transfer readily to the assault weapons question.

\textit{a. Protecting Best Methodologies for Preservation of Life and Health}

The \textit{Stenberg} majority flatly rejects the assertion that the constitutional right to abortion is adequately respected by the availability of safe alternatives to the disputed D\&X procedure.\textsuperscript{236} Writing for the majority, Justice Breyer makes plain that where the woman's life or health is at stake, she is entitled to the superior abortion procedure.\textsuperscript{237} Even postviability, the government's interest in the life of the fetus must give way to medical judgments that the procedure is necessary to preserve the life or health of the mother.\textsuperscript{238}

\textit{Stenberg}'s protection of better methodologies for exercising a core constitutional right speaks squarely to the self-defender's parallel interest in the best tool for particular categories of self-defense.\textsuperscript{239} Indeed, people who cannot manage the weight or recoil of a heavier, more powerful gun, or the dexterity demands of the handgun,\textsuperscript{240} have a substantially different and stronger claim. For them, the assault weapon may \textit{always} be the better alternative.

\textit{b. The Dispositive Empirical Question: Is the Disputed Methodology Never the Best Option?}

The empirical debate over whether D\&X is ever the best alternative for saving the life or health of the mother sharpens the core message of \textit{Stenberg}: If the state can show that the contested methodology is \textit{never} the best option for protecting life or health, then the partial-birth abortion ban is permissible.\textsuperscript{241} According to the majority, the State simply

\textsuperscript{235} Id. at 958–59 (Kennedy, J., dissenting) ("The fetus, in many cases, dies just as a human adult or child would: It bleeds to death as it is torn limb from limb.... Dr. Carhart... testified [that] he knows of a physician who removed the arm of a fetus only to have the fetus go on to be born "as a living child with one arm." (citation omitted) (quoting Brief for Ass'n of American Physicians & Surgeons et al. as Amicus Curiae, \textit{Stenberg}, 530 U.S. 914 (No. 99-830))).

\textsuperscript{236} Id. at 931–32 (majority opinion). \textit{Compare} District of Columbia v. Heller, 128 S. Ct. 2783, 2860 (2008) (Breyer, J., dissenting) (concluding that dispute about the utility of the Washington, D.C. handgun ban required deference to the legislature "because legislators, not judges, have primary responsibility for drawing policy conclusions from empirical fact"), with \textit{Stenberg}, 530 U.S. at 970 (Kennedy, J., dissenting) ("The Court fails to acknowledge substantial authority allowing the State to take sides in a medical debate, even when fundamental liberty interests are at stake and even when leading members of the profession disagree with the conclusions drawn by the legislature.").

\textsuperscript{237} \textit{Stenberg}, 530 U.S. at 930–31.

\textsuperscript{238} Id.

\textsuperscript{239} See discussion supra Part II.B.2.

\textsuperscript{240} See supra notes 170–76 and accompanying text. As discussed above, in the category of long guns, the recoil and weight of the shotgun and many so-called "sporting rifles" exempted from the 1994 ban make them impractical for many smaller or weaker people. See supra notes 170–71 and accompanying text.

\textsuperscript{241} 530 U.S. at 937–38.
failed on the factual showing.\textsuperscript{242} On the view of at least some medical experts, D&X "may be the best or most appropriate procedure in a particular circumstance to save the life or preserve the health of a woman."\textsuperscript{243} In the assault weapon context the state would face the equivalent burden of showing that assault weapons are never the best self-defense option. This is difficult first because of the regulatory paradox (i.e., the claim of special externalities is also an admission of special utility).\textsuperscript{244} Also the claimant's burden is comparatively easier because assault weapon utility is easier to quantify than partial-birth abortion utility.\textsuperscript{245} Partial-birth abortion utility is controversial because of disputes between doctors that are in part subjective—a function of what methodology particular doctors prefer.\textsuperscript{246} Assertions of assault weapon utility—lower recoil, less lethal ammunition—are grounded on less contestable, objectively measurable physical characteristics.\textsuperscript{247}

\textit{Stenberg}'s "never the best option" filter also helps define the proper scope of state regulation in a way that supplements \textit{Heller}'s common-use test. The demand in at least some cases that the disputed methodology be the superior option means that firearms that are always inferior and which impose special externalities would not be protected. For example, unreliable, inaccurate guns that are prone to malfunctioning or injuring the user, like the infamous zip gun\textsuperscript{248} or the poorly identified "Saturday Night Special,"\textsuperscript{249} might be banned on the argument that they are universally inferior and often used by people who are prohibited from having guns.\textsuperscript{250}

\begin{itemize}
  \item \textsuperscript{242} Id. at 932 ("The State fails to demonstrate that banning D&X without a health exception may not create significant health risks for women, because the record shows that significant medical authority supports the proposition that in some circumstances, D&X would be the safest procedure."). \textit{But see} District of Columbia v. \textit{Heller}, 128 S. Ct. 2387, 2852-53, 2860 (Breyer, J., dissenting) (urging deference to the legislature).
  \item \textsuperscript{243} \textit{Stenberg}, 530 U.S. at 932 (quoting Carhart v. \textit{Stenberg}, 11 F. Supp. 2d 1099, 1126 (D. Neb. 1998)).
  \item \textsuperscript{244} \textit{See supra} Part II.B.
  \item \textsuperscript{245} \textit{See supra} Part II.B.1.
  \item \textsuperscript{246} \textit{Stenberg}, 530 U.S. at 964 (Kennedy, J., dissenting) (contending that by insisting on an exception to the ban where the individual doctor makes a judgment that partial-birth abortion is necessary, the majority "awards each physician a veto power over the State's judgment that the procedures should not be performed").
  \item \textsuperscript{247} \textit{See supra} Part II.B.1.
  \item \textsuperscript{249} \textit{See Dave Kopel}, Second Amendment Project, Warren Burger and the Second Amendment, http://davekopel.org/2A/Mags/crburger.htm (last visited June 10, 2009) ("So called 'Saturday Night Specials' are small, inexpensive, low-calibre handguns, disdained by most criminals . . . . ").
  \item \textsuperscript{250} The second point may be difficult to show empirically. Also, some will object that this critique ignores the special utility of affordability—that it is not criminals but poor people who gravitate to these guns. Compare odd and idiosyncratic guns like those disguised as writing instruments, canes, or umbrellas that the ATF historically attempted to regulate more closely. \textit{See} HALBROOK, \textit{supra} note 37.
c. Disputed Utility: Rarity

The State argued in Stenberg that the D&X procedure was not a protected methodology because it was very rarely used. Only a very small fraction of the million or so abortions per year are D&X procedures. And only a fraction of that fraction involve a threat to the life of the mother. The majority rejected this argument, ruling that a burden on a particular methodology "unduly burden[s] the right to choose abortion itself." Rarity of the procedure, said Justice Breyer, "is not highly relevant." The deciding focus is those occasions that "could strike anyone" where D&X is the best methodology. "[T]he State cannot prohibit a person from obtaining treatment simply by pointing out that most people do not need it."

In the gun context, this answers the criticism that stormy days of high assault weapons utility are thankfully rare. Rarity, Justice Breyer emphasizes, "is not highly relevant." The deciding factor is that assault weapons exhibit special utilities in particular scenarios, "which could strike anyone." The state cannot deny right-bearers who require the SMUs of assault weapons on the argument that "most people do not need" them.

Realize also that the rarity-parallel gains an extra feature in the assault weapons case because the assault weapon is not just a stormy-day tool. For smaller, weaker people, strength and dexterity requirements of shotguns or handguns eliminate them entirely as alternatives. For many of those people, assault weapons might always be better self-defense tools.

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at 529.

251. 530 U.S. at 933.
252. The Stenberg Court noted that there is "no reliable data on the number of D&X abortions performed annually. Estimates have ranged between 640 and 5,000 per year." Id. at 929.
253. Strauss et al., supra note 203, at 1.
254. Id.
255. Stenberg, 530 U.S. at 930.
256. Id. at 934 ("[C]ertain of the arguments are beside the point. The D&X procedure’s relative rarity (argument (i)) is not highly relevant.").
257. Id.
258. Id.
259. See id.
260. See id. The comparative numbers for self-defense of course are contested. Compare Kleck & Gertz, supra note 192, at 164 (finding that up to 2.5 million Americans use guns defensively each year), with Philip J. Cook et al., The Gun Debate’s New Mythical Number: How Many Defensive Uses Per Year?, 16 J. POL’Y ANALYSIS & MGMT. 463, 465 (1997) (estimating 1.5 million defensive gun users). In most defensive gun uses, the gun is not actually discharged. Kleck, supra note 59, at 162. This suggests that the appearance of the gun has substantial deterrent value. If this is right, the appearance of the assault weapon—its nonSporting features—should have higher deterrent value than others.
261. See Stenberg, 530 U.S. at 934.
262. See supra Part II.B.1.
The Stenberg Court takes the point a step further, acknowledging that rarity might reflect that D&X truly has no special utility.\textsuperscript{263} Empirically there was strong evidence to support this,\textsuperscript{264} but the dispute was resolved in favor of the right-bearer.\textsuperscript{265} So even if there is dispute about stormy-day utility or whether assault weapons are a better choice for people who cannot be proficient with other guns, Stenberg principles dictate that plausible claims of SMU trump gun bans. Remember also the state's dilemma. Unless the assault weapon does in fact have some special utility, the initial decision to ban it is not even rational.\textsuperscript{266} But, says Stenberg, once demonstrated, this utility, \textit{even if rarely accessed}, trumps the state's countervailing interest.\textsuperscript{267}

d. Asserted Disutility: The Contested Methodology Imposes Greater Risks than Available Alternatives

One contention in Stenberg was that the D&X procedure actually posed a \textit{greater} health risk to the mother than available alternatives.\textsuperscript{268} The district court rejected this claim on the evidence,\textsuperscript{269} but the argument opens a useful comparison to the assault weapons question. First of all, no one has shown, and no facts suggest, that the assault weapon presents a greater risk to the user than other types of firearms. On this point the assault weapons claim is stronger.

Some will object that the proper question is whether the assault weapon poses peculiar externalities—risks to the population at large. But even loosening the analogy to accommodate that question, the argument that the assault weapon poses greater risks does not survive the factual inquiry. It is indisputable that the handgun inflicts exponentially greater costs than the assault weapon.\textsuperscript{270} Also, the typical assault weapon, which by definition fires an intermediate cartridge, is ballistically inferior to most deer rifles (many of which are semiautomatics),\textsuperscript{271} so it actually complements the state interest in limiting negative externalities.

\textsuperscript{263} 530 U.S. at 934.
\textsuperscript{264} See id. at 935.
\textsuperscript{265} Id. at 938.
\textsuperscript{266} See supra text accompanying note 137.
\textsuperscript{267} See supra text accompanying note 241.
\textsuperscript{268} 530 U.S. at 935.
\textsuperscript{269} Id. at 932.
\textsuperscript{271} Ballistically it is difficult to sustain the argument that the assault weapon imposes more risk than a "sporting" long gun, say in the .300 Magnum category, or one of the "approved semiautomatics" from the last ban, like the M1 Garand. See supra Part II.A.2.
Finally, any argument that the assault weapon imposes special net risks is difficult to sustain because the utilities and the externalities of all firearms are just different sides of the same coin. The things that make the assault weapon or any other gun useful for legitimate self-defense become negative externalities where the gun is used for crime. The assault weapons distinction rests on the implausible assertion that particular features have personalities—with some features dedicated to good and others committed to evil. The truth, of course, is that guns and their features function the same way no matter who operates them. So if the assault weapon has a distinct SMU, right-bearers generally will have an interest in it that Stenberg says we must respect.

e. Disputed Utility: Erring for the Right-Bearer

Acknowledging the deep dispute over the utility of D&X, the Stenberg majority protected the abortion right by resolving ambiguities against the government.\(^{272}\) The empirical case for D&X utility was so deeply contested that the Court did not demand "absolute proof" of SMU.\(^{273}\) "[U]nanimity of medical opinion" was not required, and the Court resolved the "differences of medical opinion" about the utility of D&X in favor of the mother in order to avoid "unnecessary risk of tragic health consequences."\(^{274}\) And if it turns out the Court is wrong about the utility of D&X, said Justice Breyer, then that is a lesser harm because "the exception will simply turn out to have been unnecessary."\(^{275}\)

The parallel assault weapons claim is clearer and easier to evaluate because much of it is objectively measurable (i.e., weight, recoil, and lower lethality). These factors weigh in favor of assault weapons protection without resort to the Stenberg principle of erring for the right-bearer. It is only in the context of the subjective SMUs (which are not essential to establish the claim) that the assault weapons claim might require Stenberg burden-shifting. And even on these subjective measures, the assault weapons argument is stronger than the Stenberg abortion claim.

Stenberg recites the deep divisions among experts about the utility of D&X.\(^{276}\) Even though the American College of Obstetricians and

\(^{272}\) 530 U.S. at 937–38.

\(^{273}\) Id. at 936–37.

\(^{274}\) Id. at 937 ("[W]e cannot say that the presence of a different view by itself proves the contrary."). In the assault weapons context, there are analogies, but they cut against the state claim, either that assault weapons are a special enough threat that the state can impair the right in that limited case, or that assault weapons have no special utility in selected strands of self-defense.

\(^{275}\) Id. (emphasis added). Justice Breyer offers this as if the abortion procedures do not really present a problem. He really is saying that stepping on the constitutional right is more of a problem, and the primary one, and that we will err in favor of the individual and protect the optimal methodology, even where the state and many citizens find the procedure gruesome, even criminal.

\(^{276}\) Id.
Gynecologists' report "could identify no circumstances under which [D&X] would be the only option to save the life or preserve the health of the woman," the Court protected the procedure on the authority of other expert testimony.777 There is nothing close to this type of dispute about the subjective SMUs of the assault weapon. Indeed, the assertion of special externalities, and thus special utility, is what prompts assault weapons regulation in the first place.778 However, even where the state manages a plausible argument that assault weapons present more costs than benefits,779 Stenberg resolves doubt in favor of the right-bearer.280

f. A Critique of Irrational Distinctions

Justice Breyer argues that the Nebraska statute does not really further the state's asserted interest in the "potentiality" of human life—that it is not geared to actually save any particular fetus from destruction because it only affects a rare method of abortion and abortion by other methods is freely available.281 So the rationale for the partial-birth abortion ban is illusory because abortion is a broadly protected constitutional right that unquestionably could be exercised through alternative means. Indeed, Justice Breyer contends that the D&X ban is irrational because the statute makes it hard to distinguish between D&X and the ostensibly legal D&E procedure.282 So even the interest in avoiding destruction of the fetus through a particularly troublesome methodology is not achieved. Justice Stevens's short concurrence puts the argument bluntly: the Nebraska statute is not rational because there is no reason to believe that the banned procedure is any "more brutal, more gruesome, or less respectful of 'potential life'" than the permitted procedure.283

277. Id. at 934 (quoting Am. Coll. of Obstetricians & Gynecologists Executive Bd., Statement on Intact Dilation and Extraction (Jan. 12, 1997)).
278. See generally Part II.B (explaining the regulatory paradox).
279. This claim requires the difficult showing that a gun's features are not neutral—that somehow they are only accessible to criminals. The Brady Campaign to Prevent Gun Violence attempts this argument, suggesting that assault weapons have some special capacity for shooting from the hip—something criminals especially need to do. See BRADY CAMPAIGN TO PREVENT GUN VIOLENCE, supra note 82. David Hemenway makes a similar effort in a survey that questions whether owners of semiautomatic firearms exhibit peculiar personality traits. See Hemenway & Richardson, supra note 76, at 286. He found that 60% of gun owners had at least one automatic or semiautomatic firearm, and that those people reported more frequent binge drinking. Id. at 287.
280. See 530 U.S. at 937–38.
281. Id. at 930.
282. Id. at 938–39 ("We do not understand how one could distinguish, using [the statutory] language, between D&E... and D&X...").
283. Id. at 946–47 (Stevens, J., concurring). Compare id. (describing as "irrational" the notion that the state furthers any legitimate interest by banning one abortion method but not the other), with Gonzales v. Carhart, 127 S. Ct. 1610, 1647 (2007) (Ginsburg, J., dissenting) ("The law saves not a single fetus from destruction, for it targets only a method of performing abortion."). These arguments parallel the broad claim that there is no distinction between the good guns and the bad guns in assault weapons legislation, and thus the distinctions based on appearance are irrational.
Here Justices Stevens and Breyer track almost exactly criticisms that I and others leveled at the 1994 ban. I argued that banning the AR-15 and exempting the visually-distinct but functionally-equivalent Mini-14 was incoherent—that distinctions elevating appearance over function were silly.\(^{284}\) The assault weapons distinction is incoherent because multiple other guns remain available, all of them are similarly deadly, many of them are objectively more lethal than the assault weapon, and an entire category of explicitly constitutionally protected guns (handguns) account for the vast majority of gun crime.\(^{285}\) Tracking Justice Stevens’s *Stenberg* argument, how does a ban on semiautomatic guns with pistol grips and folding stocks serve the state interest in limiting firearms externalities when functionally identical and far more destructive guns are explicitly permitted in the same legislation and are otherwise constitutionally protected?

Ultimately we know that “assault weapon” is a political designation that breathed life into the waning handgun prohibition movement and was calculated to avoid the wrath of hunters by exempting millions of more-lethal semiautomatic “sporting” guns.\(^{286}\) But this only makes the earlier point another way. Semiautomatic guns are and long have been a significant fraction of the inventory of civilian firearms.\(^{287}\) Assault weapons, distinguished primarily by appearance,\(^{288}\) are a functionally indistinct and irrational classification.

g. *Attitudinalism and the Cringe Factor*

All of the *Stenberg* opinions, particularly the dissents, labor over the particulars of the contested abortion procedures.\(^{289}\) Justices Thomas and Kennedy both present the gruesome details almost as if the description alone should settle things.\(^{290}\) If the dispute really comes down to this, the attitudinalist claim that passions trump principles is compelling.\(^{291}\)

Justice Stevens also captures the essence of the armed self-defense decision in his summary of the personal right of the woman “to make this difficult and extremely personal decision.” *Stenberg*, 530 U.S. at 946 (Stevens, J., concurring). The self-defense claim is stronger of course because the competing life interest is totally innocent in the abortion context and predominantly culpable in the self-defense context. Also, the gun case is stronger because it is death or severe bodily harm in the balance for the armed self-defender. In the abortion context, this is rarely the case. See *supra* notes 251-54 and accompanying text.

286. See *supra* Parts I, II.A.2; see also Kopel, *supra* note 40, at 164–70 (comparing exempt recreational firearms and assault weapons).
287. See *supra* Part II.A.1.
290. See *id.* at 961 (“In light of the description of the D&X procedure, it should go without saying that Nebraska’s ban on partial birth abortion furthers purposes States are entitled to pursue.”); *id.* at 983–89 (Thomas, J., dissenting).
291. One obvious explanation for the split in *Stenberg* is that, compared to the majority, the
The *Stenberg* dissenters argue that even the technical, clinical description of the disputed procedure is grotesque. Even Justice Breyer dissenters place a generally higher relative value on the fetus. Justice Kennedy, for example, emphasizes testimony that D&X in some renditions is a hair's breadth away from infanticide. *Id.* at 958–59 (Kennedy, J., dissenting). The life interest of the fetus is difficult to define. *Stenberg* discusses the state's interest in the "potentiality of human life." *Id.* at 930 (majority opinion). This reflects that the fetus is not a separate person, but is substantially more than nothing (some grieve over its loss). It is more than just the idea of a life that might emerge. Whatever label we apply to it, it has happened, it exists. But how far apart are these valuations and what else do they tell us? Only in context do we approach an answer. Compare, then, Justice Breyer's majority opinion in *Stenberg* and his dissent in *Heller*. Together they are a textbook illustration of the standard position and perhaps illuminate core convictions that attitudinalists say really control these questions.

One explanation for the standard position is the relative valuation of life-interests. Both the abortion right and the gun right threaten and ultimately consume competing life-interests: the gun right through criminal homicides and legitimate self-defense shootings; the abortion right through destroyed fetuses. One way to arrive at the standard position is to value the fetus as some fraction of a life-in-being. So 1.3 million fetuses destroyed each year are weighted less than 13,000 gun homicides. *See* Johnson, *supra* note 1, at 843; Alexi A. Wright & Ingrid T. Katz, *Roe versus Reality—Abortion and Women's Health*, 355 New Eng. J. Med. 1, 2 (2006). On that measure, the standard position values the fetus at about .01 of a life-in-being.

One might adopt the standard position on the view that the externalities of the gun right weigh more heavily than those of the abortion right. But this is empirically problematic. It rests on the highly contested assumption that firearms impose net social costs while the abortion right only causes opponents some existential angst. It means ignoring evidence that guns are used widely for self-defense and that communities where trustworthy people are armed experience less crime. *See*, e.g., JOHN R. LOTT JR., MORE GUNS, LESS CRIME: UNDERSTANDING CRIME AND GUN-CONTROL LAWS 51 (1998); Kleck & Gertz, *supra* note 192, at 185. And that requires erring against the right-claimant on a deeply contested empirical question—precisely the opposite of what *Stenberg* commands. *See supra* Part III.B.1.e.

Another explanation is that the costs of the abortion right are private and predictable, while the externalities of the gun right spin out at random. But this really collapses back into the fetus valuation question. If we were balancing a life-in-being rather than a fetus, it would not be a privacy issue at all. It would be just like the gun question, where it is no excuse that gun violence occurs in private or between family members. The only difference in the abortion case is that the fetus depends on the mother in a unique way, and in a contest between the two, that dependency lowers the valuation of the fetus.

There is another superficially different explanation that, again, reduces to the valuation question. It emphasizes the mother's autonomy and equality in a world where men and women are both responsible for the pregnancy but women disproportionately bear the burden of caring for the unwanted child. *See* Ginsburg, *supra* note 204, at 382–83. This transforms the question into a contest between the man and woman who created the fetus. Equality means that the woman should have an equivalent chance to avoid the burden of the unwanted child. It is interesting to compare this argument with the militia-centric version of the Second Amendment that is advanced, for example, by Justice Stevens's dissent in *Heller*. *See* District of Columbia v. *Heller*, 128 S. Ct. 2783, 2824–26 (2008) (Stevens, J., dissenting). Formal militia participation historically has been, and continues to be, explicitly gender-discriminatory. *See*, e.g., 10 U.S.C. § 311 (2006) (identifying militia members as able bodied males ages eighteen to forty-five, and female members of the national guard). This seems to be an equal or plainer violation of the equality argument. This reduces to the valuation argument because any value attached to the fetus is secondary to the woman's equality claim.

It is then difficult to escape the assessment that the standard position depends on a comparatively low valuation of the fetus. Is it principle or passion that explains this valuation? 292. *See*, e.g., 530 U.S. at 983–89 (2000) (Thomas, J., dissenting).
acknowledges, "our discussion may seem ... horrifying." The details of the assault weapon ballistics argument will strike some people the same way. Consider, for example, Dr. Martin Fackler's illustration of the comparatively less lethal characteristics of the assault weapon projectile: 

"[Assertions that assault weapon bullets are especially destructive] must cause the thinking individual to ask: ... how is it possible that twenty-nine children and one teacher out of thirty-five hit in the Stockton schoolyard survived ...?" Dr. Fackler's point is that assault weapons fire an intermediate round "designed to limit tissue disruption—to wound rather than kill." One response is that this large number of people would not have been shot but for the assault weapon. The rebuttal unfortunately is that the unilaterally armed assailant is at no practical disadvantage for having to top off or reload any of the other common firearms technologies. Defenseless people are no better off whether their assailant is using a continuously reloadable shotgun, 100-year-old lever-action rifle, or a revolver that takes seconds to reload. The broader point is that some may find this whole conversation as repulsive as others find Justices Breyer's and Stevens's arguments that D&X and D&E are so similarly grotesque that the state cannot rationally discriminate between the two. One wonders whether principles, constitutional or otherwise, can compete with the passions stirred by questions.

293. Id. at 923 (majority opinion).
294. See Kopel, supra note 40, at 169–70 (alteration in original).
295. Id. at 170.
298. I have long held the view that people react viscerally to the gun question and rarely change their position absent some cathartic event. I have viewed this mainly as a cultural phenomenon. The work of cognitive psychologists tracking the seats of different capabilities and emotions in the brain suggests another possibility—that it might be hard-wiring as much as culture that guides how we approach the gun question. Particularly interesting is the recognition that in our "reptile brain," the cerebellum controls more basic and automatic functions. See generally DANIEL J. LEVITIN, THIS IS YOUR BRAIN ON MUSIC: THE SCIENCE OF A HUMAN OBSESSION (2007), for a fascinating study of these general ideas. Could it be that the revulsion and fear that people experience viewing just a picture of a firearm keys into some hard-wired survival instinct? Or that the fascination others have with firearms reflects a different version of the same thing? Perhaps thinking about private weapons is a largely hard-wired response to perceived danger. See id.
2. **The Stenberg Dissents**

There are, of course, distinctions between the ideas that ground abortion and gun rights, but mainly those distinctions show that the abortion right is on more tenuous footing. This subsection elaborates those distinctions by reference to the dissenters' criticisms of the *Stenberg* majority.

a. **Kennedy in Dissent**

i. Government's Countervailing Interest: Promoting Respect for Human Life and the Impulse for Irrational Assault Weapon Definitions

Justice Kennedy argues that the majority fails to respect *Planned Parenthood of Southeastern Pennsylvania v. Casey,* in which the Court validated the state's substantial countervailing interest in "promot[ing] the life of the unborn and... ensur[ing] respect for all human life and its potential," and combating things that cause society to become "insensitive, even disdainful, to life." Justice Kennedy's lament comes closer to capturing the impulse for assault weapons bans than anything offered in legislative preambles.

Although assault weapon classifications make little sense functionally, they do successfully stigmatize fighting tools. This explains the typical exemptions for functionally identical guns (just as effective for fighting) that by appearance seem more like sporting tools. I have criticized this elevation of appearance over function as silly, but Justice Kennedy's "insensitivity to life" theme evokes a symbolism that renders assault weapon distinctions entirely understandable. A seminar student several years ago gave voice to it. In a deeply emotional reaction to a discussion of the irrational classifications in the 1994 ban, she said she did

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299. See Johnson, supra note 12.
301. *Id.* at 961.
302. It is almost too easy to criticize assault weapons bans for the absurd focus on pistol grips, bayonet lugs, and flash hiders that are irrelevant to function. Representative Carolyn McCarthy, sponsor of a House bill to renew the 1994 ban, was embarrassed on national television when asked by Tucker Carlson to explain what a barrel shroud was and why her bill proposed to ban them. See *Tucker* (MSNBC television broadcast Apr. 18, 2007), available at http://www.youtube.com/watch?v=ospNRk2uM3U. Pressed, she admitted that she did not know what a barrel shroud was: her guess was the sling or carrying strap. *Id.* Representative McCarthy ran for Congress after losing a loved one to the gunfire of a madman who shot people randomly on a Long Island Railroad train. Peter Marks, *Train Shooting Victim Speaks for First Time Since Injury,* N.Y. TIMES, Dec. 15, 1993, available at http://www.nytimes.com/1993/12/15/nyregion/train-shooting-victim-speaks-for-first-time-sinceinjury.html.

not want to be part of a society in which people owned assault weapons. It was irrelevant to her that two guns would kill the same way, that they were identical in function. It was vital to her that one gun by its appearance seemed clearly "intended" only for fighting! There was something wrong with a society that allowed such things and something wrong with people who owned them. Her essential anguish tracked Justice Kennedy's criticism. The appearance of the guns suggests we are insensitive to the value of life. Ignoring the root political calculations, this is the purest form of the impulse for assault weapons restrictions.

The answer to this is straightforward. Post-Heller, firearms for self-defense against criminal attackers are at the core of the Second Amendment right. The sporting-use designation, a key feature of federal importation rules that seeped into general questions of firearms legitimacy, is now just a vestige of the pre-Heller world. So while the impulse to ban assault weapons is understandably rooted in the symbolism of the sporting-use designation, Heller's protection of ordinary self-defense guns nullifies the sporting use filter and places self-defense utility at the center of the constitutional inquiry.

Justice Kennedy argues that the state has an interest in declaring critical moral differences between the permitted D&E and the restricted D&X procedures. The state, he says, need not be indifferent to a procedure that uses the natural delivery process to kill the fetus. This is a fair analogue to the argument that the state has an interest in preventing citizens from defending themselves with guns that look like weapons of war, and that "silly" distinctions based on appearance actually reflect important moral judgments.

One answer is that the distinctions used to classify some semiautomatic guns as assault weapons are hardly perceptible and others are nebulous. For example, one of the things necessary to make a prohibited gun legal under the 1994 ban was swapping internal parts like the foreign-trigger group for domestic parts. And for some people just the color and constituent materials of the gun (black and synthetic versus

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305. The 1994 ban was grounded partly in the pre-Heller focus on "sporting use" to define legitimacy. See Johnson, supra note 106, at 771-72. Post-Heller, with its explicit protection of arms ordinarily used for self-defense, the sporting-use designation recedes to the margins.
306. Stenberg, 530 U.S. at 964 (Kennedy, J., dissenting).
307. Id.
308. See Johnson, supra note 65, at 445.
309. Domestic parts were manufactured for precisely this purpose. See Brownells.com, AK-47 Trigger Group, http://www.brownells.com/aspx/pid=22875/Product/ (last visited June 10, 2009) ("Drop-in replacement for factory trigger . . . . Made in the U.S.A. to keep your gun in compliance with U.S. Code Title 18 Section 922(r) part-source requirements. Kit counts as three, U.S.-made parts—trigger, disconnector, and hammer. Single and double hook models available.").
wood and blued steel) may be the difference between sporting and menacing. More broadly, in the context of the full inventory of common firearms, the moral distinction is unsustainable. Is it plausible that guns easily secreted on the person (i.e., handguns, all of which have pistol grips) are morally superior to rifles with pistol grips? Are high-powered rifles that can produce sure kills on human targets at hundreds of yards (essentially every deer rifle ever made) morally superior to lower-powered carbines with adjustable stocks (e.g., the AR-15)? Why are semiautomatic repeaters in intermediate calibers reprehensible but high-caliber semiautomatic, pump-, or lever-action hunting guns, and multi-projectile shotguns morally benign?

My emotional student's revulsion against the assault weapon is a tenuous platform for building policy. But if assault weapons bans are to be sustained, it is something like that revulsion that must be elevated to a countervailing state interest. Compared to the state interest in the partial-birth abortion case—restricting a procedure that borders on infanticide—it seems quite trivial.

ii. Private Judgments and Public Morality

Justice Kennedy contends that the judgment of the doctor about the necessity of D&X to preserve life or health of the mother puts a public judgment into private hands—that "it is now Dr. Leroy Carhart who sets abortion policy for the State of Nebraska, not the legislature or the people." On a question steeped in "morality," Justice Kennedy says it is wrong to make this an individual subjective decision.

Contrast the assault weapons case where the mere assertion by the right-bearer that a particular technology is better for him (the equivalent of Justice Kennedy's complaint about Dr. Carhart) is only secondary evidence of SMU. For assault weapons, the primary claim of SMU is objective, based on distinctions in ballistics, recoil, and rate of fire that are mechanical, repeatable, and precisely measurable.

iii. Rights on the Border of Legitimacy and the State Interest at Its Peak

Justice Kennedy emphasizes that the disputed D&X procedure is effective only when the fetus is nearly or actually viable, a point where the state's interest in fetal life is nearing its peak and the woman's claim is weakest. He emphasizes Dr. Carhart's admission that he performs

311. Stenberg, 530 U.S. at 965 (Kennedy, J., dissenting).
312. Id. at 964-65.
313. See id. at 968.
D&X abortions even "when he is unsure whether the fetus is viable" and argues that dispatching the viable fetus through the prohibited D&X procedure borders on infanticide because the abortion proceeds essentially as a live birth until the fetus is destroyed. He argues essentially that D&X is categorically different from other abortion procedures.

The assault weapons question avoids this criticism. There is no comparable argument that the assault weapon user is any different from someone who has used a handgun or other unquestionably constitutionally-protected gun in self-defense. It is the circumstances, not the gun type, that determine whether the self-defense claim is legitimate. On this measure, the assault weapons claim is stronger. D&X, and arguably even the less controversial D&E procedure, produces a qualitatively distinct type of destruction because the fetus has grown to look more human, is perhaps viable outside the womb, and is destroyed in a fashion where analogies like drawing and quartering seem fair.

A different argument is that the assault weapon in criminal hands generates externalities qualitatively different from other guns in the civilian inventory. The utility discussion above shows that while every type of gun has its SMUs, the utility that imposes the highest externalities is the concealability of handguns. Moreover, most assault weapons are less lethal than deer rifles, and their multishot capability is exceeded by the ubiquitous shotgun. The complaint about their appearance reflects an uneasiness about making self-defense against fellow citizens a central component of public policy. But now that Heller has done just that, the objection to "nonsporting," overtly self-defensive guns is unsustainable.

iv. Incorporating Substantial Countervailing Interests

Justice Kennedy argues that Stenberg violates Casey by establishing a right to partial-birth abortion without any interference from the state. People will debate this construction, but it highlights an important point. Casey acknowledged the substantial state interest in potential life throughout pregnancy, declaring that "not all regulations must be deemed unwarranted."

This prompts an instructive comparison with Heller, which broadly affirms the state’s interest in regulating firearms externalities. Heller says

314. Id. at 958.
315. Id. at 959-60.
317. See Kopel, supra note 40, at 164-67.
318. See Stenberg, 530 U.S. at 960-61 (Kennedy, J., dissenting); see also id. at 1012 (Thomas, J., dissenting) (levying essentially the same criticism that by ceding authority to the physician to apply the health exception, the majority mandates “unfettered abortion on demand”).
that most existing gun-control regulations remain valid, that laws restricting access by felons and minors are not suspect, and that functionally distinct guns like machine guns might not be protected.\textsuperscript{320} That the Court has limited Second Amendment protection to guns in common use for lawful purposes like self-defense by definition denies citizens access to substantially all of the military arsenal.\textsuperscript{321} In this sense \textit{Heller} already endorses a broader range of government regulation than \textit{Stenberg} would tolerate in the abortion context. Under the logic of \textit{Stenberg}, essentially every type of abortion procedure is guaranteed if deemed necessary to save the mother’s life.\textsuperscript{322} \textit{Heller}, on the other hand, declares that only a narrow range of common firearms are guaranteed under the Second Amendment, and that many people by their behavior or their status can be denied even those.\textsuperscript{323}

v. De Minimis Special Marginal Utilities

Justice Kennedy contends that the majority is “wrong to limit its inquiry to the relative physical safety of the two procedures, with the slightest potential difference requiring the invalidation of the law.”\textsuperscript{324} The majority is straightforward about this. Alternatives to the D&X procedure were found by the district court actually to be safe and adequate, respecting at a reasonable level the woman’s interest in having a safe procedure.\textsuperscript{325} However, the prevailing argument was that the prohibited procedure was \textit{safer} than other safe ones.\textsuperscript{326} Women are entitled to the better methodology, even where that means destruction of the entirely innocent postviability fetus through a very problematic methodology.\textsuperscript{327}

The argument that the special utilities of assault weapons can be adequately replaced by other constitutionally protected firearms is essentially the same. \textit{Stenberg} principles dictate that the state may not ban assault weapons on the argument that alternate firearms exist, so long as the assault weapon provides an advantage. On this point as well, the assault weapons claim is comparatively stronger. There is substantial dispute about the special utility of the D&X procedure, with competing views plagued by subjective judgments.\textsuperscript{328} The assault weapons case, in contrast, turns on verifiable physical characteristics already discussed.

\textsuperscript{320} 128 S. Ct. at 2816–17.
\textsuperscript{321} \textit{Id.} at 2817.
\textsuperscript{322} \textit{See Stenberg}, 530 U.S. at 961 (Kennedy, J., dissenting).
\textsuperscript{323} 128 S. Ct. at 2816–17.
\textsuperscript{324} \textit{Stenberg}, 530 U.S. at 967 (Kennedy, J., dissenting).
\textsuperscript{325} \textit{Id.} at 914, 915 (majority opinion).
\textsuperscript{326} \textit{Id.} at 928–29.
\textsuperscript{327} \textit{See id.}
\textsuperscript{328} \textit{Id.} at 926–29.
vi. Letting the State Take Sides in Utility Disputes

Justice Kennedy criticizes the majority for ignoring precedent that in other contexts permitted states to take sides on disputed medical questions. In the assault weapons case, this principle would demand a detailed evaluation and deference to the state where there is fair disagreement about assault weapons' externalities. The showing would focus on the objective evidence of functionality. Faked photo-ops and wild assertions about super-destructive assault weapon bullets would diminish the state's position. And here, the interesting question is whether Justice Kennedy would defer to credible state findings that assault weapons impose important net externalities. Unwillingness to defer would expose him to the attitudinalist critique.

b. Thomas in Dissent

i. Highlighting the Partial-Birth Abortion/Assault Weapon Intersection

Justice Thomas argues that the Stenberg majority goes beyond what is required to protect the mother's health. He contends that the majority fails "to distinguish between cases in which health concerns require a woman to obtain an abortion and cases in which health concerns cause a woman who desires an abortion (for whatever reason) to prefer one method over another."

This highlights the space where the abortion and gun claims intersect and is another illustration of their relative strength. The Stenberg abortion right is strongest—near absolute—where necessary to preserve the life or health of the mother. The mother is never required to surrender her life to the state's interest in the life of the fetus. This is pure abortion as self-defense claim in the style of Judith Thomson and Donald Regan. But this self-defense analogy only covers the small fraction of abortion claims where the mother's life is at stake. In contrast, essentially every gun claim to the better methodology for self-defense invokes the principle (controlling in Stenberg) that the state cannot trump the right-bearer's interest in preserving her own life. So over a far broader range of cases, the gun claim is covered by the strongest rendition of Stenberg's protection of methodological alternatives.

329. Id. at 971–72 (Kennedy, J., dissenting).
331. 530 U.S. at 1010 (Thomas, J., dissenting).
332. Id.
333. See supra Part III.A.
334. See supra Part III.A; see also Johnson, supra note 196, at 102–15 (critiquing the positions advanced by Regan and Thomson).
335. Compare Stenberg, 530 U.S. at 980 (Thomas, J., dissenting) (making several other discrete points that highlight the intersection, by summarizing the basic case that the abortion right is not supported in the text of the Constitution), with Johnson, supra note 12, at 138–60 (weighing the textual...
ii. Tolerating Infringements at the Margin

Justice Thomas’s criticism that the majority has overridden important state interests to protect a marginal, even reprehensible, abortion methodology highlights another important distinction that makes assault weapons a stronger case under Stenberg principles than partial-birth abortion.\(^{336}\) His first point is that this is not like Planned Parenthood of Central Missouri v. Danforth, which outlawed a procedure used in 70% of abortions after twelve weeks.\(^{337}\) His view of the Court’s abortion decisions is that banning a widely used methodology is problematic, but infringements at the margin can be tolerated.\(^{338}\)

The gun parallel is evident. Under Justice Thomas’s view, it would be problematic to ban handguns because they are so widely used for self-defense.\(^{339}\) The assault weapon, in contrast, is like the more rarely used abortion methodologies. In principle, then, Justice Thomas’s willingness to tolerate infringements at the margin—on the view that the core right is intact—should predict his response to an assault weapons ban. Is he trapped by inconsistency if he votes to strike down an assault weapons ban and rejects the argument that adequate alternative guns are available?

The answer is in the details of his Stenberg dissent. Thomas invokes Danforth to press the point that D&X is not only rarely used (it is only considered in 5.5% of abortions that occur after fifteen weeks, the vast majority of which are performed using the D&E alternative)\(^{340}\) but that “[a] select committee of [the American College of Obstetricians and Gynecologists] ‘could identify no circumstances under which this procedure...would be the only option.’”\(^{341}\) So, unlike the majority, Justice Thomas concludes from the empirical debate that there is “no basis upon which to state the claim that [partial-birth abortion] is a safer or even a preferred procedure.”\(^{342}\) In his view, the SMUs of D&X is zero, and its externalities (flirting with infanticide) are off the scale.\(^{343}\) In

\(^{336}\) Stenberg, 530 U.S. at 1014 (Thomas, J., dissenting).

\(^{337}\) See 428 U.S. 52, 75-76 (1976).

\(^{338}\) Stenberg, 530 U.S. at 1014 (Thomas, J., dissenting).

\(^{339}\) See, e.g., Kleck, supra note 192, at 185.

\(^{340}\) Stenberg, 530 U.S. at 1015 (Thomas, J., dissenting).

\(^{341}\) Id.

\(^{342}\) Id. at 1016.

\(^{343}\) Id. at 1020.
contrast, the assault weapon claim presents strong objective evidence of SMU. His answer, then, to the attitudinalist critique would be that there is a broad empirical disanalogy favoring the assault weapons claim and disfavoring partial-birth abortion. Even though they reside in similarly contested space, on this point the greater SMUs of the assault weapon makes the two claims very different cases.\textsuperscript{344}


In 2007, Court conservatives upheld a federal partial-birth abortion ban that distinguished and diminished Stenberg.\textsuperscript{345} In Gonzales v. Carhart, the Court credited congressional findings that "intact D&E" (i.e., D&X) is never the better methodology for preserving the life or health of the mother.\textsuperscript{346} Gonzales exposes the conservative wing of the Court to the attitudinalist critique. It reflects one leg of what I will call the "common view" of conservatives (i.e., support for gun rights and disparagement of abortion rights). While Heller nominally reflects the other leg, the better and more instructive test of the attitudinalist proposition would be an assault weapons case invoking the Stenberg principles that conservatives opposed.\textsuperscript{347} However, that case still would not be as open and telling a test of conservative attitudinalism as Stenberg is for Court liberals.

The reason is in the distinction that has been evident throughout this critique. Gonzales underscores the conclusion that the common view faces a far lighter burden of principle than the standard position. This is a function of the factual distinctions between the partial-birth abortion and assault weapons claims. Those distinctions are illustrated broadly by my original assessment in Principles and Passions,\textsuperscript{348} and more particularly here. The discussion below will elaborate the relative burdens of the standard position and the common view by emphasizing elements of the assault weapons claim that make the common view easier to sustain as a matter of principle.\textsuperscript{349}

\textsuperscript{344} Kopel, supra note 38. The assault weapon presents SMUs in terms of ballistics and recoil that can be measured to decimal places. See supra Part II. The assault weapon's lower lethality actually complements the state interest in reducing externalities. See supra Part II. The significance of this reduced lethality (and the arguable irrationality of a restriction that fails to account for it) should be understood in contrast to the advanced lethality of guns expressly identified as legitimate (e.g., most medium to large game hunting rifles in a variety of repeating technologies). See supra Part II.

\textsuperscript{345} See Gonzales v. Carhart, 127 S. Ct. 1610, 1619 (2007).

\textsuperscript{346} Id. at 1644.

\textsuperscript{347} See supra Part III.B.2.a–b (discussing dissents of Justices Kennedy and Thomas, criticizing the adequacy of a peppercorn of SMUs and protection of methodologies rarely necessary to protect life or health).

\textsuperscript{348} Johnson, supra note 12.

\textsuperscript{349} I do not claim that this would satisfy the attitudinalist who might always dismiss articulated principles as just byplay or "worse than useless" bunk. See Dorf, supra note 22, at 500.
a. Partial-Birth Abortion as a Transformative Methodology

Writing for the majority, Justice Kennedy suggests partial-birth abortion is an appropriate object of legislative attention because it is a qualitatively different, indeed transformative, methodology. The D&X procedure is distinct even from D&E because the relative similarity of D&X to the actual birth process transforms it from a legitimate abortion procedure into something just short of assault on a human child.

Nothing about the assault weapon, or using assault weapons for self-defense, is similarly transformative. The assault weapon is a gun, like other guns. It is deadly, like other guns. But it is demonstrably not the most dangerous gun in the inventory of common firearms. It does not impact targets in a different, somehow more reprehensible way. Legitimate acts of self-defense are not rendered illegitimate because the defender uses an AR-15 instead of a handgun. So unlike partial-birth abortion, on this test of legitimacy, the assault weapon survives.

b. Disputed Utility and Legislative Discretion

Integral to the outcome in Gonzales is the majority's willingness to credit the legislature's judgment that there is overriding evidence of disutility: the contested statute was grounded on a congressional finding that partial-birth abortion is never the best methodology for preservation of the life or health of the mother. Justice Kennedy dissented in Stenberg that legislatures should be permitted to take sides in this fashion. Gonzales enforces that view. Acknowledging the dispute about the utility of D&X, the majority finds the case close enough to defer to Congress.

There is documented medical disagreement whether the Act's prohibition would ever impose significant health risks on women.

The question becomes whether the Act can stand when this medical uncertainty persists. The Court's precedents instruct that the Act can survive this facial attack. The Court has given state and federal

350. See Gonzales, 127 S. Ct. at 1634-35 ("Partial-birth abortion, as defined by the Act, differs from a standard D&E because the former occurs when the fetus is partially outside the mother to the point of one of the Act's anatomical landmarks."); see also Stenberg v. Carhart, 530 U.S. 914, 1006-07 (2000) (Thomas, J., dissenting) ("The American Medical Association has recognized that this procedure is 'ethically different from other destructive abortion techniques because the fetus, normally twenty weeks or longer in gestation, is killed outside the womb. The 'partial birth' gives the fetus an autonomy which separates it from the right of the woman to choose treatments for her own body.'" (quoting Brief for Ass'n of American Physicians & Surgeons et al., supra note 235)).

351. See Kopel, supra note 40, at 164-67.

352. 127 S. Ct. at 1624.

353. See 530 U.S. at 971-72 (Kennedy, J., dissenting).

354. Gonzales, 127 S. Ct. at 1637 ("On the one hand, the Attorney General urges us to uphold the Act on the basis of the congressional findings alone. Although we review congressional fact-finding under a deferential standard, we do not in the circumstances here place dispositive weight on Congress' findings. The Court retains an independent constitutional duty to review factual findings where constitutional rights are at stake." (citation omitted)).
legislatures wide discretion to pass legislation in areas where there is medical and scientific uncertainty. . . .

. . .

Medical uncertainty does not foreclose the exercise of legislative power in the abortion context any more than it does in other contexts. . . .

The conclusion that the Act does not impose an undue burden is supported by other considerations. Alternatives [for example, D&E] are available to the prohibited procedure. . . .

. . .

. . . Considerations of marginal safety, including the balance of risks, are within the legislative competence when the regulation is rational and in pursuit of legitimate ends. 355

The Court does not entirely credit the congressional assessment. 356 But it does find the state interest sufficient to trump the essentially de minimis assertions of partial-birth abortion special utility. 357 This explicitly undercuts Stenberg and, more importantly for our purposes, exposes the Gonzales majority 358 to the attitudinalist critique. So would the Gonzales majority defer to legislative findings that assault weapons have no SMUs or are never the better self-defense option? If not, would they simply be indulging the common view of the right? Or can such a decision be justified as a matter of principle? This dilemma is structurally parallel to that afflicting Court liberals, but quantitatively it is quite different.

First, the deference in Gonzales is in the context of doctors' subjective preferences for competing medical procedures. 359 In contrast, the assault weapons question is more plainly a matter of measurable physical differences. In terms of functional utility, there is far less room to establish a parallel empirical disagreement about the assault weapon. For example, the core measurable utility of intermediate ballistics is indisputable. 360

Still, the emphasis on the wide discretion the Court has permitted legislatures on questions of disputed medical utility 361 poses for the Gonzales majority a threshold burden of principle in the assessment of subsequent assault weapons bans. Justices who in Gonzales endorsed

355. Id. at 1636–38 (citations omitted).
356. Id. at 1637–38.
357. Id. at 1638–39.
358. The Gonzales majority was made up of the same five Justices who voted in the Heller majority.
359. See supra Part III.B.2.b (noting that the entire utility is grounded in conflicting testimony by medical experts about the usefulness of D&X to the abortion doctor).
360. See, e.g., Kopel, supra note 40, at 168–69.
361. See Gonzales, 127 S. Ct. at 1636.
deference to the legislature on disputed medical questions must take pains to show that the assault weapons claim is not exposed to the same type of subjective empirical dispute—that assault weapon SMUs are objectively measurable and that distinct assault weapons features will operate both as SMUs or externalities purely depending on the user. These distinctions are more than plausible but present a difference of degree, not substance. Committed attitudinalists still might say it is all just a smokescreen for conservatives advancing the common view.

c. Dominant Methodologies and Methodological Alternatives

Like Stenberg, Gonzales affirms that a broad ban on dominant methodologies for exercising the protected right would be unconstitutional. But unlike Stenberg, Gonzales permits limitations on rarely-used methodologies where good alternatives are available. Extending that principle to the gun case, a sweeping handgun ban should be treated the same as a sweeping early-term-abortion ban. Both statutes should be struck down because they prohibit the dominant methodology for exercising the protected right. The assault weapon, however, is like the D&X procedure under Gonzales—a less common methodology that has substitutes—with an important difference. For some people, the light recoil from the intermediate cartridge makes the assault weapon always the best self-defense tool. This showing would remove the “available alternatives” element that justified the infringement on marginal

362. See supra note 138 and accompanying text (discussing the regulatory paradox).
363. See Gonzales, 127 S. Ct. at 1637.
364. Id.

The instant cases, then, are different from Planned Parenthood of Central Mo. v. Danforth, in which the Court invalidated a ban on saline amniocentesis, the then-dominant second-trimester abortion method. The Court found the ban in Danforth to be “an unreasonable or arbitrary regulation designed to inhibit, and having the effect of inhibiting, the vast majority of abortions after the first 12 weeks.” Here the Act allows, among other means, a commonly used and generally accepted method, so it does not construct a substantial obstacle to the abortion right.

Id. (citation omitted) (quoting Planned Parenthood of Cent. Mo. v. Danforth, 428 U.S. 52, 79 (1976)).
365. David Kopel puts the point in human terms:

One evening, a gang brawl broke out in the street next to the northwest Denver home of a young woman named Sharon Deatherage. A police car happened upon the scene, and sped away without taking any action, never to return. As a result of this experience, the young woman, who lived alone, decided that she would have to take measures to protect herself because she could not rely on the Denver City government for protection. Because of an injury to her wrist, she was unable to use a handgun. At the suggestion of a firearms instructor, she bought an M-1 carbine, which is a relatively small, low-powered semiautomatic rifle, and which has been commercially available for nearly half a century. Not long after she bought the weapon, the City of Denver turned Ms. Deatherage into a criminal by declaring her M-1 carbine and its attached 30-round ammunition magazine an illegal “assault weapon.”

Kopel, supra note 38, at 381 (footnote omitted). As the example illustrates, someone who wants a gun for self-defense but is physically unable to use a handgun must choose another suitable gun. The M-1 carbine assault rifle is perhaps the lowest-recoiling gun firing a cartridge still suitable for self-defense, making it and other low-recoil assault weapons the best available option for self-defense. Id.
methodologies in Gonzales. It also would provide cover to the conservative wing of the Court in a subsequent assault weapons case that had to explain why infringement on marginal methodologies was acceptable in the abortion context (Gonzales) but not in the gun case. As legal distinctions go, it seems fair. Whether it would satisfy the committed attitudinalist is a tougher question.

d. Rejecting Physicians' Subjective Valuations

Justice Kennedy dissented in Stenberg that the majority turned individual doctors into arbiters of community morality. Gonzales gives that objection constitutional effect: "The law need not give abortion doctors unfettered choice in the course of their medical practice, nor should it elevate their status above other physicians in the medical community." Furthermore, "[w]hen standard medical options are available, mere convenience does not suffice to displace them; and if some procedures have different risks than others, it does not follow that the State is altogether barred from imposing reasonable regulations." So the preferences of individual doctors will not be dispositive on the question of methodological utility.

The assault weapons comparison yields two separate points. Throughout the discussion of Stenberg, I have emphasized that assertions of partial-birth abortion utility were primarily subjective (grounded in the surgical preferences of particular doctors) while the primary SMUs of the assault weapon were objectively measurable. However, as discussed above, the assault weapon presents a variety of "subjective" SMUs as well. Conceivably, one or more of those factors might be central to a particular aspect of a future assault weapons dispute. In a case like that, Justice Kennedy's treatment of subjective SMU claims would invite an attitudinalist challenge.

e. Disputed Utility and Facial Attacks

Justice Kennedy explains that the questionable utility of partial-birth abortion, supplemented by the congressional finding that it is never the best alternative, makes the statute particularly unsuited to facial attack. The problem is better suited to an as-applied challenge:

The Act is not invalid on its face where there is uncertainty over whether the barred procedure is ever necessary to preserve a woman's health, given the availability of other abortion procedures that are considered to be safe alternatives.

366. 127 S. Ct. at 1636.
368. 127 S. Ct. at 1636.
369. Id. at 1638.
370. See discussion supra Part II.B.1.
371. See discussion supra Part II.B.2.
The considerations we have discussed support our further determination that these facial attacks should not have been entertained in the first instance. In these circumstances the proper means to consider exceptions is by as-applied challenge.373

This view imposes a substantial burden of principle on Court conservatives. It is not at all clear that the quantitative differences between the partial-birth abortion and assault weapons claims dictate a different outcome on the facial challenge question. So a subsequent facial attack on assault weapons legislation would be telling. Justice Kennedy's suggestion that an as-applied challenge gives the Court a better opportunity to quantify and balance utility and risk is easily applicable to the assault weapons question. But broadly speaking this is always the case. So there still is room to answer that the facial challenge comparison really is not close, as shown by comparing the respective claims of special utility.374

Evaluation of assault weapons under the abortion standard for facial challenges is complicated by the Court's failure to articulate a precise standard. The Gonzales majority explains, "What [the facial challenge] burden consists of in the specific context of abortion statutes has been a subject of some question. We need not resolve that debate."375 Justice Kennedy acknowledges two possible views: that a facial challenge to an abortion statute "must show that no set of circumstances exists under which the Act would be valid,"376 or that the legislation would be "unconstitutional in a large fraction of relevant cases."377

So a facial challenge in the equivalent assault weapons case might require a showing that no set of circumstances exists under which the ban would be valid. This is an extremely demanding standard that, taken literally, seems to credit almost any scenario the government can articulate. So even though assault weapons claimants might make powerful arguments that a facial challenge to an assault weapons ban is a far stronger case, a facial challenge sustained by conservatives still would

373. Id. at 1638.

The Government has acknowledged that preenforcement, as-applied challenges to the Act can be maintained. This is the proper manner to protect the health of the woman if it can be shown that in discrete and well-defined instances a particular condition has or is likely to occur in which the procedure prohibited by the Act must be used. In an as-applied challenge the nature of the medical risk can be better quantified and balanced than in a facial attack.

Id. at 1638–39 (citation omitted).

374. This comparison pits the strong argument, that partial-birth abortion is never the best alternative, against the assault weapon's objectively measurable SMUs and assault weapons bans' irrational attribution of dangerous qualities to features that only affect appearance.

375. 127 S. Ct. at 1639 (citation omitted).

376. Id.

377. Id.
invite the strong attitudinalist challenge of unprincipled capitulation to the conservative common view.

On the second, weaker standard, Justice Kennedy argues in Gonzales that respondents failed to demonstrate that the ban would be unconstitutional in a large fraction of relevant cases. On that measure the assault weapons claim is dramatically stronger, and this underscores a distinction I have made throughout. The strongest arguments in favor of abortion (i.e., abortion as self-defense) only cover a very narrow slice of all abortions (because most pregnancies do not threaten the life of the mother). In contrast, nearly every assault weapons claim can fairly assert the right-bearer’s entitlement to the SMUs necessary to defend life against wrongful aggressors. Here, the assault weapons claim is sufficiently distinct and compelling that the Court might consider the assault weapons question facially, without the criticism of unprincipled capitulation to the common view.

CONCLUSION

One can on a principled basis elevate the state’s interest above the individual’s interest on questions of self-defense and abortion. One can on a principled basis subordinate the state’s interest in both. One can on a principled basis elevate the gun right but not the abortion right (because the competing life-interest in the abortion context is entirely innocent and in only a fraction of cases is the mother’s life at stake, while the right-bearer’s life is always at stake in the self-defense case). But a principled argument has yet to be made for elevating the abortion right but subordinating the gun right. Attitudinalists tell us it is folly to expect adherence to principle on such matters. If and when an assault weapons case reaches the Supreme Court, it will be an important test of whether the attitudinalists are correct.

378. Id. ("We note that the statute here applies to all instances in which the doctor proposes to use the prohibited procedure, not merely those in which the woman suffers from medical complications.").
379. See supra Part III.A.
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