INTRATEXTUAL AND INTRADOCTRINAL DIMENSIONS OF THE CONSTITUTIONAL HOME

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ABSTRACT

The home has been lifted to a special pantheon of rights and protections in American constitutional law. Until recently, a conception of special protections for the home in the Fifth Amendment Takings Clause was under-addressed by scholars. However, a contemporary and robust academic treatment of a home-centric takings doctrine merits a different approach to construction and interpretation: the intratextual and intradoctrinal implications of a coherent set of homebound protections across the Bill of Rights, including the Takings Clause.

Intratextualism and intradoctrinalism are interpretive methods of juxtaposing non-adjoining and adjoining clauses in the Constitution and Supreme Court doctrines to find patterns of meaning in words and jurisprudence. Applying these methodological exercises to the first five amendments in the Bill of Rights reveals deeper thematic connections among the textual and doctrinal protections to the home. This cross-pollination of constitutional clauses and doctrines also offers scholars and jurists normative doctrines to provide greater protections to homes beyond the traditional protections that have existed for decades under Supreme Court jurisprudence.

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INTRODUCTION

Constitutional law scholars and jurists frequently engage in textual and doctrinal methods of constitutional construction. This is well recognized in constitutional law literature, but scholars have paid little attention to or engaged in these methods of interpretation with regard to the "constitutional home."[1] A textual and doctrinal thread of homebound protections runs through the first five amendments, delineating the home as a place worthy of special constitutional protections. However, there is a distinct chasm. The Bill of Rights extends special protections to homes in rights that cover smut, guns, soldiers, searches, and self-incrimination, but those same protections do not extend to takings.[2]

In recent scholarship, I argued that the story behind the absence of a special protection to homes in the Takings Clause is partly due to the Supreme Court's adherence, particularly in its public use doctrine, to

1. *See generally* Gerald S. Dickinson, *The Puzzle of the Constitutional Home*, 80 OHIO ST. L.J. 1099 (2020).

2. *Id*. at 1100.

deferential standards in substantive economic due process. But the Court has applied strict scrutiny standards for fundamental rights, including privacy rights that involve the home as a zone of protection.[3] However, this explanation is unpersuasive as to why the Supreme Court should, normatively, extend the homebound protections to its takings doctrine. Thus, the absence of a homebound takings doctrine calls for an application of coherence theory to carve out a special protection doctrine for the home under the Takings Clause.[4] All else being equal, scholars and the Supreme Court could, and arguably should, as a matter of coherence theory, extend the home-centric doctrinal thread of special protections to cover homes in takings.[5] This Article advances this thesis by engaging in intratextual and intradoctrinal methods of constitutional interpretation to cross-pollinate various homebound protections across the Bill of Rights.

Akhil Amar has noted that protections to the home under the Constitution were largely a result of the post-Reconstruction era, where the Third Amendment bridged a "home-centric Second Amendment and a Fourth Amendment that was from the beginning protective of the private domain."[6] Indeed, an intratextual and intradoctrinal approach to homebound protections within the Bill of Rights—"done correctly"—provides scholars and jurists a deeper appreciation of and understanding for protections of the "home" than analyzing the Court's analysis of each amendment separately.[7] This methodological exercise reveals intriguing patterns of related protections between different homebound protections in the Bill of Rights, while at the same time exposing deeper thematic associations of protections to the home within the Bill of Rights and normative arguments for expanding protections to the home.

I. INTERPRETIVE METHODS TO THE DOCUMENT AND DOCTRINE

Textualism and doctrinalism have long competed for the laurel as the superior method of constitutional interpretation.[8] While textualism

3. *Id.* at 1104.

4. *Id.* at 1103.

5. *Id.*

6. AKHIL REED AMAR, THE BILL OF RIGHTS 267 (1998).

7. Adrian Vermeule & Ernest A. Young, *Hercules, Herbert, and Amar: The Trouble with "Intratextualism"*, 113 HARV. L. REV. 730, 771 (2000).

8. *See generally* PHILLIP BOBBITT, CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION (1982) (proposing six modalities of interpretation, including historical, textual, doctrinal, prudential, structural and ethical). Although the traditional interpretive methods

is resurgent in constitutional and statutory interpretation,[9] doctrinalism still maintains a foothold as the predominant method of interpretation.[10] Intratextualism may provide a more coherent and harmonized conception of the sanctity of the home across the Bill of Rights.[11] However, a more holistic examination of the Bill of Rights offers greater clarity and coherence to the Court's distinctive protection to the home, but also its inexplicable absence of such protections in takings. For example, textually relying upon the "writtenness" of the home is an incomplete treatment of home-centric interpretations across the Bill of Rights. Thus, we would be remiss not to engage with doctrinalism—or intradoctrinalism—to resolve the dilemma.[12]

include text, history, structure, prudence, and doctrine, I chose to focus the methodological framework on textualism and doctrinalism, as both are primary methods and the former encompasses, for the most part, "structural" and "historical" methods that aim to "mine as much meaning as possible from the Constitution itself," or who Akhil Reed Amar refers to as "documentarians." *See* Akhil Reed Amar, *The Supreme Court 1999 Term, Foreword: The Document and the Doctrine*, 114 HARV. L. REV. 26, 30 (2000) (arguing that these "readings are documentarian").

9. *See generally* Abbe Gluck, *The State as Laboratories of Statutory Interpretation: Methodological Consensus and the New Modified Textualism*, 119 YALE L.J. 1750 (2010) (examining how state courts have experimented with giving stare decisis effect to methodologies of statutory interpretation); Anita S. Krishnakumar, *Textualism and Statutory Precedents*, 104 VA. L. REV. 157 (2018) (highlighting how textualist U.S. Supreme Court Justices have been willing to abandon stare decisis); John F. Manning, *Second-Generation Textualism*, 98 CALIF. L. REV. 1287 (2010); Daniel J. Meltzer, *Preemption and Textualism*, 112 MICH. L. REV. 1 (2013) (arguing that while textualism has a strong foothold in the U.S. Supreme Court, the Court's approach to preemption still tends to fundamentally purposive); Jonathan F. Mitchell, *Textualism and the Fourteenth Amendment*, 69 STAN. L. REV. 1237 (2017) (arguing that textualism has seen a resurgence in in statutory interpretation including in interpreting civil rights statutes); Henry Paul Monaghan, *Supremacy Clause Textualism*, 110 COLUM. L. REV. 731 (2010) (highlighting Philip P. Frickey's work examining the "empirical foundations of early textualism); Jennifer Nou, *Regulatory Textualism*, 65 DUKE L.J. 81 (2015) (arguing that judges should take a textualist approach to regulatory interpretation); John David Ohlendorf, *Textualism and Obstacle Preemption*, 47 GA. L. REV. 369 (2013) (highlighting the tension between the "new textualism" and obstacle preemption); Robert J. Pushaw, Jr., *Talking Textualism, Practicing Pragmatism: Rethinking the Supreme Court's Approach to Statutory Interpretation*, 51 GA. L. REV. 121 (2016) (asserting that Supreme Court Justices have used a combination of textualism with pragmatism to mold decisions based on ideological preferences); James E. Ryan, *Laying Claim to the Constitution: The Promise of New Textualism*, 97 VA. L. REV. 1523 (2011) (documenting the rise of "new textualism", its significance, and work that remains to be done).

10. *See* David A. Strauss, *Foreword: Does the Constitution Mean What It Says?*, 129 HARV. L. REV. 1, 4 (2015) (indicating that "constitutional law resembles the common law much more closely than it resembles a text-based system").

11. Vermeule & Young, *supra* note 7, at 771. *See* Amar, *supra* note 8, at 30. It matters little, as Ahkil Amar explains, whether we label such interpretive methods "textual," "structural," or "historical." These interpretations are, at the end of the day, "documentarian" in that they seek meaning directly from the Constitution. *Id.*

12. Akhil Reed Amar, *Intratextualism*, 112 HARV. L. REV 747, 747–48, 796 (1999) [hereinafter Amar's *Intratextualism*].

A. Intratextualists and Textualism

Some scholars have argued that the Constitution's Bill of Rights has not been "studied holistically," and instead has been "broken up into discrete blocks of text, with each segment examined in isolation."[13] One methodological approach is what Amar coins as "intratextualism"; that is, using the Constitution as a concordance to identify patterns across the first five Bill of Rights.[14] This type of concordance intratextualism enables and encourages scholars to "place nonadjoining clauses alongside each other for analysis because [the clauses] use the same (or very similar) words and phrases."[15] This approach of interpreting noncontiguous and contiguous amendments reveals "deeper thematic connection[s]," and is particularly useful in understanding home-centric protections.[16]

At its core, intratextualism is a method for understanding the meaning of certain words, provisions, and clauses in the Constitution by comparing "various words and phrases" that recur throughout the document.[17] The goal is to find meaning. The interpreter attempts to "read a contested word or phrase that appears in the Constitution in light of another passage . . . featuring the same (or very similar) word or phrase."[18] This, Amar argues, is a necessary supplement to the traditional constitutional interpretive methods, such as "text, history, structure, prudence, and doctrine."[19] In other words, if scholars—and jurists especially—parse the "text of a given clause[,]" they can find meaning and patterns that lead to conclusions about the intent of the Framers or the meaning of a particular provision.[20] Intratextualism also considers parallel provisions in light of their text, history, and precedent, and seeks illumination by comparing the two provisions.[21] An intratextualist approach to the Constitution by interpreters requires an eye towards "consistency rather than inconsistency."[22] As

13. AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION 78 at XI. (1998). This is not an endorsement of Amar's "intratextualism" per se, but instead simply an application of an interpretative methodology that is useful to examine the chasm in homebound protections between the Takings Clause and the rest of the Bill of Rights.
14. Amar's *Intratextualism*, *supra* note 12, at 792–93.
15. *Id.* at 793.
16. *Id.*
17. *Id.* at 747–48.
18. *Id.* at 748.
19. *Id.* at 754.
20. *Id.*
21. Vermeule & Young, *supra* note 7, at 739.
22. Amar's *Intratextualism, supra* note 12, at 794.

many will argue, it is difficult to find "any single, coherent scheme of principle"[23] under the Constitution, but intratextualism attempts to do so.

Amar's famous example of intratextualism is his analysis of Justice Marshall's "intriguing methodological turn" in *McCulloch v. Maryland*.[24] There, Justice Marshall referenced several provisions in the Constitution, effectively using the document itself as a dictionary to define "necessary" and "absolutely necessary." In doing so, Amar explains that Justice Marshall concluded that "absolutely necessary" was used by the Framers to convey "necessity," and therefore "necessary" under Article I, Section 8 does not implicitly mean the same as the strict meaning of "necessity."[25]

Another example is Amar's parsing of Article V. The provision states that Congress is empowered "whenever two thirds of both Houses shall deem it *necessary*"[26] to suggest changes to the Constitution. Likewise, the Necessary and Proper Clause states that Congress shall "make all Laws which shall be *necessary and proper* for carrying into Executive the foregoing Powers."[27] And then, again, in Article II, Section 3, the Constitution gives the President the power to recommend to Congress "such Measures as he shall judge *necessary and expedient*."[28] Later in the text, Article IV, Section 3 states that Congress has the power to "make all *needful* rules and regulations respecting the territory or other property belonging to the United States."[29]

Amar's "intratextualism" views the Constitution as its own dictionary, and holds that similar words could and should be interpreted the same way. If the reader (or judge) is unsure of the meaning behind "necessary" or "proper," then she could pull out the internal dictionary that is the Constitution, scan its pages to find the same word, and then interpret that same word the same way as (or differently than) it has been interpreted by other judges in similar (or not so similar) factual and legal circumstances.[30] If intratextualism is

23. RONALD DWORKIN, LAW'S EMPIRE 217, 229 (1986).
24. McCulloch v. Maryland, 17 U.S. 316 (1819); *see also* Amar's *Intratextualism*, *supra* note 12, at 756.
25. Amar's *Intratextualism*, *supra* note 12, at 757.
26. U.S. CONST. art. V (emphasis added).
27. U.S. CONST. art. I, § 8 (emphasis added).
28. U.S. CONST. art. II, § 3 (emphasis added).
29. *Id.* (emphasis added).
30. Amar's *Intratextualism*, *supra* note 12, at 788.

done "modestly," such a method may have benefits that outweigh the burdens or liabilities.[31]

Yet, the text of the Constitution "routinely . . . has very little to do with the way the case is argued or decided," and instead "resembles the common law much more closely than it resembles a text-based system."[32] The Court's opinions are atextual in nature and more reminiscent of "purposivist and precedent-based interpretive methodologies."[33] But "intratextualism often merely provides an interpretive lead or clue" that cannot be fully understood until scholars and jurists employ additional interpretive tools."[34]

B. Doctrinalists and Doctrinalism

This Article leans simultaneously on both "documentarians"[35] *and* "doctrinalists" to study how a homebound "takings" doctrine—as explored in prior scholarship[36]—might inform normative protections to homes in other adjacent and nonadjacent amendments across the Bill of Rights.[37] While documentarians look to the "specific words and word patterns, [and] the historical experiences that birthed and rebirthed the text,"[38] doctrinalists do not rely strictly upon the text, history, and structure of the Constitution. Rather, they "strive to synthesize what the Supreme Court has said and done, sometimes rather loosely, in the name of the Constitution."[39] An interpreter who utilizes doctrinalism

31. *Id.* at 738.

32. Strauss, *supra* note 10, at 4.

33. *See* Mitchell, *supra* note 9, at 1241 (citing Thomas C. Grey, *Do We Have an Unwritten Constitution?*, 27 STAN. L. REV. 703, 709 (1975)); *see also* David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877, 921 (1996) (noting how the Establishment Clause and Warrant Clause have been interpreted in purposivist ways that are at odds with the original understanding of the text).

34. Amar's *Intratextualism, supra* note 12, at 771.

35. Examples of such interpreters include Justice Hugo Black, Dean John Hart Ely, and Professors Steven Calabresi and Douglas Laycock. *See* AMAR, *supra* note 6, at 26.

36. *See* Dickinson, *supra* note 1, at 1099.

37. *See infra* Part III.

38. AMAR, *supra* note 6, at 26.

39. *Id.* Notable doctrinalists include Justice Harlan, Dean Kathleen Sullivan, Professor Richard Fallon and Professor David Strauss. *See* AMAR, *supra* note 6, at 26; *see also* Bruce Ackerman, *The Common Law Constitution of John Marshall Harlan*, 36 N.Y.L. SCH. L. REV. 5 (1991) (arguing that Harlan sought to "revitalize common law constitutionalism"); Richard H. Fallon, Jr., *The Supreme Court 1996 Term—Foreword: Implementing the Constitution*, 111 HARV. L. REV. 54 (1997) (assessing the content, role, and process of Supreme Court doctrine); Jed Rubenfeld, *Reading the Constitution as Spoken*, 104 YALE. L.J. 1119 (1995) (arguing that Supreme Court doctrine is fundamentally based on understandings of democracy); Kathleen M. Sullivan, *The Supreme Court, 1991 Term–Foreword: The Justices of Rules and Standards*, 106 HARV. L. REV. 22 (1992) (highlighting the surprisingly moderate nature of the 1991 term shedding light on

replaces the enacted text with "elaborate precedent."[40] Those who "privilege precedent concede that the text does sometimes matter."[41] But, by utilizing doctrinalism alongside intratextualism, one might argue that "[j]udicial doctrines, working alongside [other] rules . . . properly fill in the document's outline, making broad principles workably specific in a court and in the world."[42] This approach acknowledges that the document requires the "crafting of doctrine by courts."[43] Likewise, interpreting the Constitution is similar to the Court utilizing common law doctrinal principles to flesh out meaning.[44]

With the methodological framework of this Article laid out, let us proceed to revisit the Court's homebound doctrines that involve smut, guns, soldiers, searches, and self-incrimination using intratextualism and intradoctrinalism as interpretive tools.[45] I will then proceed to identify and discuss the lack of protections to the home under the Takings Clause, and then advocate for a homebound limitation in takings as a matter of harmony and consistency.[46]

II. THE HOMEBOUND BILL OF RIGHTS

The Constitution and the Supreme Court have created a textual and doctrinal schism within the Bill of Rights that, until recently, was left unaddressed.[47] Over decades, the Court has granted special protections to a zone of privacy within the home but has failed to extend similar protections to the home in its takings doctrine.[48]

Take, for example, the First Amendment. In *Stanley v. Georgia*, the Court noted that "[i]f the First Amendment means anything, it means that a State has no business telling a man, sitting alone in his own *house*, what books he may read or what films he may watch."[49] This is an

the connection between rules and standards); Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1413 (1989) (vigorously defending the doctrine of unconstitutional conditions).

40. AMAR, *supra* note 6, at 27.

41. *Id.*

42. *Id.* at 79.

43. Fallon, *supra* note 39, at 57.

44. *See* Strauss, *supra* note 33, at 877–79 (arguing that textualism and originalism are inadequate models for constitutional law, but rather the common-law approach "restrains judges more effectively").

45. *See* Dickinson, *supra* note 1, at 1099.

46. *See infra* Part III.

47. *See* Dickinson, *supra* note 1.

48. *Id.*

49. Stanley v. Georgia, 394 U.S. 557, 567 (1969); *see also* United States v. Orito, 413 U.S. 139, 142 (1973) ("The Constitution extends special safeguards to the privacy of the home, just as it

atextual treatment of the homebound protections—a precise and express protection to the home is not evident in the text of the First Amendment.

Likewise, in *District of Columbia v. Heller*, the Court found a constitutionally-protected individual right to bear arms in the "hearth and home."[50] This atextual reading of the Second Amendment left many wondering the value and import of structure and textual interpretations of the Second Amendment.[51] Yet, adjoining the Second Amendment is the Third Amendment's prohibition on quartering soldiers in the home during peacetime. This rarely studied amendment has raised significant questions regarding its utility and original intent. In *Youngstown Sheet & Tube Co. v. Sawyer*, the Court gave credence to the Third Amendment's textual prohibition of quartering soldiers in a home during peace time, noting that "in many parts of the world, a military commander can seize private housing to shelter his troops. Not so, however, in the United States."[52]

Similarly, the adjacent Fourth Amendment textually protects the home, giving "[t]he right of the people to be secure in their . . . houses . . . against unreasonable searches and seizures.[53] The Court has noted that "the physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed."[54] Even in the criminal procedure clause of the Fifth Amendment there exists an atextual protection of the home. The Court has peered across the Bill of Rights to the Fourth Amendment to find a homebound protection in compulsory exhortation of a person's testimony when the home is unlawfully entered and searched by law enforcement.[55] The Court has

protects other special privacy rights."); Moreno v. United States Dep't of Agric., 345 F. Supp. 310, 314 (D.D.C. 1972) ("Recent Supreme Court decisions make it clear that even the states, which possess a great police power not granted to Congress, cannot in the name of morality infringe the rights to privacy and freedom of association in the home.").

50. *See* District of Columbia v. Heller, 554 U.S. 570, 615–16, 635 (2008) (explaining that the founding generation supported "every man bearing his arms about him and keeping them in his house, his castle, for his own defense").

51. *See id.* at 720 (Breyer, J., dissenting) (questioning the basis for finding the use of arms for self-defense purposes as the core of the Second Amendment right).

52. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 644 (1952).

53. U.S. CONST. amend. IV.

54. *See* Payton v. New York, 445 U.S. 573, 589–90 (1980) ("The Fourth Amendment protects the individual's privacy in a variety of settings. In none is the zone of privacy more clearly defined than when bounded by the unambiguous physical dimensions of an individual's home.").

55. *See* Boyd v. United States, 116 U.S. 616, 630 (1886) ("The principles laid down in this opinion affect the very essence of constitutional liberty and security. They reach farther than the concrete form of the case then before the court.").

noted that the Fourth and Fifth Amendments run "almost into each other"[56] and that the protections "apply to all invasions . . . of the sanctity of a man's home and privacies of life"[57] when "[b]reaking into a house . . . ."[58] But when arriving at the Fifth Amendment's Takings Clause, no such protections to or within the home exist.

In *Kelo v. New London*, the Court found that the seizure of homes for economic development purposes was justifiable.[59] Unlike the Third and Fourth Amendments, the Fifth Amendment does not textually impose any special protections on homes. But like the First and Second Amendments and the criminal procedure clause of the Fifth Amendment, the Takings Clause does not doctrinally provide for a special protection to the home. However, a close reading of Justice Thomas's dissent in *Kelo* raises the prospect that the Court could, in limited circumstances, provide for special protections to homes in takings.[60]

There, Justice Thomas noted that the Court has "elsewhere [in the Fourth Amendment] recognized 'the overriding respect for the sanctity of the home that has been embedded in our traditions since the origins of the Republic.'"[61] He implicitly referenced the special protections to the home as a zone of privacy in the First, Second and Fourth Amendments by noting that "[t]hough citizens are safe from the government in their homes, the homes themselves [in takings] are not."[62] He then focused his argument for a lack of homebound protection in takings on the Fourth Amendment, explaining that "[w]e would not *defer to a legislature's determination* of the various circumstances that establish, for example, when a search of a home would be reasonable," because we have recognized the "overriding respect for the sanctity of the home."[63]

The Court has failed to embrace Justice Thomas's plea for a more rigorous judicial review of takings where homes are subject to seizure. However, as argued in recent scholarship, the logical doctrinal step is for the Court to embrace coherence theory as a guiding principle for

56. *Id*.
57. *Id.*
58. *Id.*
59. Kelo v. City of New London, 545 U.S. 469 (2005).
60. *See* Dickinson, *supra* note 1, at 1103 (explaining why the absence of home-centric takings protection is notable).
61. *Kelo*, 545 U.S. at 518 (Thomas, J., dissenting).
62. *Id.*
63. *Id.* (emphasis added).

invoking a home-centric takings doctrine.[64] Doing so would close the schism in the special protections to the home.[65] This seems logical.

Scholars and jurists strive for coherence. The practice of achieving harmony in text and doctrine requires scholars and jurists to identify "patterns of influence and adjustment" and then reason their way to a coherent outcome.[66] Thus, intratextual and intradoctrinal methods of interpretation reveal a pattern of jurisprudential influence by the Supreme Court that carves out a variety of interpretive tools to find a zone of protections in the home in the First, Second, Third, Fourth, and Fifth Amendments, except for the Takings Clause. This pattern of coherence strongly suggests that the Court could, and arguably should, in limited circumstances, achieve coherence in takings by applying special protections homes that are subject to expropriation or overregulation.[67]

64. *See* Dickinson, *supra* note 1, at 1103 ("[I]f the Fourth Amendment provides protections to homes (albeit within the zone of privacy), then it would seem that, as a matter of consistency and symmetry, the Court should likewise extend similar special protections to homes[.]").

65. *Id.* Writing about this schism:

> Constitutional congruence of home protections offers a comprehensive vision of the sanctity of the home in the Bill of Rights that embraces consistency and predictability. This constitutional congruence, in other words, offers a pragmatic mode of interpretation that harmonizes the home consistently in between and across all five amendments, including the Takings Clause. The addition of homebound protections in takings would further allow scholars and jurists to contemplate the home not solely through the lens of an "individual line of constitutional text" as if bound to, say, the Third or Fourth Amendment. Rather, pursuing home protections in the Takings Clause harmonizes home-centric doctrines in the Bill of Rights as a whole. This is achieved by doing two things at once: inferring the "home's constitutional primacy from the structure and context of the document itself," and subsequently drawing parallels to the sanctity of the home by leaning on precedent and doctrine from other doctrines within the Bill of Rights.

Id. at 1136.

66. Richard H. Fallon, Jr., *A Constructivist Coherence Theory of Constitutional Interpretation*, 100 HARV. L. REV. 1189, 1241 (1987).

67. *See* Dickinson, *supra* note 1, at 1103. I have proposed a homebound takings doctrine that would include special protection tests and doctrines to homes under the *Nollan* and *Dolan* means-end tests in the public use context, the *Penn Central* burden per se burden shifting test, the *Lucas* categorical test and *Loretto*'s temporary physical invasion tests. For example, in an eminent domain proceeding where a home is subject to condemnation, the Court could theoretically employ the *Nollan* and *Dolan* exactions heightened scrutiny tests to technically require the condemning municipality to rationally relate the means by which the government acquires property to the specific public purpose where homes are threatened by condemnation. In other words, the proof standard would require the government to demonstrate a connection between the taking of a home and the specific public purpose for the taking. Likewise, a homebound protection under the Court's takings doctrine would specially protect homes if a regulation affected the economic value of the home. For example, special just compensation formulas, or above fair market values, would be granted to homeowners whose property is impacted. Under the Court's *Lucas* test, a homebound doctrine might invalidate a regulation if it reduced the

III. METHODOLOGICAL & DOCTRINAL IMPLICATIONS OF A COHERENT HOMEBOUND BILL OF RIGHTS

A harmonized, home-centric Bill of Rights reveals profound interdependence and relational connections within and across homebound doctrines in ways scholars have not addressed by employing intratextual and intradoctrinal modes of interpretation. To read the Court's homebound doctrines as just one "individual line of constitutional text" within each amendment[68] distracts jurists and scholars from the normative prescriptions that the home could, and arguably should, be granted greater protections across the Bill of Rights as a whole, including the Takings Clause.[69]

Bridging various home-centric amendments "can help identify additional aspects of holistic constitutional reasonableness," such as property protections.[70] These interpretive combinations are useful for deeper understandings of the utility of home-protection doctrines across the Bill of Rights, because "[s]ometimes the home's constitutional preeminence is express" while at other times the Court has "inferred the home's constitutional primacy from the structure and context of the document itself."[71] When we juxtapose the various protections to homes in adjoining and non–adjoining clauses, we find potentially new doctrines to provide greater protections to homes that were previously unaddressed.

A. Smut, Guns and Searches

Juxtaposing the adjoining and non–adjoining First, Second, and Fourth Amendment doctrines involving smut, guns, and searches brings a fresh perspective to the atextual nature of the Court's homebound doctrine.

market value of the home by some specified percentage, as opposed to *Lucas*'s test of "all economically viable use." If the regulation deprived the homeowner of even less than all economically viable use of the property, the regulations would either be struck down or the homeowner would be entitled to specially calculated just compensation. Lastly, a homebound protection under the Fifth Amendment might employ the *Loretto* test if the "character of the governmental action" is a temporary instead of a permanent physical occupation or invasion of the home.

68. Darrell A. H. Miller, *Guns as Smut: Defending the Home-Bound Second Amendment*, 109 COLUM. L. REV. 1278, 1305 (2009).

69. Michal C. Dorf, *Does* Heller *Protect a Right to Carry Guns Outside the Home?*, 59 SYRACUSE L. REV. 225, 232 (2008).

70. AMAR, *supra* note 6, at 79.

71. Miller, *supra* note 68, at 1304.

Recall *Stanley v. Georgia*. Some members of the Court focused their review of the underlying action on its Fourth Amendment jurisprudence, yet *Stanley* was a case that dealt strictly with lewd material in the home. In his concurrence, Justice Stewart honed in on the Fourth Amendment—rather than the First—as the primary constitutional inquiry before the Court, noting that the presence of the agents in the "house" with warrants made the search and seizure valid, but did not permit the agents to seize the obscene material.[72] The Court was able depart doctrinally from its earlier rulings finding obscenity unprotected under the First Amendment by making the distinction that the prior rulings dealt with obscenity in public, whereas the locus at issue in *Stanley* was a private home.[73] Perhaps the Court in *Stanley* was "influenced by an appreciation of our society's traditional connection between one's home and one's sense of autonomy and personhood."[74]

Justice Scalia's opinion in *Heller*, on the other hand, makes a non–adjoining intradoctrinal connection as opposed to intratextual one, by tracking the First and Fourth Amendments in justifying the Court's position on bearing arms in the home. He stated that like the First and Fourth Amendments—each of which respectively protect modern forms of communications and searches—the Second extends to all instruments that constitute "bearable arms, even those that were not in existence at the time of the founding."[75] Justice Scalia further illustrated the connection between the First and Second Amendment, arguing that "just as we do not read the First Amendment to protect the right of citizens to speak for any purpose," the Court does not read the Second Amendment to protect the right of citizens to "carry arms for any sort of confrontation."[76] Then, to add the Fourth Amendment to the mix and draw an extended link between constitutional amendments, Justice Scalia stated that the First and Second (and Third) Amendments "codified a pre–existing right."[77]

It is clear that Justice Scalia—inadvertently perhaps—extended the Court's obsession with protections to the "home" to the Second Amendment by relying upon the First and Fourth Amendments

72. Stanley v. Georgia, 394 U.S. 557, 565 (1969)

73. *See* Roth v. United States, 354 U.S. 476, 485 (1957) (finding obscenity "not within the area of constitutionally protected speech").

74. MARGARET JANE RADIN, REINTERPRETING PROPERTY 57 (1993).

75. District of Columbia v. Heller, 554 U.S. 570, 580 (2008).

76. *Id.* at 595.

77. *Id.* at 591.

protections. For an originalist (arguably textualist[78]) such as Scalia, it seems that "even the best documentarian reading must sometimes yield in court to brute facts born of earlier judicial and political deviations."[79] When homes are at the center of a constitutional dispute, textualists simply may be "ill-equipped to be good documentarians."[80] Perhaps this is a good thing, but as Amar has argued, the law might also be worse off if all the Justices engaged in pure textualism.[81]

Putting aside the Fourth Amendment for a moment, it does seem that the Second Amendment is the "equivalent of our coming to know the First Amendment."[82] But this raises a few problems doctrinally. Justice Scalia did not seem to recognize that if obscenity is protected inside the home, but not outside the home, then why should the right to bear arms outside the home have greater protections? It is arguably the case that the *Heller* Court "sent unmistakable signals that the First and Second Amendments are cousins and may be subject to similar limitations."[83]

Indeed, "[o]utside the home, the undirected, unauthorized bearing of firearms by individuals simply is not the bearing of arms in the Second Amendment sense, any more than obscenity outside the home is speech in the First Amendment sense."[84] Juxtaposing these two amendments in light of Justice Scalia's doctrinal somersaults shows the difficulty of interpreting adjoining amendments within the Bill of Rights regarding homes. Similar to obscenity, "it is the *home* that mediates not only the constitutional purpose, but the constitutional meaning of these textual provisions."[85] Sometimes the Court must go beyond identifying meaning and instead engage in implementation of the Second Amendment by crafting doctrine that is driven by the Constitution but is not directly reflective of its meaning. As Miller notes, this is exactly what Justice Scalia achieved in reading into the Second Amendment jurisprudence a right to bear arms in "hearth and

78. Michael P. Healy, *The Claims and Limits of Justice Scalia's Textualism: Lessons from his Statutory Standing Decisions*, 40 CARDOZO L. REV. 2861, 2867 (2019) ("Beginning in the 1980s, Justice Scalia emerged as the leading advocate of the textualist approach to the interpretation of statutes.").

79. *See* AMAR, *supra* note 6, at 28.

80. *Id.*

81. *Id.*

82. Elaine Scarry, *War and the Social Contract: Nuclear Policy, Distribution, and the Right to Bear Arms*, 139 U. PA. L. REV. 1257, 1268 (1991).

83. Miller, *supra* note 68, at 1304.

84. *Id.* at 1320–21.

85. *Id.* at 1321.

home."[86] Indeed, as Miller says, a "person who feels truly at liberty from government or private threats only when he strolls about the streets with bandoliers and a machine gun . . . is much like the person who feels truly at liberty only when he scans obscene magazines on a public park bench."[87] This, as Miller explains, is not constitutionally-protected activity.

Inserting the Court's smut doctrine into the Court's gun doctrine would seem to be simple, because the latter right, like the former, is a right that, in some instances, "ends at the doorstep."[88] If the government, by way of the First Amendment, "can regulate obscenity" in public spaces to "protect the health and welfare of the populace" then arguably, as Miller notes, the government should be able to do the same with firearms.[89] Doing so views the regulation of firearms in public no different than the regulation of lewd material in public.[90] Smut, guns, and searches, when commingled and cross-pollinated, show how intradoctrinalism and intratextualism work in tandem to shed light on underexplored themes in constitutional law.

B. Seizing Guns

The Court's ruling in *Chicago, B. & Q.R. Co. v. Chicago* noted that governments must compensate owners when property is taken for a public use.[91] This rule, embedded in due process doctrine, extends to compensating property owners when property is destroyed or reduced in value for a public purpose.[92] However, as the Court noted in *Miller v. Schoene*, the government may also destroy a *class of property* for the purpose of promoting public values.[93]

One obvious parallel in seizures of personal property deemed the antithesis of the public good is alcohol. In the Court's pre-*Lochner* era ruling in *Mugler v. Kansas*, the Court made a distinction between its police power and takings power by permitting the destruction of property for a justifiable public good.[94] There, the Court drew a fine

86. *Id.* at 1351.
87. *Id.* at 1352.
88. *Id.* at 1299.
89. *Id.* at 1300.
90. *Id.*
91. 166 U.S. 226, 241 (1897).
92. Robert A. O'Hare, Jr. & Jorge Pedreira, *An Uncertain Right: The Second Amendment and the Assault Weapon Legislation Controversy*, 66 ST. JOHN'S L. REV. 179, 200 (1992).
93. Miller v. Schoene, 276 U.S. 272, 279 (1928) (emphasis added).
94. 123 U.S. 623, 669 (1887).

parallel between the prohibition era practice of destroying alcohol for the public good—an exercise of the police power—and takings. Robert A. O'Hare, Jr. and Jorge Pedreira note that if the government exercises its police powers to destroy personal property, such as alcohol, then such logic may extend to destroying confiscated guns for the public benefit or public good of health and safety.[95] Indeed, this would extend to regulations affecting firearms and physical confiscation of such firearms. The argument is buttressed by state legislatures that have viewed bans on assault weapons specifically as justifiable under police power prerogatives of protecting public safety.[96] Private property that is deemed a public nuisance, such as guns, could plausibly avoid takings scrutiny if the purpose of the state action is to protect the health, safety, and general welfare of the public. Indeed, restrictions on manufacture and sale of machine guns or temporary suspensions on importing assault weapons have not been found to be takings.[97]

Likewise, regulations that require peaceable surrender, lawful disposition, or lawful removal of a firearm may arguably be a lawful exercise of the legislature's police power instead of eminent domain.[98] In fact, some courts have upheld ordinances that have limited geographic reach, in which restrictions were placed on firearms, but owners could still sell or dispose of their firearms beyond the municipal boundaries, thus negating any taking because the regulation did not destroy the use and enjoyment of the firearm completely.[99] However, that doctrinal calculus may change if the state focused its police power

95. O'Hare & Pedreira, *supra* note 92, at 201.

96. *Id.*; *see also* Hyde v. City of Birmingham, 392 So. 2d 1226 (Ala. Crim. App. 1980) (forbidding by ordinance public possession of certain weapons under circumstance where natural tendency of such possession would be to provoke breach of the peace); Matthews v. State, 148 N.E.2d 334 (Ind. 1958) (requiring by statute procurement of a license to carry certain firearms except in person's abode or fixed place of business); People v. McFadden, 188 N.W.2d 141 (Mich. App. 1971) (requiring by statute license to carry a concealed weapon); State v. Robinson, 343 P.2d 886 (Or. 1959) (forbidding by statute a person who has been convicted of a felony from having in his possession or under his custody or control any firearm capable of being concealed upon the person); Second Amendment Found. v. City of Renton, 668 P.2d 596 (Wash. 1983) (limiting by ordinance possession of firearms where alcoholic beverages are sold); Carfield v. State, 649 P.2d 865 (Wyo. 1982) (forbidding by statute the use or possession of a firearm by one who has been convicted of or pleaded guilty to certain crime).

97. *See* Gun S., Inc. v. Brady, 877 F.2d 858, 869 (11th Cir. 1989) (holding that temporary suspensions are not takings after considering the nature of the regulation and its economic impact); Akins v. United States, 82 Fed. Cl. 619, 622 (2008) (holding that the Bureau of Alcohol, Tobacco, Firearms and Explosives' designation of, and restrictions on, machine guns were an exercise of police power).

98. Fesjian v. Jefferson, 399 A.2d 861, 865–66 (D.C. 1979) (upholding a police department's decision to deny registration for guns with particular level of fire power).

99. Quilici v. Village of Morton Grove, 532 F. Supp. 1169, 1184 (N.D. Ill. 1981).

to force the surrender, disposition, or removal of a firearm stored or possessed in the home. A home-centric takings doctrine would then become relevant.

The government does, in limited circumstances, seize guns as an exercise of its police power for the health, safety, and general welfare of the public. Such an ordinance, for example, could ban assault weapons in public and in private residences, specifically homes, due to the concern that such weapons stored in homes could injure or cause death to children, guests, and other family members, or cause abrupt disorder. This is precisely what happened in the aftermath of Hurricane Katrina.

There, New Orleans law enforcement officials went to the doors of property owners, many of who were homeowners, to force compliance with evacuation orders.[100] Those orders required law enforcement to, among other things, confiscate firearms for the purpose of maintaining civility. Public officials cited significant public looting and criminal activity in the wake of Katrina as reasons for banning possession of firearms. The ordinance authorized law enforcement to confiscate firearms with an authorized search warrant. Gun rights advocates argued the very opposite, noting that stripping citizens of firearms left families at risk of harm, injury, or death at the hands of looters, gangs, home invaders, rapists and other criminals.[101]

Missing from the debate in the wake of the New Orleans firearm ordinance was the Takings Clause. The *Heller* ruling, handed down soon after Hurricane Katrina, established additional protections of firearm possession in the "hearth and home."[102] Yet, *physical seizure* of firearms possessed in the homestead, for purposes of keeping public order during a natural disaster, may not fall as comfortably within police powers of local governments as one would expect in light of a home-centric Takings Clause.[103]

100. Stephen P. Halbrook, *"Only Law Enforcement Will Be Allowed to Have Guns": Hurricane Katrina and the New Orleans Firearms Confiscations*, 18 GEO. MASON U. C.R.L.J. 339, 339–40 (2008) (describing the confiscation order and subsequent litigation by the NRA, written by counsel for the NRA in NRA of Am., Inc. v. Nagin, No. 05-4234 J(2), 2006 U.S. Dist. LEXIS 275 (E.D. La. 2006)).

101. *Nagin*, 2006 U.S. Dist. LEXIS 275, at *3–*4 (issuing a consent decree following a settlement of the NRA's suit against the Mayor of New Orleans and the New Orleans Superintendent of Police granting a permanent injunction against the seizure of lawfully possessed firearms).

102. District of Columbia v. Heller, 554 U.S. 570, 635 (2008).

103. In Redington v. State, 992 N.E.2d 823, 833 (Ind. Ct. App. 2013), the Court of Appeals of Indiana held that a firearm seizure and retention statute was rationally calculated to advance the

In other words, a homebound takings doctrine places special limitations on governments who attempt to condemn personal property in firearms for purposes of public safety. Local governments could conceivably, in the face of difficult doctrinal hurdles, circumvent Second Amendment homebound restrictions on firearms by simply physically seizing such personal property as part and parcel of its police power. However, a home-centric takings doctrine might impose stricter compensation requirements or heightened scrutiny when physically taking a home or requiring the surrender and confiscation of weapons possessed in the home in a time of emergency.

C. Firearms, the Police Power and Takings

The noncontiguous Second and Fifth Amendments raise an interesting parallel in doctrine when read from the Court's line of regulatory takings precedent. In fact, some federal courts have entertained challenges to gun possession statutes under the Takings Clause.[104] Recall *Loretto v. Teleprompter Manhattan CATV Corp*.[105] There, the Court weighed the government's exercise of its police power to enact laws that regulate property, and whether such a regulation, which is usually deemed valid and permissible, inhibits property rights to the extent that it becomes a taking without regard to the public interest.[106] In light of the state's police power, the Court also set forth the basis for what eventually become known as the *Lucas* test, which determines if a regulation constitutes a taking by asking whether it deprives the property owner of all economically viable use of his

legitimate governmental purpose of prohibiting the mentally ill from possessing firearms. Therefore, it seems the statute was a valid exercise of police power and not a violation of the right to bear arms. *Id.* at 836–37. In State ex rel. Brnovich v. City of Tucson, 399 P.3d 663, 676 (Ariz. 2017), the Arizona Supreme Court held that the State may constitutionally prohibit a city's practice, prescribed by local ordinance, of destroying firearms that the city obtains through forfeiture or unclaimed property. In doing so, the court explained that "[r]egulation of firearms, including their preservation or destruction . . . involves the state's police power and is of statewide concern." *Id.* Perhaps impliedly then, if the destruction of firearms is equivalent to the taking of firearms, the Arizona Supreme Court held that the taking of firearms, at a minimum, involves state's police power and is of statewide concern.

104. *See, e.g.*, Gun S., Inc. v. Brady, 877 F.2d 858, 869 (11th Cir. 1989) (finding law temporarily suspending importation of assault weapons not violative of the Takings Clause). The court noted that if it had jurisdiction to consider a takings claim, it would analyze a gun regulation under the *Penn Central* per se test to determine the character of the governmental action, its economic impact and its interference with reasonable investment backed expectations.

105. 458 U.S. 419 (1982) (holding that requiring an apartment owner to allow installation of a cable box on the building is a taking requiring just compensation).

106. *Id.* at 425.

property.[107] Or, as set forth in *Penn Central*, whether the regulation imposes substantial economic impact, interferes with investment-backed expectations, and the character of the action runs afoul of the public interest generally.[108] Indeed, for example, legislation that dispossesses an owner of a gun or capacity magazines, by forcing him to surrender the property to law enforcement, is arguably a regulatory taking.[109] This line of reasoning is what the Court in *Horne* explained: property owners "do not expect their property, real or personal, to be actually occupied or taken away."[110] Legislation that requires a gun owner to surrender, remove, or sell a firearm and thus deprives the owner of possession and use of his property rights is a taking, and the states' police power could not be justified to circumvent the just compensation requirement.[111]

The Supreme Court's *Murr* ruling set forth two scenarios where governmental regulation is so burdensome that it constitutes a taking, noting that "with certain qualifications . . . a regulation which 'denies all economically beneficial or productive use of land' will require compensation under the Takings Clause."[112] The Court proceeded to explain that "when a regulation impedes the use of property without depriving the owner of all economically beneficial use, a taking still may be found based on 'a complex of factors,' including (1) the economic impact of the regulation on the claimant; (2) the extent to which the regulation has interfered with distinct investment-backed expectations; and (3) the character of the governmental action."[113] Likewise, the Court further extended its logic in *Horne*, noting that "a physical *appropriation* of property g[ives] rise to a *per se* taking, without regard to other factors."[114] There, the Court found that a physical seizure of raisins was cognizable under the Takings Clause.[115]

107. Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992).

108. *See Loretto*, 458 U.S. at 426 (describing the *Penn Central* test); Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 127–28 (1978).

109. Duncan v. Becerra, 265 F. Supp. 3d 1106 (S.D. Cal. 2017) (enjoining enforcement of a California statute that restricted possession of magazines able to hold more than 10 rounds).

110. Horne v. Dep't of Agric., 135 S. Ct. 2419, 2422 (2015) (finding that a regulation requiring raisin growers to reserve a percentage of their raisins for the government, free of charge, and to pay a fine for failure to obey was a taking requiring just compensation).

111. *Becerra*, 265 F. Supp. 3d at 1138–39.

112. Murr v. Wisconsin, 137 S. Ct. 1933, 1942–43 (2017) (alteration in original) (quoting Palazzolo v. Rhode Island, 533 U.S. 606, 617 (2001)).

113. *Id.* at 1943.

114. *Horne*, 135 S. Ct. at 2427 (2015).

115. *Id.*

Indeed, some federal courts have agreed that regulations requiring surrender of guns to law enforcement to be destroyed constitutes a taking, relying upon the precedential string of regulatory takings cases to make the point. In *Duncan v. Becerra*, the Southern District of California enjoined California from requiring persons to dispossess themselves of lawfully-owned magazines able to hold more than 10 rounds.[116] Persons could dispossess the magazines by removing them from the State, selling them to a licensed firearm dealer, or surrendering them to a law enforcement agency for destruction.[117] Plaintiffs brought facial and as-applied challenges to the regulation, alleging infringement of their Second Amendment right to bear arms.[118] The government contended that it acted within its police powers for public safety purposes, and that "a prohibition on possession of property declared to be a public nuisance is not a physical taking."[119]

The District Court recognized that, in accordance with *Loretto*,[120] "whether a law effects a physical taking is 'a separate question' from whether the state has the police power to enact the law."[121] And even where the regulation "enjoin[s] a property owner from activities akin to public nuisances," scrutiny under the regulatory takings doctrine may still be appropriate.[122] Indeed, dispossession of guns via surrender to the government for destruction constituted, according to the court, a *per se* taking requiring just compensation.[123] Further, such dispossession via sale was infeasible because the regulation brought the fair market value of the magazines "near zero."[124] Likewise, the court found removal of guns from the state infeasible because it unfairly relied upon other states that permit ownership of large capacity magazines, and "the associated costs of removal and storage and retrieval may render the process more costly than the fair market

116. *Becerra*, 265 F. Supp. 3d at 1139–40 (citing Cal. Penal Code § 32310).

117. *Id.* at 1110.

118. *Id.* at 1112.

119. *Id.* at 1136. The District Court noted that California's designation of large capacity magazines as a public nuisance is "dubious." *Id.* at 1137.

120. Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 425–26 (1982) ("It is a separate question, however, whether an otherwise valid regulation so frustrates property rights that compensation must be paid. We conclude that a permanent physical occupation authorized by government is a taking without regard to the public interests that it may serve.").

121. *Becerra*, 265 F. Supp. 3d at 1137 (citing *Loretto*, 458 U.S. at 425).

122. *See id.* ("[T]he 'legislature's recitation of a noxious-use justification cannot be the basis for departing from our categorical rule that total regulatory takings must be compensated.'" (internal citations omitted)).

123. *Id.* at 1138.

124. *Id.*

value[125] (if there is any) of the magazine itself." The court, in an apt line, noted "whatever might be the State's authority to ban the sale or use of magazines over 10 rounds, the Takings Clause prevents it from compelling the physical *dispossession* of such lawfully-acquired private property without just compensation."[126]

A home-centric takings doctrine that tightens the *Loretto* test, for example, to include any temporary invasion or occupation of the home, may extend to regulations that "temporarily" suspend or invade gun possession in the home. Further, a stricter *Lucas* test that permits challenges to gun regulations that deprive a gun owner of less than all economically viable use of the firearm in the home is an interesting parallel worth noting.

However, under the prevailing home-less takings doctrine, temporary gun suspensions in the home or elsewhere may not rise to a regulatory taking. In *Gun South, Inc. v. Brady*, the government argued, among other things, that a gun manufacturer could not "establish a valid taking claim because . . . the Government's temporary deprivation of the rifles does not constitute a compensable taking."[127] The Eleventh Circuit held that it did not have jurisdiction to review the takings claim, but the court nonetheless entertained how such a claim might result. It noted "that the temporary suspension does not constitute a taking" because the state "acted in a purely regulatory capacity and does not profit from its actions."[128] The court further noted that the state action "neither permanently nor totally deprived [Gun South] of any property because the Government . . . only temporarily suspended the importation of such rifles" and that although the gun manufacturer may have had a "reasonable investment-backed expectation, [Gun South did] not demonstrate that the suspension will unreasonably impair the value of the rifles."[129] Consequently, "no compensable taking . . . occurred."[130]

125. *Id.* at 1138. The District Court noted that the "typical retail cost of a magazine" is between $20 and $50. *Id*.

126. *Id.* The District Court concluded that the regulation would deprive Plaintiffs "not just of the *use* of their property, but of *possession*" as well. *Id*. (emphasis in original). "Without compensation, Plaintiffs will be irreparably harmed as they will no longer be able to retrieve or replace their 'large' capacity magazines." *Id*. Accordingly, the court granted the preliminary injunction "to maintain the *status quo* and prevent irreparable injury under the Takings Clause." *Id.* at 1139 (emphasis in original).

127. 877 F.2d 858, 860 (11th Cir. 1989).

128. *Id*.

129. *Id.*

130. *Id.*

D. Firearms, Exactions and Permits

In a similar vein, the Court's exactions doctrine, which requires the state to satisfy criteria for bargains that implicate the use of land,[131] could conceivably be applied in the Second Amendment context with caution. Conditioning a permit to use property in a certain manner on the requirement that a property owner relinquish a constitutional right is a quintessential example of the unconstitutional conditions doctrine.[132] Recall *Nollan v. California Coastal Commission*.[133] There, the Court determined that an unlawful exaction had been exercised when the government demanded the landowner convey an easement across his land for a beachfront view to the public in exchange for a building permit.[134] In *Dolan v. City of Tigard*, likewise, withholding a building permit on a condition that has no essential nexus or rough proportionality to the public harm was an exaction in violation of the Takings Clause.[135] In *Koontz v. St. Johns River Water Management District*, the Court found that denying a development permit based on a landowner's refusal to accede to a wetland improvement condition was a taking and that demanding a monetary fee in exchange for the permit also ran afoul of the Takings Clause.[136]

Now, recall *Heller*.[137] There, the D.C. ordinance banned handgun possession of unregistered firearms and required residents keep lawfully owned guns unloaded or bound by a trigger lock in the home. Dick Heller's registration application was denied because he wished to possess his handgun in his home for protection.[138] The Court found that mandating nonfunctional firearms in the home was a total ban on handguns in violation of the Second Amendment's individual right to bear arms.[139] However, to read the Court's exaction branch of its

131. Lee Anne Fennell & Eduardo M. Peñalver, *Exactions Creep,* 2013 SUP. CT. REV. 287, 288.

132. Sullivan, *supra* note 39, at 1420.

133. 483 U.S. 825 (1987).

134. *Id*. at 841–42 ("California is free to advance its 'comprehensive program,' if it wishes, by using its power of eminent domain . . . but if it wants an easement across the Nollans' property, it must pay for it.").

135. 512 U.S. 374, 394–95 (1994) ("We conclude that the findings upon which the city relies do not show the required reasonable relationship between the floodplain easement and the petitioner's proposed new building.").

136. 570 U.S. 595, 619 (2013) ("[T]he government's demand for property from a land-use permit applicant must satisfy the requirements of *Nollan* and *Dolan* even when the government denies the permit and even when its demand is for money.").

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

138. *See id*. at 575–76.

139. *Id*. at 635.

regulatory takings doctrine from an intradoctrinal method into the Second Amendment's right to bear arms raises a few intriguing points.

First, can the government achieve indirectly through the Takings Clause what it cannot do directly in the Second Amendment? Could the government circumvent the Second Amendment's strict scrutiny standard by requiring the applicant to agree to dissemble or lock his handgun in the home in exchange for the firearm permit? Such an *ad hoc* exercise of the government's police power may give rise to a takings claim, but it arguably would survive the Court's heightened standard of review in exactions. Let us assume that there is an individual right, as opposed to collective right, to bear arms and that such a right may be realized through a lawful registration and permitting process. *Heller* tells us that a total ban on functioning firearms in the home runs afoul of the Second Amendment. Further, let us assume that a person has a property interest in a handgun and firearm permit, because a firearm, in and of itself, is personal property, like a vehicle, triggering protections under the Takings Clauses.[140] If the government cannot totally ban operable firearms from a person's home, then the government could, arguably, be capable of achieving that same result by demanding the owner forfeit his operable firearm in the home in exchange for a non-operable firearm permit.

As Justice Breyer's dissent explains, the D.C. ordinance was enacted in part on the basis that gun-related accidents required government regulation for purposes of public safety.[141] The public harm, then, is injury and death caused by unlocked and assembled firearms inside and outside the home. The condition may meet the essential nexus test, which requires a direct connection between the legitimate state interest in saving lives and mitigating gun-related injuries and the permit condition of requiring the applicant to agree to trigger-lock or disassemble the firearm in the home.[142] Further, such *ad hoc* conditions may meet the rough proportionality test, which inquires whether the gun restriction by a city ordinance, like the one in *Heller*, bears a reasonable relationship to the projected impact of unlocked triggers and assembled firearms in the home.[143]

140. *See* Horne v. Dep't of Agric., 135 S. Ct. 2419, 2421–22 (2015).

141. *Heller*, 554 U.S. at 688 (Breyer, J., dissenting).

142. *See id.* ("The law at issue here, which in part seeks to prevent gun-related accidents, bears a 'rational relationship' to that 'legitimate' life-saving objective.").

143. *See id.* at 689 (Breyer, J., dissenting) ("Thus, any attempt *in theory* to apply strict scrutiny to gun regulations will *in practice* turn into an interest-balancing inquiry, with the interests protected by the Second Amendment on one side and the governmental public-safety concerns

But these arguments also weaken the home-centric protections generally sought by the Court. On the contrary, reading exactions doctrine into the Second Amendment may provide greater protections from legislation impinging on the right to bear arms in the home. It is equally plausible that the essential nexus and rough proportionality tests fail when the government seeks to condition gun permits on the owner relinquishing his right to have an operable firearm in the home, because courts may find the health and safety concerns involving self-defense in the home are not roughly proportional to perceived harm to children, other family members or guests in the home.

E. Soldiers, Searches and Self-Incrimination

Drawing upon intratextual and intradoctrinal methods of protections regarding soldiers and searches shows the Court's cleverness with doctrinalism when the home and privacy are intertwined. Few provisions and amendments that adjoin each other have the same or similar wording. But the Third and Fourth Amendments are the Constitution's textual "home" for protections to homes, and, arguably, are the root of the homebound tree that has grown into the First, Second, and Fifth Amendments. The Third Amendment permits the forced quartering of soldiers, presumably by an act of Congress, in houses during wartime, but not during peacetime.[144] The Fourth Amendment, on the other hand, states the "right of the people to be secure in their . . . houses," meaning perhaps the Third Amendment is really about property, rather than people.[145] This important connection shows that both amendments "explicitly protect 'houses' from needless and dangerous intrusions by governmental officials."[146]

As some argue, "[w]ith the help of the Fourth Amendment, the Third Amendment [] constitutionalized the maxim, 'every man's home is his castle[]'" and that liberty and privacy protections in the Third "have justified the application of the Fourth Amendment's prohibition against unreasonable searches and seizures[.]"[147] But the text of both

on the other, the only question being whether the regulation at issue impermissibly burdens the former in the course of advancing the latter." (emphasis in original)).

144. U.S. CONST. amend. III.

145. Geoffrey M. Wyatt, *The Third Amendment in the Twenty-First Century: Military Recruiting on Private Campuses*, 40 NEW ENG. L. REV. 113, 132–33 (2005).

146. Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131, 1175 (1991).

147. Engblom v. Carey, 677 F.2d 957, 967 (2d Cir. 1982) (Kaufman, J., concurring in part and dissenting in part).

amendments could be read differently. For example, the Third Amendment is arguably concerned with property protections rather than privacy, as the text expressly states soldiers may not be "quartered in any house," whereas the Fourth Amendment protects the "right of the people to be secure in their . . . houses."[148]

Recall *Mapp v. Ohio*, the Supreme Court's major ruling on obscenity and Fourth Amendment searches and seizures.[149] There, officers found paraphernalia hidden in the home, and without a warrant, the Court ruled that such a search and seizure of items not initially part of the investigation was unconstitutional.[150] But Justice Clark's opinion offers more than just a lesson on criminal procedure under the Fourth Amendment. He offers a clue into what the Court makes of the "home" across several amendments.

There, he explained that the Fourth and Fifth Amendments run "almost into each other" and that the Court's doctrine in both amendments "applies to all invasions on the part of the government and its employees of the sanctity of a man's home and the privacies of life."[151] He further explained that "[i]t is not the breaking of his doors, and the rummaging of his drawers, that constitutes the essence of the offence; but it is the invasion of his indefeasible right of personal security, personal liberty, and private property[.]"[152] Here, Justice Clark commingles the Fifth Amendment's protection from self-incrimination in the "home" with the Fourth Amendment's protection from warrantless searches and seizures in the "home." The link drawn by Justice Clark offers a window for which we can have greater appreciation for how homebound doctrines across and within the Bill of Rights seamlessly influence each other, and how the Court has often leaned into a particular home-centric doctrine to make sense of an adjacent or nonadjacent amendment.

Likewise, Justice Douglas' opinion in *Griswold v. Connecticut* is a nod to the Third, Fourth, and Fifth Amendment's protections of homes.[153] That case, of course, dealt with the Court's reading of an anti-contraception statute as a violation of a person's right to marital

148. Wyatt, *supra* note 145, at 132 (internal quotations omitted); *see also* U.S. CONST. amend. III, IV.

149. 367 U.S. 643 (1965).

150. *See id.* at 655 ("We hold that all evidence obtained by searches and seizures in violation of the Constitution is, by that same authority, inadmissible in a state court.").

151. *Id.* at 646 (quoting Boyd v. United States, 116 U.S. 616, 630 (1886)).

152. *Id.* (quoting *Boyd,* 116 U.S. at 630).

153. 381 U.S. 479, 485 (1965).

privacy and the broader privacy right involving intimate practices.[154] The Court in *Griswold* built upon prior privacy cases to establish a general right to protection from government intrusion into private spaces, such as the home.[155] Justice Douglas quotes "houses" in both the Third and Fourth Amendment, but failed to explain how the sanctity of the home could be used to "signal the special sanctity of bedrooms."[156]

But the Court did not stop at the adjoining nature of the house in the Third and Fourth Amendments. Justice Douglas also drew upon the self-incrimination clause of the Fifth Amendment to explain the majority's decision, asking: "[w]ould we allow the police to search the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives?"[157] By linking the "houses" in the Third and Fourth, Douglas made the intradoctrinal leap by pulling from the Fifth Amendment's self-incrimination clause to solidify his argument for privacy protections in a bedroom regarding conception. Indeed, Douglas utilized the penumbra of homebound "emanations" in other amendments to strengthen the majority's reliance upon an unenumerated justification to strike down the Connecticut statute.

F. Soldiers and Takings

Juxtaposing the nonadjoining Third and Fifth Amendments presents a unique thematic association between two provisions that directly involve property. There are "few scholars [who] have noted the similarities between" these amendments.[158] Textually, the Third and the Fifth Amendment could plausibly be read into each other, as the Third may be the "first cousin to the Fifth."[159] But the Third Amendment's "absence from the Takings Clause debate is striking."[160] Both amendments tend to break down along property and liability rules.[161]

154. *Id.* at 485.

155. *See id.* at 485–86 ("Would we allow the police to search the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives? The very idea is repulsive to the notions of privacy surrounding the marriage relationship.").

156. *See* Akhil Amar, *America's Lived Constitution*, 120 YALE L.J. 1734, 1774 (2011).

157. *Griswold*, 381 U.S. at 485

158. Eugene Kontorovich, *The Constitution in Two Dimensions: A Transaction Cost Analysis of Constitutional Remedies*, 91 VA. L. REV. 1135, 1161 n.58 (2005).

159. Thomas G. Sprankling, *Does Five Equal Three? Reading the Takings Clause in Light of the Third Amendment's Protection of Houses*, 112 COLUM. L. REV. 112, 131 n.120 (quoting Johnson v. United States, 208 F.R.D. 148, 151–52 (W.D. Tex. 2001)).

160. *Id.* at 122.

161. Kontorovich, *supra* note 158, at 1162.

The Fifth prohibits taking private property unless for public use (a property rule) and requires just compensation (a liability rule).[162] The Third, on the other hand, prohibits quartering soldiers in a person's home (a property rule) during peacetime (a liability rule).[163] Thus, it is plausible to read the protections afforded under the Third into the Fifth.

From a historical perspective, the Third Amendment was arguably focused on quelling military oppression, which can be interpreted to mean that the "home deserved special protection from government intrusion" and that, likewise, it is "possible that the Framers intended [the Takings Clause]" to provide greater protection to the home than other types of property.[164] In other words, one might stretch the text of both the Third and Fifth Amendments, especially the Takings Clause protection of "private property," to "implicitly" mean protections to the home.[165] This is plausible. Read together, the Third and Fifth (especially a homebound Takings Clause) might offer special protections to homes given the continued constitutional "solicitude for the home."[166] But without a homebound limitation in the Court's takings jurisprudence, it is plausible that the military could, if it wanted, circumvent the peacetime protections in the Third Amendment by condemning homes to quarter officers and paying just compensation.[167] But if a homebound limitation were acknowledged in takings, then such maneuvering would be more difficult. And what about the physical occupation of soldiers in homes during peacetime or wartime?

Recall *Loretto v. Teleprompter Manhattan CATV Corp.*[168] There, the Court set forth its *per se* takings test involving physical occupations of private property. The intruder, of course, was not a soldier seeking refuge during peacetime. Instead, it was a cable company authorized by statute to affix cable boxes to walls.[169] In light of *Loretto*, which for many was an unsatisfactory ruling that left gaps in logic (what about mailboxes or water meters?), does quartering soldiers qualify as a taking, and if so, is it merely a partial taking? The Court's takings

162. *Id.* at 1161.
163. *Id.* at 1164.
164. Sprankling, *supra* note 159, at 131.
165. *Id.* at 132.
166. *Id.*
167. Tom W. Bell, *The Third Amendment: Forgotten but Not Gone*, 2 WM. & MARY BILL OF RTS. J. 117, 146–47 (1993).
168. 458 U.S. 419 (1982) (holding that requiring an apartment owner to allow installation of a cable box on the building is a taking requiring just compensation).
169. *Id.* at 421.

jurisprudence leaves the door open to the argument that quartering soldiers, even temporarily, may be an unlawful intrusion requiring compensation under the Third, if not simultaneously the Fifth.[170] The question, of course, is whether the soldiers are temporarily or permanently "affixed" to the home. It is unclear whether that matters, as any invasion into the home, regardless of time horizons, arguably requires a remedy for the physical imposition.

Indeed, quartering may qualify as a taking requiring just compensation.[171] For example, quartering soldiers in a person's home is a "specific type of partial taking" because the "owner's occupancy of the property is limited and its value reduce[d]" while at the same time the owner retains fee simple ownership and still, to some degree, benefits from the property and will, at some point, take back full possession.[172] This, one may argue, would be a quintessential regulatory taking not requiring just compensation.[173] The result might be that the Third Amendment "provides [the] benchmark for regulatory takings" where claims of takings must give rise to a "much more severe deprivation" of private property than the quartering of troops.[174]

If the Third Amendment, under this conception, were to morph into a secondary takings clause of sorts, then it seems to elevate the quartering of soldiers as a "special class of taking" that requires a homeowners' consent.[175] Such consent gives homeowners a heightened sense of property interest because they can protect the home and personal possessions more than other types of property.[176] In other words, the Third Amendment arguably presents a special property interest in the home because the provision "gives the owner of any 'house' (and presumably not nonresidential property) the right to refuse to quarter soldiers during peacetime."[177] However, the Takings Clause, regardless of a focus on home protections, would restrict the military by prohibiting the institution from denying or disparaging "a homeowner's right to receive just compensation for a public taking."[178]

170. Bell, supra note 167, at 146–47 (citing *Loretto*, 458 U.S. 419 (1982)).

171. *Id.* at 148.

172. *See* Kontorovich, *supra* note 158, at 1168 ("The Supreme Court has described similar governmental action as a regulatory taking that does not require compensation.").

173. *Id.*

174. *Id.*

175. Bell, *supra* note 167, at 147.

176. William A. Fischel, *The Political Economy of Just Compensation: Lessons from the Military Draft for the Takings Issue*, 20 HARV. J.L. & PUB. POL'Y 23, 25 n.8 (1996).

177. *Id.*

178. Bell, *supra* note 167, at 148.

G. Searches and Physical Occupations

Scholars note that the "[t]he most sacred of all areas . . . is the home" under the Fourth Amendment"[179] and that such a locus is the "gold standard" for Fourth Amendment protections.[180] Such protections extend beyond the typical owner-occupied "houses" to residential dwellings broadly, including temporary dwellings, hotels, boarding places, and long-term hospital rooms.[181] Linda McClain explains: "jurists often use [the] maxim[s] [of 'castle' and 'fortress'] to explain the political and historical significance of the Fourth Amendment, which purposely focuses protections on the 'inviolability of the inside'" of the locus.[182] And though the privacy concerns embedded in the Court's home-centric Fourth Amendment jurisprudence are legion, there also persists a property-centric conception of the Fourth Amendment.[183] As Orin Kerr explains, though the text of the Amendment states "reasonable expectation of privacy," that expectation is realized by the right to exclude, which permits the owner to retreat into his own home for safety and security from government intrusion.[184]

The rights entrenched under the Fourth Amendment also tend to "track the right to exclude others" by first having rights of occupation, ownership, leasehold interests, or other tenancy rights that give rise to a legal right to exclude.[185] As Stephanie Stern explains, the "home protection is not absolute and there are chinks in the doctrinal armor" that reveal a "double-edged sword of housing exceptionalism's property" focus, including lesser privacy protections in trespass or squatting cases, protective sweeps after arrest, or the plain-view seizure doctrine giving law enforcement power to seize evidence observed

179. Stephen P. Jones, *Reasonable Expectations of Privacy: Searches, Seizures, and the Concept of Fourth Amendment Standing*, 27 U. MEM. L. REV. 907, 957 (1997).

180. Arianna Kennedy Kelly, *The Costs of the Fourth Amendment: Home Searches and Takings Law*, 28 MISS. C. L. REV 1, 7–8 (2009).

181. Stephanie M. Stern, *The Inviolate Home: Housing Exceptionalism in the Fourth Amendment*, 95 CORNELL. L. REV. 905, 913 n.31 (2010); *see also* United States v. Gooch, 6 F.3d 673, 677 (9th Cir. 1993).

182. Linda C. McClain, *Inviolability and Privacy: The Castle, the Sanctuary, and the Body*, 7 YALE J.L. & HUMAN. 195, 202 (1995).

183. *See, e.g.*, Orin Kerr, *The Fourth Amendment and New Technologies: Constitutional Myths and the Case for Caution*, 102 MICH. L. REV. 801, 809–19 (2004) ("[A] strong and underappreciated connection exists between the modern Fourth Amendment and real property law.").

184. *Id.* at 809–10.

185. *Id.* at 811.

outside the home.[186] But as Stern recognizes, even in light of these chinks, the home still receives stronger protections under the Fourth than other property interests, such as commercial buildings, automobiles, and public spaces and places, giving rise to a "bizarre" pattern of privacy protection exceptions that, in some circumstances, require probable cause for searches of curtilage but reasonable suspicion for strip searches in schools.[187] It is clear that though the Fourth Amendment protects the house in some way, shape or form, the Court's jurisprudence is mainly focused on the privacy protections of a person to be secure in the home from unreasonable searches and seizures.[188]

Yet, with the Fourth Amendment and the Fifth Amendment's Takings Clause adjoined, one can find useful interconnections between the two provisions. For example, Amar writes that the Court could plausibly "use the Fourth Amendment to craft special rules when the government tries to 'seize' a 'house.'"[189] Such protections run the other way. The Court's takings jurisprudence, especially regulatory takings, could be utilized to offer greater protections and remedies to unlawful and even lawful searches and seizures.

To force a person to submit to some physical occupation of his land is conceivably the same as forcing onto a person's home and residence the entrance of government agents for purposes of search and seizure.[190] The difference is that though homeowners are compensated for the forcible taking, they "are not compensated for the government's use of the physical space of the home" during a search.[191] As a result, a unique takings claim is plausible where the Court employs its takings analysis in its Fourth Amendment jurisprudence that provides for a "compensable intrusion."[192]

This argument, however, runs into some doctrinal difficulty in light of the Court's *Katz* decision holding that the Fourth Amendment is about privacy rights and its protections do not attach to "places," but rather "people."[193] Privacy conceptions of unenumerated rights is simply insufficient, especially because the Fourth Amendment

186. Stern, *supra* note 181, at 917–18.
187. *Id.* at 918.
188. *See* Amar, *supra* note 156, at 1771; *see also* Sprankling, *supra* note 159, at 123 n.68.
189. *See* Amar, *supra* note 156, at 1777.
190. *See* Kelly, *supra* note 180, at 6–7.
191. *Id.* at 1.
192. *Id.*
193. Katz v. United States, 389 U.S. 347, 351 (1967).

protections were once focused on places, not people.[194] The Court's post-*Katz* search and seizure doctrine still entails elements focused on property protections. It is arguably a flawed doctrine because it focuses too much on the residential property, specifically the home.[195] Still, "while the Fourth Amendment turns a blind eye to the costs incurred by legitimate searches, the care for individuals' property embodied in the Takings Clause helps to illustrate" why the blindness may be unjust.[196] Whether homeowners "should be compensated regardless of whether the search was warranted or reasonable" under the Takings Clause is a question that a court might entertain.[197]

CONCLUSION

This Article engaged with textual and doctrinal facets of homebound protections in the Bill of Rights. Coherence theory adds a dimension to the Supreme Court's Bill of Rights doctrine. That is, the Court could entertain a homebound doctrinal and textual thread of protections across the Bill of Rights that would extend from smut to takings. What we find by exercising this hybrid interpretive methodology combining both intratextualism and intradoctrinalism is clarity, coherence, and consistency when the Takings Clause is viewed in a similar home-centric vein as its adjoining and non-adjoining amendments in the Bill of Rights. This methodological exercise also reveals intriguing patterns of related protections between different homebound Bill of Rights protections to the home, while at the same time exposing deeper thematic associations of protections to the home within and across the Bill of Rights and providing normative ways to expand protections to the home.

194. Stern, *supra* note 181, at 907; *see also* Kerr, *supra* note 183, at 809–27.
195. Stern, *supra* note 181, at 907.
196. Kelly, supra note 180, at 3.
197. *Id.*