
NOTES

“MCDONALD DOES DALLAS”: HOW OBSCENITY LAWS ON HARD-CORE PORNOGRAPHY CAN END THE NATION’S GUN DEBATE

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I. INTRODUCTION

*Hundreds of terrified parents arrived as their sobbing children were led out of the Sandy Hook Elementary School. . . . By then, all of the victims had been shot and most were dead, and the gunman, identified as Adam Lanza, had committed suicide. The children killed were said to be 5 to 10 years old.*¹

The Sandy Hook shooting marks December 14, 2012 as a tragic day in American history.² Unfortunately, Newtown, Connecticut is not alone

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This Note’s title references *Debbie Does Dallas*, an adult film released domestically in 1978 during the “golden age of porn.”

1. James Barron, *Nation Reels After Gunman Massacres 20 Children at School in Connecticut*, N.Y. TIMES (Dec. 14, 2012), <http://www.nytimes.com/2012/12/15/nyregion/shooting-reported-at-connecticut-elementary-school.html>.

2. Michael Martinez, *Newtown a Year Later: Nation Reflects on Legacy of Its 2nd-Deadliest Mass Shooting*, CNN (Dec. 14, 2013), <http://www.cnn.com/2013/12/14/us/newtown-sandy-hook-shooting-anniversary/> (“Horror struck Newtown, Connecticut, in such a disturbing way that the nation

when it comes to such suffering.³ Between December 14, 2012 and February 12, 2014, there have been an astonishing twenty-eight lives lost over the course of forty-four school shootings.⁴ In 2011 alone, almost half a million people were victims of “crime[s] committed with a firearm.”⁵ The problem of gun violence has been recognized as so severe that some have even analogized gun violence to an “epidemic.”⁶

On November 21, 2013, less than one year after Sandy Hook, a seventy-year-old woman found herself in the midst of a home invasion.⁷ Initially in the pursuit of prescription drugs, two men, wearing camouflage and ski masks, entered the woman’s home. When she ran to the bedroom for her gun, one of the men followed and “threw the woman to the bed and got on top of her.”⁸ Then, the woman “pointed the gun at him and said ‘I’ll blow your head off.’”⁹ The two intruders ran for the door, and the woman was treated for only minor injuries.¹⁰

The dialogue on guns in the United States tends to fall toward one of two extremes—“everyday, guns kill good people” or “everyday, guns kill bad people.” The debate becomes a battle of values between two groups with two very different, yet very passionately held worldviews.¹¹ Even legal scholarship cannot immunize itself from devolving into normative discussions founded on what the law should be, rather than providing

still struggles with its impact a year later. The legacy of the second-deadliest mass shooting in U.S. history is so profound that it cannot hold just one meaning.”)

3. See Joseph Straw, *School Shootings Happen Every 10 Days Since Sandy Hook, Gun Control Groups Find*, N.Y. DAILY NEWS (Feb. 12, 2014), <http://www.nydailynews.com/news/crime/school-shootings-happen-10-days-gun-control-groups-article-1.1612349> (“[C]ount[ing] 13 school shootings in the first six weeks of [2014] alone”).

4. *Id.*

5. MICHAEL PLANTY & JENNIFER L. TRUMAN, BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, SPECIAL REPORT: FIREARM VIOLENCE, 1993–2011 (NCJ 241730) 1 (2013), available at <http://www.bjs.gov/content/pub/pdf/fv9311.pdf>.

6. Mike Weisser, *If Gun Violence Is a Health Epidemic, Can We Quarantine It Like a Virus?*, HUFFINGTON POST (Jan. 23, 2014, 6:58 PM), http://www.huffingtonpost.com/mike-weisser/gun-violence-epidemic_b_4095021.html (recognizing that President Obama referred to American gun violence as an “epidemic,” and advocating for an aggressive grassroots campaign to educate at-risk persons and neighborhoods about the dangers of guns).

7. Katie Kormann, Shain Bergan & Aubry Killion, *Sebastian County Woman to Intruders: ‘I’ll Blow Your Head Off.’* 5NEWSONLINE (Nov. 22, 2013), <http://5news.com/2013/11/21/woman-injured-after-fighting-off-home-invaders>.

8. *Id.*

9. *Id.*

10. *Id.*

11. Joseph Blocher, *Firearm Localism*, 123 YALE L.J. 82, 90–93 (2013) (discussing “pro-gun” and “pro-gun control” beliefs and their rural-urban dichotomy).

analysis of what the law actually is.¹² Unfortunately, a more targeted discussion arising directly out of Second Amendment jurisprudence is particularly difficult, as the U.S. Supreme Court has provided very limited guidance on the types of gun regulations that can pass constitutional muster.¹³

Since the Supreme Court decided *District of Columbia v. Heller*¹⁴ and *McDonald v. City of Chicago*,¹⁵ over seven hundred civil and criminal matters containing Second Amendment issues have arisen.¹⁶ Without adequate guidance, lower courts have attempted to craft their own tests, often using analytical methodologies that go directly against the instructions of the Supreme Court.¹⁷ This Note employs a system of “constitutional borrowing”¹⁸ to craft a workable test for jurists, legislators, and advocates that complies with the limitations of the *Heller* and *McDonald* decisions, while still providing enough legislative flexibility to deal with the many unique gun issues throughout the United States.

Through *Heller* and *McDonald*, the Supreme Court began to establish the scope of the individual right to keep and bear arms under the Second Amendment. In *Heller*, the Court held “that the District [of Columbia’s] ban on handgun possession in the home violates the Second Amendment, as does its prohibition against rendering any lawful firearm in the home operable for the purpose of immediate self-defense.”¹⁹ Two years later, in *McDonald*, the Court held that “the Second Amendment right is fully

12. See, e.g., Joshua J. Styles, Addendum, *The Right to Bear Arms and the Abominable Snowman: How Six Inches of Snow Swallowed a Fundamental Right*, 90 N.C. L. REV. 84A, 98A–104A (2012) (arguing that a North Carolina statute providing for the restriction of gun rights during a state of emergency needs significant modification).

13. Darrell A.H. Miller, *Text, History, and Tradition: What the Seventh Amendment Can Teach Us About the Second*, 122 YALE L.J. 852, 855 (2013) (explaining how *District of Columbia v. Heller*, 554 U.S. 570 (2008), and *McDonald v. City of Chicago*, 130 S. Ct. 3020 (2010), “posed a riddle” for lower courts to solve when faced with challenges to gun regulations).

14. *District of Columbia v. Heller*, 554 U.S. 570 (2008).

15. *McDonald v. City of Chicago*, 130 S. Ct. 3020 (2010).

16. TRPChicago, *60 Cases and Counting: What Gun Case Will SCOTUS Take Next?*, DAILY KOS (Oct. 28, 2013), <http://www.dailykos.com/story/2013/10/28/1250584/-60-Cases-and-Counting-What-Gun-Case-Will-SCOTUS-Take-Next#> (noting that over 60 “gun cases” have been rejected by the Supreme Court for review).

17. Miller, *supra* note 13, at 867–68 (discussing how courts have used intermediate scrutiny for determining the constitutionality of gun laws and regulations, even though the Supreme Court has rejected the use of any government interest-balancing tests).

18. See Nelson Tebbe & Robert L. Tsai, *Constitutional Borrowing*, 108 MICH. L. REV. 459, 463–65 (2010) (explaining the common use of “constitutional borrowing” to import guidance from one area of the law for use in another).

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

applicable to the States.”²⁰ Both *Heller* and *McDonald* agreed that the common law right to self-defense exists at the center of the Second Amendment’s scope and purpose,²¹ and that when evaluating this right, courts must reject the use of interest-balancing tests.²²

In *Miller v. California*, the Supreme Court provided an analytical framework for determining whether sexually explicit material was obscene, and thus outside the scope of the First Amendment’s protections.²³ The framework required that triers of fact evaluate sexually explicit material based on its type, its use or manifestation, and its purposes with respect to how it fits within the scope of the goals of the First Amendment.²⁴ Material deemed obscene fell outside the Amendment’s protection.²⁵

This Note argues that applying a similar test to the Second Amendment, which evaluates (1) the firearm’s type, (2) the firearm’s use, and (3) the firearm’s purpose, would help determine if a particular firearm, or firearm-related right, falls under the protection of the Constitution. Part II of this Note will provide a brief analysis of *Heller* and *McDonald*, and will highlight the key guiding principles and limitations provided by these two seminal opinions. Part III will examine previous attempts at constitutional borrowing for the purposes of Second Amendment scholarship, with a particular emphasis on the use of obscenity doctrine as a model framework. Part IV will begin with a brief discussion of the development of the modern obscenity doctrine, followed by an explanation of the *Miller* three-prong test, as it currently exists. Part V will demonstrate how the analytical framework of the obscenity doctrine can fit within the scope of the guiding principles and limitations set forth in *Heller* and *McDonald*. Part VI will examine the veracity of the modified three-prong test by using it to evaluate specific gun regulations. Finally, Part VII will briefly conclude.

20. *McDonald*, 130 S. Ct. at 3026.

21. *Id.* at 3036; *Heller*, 554 U.S. at 599.

22. *McDonald*, 130 S. Ct. at 3047 (“In *Heller*, however, we expressly rejected the argument that the scope of the Second Amendment right should be determined by judicial interest balancing”); *Heller*, 554 U.S. at 634–35 (“We know of no other enumerated constitutional right whose core protection has been subjected to a freestanding ‘interest-balancing’ approach. The very enumeration of the right takes out of the hands of government . . . the power to decide on a case-by-case basis whether the right is *really worth* insisting upon.”).

23. *Miller v. California*, 413 U.S. 15, 24–25 (1973).

24. *Id.* at 24.

25. *Id.* at 23; *Roth v. United States*, 354 U.S. 476, 485 (1957) (“We hold that obscenity is not within the area of constitutionally protected speech or press.”).

II. SECOND AMENDMENT JURISPRUDENCE

The Second Amendment states, “[a] well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.”²⁶ Although it appears unintimidating at first, a lack of Supreme Court decisions concerning firearm laws and regulations makes discerning the scope of the Second Amendment exceedingly challenging. However, over the years, there have been a handful of leading cases that provide guidance on the evolving scope of this right, up to and including *Heller* and *McDonald*.

A. PRE-*HELLER* JURISPRUDENCE

Prior to the *Heller* decision, the Supreme Court had examined very few Second Amendment cases.²⁷ In the Court’s absence, both proponents of gun rights and gun control have developed two drastically opposing views on what the Second Amendment means.²⁸ However, prior to 2008, the Court had made a few notable attempts at defining the right to keep and bear arms.

First, in *United States v. Cruikshank*,²⁹ the Supreme Court found that the Constitution neither granted, nor eliminated the rights of individual citizens to keep and bear arms.³⁰ Rather, the Second Amendment merely limited the power of the Congress to restrict this right.³¹ In *Presser v. Illinois*, the Supreme Court again found that the Second Amendment only applied to Congress, rather than to the several states.³² Furthermore, while *Presser* appears to suggest in dicta that a state might be prevented from disarming its citizens because doing so would restrict the right of the Federal government to call forth a citizens’ militia in times of need, the Supreme Court made clear that any potential issue would not stem from the Second Amendment.³³ However, since the Court found that the Military Code of Illinois did not amount to such a disarming, it did not need to

26. U.S. CONST. amend. II.

27. LEE EPSTEIN & THOMAS G. WALKER, CONSTITUTIONAL LAW FOR A CHANGING AMERICA: RIGHTS, LIBERTIES, AND JUSTICE 387–88 (8th ed. 2013).

28. *Id.* at 387.

29. *United States v. Cruikshank*, 92 U.S. 542 (1875).

30. *Id.* at 543, 553 (evaluating the convictions of men who had attempted to harass, degrade, and disarm African American citizens). *See also* *Miller v. Texas*, 153 U.S. 535, 538 (1894) (affirming *Cruikshank*’s view that the Second Amendment only applies to Congress).

31. *Cruikshank*, 92 U.S. at 553.

32. *Presser v. Illinois*, 116 U.S. 252, 265–66 (1886).

33. *Id.*

elaborate on the issue.³⁴

In *United States v. Miller*,³⁵ the Supreme Court finally got the chance to test a federal statute against the Second Amendment.³⁶ The case involved charges against two individuals for “transport[ing] in interstate commerce” a short barrel shotgun.³⁷ The *Miller* Court found that the Second Amendment does not protect the right of an individual to own such a firearm.³⁸ Rather, the Supreme Court reasoned that the Second Amendment merely helps maintain the existence of the militia.³⁹ As mentioned in *Presser*,⁴⁰ if the people were to be disarmed, Congress would functionally lose its Article I, Section 8 power⁴¹ to call forth the militia.⁴² However, since the Court could not ascertain any potential military usage of a short barrel shotgun, it did not find the possession of such a weapon to fit within the purpose of the Second Amendment. Therefore, the Court determined that the particular firearm fell outside the scope of the Second Amendment’s protection.⁴³

Following the *Miller* decision, the battle between gun rights and gun control advocates continued to rage in the legislature.⁴⁴ However, the Supreme Court avoided hearing cases that involved complex Second Amendment questions, leaving *Miller* as the leading Second Amendment decision for decades.⁴⁵

B. *DISTRICT OF COLUMBIA V. HELLER*

In *Heller*, the Supreme Court analyzed whether various statutory handgun restrictions in the District of Columbia were unconstitutional.⁴⁶ The District of Columbia made it a crime to carry unregistered firearms, prohibited the registration of handguns, and required that people who wanted to carry handguns, even in their homes, get a license; additionally, the District required even “lawfully owned firearms” to be disassembled or

34. *Id.*

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

36. EPSTEIN & WALKER, *supra* note 27, at 388–89.

37. *Miller*, 307 U.S. at 175.

38. *Id.* at 178.

39. *Id.*

40. *Presser v. Illinois*, 116 U.S. 252, 265 (1886).

41. U.S. CONST. art. I, § 8, cl. 15.

42. *See Miller*, 307 U.S. at 178–79 (explaining that the Second Amendment aimed at maintaining the existence and effectiveness of the militia).

43. *Id.* at 178.

44. EPSTEIN & WALKER, *supra* note 27, at 389–90.

45. *Id.* at 390.

46. *District of Columbia v. Heller*, 554 U.S. 570, 573–76 (2008).

trigger-locked unless they were used recreationally or in a place of business.⁴⁷ Although they allowed people in the District to own other guns besides handguns, the regulations were designed to prevent all types of guns from actually being used in the city—even in a person’s home, and even in the face of an actual attack or home invasion.⁴⁸

After an extensive historical analysis,⁴⁹ the Court “h[e]ld that the District’s ban on handgun possession in the home violate[d] the Second Amendment, as [did] its prohibition against rendering any lawful firearm in the home operable for the purpose of immediate self-defense.”⁵⁰ In so doing, the Court turned the *Miller* doctrine of a militia-based Second Amendment on its head.⁵¹ Although Justice Antonin Scalia acknowledged that the Second Amendment’s text certainly aims at protecting the militia, he argued that military service does not fully define the Amendment’s scope.⁵² For Justice Scalia, the structure of the “citizens’ militia” at the time of the United States’ founding required that individuals maintain the right to keep and bear arms.⁵³ To Justice Scalia’s credit, from a historical standpoint, personal self-defense and the defense of the community were not mutually exclusive concepts for the founding generation.⁵⁴

However, the Court still had to deal with precedent, which appeared to point to a more collective right of self-defense.⁵⁵ The *Heller* Court

47. *Id.* at 574–75.

48. Adam Winkler, *Heller’s Catch-22*, 56 UCLA L. REV. 1551, 1554 (2009).

49. *Heller*, 554 U.S. at 579–628.

50. *Id.* at 635.

51. *See* *United States v. Miller*, 307 U.S. 174, 178 (1939) (describing the maintenance of the militia as the primary focus of the Second Amendment right to keep and bear arms).

52. *Heller*, 554 U.S. at 599 (“It is therefore entirely sensible that the Second Amendment’s prefatory clause announces the purpose for which the right was codified: to prevent elimination of the militia. The prefatory clause does not suggest that preserving the militia was the only reason Americans valued the ancient right; most undoubtedly thought it even more important for self-defense and hunting.”).

53. *Id.* (“If . . . the Second Amendment right is no more than the right to keep and use weapons as a member of an organized militia, . . . that is, the *organized* militia is the sole institutional beneficiary of the Second Amendment’s guarantee—it does not assure the existence of a ‘citizens’ militia’ as a safeguard against tyranny.”).

54. Akhil Reed Amar, *Heller, HLR, and Holistic Legal Reasoning*, 122 HARV. L. REV. 145, 163–64 (2008). However, many historians still believe that the actual purpose of the Second Amendment had much more to do with the direct functionality of the militia than Justice Scalia claimed. *See* Cass R. Sunstein, *Second Amendment Minimalism: Heller as Griswold*, 122 HARV. L. REV. 246, 256–59 (2008) (arguing that many historians agree with Justice John Paul Stevens’ military-centric approach to analyzing the Second Amendment).

55. EPSTEIN & WALKER, *supra* note 27, at 390 (noting Justice Clarence Thomas’s observation in *Printz v. United States*, 511 U.S. 898, 939 n.2 (1997), that “a growing body of scholarly commentary indicates that the right to keep and bear arms is, as the amendment’s text suggests, a personal right”).

explained that past cases, although having provided a great deal of analysis on the scope of the Second Amendment, had not actually answered the direct question of whether individuals had a right to keep and bear arms outside the scope of military service.⁵⁶ For example, the Court articulated the holding of *Presser* to merely allow state governments to ban private military regiments from marching through cities and towns armed.⁵⁷ In addition, according to the *Heller* Court, *Miller* did not restrict the bearing of “short-barreled shotguns” because they were not being used for military purposes, but rather because this particular type of gun was not “typically possessed by law-abiding citizens for lawful purposes.”⁵⁸

From these early cases and a review of the historical record, the *Heller* Court highlighted what it perceived to be the Founders’ priorities in the Second Amendment.⁵⁹ First, the Second Amendment protects the right of individuals⁶⁰ to keep and bear arms, but the right is not unlimited.⁶¹ Second, the firearms protected by the Amendment are “the sorts of weapons . . . [that] were . . . ‘in common use at the time’”⁶² of the Second Amendment’s ratification and those that were popular for the “defense of self, family, and property.”⁶³ Thus, weapons that are “dangerous and unusual” do not receive the same protection.⁶⁴ Third, self-defense is the “central component” of the Second Amendment right.⁶⁵ Fourth, the need for self-defense rises to its apex in the home.⁶⁶ Finally, when evaluating the constitutionality of particular firearm laws and regulations, interest-balancing tests fail to meet the constitutional standard.⁶⁷

C. MCDONALD V. CITY OF CHICAGO

Two years after *Heller*, the Supreme Court revisited the issue of handgun bans in *McDonald v. City of Chicago*.⁶⁸ Petitioners brought an

56. *Heller*, 554 U.S. at 620–26.

57. *Id.* at 620.

58. *Id.* at 622–25.

59. *Id.* at 592–95.

60. *Miller*, *supra* note 13, at 898 (interpreting *Heller* to read that the right to keep and bear arms mirrors the individualistic interpretation of the constitutional right to assemble).

61. *Heller*, 554 U.S. at 595.

62. *Id.* at 627–28 (citation omitted).

63. *Id.* at 628.

64. *Id.* at 627.

65. *Id.* at 599.

66. *Id.* at 628–29.

67. *Id.* at 634–35 (explaining that a balancing of the government’s interest in safety and the individual’s right to bear arms already occurred at the adoption of the Second Amendment).

68. *McDonald v. City of Chicago*, 130 S. Ct. 3020 (2010).

action against Chicago and Oak Park, Illinois, arguing that the cities' handgun bans violated the Second Amendment.⁶⁹ Having already held in *Heller* that the Second Amendment protects an individual's right to own firearms for self-defense, the issue before the Court was whether that Second Amendment right applied to the states.⁷⁰ After an analysis of *Heller* and the doctrine of selective incorporation,⁷¹ the plurality of the Court held, in contrast to earlier decisions on the topic,⁷² that the Second Amendment applies fully to the states under the Fourteenth Amendment.⁷³

During its analysis, the Court reaffirmed *Heller's* interpretation of the scope of the Second Amendment right.⁷⁴ The Court also emphasized that although it had limited the power of the States to regulate the personal ownership of firearms in the home for self-defense, there still would be ample opportunity for future experimentation by the States to develop reasonable and effective gun laws and regulations.⁷⁵

III. CONSTITUTIONAL BORROWING AS A TEST BUILDING TOOL

Although the Supreme Court provided significant guidance concerning the scope of the Second Amendment right in *Heller* and *McDonald*, it did not craft a clear test for lower courts and legislatures to use in determining whether any particular gun control law or regulation violates the Second Amendment.⁷⁶ Without a strong analytical methodology from these leading decisions, many courts have either relied on dicta for determining the constitutionality of firearms laws,⁷⁷ or simply ignored the Supreme Court's directions to not apply an interest-balancing test.⁷⁸ Neither approach provides a long-term solution to deal with the modern influx of Second Amendment cases.

However, an analytical methodology of constitutional borrowing can help craft a working model for Second Amendment analysis. The phrase "constitutional borrowing" describes a system in which one area of

69. *Id.* at 3026.

70. *Id.*

71. Although Justice Samuel Alito provided an interesting discussion of selective incorporation in his majority opinion in *McDonald*, the doctrine is not relevant to this Note.

72. See *McDonald*, 130 S.Ct. at 3031 (explaining that earlier cases such as *Cruikshank*, *Miller*, and *Presser* were decided before the Court had established the doctrine of selective incorporation, and therefore should not be viewed as dispositive on the issue for the purposes of the Second Amendment).

73. *Id.* at 3050.

74. *Id.* at 3036.

75. *Id.* at 3046.

76. *Miller*, *supra* note 13, at 855.

77. *Id.* at 867.

78. *Id.* at 867–71.

constitutional law provides assistance for the understanding of another.⁷⁹ Many scholars have already recognized this approach in their writings on the Second Amendment.⁸⁰ Even the Supreme Court made references to other areas of constitutional law when analyzing the handgun bans in the District of Columbia and Chicago,⁸¹ with the *Heller*⁸² and *McDonald*⁸³ decisions, respectively. By continuing to employ a method of constitutional borrowing for the Second Amendment, the vast array of constitutional wisdom surrounding other liberty provisions can help develop a workable gun regulation test.⁸⁴

For example, Professor Joseph Blocher utilized constitutional borrowing to demonstrate how the Second Amendment could be read to permit local flexibility, even in light of *McDonald*'s application of the Second Amendment to the states.⁸⁵ Professor Blocher began his analysis by examining the diverse gun views held in different regions of the country.⁸⁶ These views rarely derive strictly from interpretations of empirical data, but rather rely on significant differences in gun culture—particularly between rural and urban areas.⁸⁷ Although in a post-*Heller* world empirically driven interest-balancing tests cannot be used to evaluate the constitutionality of a particular firearm law,⁸⁸ the extent to which a particular firearm is popular

79. Tebbe & Tsai, *supra* note 18, at 463 (“A person engages in [constitutional] borrowing when, in the course of trying to persuade someone to adopt a reading of the Constitution, that person draws on one domain of constitutional knowledge in order to interpret, bolster, or otherwise illuminate another domain. It is, in other words, an interpretive practice characterized by a deliberate effort to bridge disparate constitutional fields for persuasive ends.”).

80. See, e.g., Miller, *supra* note 13, at 893–929 (suggesting that Seventh Amendment jurisprudence can provide guidance for developing an analytical framework for the Second Amendment).

81. Along with Oak Park, Illinois.

82. *District of Columbia v. Heller*, 554 U.S. 570, 635 (2008) (explaining that just as the First Amendment, although with exceptions, protects unpopular views absent an interest-balancing test, so too should the Second Amendment be spared the constant limitations imposed by such a test as it “is the very product of an interest balancing by the people”).

83. *McDonald*, 130 S. Ct. at 3031 (highlighting how *Cruikshank*—the same case that said that the Second Amendment did not apply to the States—stated that the First Amendment right to assemble did not apply to the States, only for the Supreme Court to later reject that explanation sixty years later in *De Jonge v. Oregon*, 299 U.S. 353, 364 (1937)).

84. See Tebbe & Tsai, *supra* note 18, at 467 (explaining the opportunity to “take advantage of accumulated wisdom” in the process of constitutional borrowing).

85. Blocher, *supra* note 11, at 142–43 (examining the possibilities of using the First, Fifth, and Fourteenth Amendments to justify a locally regulated Second Amendment).

86. *Id.* at 86.

87. *Id.* at 94. For a full discussion of the distinction between rural and urban gun culture, see *id.* at 94–103.

88. See *District of Columbia v. Heller*, 554 U.S. 570, 634–35 (2008) (“We know of no other enumerated constitutional right whose core protection has been subjected to a freestanding ‘interest-balancing’ approach.”).

and in common-use can be used as guidance.⁸⁹ Accordingly, recognition of the differences in the popularity and use of guns in different parts of the country is vital for evaluating the Second Amendment standard.

In addition, Professor Darrell A.H. Miller proposed a method of constitutional borrowing very similar to the method advanced by this Note.⁹⁰ He attempted to use obscenity jurisprudence to establish his particular view of how to interpret the Second Amendment.⁹¹ Unfortunately, his attempt at applying obscenity doctrine to the Second Amendment fails for a number of reasons.⁹² First, when Professor Miller focused on obscenity doctrine as applied in *Stanley v. Georgia*⁹³ and suggested that guns, like obscene materials, should be allowed in a person's home but not in public, he equated all firearms with obscene material.⁹⁴ Such a proposition proves to be rather problematic, as obscene material falls outside the scope of the First Amendment's protection,⁹⁵ while firearms—or at least those that are popular and in common use—do fall under the protection of the Second Amendment.⁹⁶ Moreover, the Supreme Court appears likely to permit at least limited public carriage rights of firearms.⁹⁷ Although *Heller* only suggested a potential Second Amendment right to carry in dicta,⁹⁸ a future holding that the Second Amendment

89. See *id.* at 627–29 (as “the sorts of weapons protected were those ‘in common use at the time’” of the enactment of the Second Amendment, the banning of hand guns, as “the most preferred firearm in the nation to ‘keep’ and use for protection of one’s home and family,” would be unconstitutional).

90. Darrell A.H. Miller, *Guns as Smut: Defending the Home-Bound Second Amendment*, 109 COLUM. L. REV. 1278 (2009).

91. *Id.* at 1280 (arguing that, as with the right to view adult obscene material, the right to keep and bear arms should apply in the home but be heavily restricted outside of it).

92. In fact, after *McDonald*, it appears as though Professor Miller has abandoned the doctrine of the First Amendment for that of the Seventh in hopes of developing a new test for the Second Amendment. See, e.g., Miller, *supra* note 13, at 895–96.

93. *Stanley v. Georgia*, 394 U.S. 557, 559 (1969) (holding that “mere private possession of obscene matter cannot constitutionally be made a crime”).

94. Miller, *supra* note 90, at 1279–82 (“As the majority noted, the First Amendment excludes from its protection categories of expression, such as ‘obscenity, libel, and disclosure of state secrets.’ The Second Amendment may be ‘no different,’ and almost certainly excludes from its protection certain kinds of ‘bearing’ and certain categories of ‘arms.’”).

95. *Roth v. United States*, 354 U.S. 476, 485 (1957) (“We hold that obscenity is not within the area of constitutionally protected speech or press.”).

96. See *District of Columbia v. Heller*, 554 U.S. 570, 634–35 (2008) (highlighting the unnecessary nature of an interest-balancing test as the existence of the Second Amendment is recognition of the people’s own balancing).

97. Styles, *supra* note 12, at 90A–91A (stating that the *Heller* Court explained in dicta that people have an implied right to carry in certain “non-sensitive places for the purposes of self-defense”).

98. *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3104 (2010) (Stevens, J., dissenting) (“The majority opinion contained some dicta suggesting the possibility of a more expansive arms-bearing right, one that would travel with the individual to an extent into public places, as “in case of

provides a right to carry a gun in public places would further weaken Professor Miller's argument.

Shortcomings aside, Professor Blocher's and Professor Miller's arguments provide an excellent starting point for crafting a Second Amendment test through a system of constitutional borrowing. By recognizing and respecting the variation in regional gun values and circumstances, an obscenity doctrine-derived test would accord respect to the central right of self-defense emanating from the Second Amendment,⁹⁹ while still addressing the very real problem of gun violence.

IV. THE OBSCENITY DOCTRINE

The First Amendment's obscenity doctrine, when applied correctly, provides an excellent framework for interpreting the Second Amendment via constitutional borrowing. However, demonstrating the utility of the obscenity doctrine for understanding the Second Amendment first requires a brief analysis of the obscenity framework.

A. DEVELOPING DOCTRINE—FROM *ROTH* TO *MILLER*

Although obscenity doctrine finds its roots in the common law,¹⁰⁰ for all intents and purposes, the modern approach began with *Roth v. United States*.¹⁰¹ In *Roth*, the Supreme Court unequivocally declared that obscenity falls outside the protection of the First Amendment.¹⁰² The Court explained how the First Amendment's purpose was to protect the "unfettered interchange of ideas."¹⁰³ However, as obscene materials do not further this social value,¹⁰⁴ they do not fit within the scope of the Amendment's rights or protections.¹⁰⁵ In determining whether given materials are obscene, *Roth* explained that jurors needed to consider how the material, taken as a whole, would impact "the average person in the community."¹⁰⁶ A few years later,

confrontation.").

99. *Heller*, 554 U.S. at 599 ("The prefatory clause does not suggest that preserving the militia was the only reason Americans valued the ancient right; most undoubtedly thought it even more important for self-defense . . .").

100. Tim K. Boone, Note, *The "Virtual" Network: Why Miller v. California's Local Community Standard Should Remain Unchanged in the Wake of the Ninth Circuit's Kilbride Decision*, 6 LIBERTY U. L. REV. 347, 349–50 (2012).

101. *Id.* at 350 (explaining how *Roth* was "a landmark decision" at the time it was decided).

102. *Roth v. United States*, 354 U.S. 476, 485 (1957) ("We hold that obscenity is not within the area of constitutionally protected speech or press.").

103. *Id.* at 484.

104. *Id.* at 484–85.

105. *Id.*

106. *Id.* at 489–90.

in *Jacobellis v. Ohio*, the Supreme Court clarified that the contemporary “community” standard referred to a national standard, rather than a local community standard.¹⁰⁷

In *Memoirs v. Massachusetts*, the Court, in addition to implementing the *Roth* test for judging obscene materials, explained that “[a] book cannot be proscribed unless it is found to be *utterly* without redeeming social value.”¹⁰⁸ Furthermore, the strength of the other two *Roth* factors cannot alone be dispositive for determining if a work is obscene.¹⁰⁹ Rather, the three factors—“prurient appeal . . . patent offensive[ness]” and social value—must be reviewed independently of one another.¹¹⁰

B. *MILLER V. CALIFORNIA*

The next revolution in the development of the obscenity doctrine came less than two decades after *Roth*, in *Miller v. California*.¹¹¹ In *Miller*, the appellant sent unsolicited advertisements for pornographic material.¹¹² The Court evaluated the state of the law and made a number of significant findings. First, the Court reiterated that the First Amendment does not protect obscene materials from regulation.¹¹³ Second, the Court rejected the third prong of the *Memoirs* test, which required that the allegedly offensive material be “utterly without redeeming social value.”¹¹⁴ Third, the Court rejected the notion that a national standard must be applied when evaluating the first two prongs of the obscenity test—prurient interest and offensiveness.¹¹⁵ Following *Miller*, the test for determining whether material could be classified as obscene, and outside the scope of the First

107. *Jacobellis v. Ohio*, 378 U.S. 184, 194–95 (1964) (“We thus reaffirm the position taken in *Roth* to the effect that the constitutional status of an allegedly obscene work must be determined on the basis of a national standard.”).

108. *Memoirs v. Massachusetts*, 383 U.S. 413, 418–19 (1966). The Court acknowledged here that [u]nder [the *Roth*] definition, as elaborated in subsequent cases, three elements must coalesce: it must be established that (a) the dominant theme of the material taken as a whole appeals to a prurient interest in sex; (b) the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters; and (c) the material is utterly without redeeming social value.
Id. at 418.

109. *Id.* at 418–19.

110. *Id.* at 419.

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

112. *Id.* at 16–18.

113. *Id.* at 36 (“[W]e . . . reaffirm the *Roth* holding that obscene material is not protected by the First Amendment . . .”).

114. *Id.* at 36–37 (holding that “such material can be regulated by the States . . . without a showing that the material is *utterly* without redeeming social value” (internal quotation marks omitted)).

115. *Id.* at 32–34 (“It is neither realistic nor constitutionally sound to read the First Amendment as requiring that the people of Maine or Mississippi accept public depiction of conduct found tolerable in Las Vegas, or New York City.”).

Amendment's protection reads as follows:

The basic guidelines for the trier of fact must be: (a) whether "the average person, applying contemporary community standards" would find that the work, taken as a whole, appeals to the prurient interest . . . ; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.¹¹⁶

The Court further decided that it would limit the application of this rule only to "'hard core' pornograph[ic]" material.¹¹⁷

In place of the *Jacobellis* national standard for evaluating what might be attractive to the "prurient interest" or "patently offensive," the Court articulated an approach based on "contemporary community standards" derived from jurors' environments and experiences, rather than "hypothetical and unascertainable 'national standards.'"¹¹⁸ The Court rejected the notion that different communities throughout the country needed to follow the same standards of decency when it came to sexually explicit content.¹¹⁹ Still, the Court recognized that the government had a significant interest in curbing the market for obscene materials.¹²⁰

C. THE MODERN OBSCENITY DOCTRINE

Since 1973, the Supreme Court has provided further interpretation and guidance on the *Miller* three-prong test. For example, in *Jenkins v. Georgia*,¹²¹ the Court clarified that although *Miller* had accepted the use of a state-based community standard, jurors were not required to use this standard.¹²² Rather, the *Miller* test permitted the scope of "community standards" to be developed by the jurors themselves, based on their own

116. *Id.* at 24 (citations omitted).

117. *Id.* at 29.

118. *See id.* at 30–31.

119. *Id.* ("Under a National Constitution, fundamental First Amendment limitations on the powers of the States do not vary from community to community, but this does not mean that there are, or should or can be, fixed, uniform national standards of precisely what appeals to the 'prurient interest' or is 'patently offensive.' These are essentially questions of fact, and our Nation is simply too big and too diverse for this Court to reasonably expect that such standards could be articulated for all 50 States in a single formulation, even assuming the prerequisite consensus exists.")

120. *Id.* at 18–19 ("[T]he States have a legitimate interest in prohibiting dissemination or exhibition of obscene material . . .").

121. *Jenkins v. Georgia*, 418 U.S. 153 (1974).

122. *Id.* at 157 ("We agree with the Supreme Court of Georgia's implicit ruling that the Constitution does not require that juries be instructed in state obscenity cases to apply the standards of a hypothetical statewide community. *Miller* approved the use of such instructions; it did not mandate their use. What *Miller* makes clear is that state juries need not be instructed to apply 'national standards.'").

understanding.¹²³

Additionally, in *Pope v. Illinois*,¹²⁴ the Court noted that the third prong of the *Miller* test should not be evaluated based on “contemporary community standards” like the first two prongs.¹²⁵ Rather, jurors should determine the “literary, artistic, political, or scientific value”¹²⁶ of a work based on how a reasonable person would evaluate the work as a whole.¹²⁷

D. EXCEPTIONS TO THE GENERAL RULE ON OBSCENITY

Not all obscene or offensive materials without legitimate literary or artistic value fit within the scope of the traditional obscenity doctrine. For example, obscene materials in the home, as well as child pornography, are not subject to the traditional obscenity test. *Stanley v. Georgia* governs obscene materials in the home.¹²⁸ Namely, the *Stanley* rule states that since the government has no interest in banning obscene materials in the home, it cannot ban adults from having or viewing such materials there—despite the fact that obscene material typically falls outside the scope of the First Amendment’s protection.¹²⁹ Child pornography on the other hand, can be banned in all contexts both public and private.¹³⁰ The nature and dangers of the market for child pornography allow the government to regulate it in order to destroy the commercial market for such goods.¹³¹

V. GUNS AND OBSCENITY

The need for a flexible standard to apply the Second Amendment arises from the diverse needs, values and priorities of the many citizens and

123. *Id.* (“We also agree with the Supreme Court of Georgia’s implicit approval of the trial court’s instructions directing jurors to apply ‘community standards’ without specifying what ‘community.’ *Miller* held that it was constitutionally permissible to permit juries to rely on the understanding of the community from which they came as to contemporary community standards . . .”).

124. *Pope v. Illinois*, 481 U.S. 497 (1987).

125. *Id.* at 500–01.

126. *Id.* (quoting *Miller v. California*, 413 U.S. 15, 34 (1973)).

127. *Id.*

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

129. *Id.* at 563–68.

130. *Osborne v. Ohio*, 495 U.S. 103, 111 (1990) (“Given the gravity of the State’s interests in this context, we find that Ohio may constitutionally proscribe the possession and viewing of child pornography.”). *See also* *New York v. Ferber*, 458 U.S. 747 (1982) (upholding the conviction of a bookstore owner who distributed sexual materials showing a young person under the age of sixteen).

131. *Osborne*, 495 U.S. at 108–11 (discussing the state’s compelling interest in “safeguarding the physical and psychological wellbeing of minors” and specifically the necessity of “protect[ing] the victims of child pornography” by preventing the “exploitive use of children,” further revictimization stemming from exposure to their pornographic recordings, and the use of such materials by pedophiles attempting to “seduce other children into sexual activity”).

communities throughout the country.¹³² People who live in rural communities tend to prefer fewer gun regulations than do those who live in cities.¹³³ The Supreme Court has noted the differences between rural and urban gun culture, and has acknowledged that urbanites are more likely to fall victim to gun homicide.¹³⁴ Recognizing that the dangers from guns, as well as affinities for them, differ depending on geographical region within the United States, what test can protect the right of citizens to keep reasonable guns, in reasonable manners, for reasonable purposes, while recognizing that the answers to these questions are not geographically or temporally static? The following section will demonstrate how a modified obscenity-style test for the Second Amendment can provide such a framework for evaluating the constitutionality of gun laws and regulations.

A. CRAFTING A TEST

Both academics and the courts have highlighted comparisons between the First and Second Amendments,¹³⁵ but building a test requires more than a simple showing of parallel interests. Still, by evaluating the scopes and purposes of both Amendments, along with their legal standards, significant conclusions can be drawn.

Heller and *McDonald* created a Second Amendment standard that protects the individual's right to keep and bear firearms if the firearms (1) are in common use, (2) are popularly relied upon for self-defense,¹³⁶ and (3) are not dangerous or unusual.¹³⁷ Since self-defense is the "central component" of the Second Amendment right, and the need for self-defense is at its apex in the home, the interests of the government cannot override an individual's constitutional right to keep and bear arms in the home for the purposes of self-defense.¹³⁸ In addition, the Second Amendment only

132. Blocher, *supra* note 11, at 103–07.

133. *Id.* at 91.

134. *District of Columbia v. Heller*, 554 U.S. 570, 698–99 (2008) (Breyer, J., dissenting) (“[A]lthough the overall rate of gun death between 1989 and 1999 was roughly the same in urban and rural areas, the urban homicide rate was three times as high; even after adjusting for other variables, it was still twice as high.”).

135. *E.g.*, *id.* at 635 (explaining that the First and Second Amendments both offer limited protection given interest-balancing concerns); Miller, *supra* note 90, at 1281 (“[T]he First Amendment and Second Amendment are cousins, and may be subject to similar limitations.”).

136. *Heller*, 554 U.S. at 622–25.

137. *Id.* at 627.

138. *See id.* at 628–29 (“Under any of the standards of scrutiny that we have applied to enumerated constitutional rights, banning from the home ‘the most preferred firearm in the nation to ‘keep’ and use for protection of one’s home and family,’ would fail constitutional muster.” (citation omitted)).

protects lawful firearms.¹³⁹ It does not provide a constitutional guarantee for an individual to carry a gun for any purpose, just as the First Amendment does not guarantee the right of individual expression for any purpose.¹⁴⁰ However, the Constitution does provide significant liberties for individuals to own and carry a number of firearms.¹⁴¹

Modern obscenity doctrine establishes that the First Amendment does not protect obscene materials. Determining what is obscene requires fact finders to decide if the materials, taken in their entirety, (1) “appeal[] to the prurient interest” when “applying contemporary community standards;” (2) depict statutorily defined sexual material in a “patently offensive” manner; and (3) fail to provide any “serious literary, artistic, political, or scientific value.”¹⁴² Whereas the first two prongs of the *Miller* test require “applying contemporary community standards,” the third prong utilizes the reasonable person test.¹⁴³

In order to more fully understand the *Miller* test, it is helpful to break it down into its constituent parts. The first prong of the test requires an examination of whether the material appeals to the “prurient interest.”¹⁴⁴ *Roth* defines such material as that which has “a tendency to excite lustful thoughts.”¹⁴⁵ Obscene material differs from mere sexual material based on its lust-promoting nature.¹⁴⁶ Although the government need not prove that the allegedly obscene material will “create a clear and present danger of antisocial conduct,” the interest in limiting such prurient material in public arises from the dangers of exposure to children.¹⁴⁷ For the Court, the prurient interest is the illegitimate one, and outside the scope of the First Amendment.¹⁴⁸ In other words, the first prong of the *Miller* test refers to the “type” of material.

The second prong requires an examination of whether the depicted material is “patently offensive.”¹⁴⁹ The depiction of expressive content

139. *Miller*, *supra* note 90, at 1293.

140. *Heller*, 554 U.S. at 595 (“[W]e do not read the Second Amendment to protect the right of citizens to carry arms for *any sort* of confrontation, just as we do not read the First Amendment to protect the right of citizens to speak for *any purpose*.”).

141. *Id.* at 622–28.

142. *Miller v. California*, 413 U.S. 15, 24 (1973).

143. *Pope v. Illinois*, 481 U.S. 497, 500–01 (1987).

144. *Id.* at 500.

145. *Roth v. United States*, 354 U.S. 476, 487 n.20 (1957).

146. *Id.* at 487.

147. *Stanley v. Georgia*, 394 U.S. 557, 567 (1969) (explaining how the interests served by limiting obscene materials in public do not exist in the privacy of one’s home).

148. *Roth*, 354 U.S. at 487.

149. *Pope*, 481 U.S. at 500.

ultimately goes to the manifestation or use of the right of expression. As with the first element, the determination of whether the material is offensive is a question of fact for the jury to determine, by applying “contemporary community standards.”¹⁵⁰ However, courts must limit the discretion of the jury in this regard,¹⁵¹ and appellate judges have the capacity to review such determinations.¹⁵²

The third prong of the test evaluates, from the perspective of a reasonable person, whether the material has any potential literary, political, artistic, or other value.¹⁵³ The furtherance of such values aligns with the central purpose of the First Amendment right to speech.¹⁵⁴ Obscene materials on the other hand, do not further this purpose.¹⁵⁵ Since obscene materials do not enhance enjoyment of the central component of the First Amendment right—legitimate, society-furthering discourse—such materials exist outside the scope of the Amendment.¹⁵⁶ In other words, the third prong compares the purpose of the material to the purpose of the underlying right protected by the First Amendment.¹⁵⁷

Thus, when broken down into its constituent parts, obscenity doctrine requires juries to evaluate: (1) the type of allegedly obscene material, (2) the use of the material, and (3) the purpose served by the material. Similarly, evaluation of a gun law or regulation could also be broken down into three basic analytical parts: (1) the type of gun, (2) the use of the gun, and (3) the purpose of the gun. *Heller* and *McDonald* ultimately evaluated gun laws in much the same way.

First, *Heller* and *McDonald* looked to the type of gun being regulated. Guns that may be protected by the Second Amendment include those in

150. *Jenkins v. Georgia*, 418 U.S. 153, 159 (1974) (quoting *Miller v. California*, 413 U.S. 15, 30 (1973)).

151. *Id.* at 160 (“Even though questions of appeal to the ‘prurient interest’ or of patent offensiveness are ‘essentially questions of fact,’ it would be a serious misreading of *Miller* to conclude that juries have unbridled discretion in determining what is ‘patently offensive.’”).

152. *Boone*, *supra* note 100, at 375–76 (obscenity convictions are reviewable “to prevent prudish communities from reaching conclusions that are unjust and inconsistent with the material at issue” (citing *Smith v. United States*, 431 U.S. 291, 305 (1977))).

153. *Miller v. California*, 413 U.S. 15, 34–35 (1973).

154. See John B. Major, Note, *Cyberstalking, Twitter, and the Captive Audience: A First Amendment Analysis of 18 U.S.C. § 2261A(2)*, 86 S. CAL. L. REV. 117, 130 (2012) (discussing the underlying goals of the First Amendment protection as “to further self-governance; to aid in the discovery of truth and maintain the marketplace of ideas; to promote autonomy and protect self-expression; and to encourage tolerance”).

155. *Roth v. United States*, 354 U.S. 476, 485 (1957) (citing *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571–72 (1942)).

156. *Id.*

157. See *id.*

common use for self-defense.¹⁵⁸ On the other hand, firearms that are “dangerous and unusual” fall outside the scope of the Second Amendment’s protections.¹⁵⁹

Next, *Heller* explained that the Second Amendment does not provide unlimited protections for how a firearm may be kept or carried.¹⁶⁰ For example, Justice Scalia noted in the majority opinion that many courts have upheld bans on concealed weapons carriage.¹⁶¹ Just as potentially offensive material (a manifestation of the right to free expression) is assessed via the second prong of the obscenity test to determine whether it is actually offensive, so too could the concealed carriage of firearms (a manifestation of the right to keep and bear arms) be evaluated. Concealed weapons laws ultimately examine the manifestation of the carriage right, which—in the context of concealed weapons—makes many people feel uncomfortable in a way similar to exposure to sexually explicit content.¹⁶²

In addition, *Heller* and *McDonald* explain that the central component of the Second Amendment right is self-defense.¹⁶³ The right to keep and bear arms must be connected to the Second Amendment’s lawful purpose.¹⁶⁴ As with obscene materials, which do not further the purpose of the underlying First Amendment right and therefore are not protected by this Amendment,¹⁶⁵ instances in which the type or use of a particular variety of firearm do not substantially further the self-defense interest underlying the Second Amendment (or so greatly exceed it that the Amendment’s purpose gets called into question) would likely fall outside

158. *District of Columbia v. Heller*, 554 U.S. 570, 624–25, 627–29 (2008).

159. *Id.* at 627 (“*Miller* said, as we have explained, that the sorts of weapons protected were those ‘in common use at the time.’ We think that limitation is fairly supported by the historical tradition of prohibiting the carrying of ‘dangerous and unusual weapons.’”).

160. *Id.* at 626–27 (“[N]othing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms.”).

161. *Id.* (“[T]he majority of the 19th-century courts to consider the question held that prohibitions on carrying concealed weapons were lawful under the Second Amendment or state analogues.”).

162. See Josh Richman, *Field Poll: California Voters Favor Gun Controls over Protecting Second Amendment Rights*, SAN JOSE MERCURY NEWS (Feb. 26, 2013), http://www.mercurynews.com/ci_22666985/field-poll-california-voters-feel-new-gun-controls (noting “61 percent of California voters favoring more gun controls to the 34 percent more concerned with Second Amendment rights”).

163. *Heller*, 554 U.S. at 599 (“[S]elf-defense had little to do with the right’s *codification*; it was the *central component* of the right itself.”); *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3036 (2010).

164. See *Heller*, 554 U.S. at 626 (explaining that the Second Amendment is a limited right, and that the Court has historically limited application of the right to lawful purposes).

165. *Roth v. United States*, 354 U.S. 476, 484–85 (1957).

the protection of the Second Amendment.¹⁶⁶

The last element of a Second Amendment test, as with the final prong of the *Miller* obscenity test, should be evaluated from the perspective of a reasonable person.¹⁶⁷ Such a standard would protect minority views from infringement by more cautious members of society.¹⁶⁸ However, it could also protect against the opposing extreme that would permit “dangerous and unusual”¹⁶⁹ weapons not truly designed for the purpose of individual self-defense. For example, although owning a grenade launcher might rationally be seen as assisting in the defense of one’s self, just as creating hard-core pornography for public display might rationally be seen as furthering one’s self-expression, such manifestations would not be *reasonable*. A ban on the possession of any functional weapon in the home clearly impacts the ability of individuals to defend themselves during a home invasion;¹⁷⁰ however, a ban on the possession of a grenade launcher does not impinge on the ability of individuals to defend themselves. Thus, when applied in the context of an obscenity-based test, grenade launchers would likely be precluded from receiving Second Amendment protection, as their dangerous and unusual nature makes it clear that they were probably not designed for the purpose of individual self-defense.¹⁷¹

This Note attempts to highlight the benefits of constitutional borrowing for the purposes of understanding the right to keep and bear arms; it does not strive to end the discussion concerning the sharing of analytical frameworks and structures between the First and Second Amendments. In order to evaluate the theoretical underpinnings of the obscenity-based approach, a draft test must be derived to evaluate the theory’s veracity. Based on the rights and limitations of the Second

166. See *Heller*, 554 U.S. at 624–25 (explaining how machine guns, although useful for military purposes, would likely fall outside the scope of the Second Amendment’s protections, as the capacity of such weapons clearly exceeds the “lawful purpose of self-defense,” even though a machine gun certainly could assist a person in defending him or herself).

167. *Pope v. Illinois*, 481 U.S. 497, 500–01 (1987) (“The proper inquiry is . . . whether a reasonable person would find such value in the material, taken as a whole.”).

168. *Id.* at 506 (Blackmun, J., concurring in part and dissenting in part) (“[T]he Court’s opinion stands for the clear proposition that the First Amendment does not permit a majority to dictate to discrete segments of the population—be they composed of art critics, literary scholars, or scientists—the value that may be found in various pieces of work. That only a minority may find value in a work does not mean that a jury would not conclude that “a reasonable person would find such value in the material, taken as a whole.”).

169. *Heller*, 554 U.S. at 627.

170. *Id.* at 628–29.

171. See *Pope*, 481 U.S. at 500–01 (referencing the use of the reasonable person standard to determine the purpose of a potentially obscene work).

Amendment as expressed in *Heller*¹⁷² and *McDonald*¹⁷³ and the structure of the evaluation criteria in the *Miller* obscenity test,¹⁷⁴ this Note proposes the following test for evaluating the constitutionality of gun laws and regulations:

(1) Whether the average person applying contemporary community standards would find the particular type of firearm to primarily appeal to a violent or illicit interest;¹⁷⁵

(2) Whether the exercise of the right in keeping and bearing the firearm is patently offensive to the common expectation of prudence necessary for living in the community;¹⁷⁶ and

(3) Whether the firearm and its use, taken together, have a legitimate and material connection to the central component of the Second Amendment right?¹⁷⁷

Thus, a gun law or regulation meets constitutional standards when it: (1) narrowly restricts only such firearms that appeal strictly to violent interests and tendencies; (2) requires merely that these firearms are kept or carried in a way that is not offensive to the community's generally accepted expectations; and (3) is designed with respect for the core purpose of self-defense embodied in the Second Amendment. When such a law or regulation does not meet the requirements of this approach, it violates the Second Amendment right to keep and bear arms and should therefore be struck down.

B. THE VALUE ADDED BY THE OBSCENITY-BASED FIREARMS TEST

This test is useful in a number of ways. First, it does not require any judicial interest-balancing, as mandated by *Heller* and *McDonald*.¹⁷⁸ Second, the test limits its scope to the self-defense function of the Second Amendment as articulated in *Heller*.¹⁷⁹ Debates about gun laws and regulations outside the scope of the central right of self-defense are neither

172. *Heller*, 554 U.S. at 594–99, 622–35.

173. *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3047–50 (2010).

174. *Miller v. California*, 413 U.S. 15, 24 (1973).

175. This first prong corresponds to the continued prohibition on “dangerous and unusual weapons.” *Heller*, 554 U.S. at 627.

176. This second prong corresponds to the continued restriction of carrying guns in schools and other sensitive places. *Id.* at 629.

177. The central component of the Second Amendment is the right to defend one's self, one's family, and one's property. *Id.* at 628–30.

178. *Id.* at 634–35; *McDonald*, 130 S. Ct. at 3047.

179. *Heller*, 554 U.S. at 599.

permitted nor proscribed by this test. Such debates could continue to be fought out at the local level—allowing different communities to set their own standards for hunting, collecting, sport shooting, and more.¹⁸⁰

The obscenity-based firearms test would protect the legitimate use of guns even where such rights are unpopular.¹⁸¹ Still, local values concerning the use and restrictions of guns would be an important part of the conversation given the use of contemporary community standards to evaluate the first two prongs of the test. It is neither “realistic nor constitutionally sound” to read the Second Amendment as requiring that the people of South Bronx or Oakland permit the same *laissez-faire* attitude with regard to guns as people in rural Texas or Montana.¹⁸² The modified obscenity-based test for evaluating the Second Amendment respects this reality.

C. POTENTIAL CRITICISMS AND RESPONSES

Suggesting that the same framework used for regulating hard-core pornography can provide insight on gun control certainly invites controversy and criticism.¹⁸³ The first area of concern regarding the use of obscenity doctrine for evaluating firearms laws and regulations derives from the inherent lack of uniformity in applying such a test.¹⁸⁴ By allowing flexibility for local communities in applying the Second Amendment, some fear that the right will lose its teeth.¹⁸⁵

Such criticisms fail, however, because they mischaracterize the Second Amendment right. The Constitution does not protect the right to

180. See Blocher, *supra* note 11, at 104–07 (describing the functional benefits of local control on firearms regulation).

181. Thus, my obscenity-based firearms test meets the relevant standard set forth in *Heller*. See *Heller*, 554 U.S. at 635 (“The First Amendment contains the freedom-of-speech guarantee that the people ratified, which included exceptions for obscenity, libel, and disclosure of state secrets, but not for the expression of extremely unpopular and wrongheaded views. The Second Amendment is no different.”).

182. *Miller v. California*, 413 U.S. 15, 32 (1973). See Blocher, *supra* note 11, at 104–07 (explaining that “firearm localism” allows for gun policies and regulations that reflect local and regional values).

183. *Miller*, *supra* note 90, at 1281, 1281 & n.8 (“Provocative? Admittedly.”).

184. See Nicholas J. Johnson, *Administering the Second Amendment: Law, Politics, and Taxonomy*, 50 SANTA CLARA L. REV. 1263, 1268–69 (2010) (explaining that it would be impossible to apply the local community standard test for hard-core pornography to gun control because each community has its own unique characteristics).

185. *Id.* at 1269 (“[G]iv[ing] communities the discretion to decide that their situation [is] special [would allow them] to constrict the constitutional right to some fraction of what is enjoyed by the rest of the country.”).

keep and bear firearms beyond what is necessary for self-defense.¹⁸⁶ The need to rely on a personal firearm for self-defense varies by location.¹⁸⁷ For example, delayed police response times in rural areas have long been an area of concern.¹⁸⁸ The need to keep and bear arms for self-defense, including outside the home, can thus be a very real problem based on the lack of police coverage in rural communities.¹⁸⁹ If the central component of the Second Amendment right is to allow individuals to protect themselves, their homes, and their families, and acceptable types of firearm and manners of firearm use change based on location, then it is the “one-size-fits-all” approach—and not the creation of locally-based standards—that restricts the central purpose of the Second Amendment.¹⁹⁰

Another criticism of an obscenity-based test for evaluating the Second Amendment comes from a general criticism of the obscenity doctrine: the reasonable person standard still leaves significant ambiguity allowing for subjective decisionmaking in determining what constitutes constitutionally unprotected material.¹⁹¹ In addition, the obscenity-based approach not only makes the last prong of the test more flexible,¹⁹² but also provides for significant discretion concerning the application of the first two prongs.¹⁹³ However, such a level of subjectivity allows the standard to be flexible and respond to the developing needs and values of various communities, while not being completely vulnerable to variance in the political process.¹⁹⁴

186. See *District of Columbia v. Heller*, 554 U.S. 570, 599 (2008) (“[S]elf-defense . . . was the central *component* of the right itself.”).

187. See Blocher, *supra* note 11, at 90–103 (discussing the difference in gun use and culture in different regions and geographic locations).

188. *Id.* at 97.

189. See RALPH A. WEISHEIT, DAVID N. FALCONE & L. EDWARD WELLS, NAT’L INST. OF JUSTICE, U.S. DEP’T OF JUSTICE, RURAL CRIME AND RURAL POLICING 6 (1994), available at <https://www.ncjrs.gov/pdffiles/rcrp.pdf>.

190. Unless, one were to argue that the standard should be set so as to encompass all possible needs in every part of the country, which in practice would eliminate most, if not all, gun control regulations. However, *Heller* emphasizes that many “longstanding” firearms laws would not be impacted by the ruling. *Heller*, 554 U.S. at 626–27.

191. Penny E. Paul, Note, *Pope v. Illinois: The Reasonable Person as the Supreme Court’s Latest Arbiter of Obscenity*, 7 CARDOZO ARTS & ENT. L.J. 185, 209 (1988) (“[T]he interjection of a ‘reasonable person’ standard into the equation still does little to elucidate that standard.”).

192. In many ways the reasonable person standard provides more protection for a wide-ranging right to obscenity, or in this case, the right to keep and bear arms. See *Pope v. Illinois*, 481 U.S. 497, 506 (1987) (Blackmun, J., concurring in part and dissenting in part) (emphasizing that the reasonable person test cannot be met merely by establishing the majority viewpoint on the material).

193. See *Jenkins v. Georgia*, 418 U.S. 153, 157 (1974) (explaining how jurors may employ their own understanding of the scope of “community” when applying contemporary community standards).

194. See Blocher, *supra* note 11, at 138–40 (highlighting that a “one-size-fits-all approach” based only on the rural-urban dichotomy poses difficulty, as it would not account for unique communities, such as suburbs, which do not fit neatly with that paradigm).

In addition, some might argue that since even local standards cannot account for diversity of opinion, using a variable approach to constitutional interpretation proves to be a meaningless endeavor.¹⁹⁵ However, the need for a variable approach is not derived only from the existence of regionally based gun cultures. In many ways, opinions on guns cannot be seen as dispositive for the purposes of Second Amendment evaluation.¹⁹⁶ Rather, although opinions on gun rights and gun control do not always fall in line with empirical data concerning the potential need to arm or disarm a community,¹⁹⁷ the fact that there are material differences concerning the practical requirements of self-defense¹⁹⁸ demonstrates the need for a variable standard.

Furthermore, many may argue that *Miller*'s localized approach no longer makes sense in the modern world.¹⁹⁹ Such criticism might suggest that interstate connectivity renders localized approaches to obscenity "hopelessly unworkable."²⁰⁰ In the context of Internet obscenity, such conclusions might be true. This Note does not attempt to evolve the understanding of the obscenity doctrine in order to handle the impact of the Internet on the availability of sexually explicit content. However, for the purposes of the Second Amendment, such issues do not arise. Although people can purchase guns online,²⁰¹ just as they can obtain obscene materials, a gun still needs to be physically moved from one location to another. Clearly, entrance into American communities does not require a pseudo-border check that inspects for illegal guns; however the federal government has been discussing possible efforts to reduce the problem of gun trafficking.²⁰² Furthermore, it would be difficult to argue that it is

195. See *Smith v. United States*, 431 U.S. 291, 313–14 (1977) (Stevens, J., dissenting) ("The diversity within the Nation which makes a single standard of offensiveness impossible to identify is also present within each of the so-called local communities in which litigation of this kind is prosecuted.")

196. See Blocher, *supra* note 11, at 96 ("One might argue that this gun culture is flatly irrelevant to the interpretation of the Second Amendment, at least to the degree that it is rooted in recreational pursuits like hunting that are penumbral to the self-defense right recognized in *Heller*.").

197. *Id.* at 102–03 ("Residents of high-crime cities are not significantly more likely to support gun control than those in low-crime cities.").

198. See WEISHEIT, FALCONE & WELLS, *supra* note 189 at 1 ("[R]ural environments are distinct from urban environments in ways that affect policing, crime, and public policy.").

199. E.g., Lawrence G. Walters & Clyde DeWitt, *Obscenity in the Digital Age: The Re-Evaluation of Community Standards*, 10 NEXUS 59, 59–60 (2005).

200. *Id.*

201. Pamela Engel, *It's Shockingly Easy to Buy a Gun Online Without a Background Check*, BUS. INSIDER (Dec. 12, 2013), <http://www.businessinsider.com/mayors-against-illegal-guns-attacks-armslist-2013-12>.

202. Editorial, *The Bid to Stop Gun Trafficking*, N.Y. TIMES (Jan. 7, 2013), <http://www.nytimes.com/2013/01/08/opinion/the-bid-to-stop-gun-trafficking.html>.

significantly easier to transport a firearm than it is to traffic an obscene magazine or book. Regardless, such limitations, at least in the context of firearms, provide no additional challenges than have existed with the obscenity doctrine for decades.

VI. TESTING THE TEST

Although using the obscenity doctrine for purposes of evaluating the Second Amendment provides a unique constitutional discussion, if the modified test cannot provide guidance for analyzing the constitutionality of specific firearms laws and regulations, then the intellectual exercise becomes futile. This section will evaluate two gun statutes in order to test the efficacy of the obscenity-based Second Amendment approach.

A. THE PRE-*HELLER* DISTRICT OF COLUMBIA HANDGUN BAN

The first step in evaluating the modified obscenity-based test for the Second Amendment is to verify that the test would have yielded the same result in earlier cases. Although both *Heller* and *McDonald* involved situations in which handguns were banned in people's homes, the following analysis will partially ignore that variable for the purposes of applying the test.²⁰³

In *Heller*, the Court found that various gun control laws in the District of Columbia ("D.C.") violated the Second Amendment.²⁰⁴ One provision required that gun owners keep all firearms inoperable at all times unless the gun was located at work or used in the course of lawful recreational pursuits.²⁰⁵ A series of other provisions together eliminated the ability of

203. As mentioned previously, from an obscenity standpoint, evaluating gun laws that apply in homes may fall outside the scope of this test and should be evaluated under the *Stanley v. Georgia*, 394 U.S. 557 (1969) standard. See Miller, *supra* note 90, at 1299 (proposing a home-based obscenity test to apply in the Second Amendment context, and stating that "[a]pplication of obscenity doctrine to the right to keep and bear arms for self-defense is elegantly, perhaps beguilingly, simple. Essentially, the Second Amendment right to keep and bear arms, like the First Amendment right to obscene materials, is a right that ends at the doorstep"). The purposes of using the *Heller* law to first test the framework is strictly to evaluate the veracity of the test prior to applying it to other gun control laws.

204. *District of Columbia v. Heller*, 554 U.S. 570, 628–30 (2008).

205. As set forth in *Heller*, the laws in question:

prohibit[ed] the possession of handguns. It [was] a crime to carry an unregistered firearm, and the registration of handguns [was] prohibited. Wholly apart from that prohibition, no person [could] carry a handgun without a license, but the chief of police [could] issue licenses for 1-year periods. District of Columbia law also require[d] residents to keep their lawfully owned firearms, such as registered long guns, "unloaded and disassembled or bound by a trigger lock or similar device" unless they [were] located in a place of business or [were] being used for lawful recreational activities.

Id. at 574–75. (internal citations omitted).

anyone to own and keep a handgun in D.C.²⁰⁶ Assessed together; the Court evaluated the merits of a gun control system that banned handguns from being kept operable in the home for the purposes of self-defense.²⁰⁷

The Court noted that handguns are popular and in common use for self-defense.²⁰⁸ Furthermore, the D.C. gun laws did not require that the gun be carried in a dangerous, offensive, or troubling manner before criminal sanctions could be imposed. Rather, all handguns were banned outright, no matter how they were kept or carried.²⁰⁹ Guns that were permitted could not be used for the purposes of self-defense, even during an actual attack.²¹⁰

Washington D.C.'s gun control system clearly fails the obscenity-based three-prong test. First, would the average person, applying contemporary community standards, find that handguns appeal to violent or illicit interests? Although there are certainly people who find all guns to be connected to violent or illicit interests, the test does not incorporate individual personal values, but rather looks to contemporary community standards. Although by law, D.C. made the ownership of handguns illicit, the definition of "community" need not fit within the city's geographical limits, and there is no reason to assume that jurors would perceive the terms "community standard" to impose such restrictions.²¹¹ Since handguns were in common use for lawful purposes in the areas immediately surrounding D.C., handguns would likely not have been perceived as promoting illicit or violent interests in the way that "dangerous and unusual weapons" would.²¹²

Second, was the exercise of the right to own the handgun patently offensive to common expectations of prudence? Again, in this particular case, no. An owner who simply possessed an operable handgun violated a

206. *Id.* at 574.

207. *Id.* at 630.

208. *Id.* at 629. Although obviously, since use was proscribed by law, not popular within D.C. itself. See Johnson, *supra* note 184, at 1268–72 (describing some of the potential problems of a localized Second Amendment).

209. *Heller*, 554 U.S. at 574–75.

210. Winkler, *supra* note 48, at 1554 (“[Even lawful guns] had to be maintained disassembled or secured with a trigger lock and, according to a D.C. court decision, a gun owner was not permitted to unlock or assemble his long gun to use in self-defense, even if a burglar or rapist was climbing through the window.”).

211. See *Jenkins v. Georgia*, 418 U.S. 153, 157 (1974) (explaining that while *Miller* rejected the need to use national community standards, it did not mandate the use of other artificial, designated, geographical boundaries).

212. See *Heller*, 554 U.S. at 627 (comparing “dangerous and unusual weapons” with those “in common use”).

number of D.C.'s regulations.²¹³ The law only permitted operable long guns in places of business or during lawful recreational activities.²¹⁴ In other words, the particular gun right being advocated for did not include the ability to carry firearms into sensitive places, nor in a manner that would rise to the level of generally agreed upon imprudence.

Third, did the required firearm and its use have a legitimate material connection to the central component of the Second Amendment right? Specifically, were handguns in common use for the purpose of self-defense? The answer here is clearly yes. A handgun offers the benefit of protecting one's self and one's family. A handgun can be used even by those with limited arm strength. Using it also keeps a hand free to call the police. Finally, an attacker cannot easily disarm a person wielding a handgun.²¹⁵ Although handguns can be used for purposes other than self-defense, a reasonable person can find a legitimate material connection between owning a handgun and the Second Amendment right to keep and bear arms for self-defense.

Since (1) the average person serving on a jury in the District of Columbia, applying contemporary community standards, would likely not find the particular firearm at issue to appeal primarily to a violent or illicit interest; (2) the keeping and bearing of handguns would likely not qualify as patently offensive to the common expectations of prudence necessary for living in the community; and (3) the handgun and its use, taken together, have a legitimate material connection to the central component of the Second Amendment right of self-defense, owning a handgun for the purposes desired would likely fit within the scope of the Second Amendment's protection. Thus, laws that prevent individuals from owning handguns in a manner similar to the laws of Washington D.C. would be unconstitutional.

B. CONNECTICUT GENERAL STATUTE § 53-202A(A)–(D)

After the Sandy Hook shooting, the Connecticut State Legislature passed a comprehensive assault weapons ban.²¹⁶ Shortly thereafter, a

213. *See id.* at 574–75 (describing the gun-prohibiting statutes in question).

214. *Id.*

215. *Id.* at 629 (providing numerous reasons why “handguns are the most popular weapon chosen by Americans for self-defense”).

216. Edmund H. Mahony, *Federal Judge Upholds State's Tough Assault Weapons Ban*, HARTFORD COURANT (Jan. 30, 2014), http://articles.courant.com/2014-01-30/news/hc-gun-control-0131-20140130_1_gun-ownership-gun-control-gun-rights.

lawsuit was brought to enjoin Connecticut from enforcing the ban.²¹⁷ In *Shew v. Malloy*,²¹⁸ the U.S. District Court for the District of Connecticut analyzed whether the ban on assault weapons²¹⁹ violated the Second Amendment, the Fourteenth Amendment's Equal Protection Clause, and whether parts of the statute were "unconstitutionally vague."²²⁰ Although the District Court found the statute to be constitutional, it did so through the use of a balancing test.²²¹ As discussed above, the Supreme Court in both *Heller* and *McDonald* expressly rejected the use of balancing tests for determining the scope of the Second Amendment right.²²² Instead, the modified obscenity-based test could have been used to evaluate the constitutionality of the statute.

The Connecticut assault weapons ban included a list of specifically banned firearms, including but not limited to:

[A]ny of a number of specifically listed makes and models of semiautomatic centerfire rifles, semiautomatic pistols, or semiautomatic shotguns . . . or copies or duplicates thereof with the capability of such, that were in production prior to or on April 4, 2013. . . . [as well as] parts of an assault weapon that can be "rapidly" put together as a whole assault weapon.²²³

Large capacity magazines, along with semiautomatic shotguns and other similar grade firearms, were also banned.²²⁴

The modified obscenity-based test for the Second Amendment would not require reliance on empirical data, as the standard relies on the trier of fact's understanding of contemporary community standards²²⁵ and the reasonable person standard.²²⁶ Still, as this Note attempts to evaluate the implementation of this test, empirical data can help predict what a juror might determine "reasonable" and in keeping with "contemporary community standards."

217. *Id.*

218. *Shew v. Malloy*, 994 F. Supp. 2d 234 (D. Conn. 2014).

219. CONN. GEN. STAT. § 53-202a(A)–(D) (2014).

220. *Shew*, 994 F. Supp. 2d at 239.

221. *Id.* at 238–40.

222. *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3047 (2010); *District of Columbia v. Heller*, 554 U.S. 570, 634–35 (2008).

223. *Shew*, 994 F. Supp. 2d at 240–41 (footnotes and internal quotation marks omitted).

224. *Id.* at 241.

225. *See Miller v. California*, 413 U.S. 15, 24 (1973) (describing the use of "contemporary community standards" in assessing the first two prongs of the obscenity doctrine).

226. *See Pope v. Illinois*, 481 U.S. 497, 500–01 (1987) (describing the use of a "reasonable person" standard in assessing the third prong of the obscenity doctrine).

In 2009, approximately 310 million guns existed throughout the country, 114 million of which were handguns.²²⁷ Although data concerning assault weapon ownership in Connecticut are not readily available, handguns are likely more popular than rifles and shotguns—whether they are of an assault variety or not.²²⁸ In addition, some estimates suggest that only between 3.5 and 4 million assault weapons are legally owned in the United States.²²⁹ Still, over half of the mass shootings that have happened nationwide employed the use of high-capacity magazines, assault weapons, or both.²³⁰ Although the above empirical data represents the entire United States rather than the local community in and around Connecticut, it demonstrates how the test operates and that it works from a functional perspective. As discussed throughout this Note, one of the benefits of using an obscenity-based approach in evaluating the Second Amendment is that it prevents the need to rely on a “one-size-fits-all” national standard for gun regulation. The above data are thus used to evaluate the proffered test’s veracity, and should be viewed as a test data set, rather than predictive.

Employing the modified obscenity-based test for the Second Amendment²³¹ would likely uphold the Connecticut assault weapons ban. First, the average person, applying contemporary community standards would likely find that assault weapons appeal to a violent or illicit interest. This is not to say that those who own weapons are violent or are criminals. Rather, assault weapons are not in common use in the same way that handguns are,²³² and could likely be considered “dangerous and unusual” under the *Heller* test.²³³

227. WILLIAM J. KROUSE, CONG. RESEARCH SERV., RL32842, GUN CONTROL LEGISLATION 8 (2012), available at <http://fas.org/sgp/crs/misc/RL32842.pdf>.

228. Justin Peters, *How Many Assault Weapons Are There in America? How Much Would It Cost the Government to Buy Them Back?*, SLATE (Dec. 20, 2012), http://www.slate.com/blogs/crime/2012/12/20/assault_rifle_stats_how_many_assault_rifles_are_there_in_america.html.

229. Paul Whitefield, *4 Million Assault Weapons in America: That Should Be Enough*, L.A. TIMES (March 14, 2013), <http://articles.latimes.com/2013/mar/14/news/la-ol-feinstein-assault-weapons-bangood-start-20130314>.

230. Mark Follman, Gavin Aronsen & Jaeah Lee, *More Than Half of Mass Shooters Used Assault Weapons and High-Capacity Magazines*, MOTHER JONES (Feb. 27, 2013), <http://www.motherjones.com/politics/2013/02/assault-weapons-high-capacity-magazines-mass-shootings-feinstein> (analyzing sixty-two mass shootings from 1982 through 2012).

231. And again, assuming that the test data used would reflect the perceptions of reasonableness of the community in a Connecticut court.

232. Compare Whitefield, *supra* note 229 (stating that there are between 3.5 to 4 million assault weapons legally owned in the United States) with KROUSE, *supra* note 227 (referencing a 2009 study stating that there were over one hundred million handguns in the United States).

233. See Follman, Aronsen & Lee, *supra* note 230 (finding that forty-eight of 143 weapons used in mass shootings in the last twenty years, involved high capacity magazines, assault weapons, or both).

The second prong, a question of fact for a jury to decide, would be impossible to judge from looking at data sets. Still, with the use of assault-style weapons in attacks across the country, including in Connecticut, it is likely that many people would find the ownership of assault weapons to be offensive to the common expectations of prudence. However, many others likely would not. Under the obscenity-based approach, local communities would evaluate this standard for themselves. For illustrative purposes only, it will be assumed that a hypothetical pool of jurors that might be drawn in Connecticut would likely find that keeping and bearing assault weapons offends common expectations of prudence.

Finally, the third prong likely would be met; unlike in *Heller*, in which D.C.'s firearm ban infringed on the right of self-defense,²³⁴ an assault weapon would not be necessary in the majority of conceivable situations to defend one's self, family, or property because many other more commonly used guns are available for such purposes. Since the average person (at least in some regions of the country) would likely find that (1) assault weapons primarily appeal to violent or illicit interests that are dangerous and unusual; (2) ownership of such weapons offends the common expectations of prudence;²³⁵ and (3) the use of such assault weapons lacks a necessary material connection to the right of self-defense, it is likely that assault weapons in Connecticut would fall outside the scope of the Second Amendment's protections as articulated by *Heller* and *McDonald*.²³⁶

VII. CONCLUSION

Implementing a modified obscenity-based approach to evaluate the scope of the Second Amendment would create a workable test for courts, legislatures, and scholars that would more effectively evaluate an individual's right to keep and bear arms. As long as every corner of the United States continues to try and craft a test for the whole country based on its own individual experiences with firearms, the American gun

234. *District of Columbia v. Heller*, 554 U.S. 570, 628–36 (2008).

235. This prong in particular would likely vary based on the individual community. For example, many communities likely would find assault weapons to be acceptable. The modified obscenity-based test for the Second Amendment allows for such variation. For the purposes of this discussion, the affirmative conclusion has been listed merely for the purposes of illustrating the practical effectiveness of the test.

236. Neither the *Heller* and *McDonald* decisions nor the test prescribed in this Note would ban assault weapons simply because they fall outside the protections of the Second Amendment. In the same way that obscene materials are not always banned, even though they similarly fall outside the protections of the First Amendment, guns would not be subject to a blanket ban under this analysis. However, the best forum for those who wish to advocate on behalf of a more comprehensive right to keep and bear arms would be before their local legislatures, not within the courts.

dilemma will never be resolved. Although the use of a modified obscenity-based approach cannot solve all differences and disagreements concerning guns, it can begin to build a foundation that appreciates a need for safety while respecting individual liberty. The obscenity doctrine has already allowed parts of the country with vastly different social values and priorities to set their own standards—rather than continually battling over what is and is not obscene—and move forward to address other issues. After decades of arguing about what can be done about guns, it is time for people to agree to disagree, and move forward with creative, local approaches to serious local issues.

