TAKE YOUR GUNS TO TOWN: EXPANDING THE SCOPE OF THE SECOND AMENDMENT BEYOND THE HOME

INTRODUCTION

In 2008, the Supreme Court of the United States concluded that the Second Amendment protects an individual right to keep and bear arms as applied to the federal District of Columbia.[1] Two years later, the Court incorporated that individual right through the Fourteenth Amendment.[2] Yet the statutes struck down in these two cases dealt only with the in-home possession of handguns; the question of whether the United States Constitution protects the right to keep and bear arms outside the home remains undecided. In both of the aforementioned decisions, the Supreme Court found that self-defense is at the core of the Second Amendment. While some lower courts maintain that the Second Amendment disappears at the threshold, others argue that the right to carry a firearm extends outside of a residence.

The courts remain undecided regarding what level of scrutiny should be applied to statutes which ban carrying a firearm in public. This Comment advances the idea that since this right is fundamental, strict scrutiny should be applied with differing applications based on varying state interests.

Drawing on parallels between the First, Second, and Fourth Amendments is a useful tool in constructing the Second Amendment's boundaries outside the home. For instance, the protections of speech afforded by the First Amendment do not disappear once Americans venture outside their houses. Substantial speech protections exist in public, with even greater protections while inside of the home. Similarly, the Fourth Amendment, with the home also at its zenith, nonetheless provides citizens with substantial protections outside their homes. In keeping with both, the same principle should hold true with the Second Amendment; the right to self-defense should not disappear once outside the home. While the Second Amendment may not protect the open carrying of rocket launchers or bazookas in public, it certainly protects the law-abiding citizen's right to carry a handgun for personal protection.

This Comment argues that the Second Amendment, while at its apex inside the home, offers substantial protections outside the

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[1] District of Columbia v. Heller, 554 U.S. 570 (2008).

[2] McDonald v. City of Chicago, 130 S. Ct. 3020 (2010).

home. Part I discusses the two seminal Supreme Court cases which set the groundwork for modern Second Amendment jurisprudence—*District of Columbia v. Heller* and *McDonald v. City of Chicago.* Part II analyzes two recent lower court decisions that expressly held that the Second Amendment's core of self-defense protections extends outside the home.

Part III divides the argument into two main sections. Section A is separated into three parts: Text, Policy, and Precedent. The "Text" subsection examines the words of the Second Amendment and distinguishes "bear" from "keep" as two separate and distinct rights. The "Policy" subsection discusses the idea that self-defense is the core of the Second Amendment, with many states having expanded those rights beyond the Castle Doctrine and liberalizing when a law-abiding citizen can use deadly force in public. The "Precedent" subsection argues that comparing the Second Amendment to the First and Fourth Amendments is useful in determining the scope of the right to keep and bear arms. Particularly, both the First and Fourth Amendments offer substantial protections outside the home yet operate at their pinnacle inside the home.

Section B insists that since the Second Amendment is a fundamental right and applies outside the home, courts should apply strict scrutiny to any infringements of the right. Finally, Part IV applies a strict scrutiny test to hypothetical statutes that would prohibit certain types of weapons inside and outside the home.

I. THE SUPREME COURT AND THE SECOND AMENDMENT

A. District of Columbia v. Heller*: The Second Amendment as an Individual Right*

Dick Heller worked as a special police officer at the Thurgood Marshall Judiciary Building in Washington, D.C.[3] Heller legally carried a handgun while on the job.[4] Wanting to be able to keep

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[3] District of Columbia v. Heller, 554 U.S. 570, 575 (2008).

[4] *Id.*

that handgun in his home, Heller attempted to get a registration certificate.[5] When the authorities denied the certificate, Heller filed suit.[6] The District Court dismissed Heller's argument but the Court of Appeals for the District of Columbia Circuit reversed, holding that the Second Amendment protects an individual right.[7] The Supreme Court granted certiorari.[8]

Writing for the Court, Justice Scalia began the opinion by discussing the linguistic makeup of the Second Amendment.[9] Comparing the language of the Second Amendment to the First and Fourth Amendments, Justice Scalia found that the language "unambiguously refer[s] to individual rights, not 'collective' rights . . . ."[10] Justice Scalia commented that the core of that individual right is "to possess and carry weapons in case of confrontation."[11] Through a study of the post ratification period, pre-Civil War cases and post-Civil War legislation and commentary, Justice Scalia contended that the right to keep and bear arms existed separate from any militia requirement.[12]

Next, the Court focused on what types of arms the Second Amendment protects.[13] At the time of ratification, "'weapons used by militiamen and weapons used in defense of person and home were one and the same.'"[14] Yet, the Court recognized that certain *unusual* weapons could be constitutionally regulated.[15] This category includes those "weapons not typically possessed by law-abiding citizens for lawful purposes . . . ."[16] Justice Scalia refers to

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[5] *Id.*

[6] *Id.* at 575-76.

[7] *Id.* at 576.

[8] *Id.*

[9] *Id.* at 576-603. Justice Scalia examined the operative clause's language: "Right of the [P]eople," "[K]eep and [B]ear Arms." *Id.* The Court also details the history of the prefatory and operative clauses in light of how such language was used at the time of ratification. *Id.*

[10] *Id.* at 579.

[11] *Id.* at 592.

[12] *Id.* at 605-20.

[13] *Id.* at 619-26. Much of this section of the case involves Justice Scalia arguing against Justice Stevens's misreading of *United States v. Miller*, 307 U.S. 174 (1939).

[14] *Heller*, 554 U.S. at 625 (citing State v. Kessler, 614 P.2d 94, 98 (1980)).

[15] *Heller,* 554 U.S. at 625, 627. An example would be a short-barreled shotgun. *Id.*

[16] *Id.* at 625.

this category as those weapons that are not "in common use . . . ."[17]

After finding that the Second Amendment protects an individual right and applies to weapons in common use, the Court then evaluated the District of Columbia's handgun law.[18] The Court found the law problematic on several grounds. The first such ground was that self-defense is at the core of the Second Amendment, especially in a private home.[19] And, secondly, Americans choose handguns as the preferred firearm for self-defense.[20] Since the District's law banned private possession of a functional handgun inside the home, the law failed "constitutional muster."[21]

B. McDonald v. City of Chicago*: Incorporating the Individual Right to Keep and Bear Arms to the States*

Like Dick Heller, Otis McDonald and three other Chicago residents wanted to keep handguns in their homes for self-defense.[22] Much like the restrictions addressed in *Heller*, Chicago banned possession of unregistered firearms while at the same time prohibiting the registration of handguns.[23] Thus, Chicago effectively banned the private possession of handguns.[24] McDonald brought suit challenging the ban, but the District Court and Seventh Circuit upheld the regulation.[25] The Supreme Court granted certiorari.[26] Petitioners for McDonald based their claims on two Fourteenth Amendment grounds—the Privileges or Immunities Clause and the Due Process Clause.[27] Justice Alito, writing for the Court in *McDonald*, noted that the Due Process

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[17] *Id.* at 627.
[18] *Id.* at 628.
[19] *Id.*
[20] *Id.*
[21] *Id.* at 629. Justice Scalia refers to handguns as the "quintessential self-defense weapon." *Id.* at 629.
[22] McDonald v. City of Chicago, 130 S. Ct. 3020, 3026 (2010).
[23] *Id.*
[24] *Id.*
[25] *Id.* at 3027.
[26] *Id.* at 3028.
[27] *Id.*

Clause is the settled method of incorporation for the Fourteenth Amendment.[28]

Justice Alito wrote that to decide whether the Second Amendment should be incorporated, the Court must determine "whether the right to keep and bear arms is fundamental to *our* scheme of ordered liberty" and whether the right is "'deeply rooted in this Nation's history and tradition . . . .'"[29] Reiterating *Heller's* finding that self-defense is at the core of the Second Amendment, Justice Alito noted that the "right to keep and bear arms was considered no less fundamental by those who drafted and ratified the Bill of Rights."[30] After discussing the Second Amendment in the decades leading up to the Civil War, Justice Alito then focused on the fact that the right to keep and bear arms was considered fundamental at the time of the ratification of the Fourteenth Amendment.[31] In sum, Alito opined that "it is clear that the Framers and ratifiers of the Fourteenth Amendment counted the right to keep and bear arms among those fundamental rights necessary to our system of ordered liberty."[32]

The City of Chicago argued that the Second Amendment should be treated differently because the right to own firearms implicates public safety.[33] Justice Alito disposed of this argument quickly, noting that the exclusionary rule and *Miranda* often involve letting dangerous felons back into society—also affecting public safety—but are still protected by the Constitution.[34] The Court also rejected the city's claim that incorporating the Second Amendment would lead to costly litigation.[35] In the end, the Court held that "the Due Process Clause of the Fourteenth Amendment incorporates the Second Amendment right recognized in *Heller*."[36]

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[28] *Id.* at 3030-31.

[29] *Id.* at 3036 (quoting Duncan v. Louisiana, 391 U.S. 145, 149 and Washington v. Glucksberg, 521 U.S. 702, 721 (1997)).

[30] *Id.* at 3037.

[31] *Id.* at 3041.

[32] *Id.* at 3042.

[33] *Id.* at 3045.

[34] *Id.*

[35] *Id.* at 3047.

[36] *Id.* at 3050.

II. LOWER COURTS EXTENDING THE SECOND AMENDMENT OUTSIDE THE HOME

A. Moore v. Madigan*: Seventh Circuit*

Two years following the Supreme Court's decision in *McDonald*, the Seventh Circuit expanded the scope of the Second Amendment to outside of the home.[37] Judge Posner, writing for the court, examined an Illinois statute that banned the carrying of a gun that is readily accessible in public.[38]

Drawing from arguments in *Heller*, Judge Posner contended that since the core of the Second Amendment is to keep and bear arms for self-defense in case of confrontation, such situations are not limited to inside the home.[39] The Seventh Circuit also recognized the deterrent effect to criminals if more people are armed.[40] After examining various empirical studies relating to guns and crime rates, Judge Posner pointed out that "the Supreme Court made clear in *Heller* that it wasn't going to make the right to bear arms depend on casualty counts."[41]

In striking down the ban, the Seventh Circuit failed to articulate a level of scrutiny.[42] Instead, Judge Posner simply stated that Illinois failed to meet its burden in justifying the most restrictive gun regulation in the country,[43] and that the right of self-defense is just as needed outside the home as it is inside.[44]

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[37] Moore v. Madigan, 702 F.3d 933 (7th Cir. 2012).

[38] *Id.* at 934.

[39] *Id.* at 935-36.

[40] *Id.* at 937, 939.

[41] *Id.* at 939. Judge Posner noted that Illinois was the last state to ban absolutely the carrying of a gun in public. *Id.* at 940.

[42] *Id.* at 941.

[43] *Id.* The court does give a hint that a level above rational basis would be needed to justify such a ban: "Illinois had to provide us with more than merely a rational basis for believing that its uniquely sweeping ban is justified by an increase in public safety." *Id.* at 942.

[44] *Id.* at 941.

B. People v. Aguilar*: Supreme Court of Illinois*

In 2013, the Illinois Supreme Court examined a statute that criminalized the carrying of a loaded firearm in public.[45] Alberto Aguilar was convicted under the statute of "aggravated unlawful use of a weapon."[46] The appellate court upheld Aguilar's conviction, and the Illinois Supreme Court granted his petition for appeal.[47]

After discussing *Heller* and *McDonald,* the Illinois Supreme Court found that the Supreme Court never expressly decided whether the scope of the Second Amendment extends outside the home.[48] Instead, the court followed Judge Posner's expansive reading of *Heller*.[49] Since self-defense is the core of the Second Amendment, "it would make little sense to restrict that right to the home . . . ."[50] In finding the statute facially unconstitutional, the Illinois Supreme Court argued the statute "amounts to a wholesale statutory ban on the exercise of a personal right that is specially named in and guaranteed by the United States Constitution. . . . In no other context would we permit this . . . ."[51]

III. ARGUMENT

A. Inside & Outside the Home: The Second Amendment at its Pinnacle in the Home with Substantial Protections in Public

1. Text: Distinguishing "Bear" from "Keep" as Two Distinct Rights

"Bear" and "keep" stand out as two separate and distinct rights expressed in the Second Amendment. The Second Amendment provides: "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and

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[45] People v. Aguilar, 2 N.E.3d 321, 325 (Ill 2013). The court also addressed the conditionality of a statute that banned the possession of a firearm by a minor. Citing historical precedents, the court upheld the conviction under the minor in possession statute. *Id.* at 328-29.

[46] *Id.* at 323-25.

[47] *Id.* at 324.

[48] *Id.* at 326.

[49] *Id.* at 327.

[50] *Id.*

[51] *Id.* at 327.

bear Arms, shall not be infringed."[52] Much like the First Amendment protects several rights, the Second Amendment protects a citizen's right to keep and *to bear* arms in public.

The Framers could have easily limited the Second Amendment to the home by inserting such language into the text, if that had been their intention. In the Bill of Rights, the two amendments following the Second contain this type of location-specific language.[53] When courts read in such language, they relegate the Second Amendment to Third-Amendment status.

The Seventh Circuit recognized the "keep" and "bear" distinction in *Moore*.[54] In *Heller*, the Supreme Court stated that the individual right to keep and bear arms is principally "in case of confrontation."[55] Judge Posner recognized that confrontations are unfortunately not exclusive to the home.[56] If the Second Amendment only protects a right inside the home, the self-defense core of the right disappears while in public.[57] To say that bearing arms only applies inside the home would be "awkward usage," thus making "to keep arms" a redundant clause.[58]

The Supreme Court of Illinois recently followed the Seventh Circuit's reasoning and struck down a statute that effectively banned the carrying of a firearm in public.[59] In finding the statute facially unconstitutional, the Justices agreed with Posner's

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[52] U.S. CONST. amend. II.

[53] The Third Amendment reads, "No Soldier shall in time of peace be quartered in any *house*, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law." U.S. CONST. amend. III (emphasis added). The Fourth Amendment reads,

> The right of the people to be secure in their persons, *houses,* papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST. amend. IV (emphasis added).

[54] Moore v. Madigan, 702 F.3d 933 (7th Cir. 2012).

[55] District of Columbia v. Heller, 554 U.S. 570, 592 (2008).

[56] *Moore*, 702 F.3d at 936. Posner goes on to point out that particularly in Chicago, a citizen is much more likely to be accosted on the street than inside a home. *Id.* at 937.

[57] *Id.*

[58] *Id.* at 936.

[59] People v. Aguilar, 2 N.E.3d 321, 328 (Ill. 2013).

rationale. Since self-defense is the primary basis for the right, "it would make little sense to restrict that right to the home . . . ."[60]

2. Policy: Self-Defense Inside & Outside the Home

Self-defense protections exist everywhere, with some added protections inside the home. As noted in *Heller* and restated in *McDonald*, self-defense is the core of the Second Amendment. Self-defense law varies from state to state. Much like the First and Fourth Amendments, courts and legislatures have historically differentiated between self-defense inside and outside of the home. Yet in the recent decades, many states expanded their self-defense laws, granting law-abiding citizens the right to protect themselves in public.

a. Castle Doctrine: Self-Defense Protections at Their Peak Inside the Home

"The principle that a man's home is his castle is basic to our system of jurisprudence."[61]

i. English Common Law and the Castle Doctrine

Even though Englishmen had a duty to retreat, one could use deadly force in defending a home. In the early English Common Law tradition, the Crown held absolute authority over force.[62] The king could authorize men to use deadly force in certain instances.[63] If an individual used deadly force in self-defense, the only relief would come by a pardon after conviction.[64] Thus, one had a duty to retreat until "backed against a wall."[65] William Blackstone wrote that the assaulted party "must therefore flee as far as he conveniently can, either by reason of some wall, ditch, or

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[60] *Id.* at 327.

[61] Lombard v. Louisiana, 373 U.S. 267, 275 (1963) (Douglas, J., concurring).

[62] Wyatt Holliday, Comment, *"The Answer to Criminal Aggression is Retaliation": Stand-Your-Ground Laws and the Liberalization of Self-Defense*, 43 U. TOL. L. REV. 407, 410-11 (2012).

[63] *Id* at 409-10. These include a writ from the king, warrantless apprehension of a felon, or in "furtherance of the state's interests." *Id.*

[64] *Id.* at 409.

[65] *Id.* at 410.

other impediment . . . ."[66] Yet one exception existed in England to the duty to retreat—the home.[67] An Englishman could use deadly force to protect his home from burglars and intruders who threatened those in the home.[68] With Blackstone referring to a man's house as his "castle," this doctrine became known as the "Castle Doctrine."[69]

ii. The American Acceptance of the Castle Doctrine

Borrowing from the English Common Law, the vast majority of states contain a Castle Doctrine provision that protects homeowners who use deadly force against an intruder.[70] These laws show a heightened protection inside the home but with substantial protections in public. Even the Model Penal Code, which advocates a general duty to retreat, recognizes the right of a person to use deadly force in a home or in a workplace without retreating first.[71] Similar to the Fourth Amendment's special regard for the home, the Castle Doctrine treats the home as a special "sanctuary where people have the ultimate right to be safe, and should not be forced by the law to flee . . . ."[72]

As courts applied the Castle Doctrine, the line where deadly force is authorized went beyond the home.[73] For example, some courts include the curtilage and porch as covered by the Castle

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[66] 4 WILLIAM BLACKSTONE, COMMENTARIES 185.

[67] Lydia Zbrzeznj, Note & Comment, *Florida's Controversial Gun Policy: Liberally Permitting Citizens to Arm Themselves and Broadly Recognizing the Right to Act in Self-Defense*, 13 FLA. COASTAL L. REV. 231, 235 (2012).

[68] *Id.* William Blackstone stated the importance of the home in English Common Law: "the law of England has so particular and tender a regard to the immunity of a man's house, that [the law considers the house] his castle, and will never suffer it to be violated with impunity." *Id.* (quoting BLACKSTONE, *supra* note 66, at 223).

[69] Zbrzeznj, *supra* note 67, at 235, 238 n. 52.

[70] *Id.* at 238.

[71] MODEL PENAL CODE §3.04 (2)(b)(ii)(A)(1962) "[T]he actor is not obliged to retreat from his dwelling or place of work, unless he was the initial aggressor or is assailed in his place of work by another person whose place of work the actor knows it to be . . . ." *Id.*

[72] Zbrzeznj, *supra* note 67, at 238-39.

[73] *Id.* at 239.

Doctrine.[74] Others extend the doctrine even further. In Mississippi, for instance, the car is considered an extension of the home; a citizen in an automobile has no duty to retreat before using deadly force.[75]

In a nineteenth century case, the Supreme Court addressed the Castle Doctrine and self-defense.[76] In *Beard v. United States*, Mr. Beard confronted men who were on his property to take a cow.[77] In the past, one of the men publicly claimed he would kill Beard.[78] Seeing the men arguing with his wife, Beard approached the men, who stood fifty to sixty yards from the Beard home.[79] When approached by one of the men with his hand in his pocket, Beard struck him in the head with the butt of his shotgun, killing him.[80] In reversing Beard's conviction, the Court found, "The defendant was where he had the right to be, . . . he was not obliged to retreat, nor to consider whether he could safely retreat, but was entitled to stand his ground, and meet any attack made upon him with a deadly weapon [. . . .]"[81] The *Beard* decision illustrates the trend where self-defense with no duty to retreat expanded where citizens used deadly force while on their own property.

b. Stand Your Ground Laws: Extending Castle Doctrine Protections Outside the Home

i. Early Supreme Court Cases

A year after the *Beard* decision, the Supreme Court clarified its ruling on the duty to retreat in *Allen v. United States*.[82] The Court stated that the holding in *Beard* turned on the fact that "the

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[74] *Id.* at 239 n. 55 (citing People v. Canales, 624 N.W.2d 439, 442 (Mich. Ct. App. 2000)).

[75] Miss. Code Ann. § 97-3-15(1)(e) (stating that deadly force is justifiable when "committed by any person in resisting any attempt unlawfully to kill such person or to commit any felony upon him, or upon or in any dwelling, in any *occupied vehicle*, in any place of business, in any place of employment or in the immediate premises thereof in which such person shall be . . . .") (emphasis added).

[76] Holliday, *supra* note 62, at 411-12.

[77] 158 U.S. 550, 551 (1895).

[78] *Id.* at 552.

[79] *Id.*

[80] *Id.* 552-53.

[81] *Id.* at 564.

[82] 164 U.S. 492 (1896).

defendant [was] upon his own premises, and it was held that the obligation to retreat was no greater than it would have been if he had been assailed in his own house."[83] Thus the Supreme Court upheld Allen's conviction because he was not on his own property when he failed to retreat and used deadly force.[84]

At the beginning of the 1920s, the Supreme Court handed down an opinion that contained language that future legislatures used to craft modern Stand Your Ground laws.[85] In *Brown*, Justice Holmes argued that "if a man reasonably believes that he is in immediate danger of death or grievous bodily harm from his assailant he may stand his ground and that if he kills him he has not succeeded the bounds of lawful self defence [sic]."[86]

ii. Modern Stand Your Ground Laws Extend Self-Defense Law Outside the Home

In 2005, Florida paved the way for a revolution in self-defense law.[87] Deemed "Stand Your Ground Law," the Florida Legislature extended Castle Doctrine protections outside of the home and eliminated the duty to retreat in certain situations. There are three main factors of Stand Your Ground laws: (1) elimination of the duty to retreat; (2) if acting otherwise legally, a presumption that the defender had a reasonable fear of death or serious bodily injury; (3) immunity from civil damages.[88]

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[83] *Id.* at 498.

[84] *Id.* at 498-502.

[85] Brown v. United States, 256 U.S. 335 (1921).

[86] *Id.* at 343. Justice Holmes goes on to state that:

> Detached reflection cannot be demanded in the presence of an uplifted knife. Therefore in this Court, at least, it is not a condition of immunity that one in that situation should pause to consider whether a reasonable man might not think it possible to fly with safety or to disable his assailant rather than to kill him.

Id.

[87] Zbrzeznj, *supra* note 67, at 267.

[88] Holliday, *supra* note 62, at 413.

Following Florida's lead, at least twenty-three other states have enacted similar laws since 2005.[89]

Self-defense laws create the most protection for law abiding citizens inside their home in an overwhelming majority of the states where the common law duty to retreat is negated by the Castle Doctrine. But the general trend is to extend similar protections outside of the "castle."

3. Precedent: Other Amendments Granting Protection both Inside and Outside the Home

Drawing parallels between the First, Second, and Fourth Amendments is useful in constructing the boundaries of the Second Amendment outside of the home. Much like the Second Amendment, both the precedents of the First and Fourth Amendments offer substantial protections outside of the home, yet their pinnacle protection exists in the home.

a. First Amendment: Stanley v. Georgia*;* City of Ladue v. Gilleo

In *Roth v. United States*, the Supreme Court held that obscene material falls beyond the protections of the First Amendment.[90] Sixteen years later, the Court settled the test that would be used to determine whether speech is considered obscene.[91]

The Court had already stated in *Roth v. United States*, that obscene material falls beyond the protections of the First Amendment.[92] Yet, deciding what test would determine whether speech is obscene or not, did not come until sixteen years following *Roth*.

Chief Justice Burger announced a three-part test in *Miller*:

> (a) [W]hether "the average person, applying contemporary community standards" would find that the work, taken as a whole, appeals to the prurient interest,

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[89] Zbrzeznj, *supra* note 67, at 267 n.294 (citing Zachary L. Weaver, *Florida's "Stand Your Ground" Law: The Actual Effects and the Need for Clarification*, 63 U. MIAMI L. REV. 395, 397 (2008)).

[90] 354 U.S. 476, 485 (1957).

[91] Miller v. California, 413 U.S. 15 (1973).

[92] Roth v. United States, 354 U.S. 476, 485 (1957).

> (b) [W]hether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and
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> (c) [W]hether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value."[93]

Chief Justice Burger specifically noted that the "*utterly* without redeeming social value" language was not part of the test although it had been stated in earlier cases,[94]

Applying the *Miller* test, the First Amendment offers substantial protections outside of the home. Although some members of the population may consider certain speech lewd or profane, the First Amendment will protect speech that falls short of actual obscenity. For example, suppose a state enacted legislation that banned all movies containing nudity, claiming that the productions fell within the obscenity definition. During the showing of an R-rated movie containing some nudity, law enforcement arrive at the theater and seize the movie, citing the state obscenity statute. Is the statute constitutional?

Following the reasoning of *Jenkins v. Georgia*,[95] the statute would fail under the *Miller* test. In *Jenkins*, the Court reversed the conviction of a theater manager who showed the movie "Carnal Knowledge," which depicted scenes containing nudity.[96] The Court stated that the contemporary community standards prong of the *Miller* test could not be used to censor a mainstream Hollywood movie just because it contained sexual themes.[97] Justice Rehnquist writing for the Court stated, "nudity alone is not enough to make material legally obscene under the *Miller* standards."[98]

The First Amendment protection afforded to movie theaters does not only apply to conventional indoor establishments. One

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[93] *Miller,* 413 U.S. at 24 (internal citations omitted) (altering list of factors into bullet points for emphasis).

[94] *Id.* at 24-25.

[95] 418 U.S. 153 (1974).

[96] *Id.* at 155-56, 161.

[97] *Id.* at 159-161.

[98] *Id.* at 161.

year after *Jenkins*, the Supreme Court struck down a Jacksonville, Florida ordinance that banned showing movies containing nudity at drive-in theaters, which could be seen from a public street or place.[99] In finding the ordinance facially unconstitutional, Justice Powell argued that "when the government, acting as censor, undertakes selectively to shield the public from some kinds of speech on the ground that they are more offensive than others, the First Amendment strictly limits its power."[100] Even though the screen could be seen from a church parking lot, the First Amendment's protections outside of the home supersede the privacy interests of the public—despite that many people found the nudity offensive.[101]

i. *Stanley v. Georgia*: Can an American Possess Obscene Materials Inside the Home, Which Would Otherwise be Illegal in Public?

In *Stanley v. Georgia,* the Supreme Court overturned Stanley's conviction of possessing obscene films.[102] During an investigation for bookmaking in Stanley's home, a federal agent stumbled upon reels of film.[103] The officers found a projector, loaded the film reels, and watched the movies.[104] After determining that the films were "obscene," the police arrested Stanley, who was subsequently convicted of being in possession of obscene materials.[105]

Writing for the Court, Justice Marshall maintained that states lack the constitutional authority to regulate what a person reads or watches in the home, exhibiting a concern for states trying to control citizens' minds.[106] Even though obscenity is an

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[99] Erznoznik v. City of Jacksonville, 422 U.S. 205 (1975).

[100] *Id.* at 209.

[101] *Id.* at 212.

[102] Stanley v. Georgia, 394 U.S. 557 (1969).

[103] *Id.* at 558.

[104] *Id.*

[105] *Id.*

[106] *Id.* at 568. Justice Marshall goes on to say, "Our whole constitutional heritage rebels at the thought of giving government the power to control men's minds." *Id.* at 565.

unprotected category of speech,[107] the First Amendment protects the material while it is inside the privacy of one's home.[108] The Court deemed this would be a "drastic invasion of personal liberties guaranteed by the First and Fourteenth Amendments."[109]

ii. *City of Ladue v. Gilleo* Further Shows a Distinction Between Constitutional Protections Inside and Outside the Home

In 1994, the Supreme Court held that the First Amendment protects a right to display yard signs at a private residence.[110] In opposition to the Gulf War, Gilleo posted a sign in her front yard that read, "Say No to War in the Persian Gulf, Call Congress Now."[111] Following vandalism to one sign and the disappearance of another, Gilleo reported the incidents to the police.[112] Officers informed Gilleo that a city ordinance prohibited these types of signs.[113] Gilleo filed a lawsuit against the city and was granted a preliminary injunction.[114]

The City of Ladue passed another sign ordinance that restricted a smaller sign that Gilleo had displayed in her window.[115] In response, Gilleo amended her earlier complaint and won when the District Court and the Eight Circuit Court of Appeals held that the ordinance was unconstitutional.[116] The Supreme Court granted the City of Ladue's petition for certiorari.[117]

In affirming the unconstitutionality of the ordinance, Justice Stevens noted, "Often placed on lawns or in windows, residential

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[107] *Id.* at 560 (quoting Roth v. United States 354 U.S. 476, 485 (1957)). Although the *Miller* test was developed after *Stanley*, the Court in *Stanley* discussed the principal states where states normally have unchecked power to regulate obscenity. *Id.* (citing Ginsberg v. New York, 390 U.S. 629 (1968)).

[108] *Id.* at 568.

[109] *Id.* at 565.

[110] City of Ladue v. Gilleo, 512 U.S. 43, 58-59 (1994).

[111] *Id.* at 45-46.

[112] *Id.*

[113] *Id.*

[114] *Id.* at 46.

[115] *Id.* at 46-47.

[116] *Id.* at 47-48.

[117] *Id.* at 48.

signs play an important part in political campaigns, during which they are displayed to signal the resident's support for particular candidates, parties, or causes. . . . [R]esidential signs have long been an important and distinct medium of expression."[118] In pointing out that the First Amendment affords substantial protections to the yard signs outside the home, the Court goes on to point out that the First Amendment offers even more protections inside the home.[119] Justice Stevens emphasized, "A special respect for individual liberty *in the home* has long been part of our culture and our law . . . ."[120]

It would be unreasonable to argue that the protections of speech afforded by the First Amendment disappear once Americans venture outside of their houses. As seen in *Stanley* and *City of Ladue*, the First Amendment offers substantial protections outside of the home, but even more inside the home.

b. Fourth Amendment: Kyllo*;* Jardines*;* Chadwick

Much like the First Amendment, the Fourth Amendment offers substantial protections outside the home, but even greater protections inside the home. The Fourth Amendment privacy right reigns supreme in the home. Justice Stewart succinctly stated in *Silverman*, "At the very core stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion." [121]

i. *Kyllo v. United States*

Barring some exigent circumstance, the Fourth Amendment requires a warrant for police to enter a home.[122] But what if

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[118] *Id.* at 55.

[119] *Id.* at 58.

[120] *Id.* (emphasis added).

[121] Silverman v. United States, 365 U.S. 505, 511 (1961). Silverman was convicted of gambling offenses after officers used a "spike mike" to listen inside a home occupied by Silverman. *Id.* at 506. The Court found that when the officers physically intruded into the building and contacted the air duct, the police violated Silverman's Fourth Amendment rights. *Id.* at 510-11.. Justice Stewart also noted, "This Court has never held that a federal officer may without warrant and without consent physically entrench into a man's office or home, there secretly observe or listen, and relate at the man's subsequent criminal trial what was seen or heard." *Id.* at 511-12.

[122] U.S. CONST. amend. IV.

technology allows law enforcement to see inside the home, which would have previously only been possible thorough a physical intrusion?

In *Kyllo v. United States,* the Court held that using a thermo-imaging device to see what was inside the home without a warrant violated the Fourth Amendment's privacy protections.[123] Writing for the Court, Justice Scalia noted, "In the home, our cases show, all details are intimate details, because the entire area is held safe from prying government eyes."[124] Under the Fourth Amendment, a firm, bright line exists at the entrance of the home.[125]

ii. *Florida v. Jardines*

The Fourth Amendment protects *inside* the home, but does that protection extend onto the front porch?

In *Florida v. Jardines,* the Court held that using a drug-sniffing canine on the front porch of a home constituted a search under the Fourth Amendment, and thus required a warrant.[126] Writing for the Court, Justice Scalia based his ruling on the fact that police physically intruded into a protected area without a license to do so.[127] Justice Scalia reiterated the longstanding tradition that Fourth Amendment protections of the home extend beyond the threshold and onto the curtilage.[128]

iii. *United States v. Chadwick*

The protections of the Fourth Amendment are at their apex inside the home, but substantial protections also go beyond the threshold and into public.

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[123] Kyllo v. United States, 533 U.S. 27, 40 (2001).

[124] *Id.* at 37.

[125] *Id.* at 40 (citing Payton v. New York, 445 U.S. 573, 590 (1980)).

[126] Florida v. Jardines, 133 S. Ct. 1409, 1417-18 (2013).

[127] *Id.* at 1415-16.

[128] *Id.* at 1414-15. Justice Scalia comments further on curtilage, "This right would be of little practical value if the State's agents could stand in a home's porch or side garden and trawl for evidence with impunity; the right to retreat would be significantly diminished if the police could enter a man's property to observe his repose from just outside the front window." *Id.* at 1414.

In 1973, railroad employees noticed two passengers loading an abnormally heavy footlocker into a train car.[129] The footlocker aroused the suspicions of the officials when they observed talcum powder leaking from the luggage.[130] Federal agents met the train at the stop in Boston.[131] Without a warrant, the officers guided a drug-sniffing dog next to the footlocker, which detected narcotics without the owners of the footlocker noticing.[132] After watching Chadwick and the two other men load the footlocker into the trunk of a car, the Federal agents arrested all three men.[133] The agents took the footlocker to the Boston Federal Building and opened it without consent or a search warrant, wherein they found marijuana.[134] Chadwick convinced the trial court and the Court of Appeals for the First Circuit to suppress the warrantless search of the footlocker.[135]

In affirming the suppression, Chief Justice Burger first noted that "the Warrant Clause does not in terms distinguish between searches conducted in private homes and other searches."[136] Speaking of the Founding Father's intent when they drafted the Fourth Amendment's Warrant Clause, Chief Justice Burger goes on to say that "there is no evidence at all that [the Founders] intended to exclude from protection of the Clause all searches occurring outside the home.[137] Before turning to the warrantless search of the footlocker, Chief Justice Burger made one final statement illustrating that the Fourth Amendment substantially protects outside of the home: "a fundamental purpose of the Fourth Amendment is to safeguard individuals from unreasonable government invasions of legitimate privacy interests, and not simply those interests found inside the four walls of the home."[138]

As for the footlocker, the Court emphasized that even though the luggage was in a public place, substantial protections

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129 United States v. Chadwick, 433 U.S. 1, 3 (1977).
130 *Id.*
131 *Id.*
132 *Id.* at 4.
133 *Id.*
134 *Id.* at 4-5.
135 *Id.* at 5-6.
136 *Id.* at 8.
137 *Id.*
138 *Id.* at 11.

remained.[139] Contrasting the lesser expectation of privacy in an automobile, the luggage gets extra protections because (1) the contents are not generally open to public view, (2) the internals are not routinely examined, and (3) luggage is "intended as a repository of personal effects."[140] Since no exigency existed, a mere probable cause standard will not suffice—the search of the luggage required a warrant.[141]

B. Applying Inside and Outside Home Doctrine to the Second Amendment

1. Courts Should Apply Strict Scrutiny to Protect a Fundamental Right

When the government infringes on a right, a fundamentality analysis is used to determine the level of scrutiny. When a right is deemed fundamental, courts apply a higher level of scrutiny, thus putting the burden on the state to demonstrate that the infringement can pass Constitutional muster. Justice Alito noted that the Founders held the Second Amendment as fundamental as the other rights enumerated in the Bill of Rights.[142]

The Supreme Court also applies a higher level of scrutiny when the right is specifically enumerated in the text of the Constitution.[143] Since "bearing arms" is specifically enumerated in the Second Amendment, strict scrutiny should apply to restrictions on that right.

Because the firearms restrictions in Washington D.C. and Chicago clearly violated the Second Amendment, the Court in *Heller* and *McDonald* did not apply a level of scrutiny to overturn

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[139] *Id.* at 13.

[140] *Id.*

[141] *Id.* at 14-16.

[142] McDonald v. City of Chicago, 130 S. Ct. 3020, 3037 (2010).

[143] An example is the Fourteenth Amendment. Courts apply strict scrutiny to race based classifications since that is what the amendment specifically enumerates. *E.g.* Grutter v. Bollinger, 539 U.S. 306 (2003). Gender classifications get intermediate scrutiny. *E.g.* Craig v. Boren, 429 U.S. 190 (1976); United States v. Virginia, 518 U.S. 515 (1996). Non-suspect classifications get rational basis review. *E.g.* New York City Transit Authority v. Beazer, 440 U.S. 568 (1979); Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456 (1981).

the in-home bans on handgun possession. Instead, Justices Scalia and Alito simply analyzed the handgun ban against the rights enumerated in the Second Amendment, finding that the in-home ban violated those rights. When analyzing whether the Second Amendment rights apply outside of the home, lower courts have differed on which level of scrutiny applies. Thus, similar regulations that are upheld in one Circuit are struck down in other jurisdictions.[144]

Judge Posner in *Moore* applied the same test as *Heller*.[145] Instead of basing the analysis on a particular level of scrutiny, the Seventh Circuit noted that the state failed to defend the outright ban on carrying arms in public.[146] But a hint of some heightened scrutiny appeared towards the end of *Moore*. Judge Posner argued that Illinois needed to show more than a rational basis in order to defend successfully the statute.[147]

This uncertainty could be cured by requiring all courts to use strict scrutiny in analyzing infringements on the Second Amendment.

2. Differing State Interests Affects Application

Strict scrutiny is not always fatal in fact. For example, the Court has upheld affirmative action university policies, even though the university used a race classification.[148] As applied to the Second Amendment, a state or the federal government could conceivably meet the threshold for strict scrutiny—a compelling state interest with language that is narrowly tailored. Yet the majority of regulations should ultimately fail to pass the test, which is designed to protect fundamental rights.

A strict scrutiny test should be used with all firearms regulations, with varying applications based on state interests. As seen in *Stanley v. Georgia*, states can articulate differing interests based on whether the individual is inside the home versus in public. In *Stanley,* the Court articulated that while obscene

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144 *E.g.* Kachalsky v. Cnty. of Westchester, 701 F.3d 81, 101 (2nd Cir. 2012); Woollard v. Gallagher, 712 F.3d 865, 876 (4th Cir. 2013).

145 Moore v. Madigan, 702 F.3d 933, 941 (7th Cir. 2012).

146 *Id.*

147 *Id.* at 942.

148 Grutter v. Bollinger, 539 U.S. 306 (2003).

materials may be censored in public, a state cannot punish a citizen for mere possession of obscene materials inside the home.[149] So with the Second Amendment outside the home, states may have a valid state interest in public safety. But just merely stating some abstract public safety concern would not meet the compelling state interest component of strict scrutiny. Likewise with restricting the Second Amendment inside the home, a state would need to be even narrower in passing a restriction that would not run afoul of the Constitution.

IV. HYPOTHETICALS

Before setting out some guidelines for firearm statutes, it is helpful to define some terms that are used. There are several basic categories of guns—handguns, long guns, and special or unusual guns. "Long guns" would include both rifles and shotguns. And, "special or unusual weapons" would be those not in common use. Examples would include, short barreled shotguns, short barreled rifles, and fully automatic machine guns.[150]

Below are several hypotheticals applying the inside and outside Second Amendment approach outlined above.

A. Unconstitutional Regulations Inside & Outside the Home

Suppose that State A bans handgun possession both inside and outside of the home. One evening while walking down main street, police stop a woman open-carrying a GLOCK 9 mm. After arresting the woman, the police subsequently get a warrant to search her home. Inside, they find more pistols varying in caliber. A jury convicts the woman on two separate accounts—illegal carrying and illegal possession of a handgun. Are these convictions constitutional? As to the possession of a handgun in the home, that statute would be unconstitutional based on *Heller* and *McDonald*.

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[149] Stanley v. Georgia, 394 U.S. 557, 558 (1969).

[150] These types of weapons are covered under the National Firearms Act, I.R.C. § 5811 (2006). The law does not prohibit the ownership of such firearms, but special taxes, forms, and waiting periods prevent these guns from becoming in common use.

Since citizens have a right to bear arms outside of the home, the question remains on exactly what kind of firearms can be carried in public. Carrying handguns in case of confrontation seems to be the most reasonable. It is up to the states to regulate the carrying of guns in public. Although all states have some sort of handgun permitting scheme, states that are "may-issue" often deny a permit to citizens that cannot give some special reason to carry a handgun. One can only imagine the uproar if a state decided to impose a similar regulation on worshipping, speaking, or voting.

As a whole, Americans choose handguns as the means of protection. Although not as effective ballistically as a long gun, Americans carry handguns due to their concealability. Although some states do not criminalize the carrying of rifles or shotguns in public, all states have some provision for citizens to carry a handgun for protection.

B. Unconstitutional Regulations Inside but Arguably Permissible Outside the Home

So suppose after losing at the Supreme Court, State A tries its hand again at limiting the constitutional right to keep and bear arms. The state legislature passes a criminal statute that bans the possession of long guns inside the home and bans the carrying of long guns in public.[151]

Barring the public carrying of long guns may seem reasonable at first blush due to the possibility of over-penetration and collateral harm to bystanders. The state would bear the burden to show that the regulation of long guns in public could meet the compelling state interest prong of strict scrutiny. But simply that some people may be frightened by long guns in public would not meet that level.

The state should have no power, however, to bar a person from carrying a rifle or shotgun inside the home. Like the Supreme Court stated in *Heller*, the need for protection is most

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[151] For a similar statute that bans the carrying of any firearms in public see D.C. CODE§ 22-4504 (a-1) (2012) (stating that "[e]xcept as otherwise permitted by law, no person shall carry within the District of Columbia a rifle or shotgun. A person who violates this subsection shall be subject to the criminal penalties set forth in subsection (a)(1) and (2) of this section.").

acute when protecting the home.[152] Similar to the mind control concern stated in *Stanley v. Georgia*, the state does not have the power to dictate to a private citizen which type of weapon he or she uses to protect the home. Likewise in *City of Ladue*, the government could not censor what a private citizen displayed in the window.

C. Permissible Regulations Inside & Outside the Home

Wanting to appear "tough on crime," the legislature of State A wants to pass a statute that could easily meet the strict scrutiny test. A new bill is passed through the state legislature and signed by the governor. The "No Bomb for You Bill" prohibits the possession, transportation, sale, and carrying of any military grade explosive or grenade launcher. In defense of the law, the state argues that the Second Amendment's core is self defense. Since no reasonable person would use a grenade or explosive as a self defense weapon, the state contends that the law easily passes the strict scrutiny test, citing the indiscriminate harm explosives cause.

Compared to the past two hypothetical statutes, this statute dealing with explosives seems to be the most likely to pass constitutional muster as applied to inside and outside of the home. For outside of the home, the state could argue that unlike firearms, explosives cannot generally be pinpointed against one particular person with no collateral damage. Thus, a public safety concern would probably meet the requirement of a compelling state interest for strict scrutiny. For inside of the home, the state could argue that no reasonable homeowner would use a grenade, bazooka, or RPG for home defense. Unlike bullets which can generally be contained within a home, detonating explosives inside the home could harm bystanders and damage neighboring property.

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[152] District of Columbia v. Heller, 554 U.S. 570, 628 (2008).

CONCLUSION

With no definitive ruling by the Supreme Court regarding the scope of the Second Amendment outside of the home, lower courts apply differing levels of scrutiny, which leads to inconsistent results. Since the Second Amendment protects a fundamental right, these courts should apply strict scrutiny to all firearms regulations. These firearms statutes would not necessarily fail under strict scrutiny. States that wish to restrict the right could have a compelling state interest, such as a special public safety concern.

With the Seventh Circuit's decision in *Moore v. Madigan*, Illinois became the fiftieth state in the country to implement a process that allows citizens to carry handguns in public. Recent trends in self-defense law show that states are giving their citizens increasing protections outside of the home. These protections parallel the First and Fourth Amendments, which are both at their apex in the home, yet offer substantial protections in public.

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