

# COLUMBIA LAW REVIEW

## SIDEBAR

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VOL. 109

OCTOBER 27, 2009

PAGES 97–104

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### THE FIRST AND SECOND AMENDMENTS

*Eugene Volokh\**

Response to: Darrell A.H. Miller, *Guns as Smut: Defending the Home-Bound Second Amendment*, 109 Colum. L. Rev. 1278 (2009).

#### I. THE SUPPOSED ANALOGY TO OBSCENITY

Analogies between the First Amendment and the Second (and comparable state constitutional protections) are over 200 years old.<sup>1</sup> *District of Columbia v. Heller* itself makes them,<sup>2</sup> and they can often make sense.<sup>3</sup>

Such analogies might, for instance, yield the conclusion that (1) most guns (like most speech) are fully protected by the Second Amendment, subject to some restrictions that leave open “ample alternative channels” for effective self-defense,<sup>4</sup> but (2) some narrow categories of valueless or marginal weapons (like some speech) are

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\* Gary T. Schwartz Professor of Law, UCLA School of Law (volokh@law.ucla.edu).

1. See, e.g., *Respublica v. Oswald*, 1 U.S. (1 Dall.) 319, 330 n.\* (Pa. 1788) (“The right of publication, like every other right, has its natural and necessary boundary; for, though the law allows a man . . . the possession of a weapon, yet it does not authorize him to plunge a dagger in the breast of an inoffensive neighbour” (relating statement by William Lewis, then a Pennsylvania legislator and later a federal judge)); H.P. Nugent, *An Account of the Proceedings had in the Superior Court of the Territory of Orleans, Against Thierry & Nugent for Libels and Contempt of Court* 43 (Philadelphia 1810) (“[A]s the liberty of keeping arms is not the liberty of killing or maiming whom we please, so is not the liberty of the press, the liberty of publishing libels” (relating statements by Judge François Xavier Martin, then a territorial judge and later Chief Justice of the Louisiana Supreme Court)); *Commonwealth v. Blanding*, 20 Mass. 304, 314 (1825) (“The liberty of the press was to be unrestrained, but he who used it was to be responsible in case of its abuse; like the right to keep fire arms, which does not protect him who uses them for annoyance or destruction.”).

2. 128 S. Ct. 2783, 2791, 2799 (2008).

3. See, e.g., Eugene Volokh, *Implementing the Right to Keep and Bear Arms for Self-Defense: An Analytical Framework and a Research Agenda*, 56 UCLA L. Rev. 1443, 1449, 1452, 1454–55 (2009); see also L.A. Powe, Jr., *Guns, Words, and Constitutional Interpretation*, 38 Wm. & Mary L. Rev. 1311 (1997) (analogizing two Amendments in the course of exploring whether Second Amendment secures an individual right).

4. See, e.g., Volokh, *supra* note 3, at 1454–59.

unprotected. Distinctions between the two Amendments can make sense, too, though I leave them for other articles.<sup>5</sup>

But *Guns as Smut* does something peculiar: It analogizes a core category of private arms to one of the *least* protected and marginal categories of speech (obscenity).<sup>6</sup> It's hard to see any justification for such an analogy, other than a purely instrumental one.

The premise of the First Amendment's obscenity jurisprudence is that obscenity is historically recognized<sup>7</sup> as one of the "limited areas"<sup>8</sup> of speech that "lack any serious literary, artistic, political, or scientific value,"<sup>9</sup> and are thus "not protected by the First Amendment."<sup>10</sup> Obscenity, at home or elsewhere, is a marginal category of speech that lacks the full protection that most speech gets. Because of this, selling, buying, and possessing obscenity in public places can be outlawed, and long has been outlawed. Only the special "solicitude to protect the privacies of the life within [the home]" leads to the prohibition on punishment for mere home possession of obscenity.<sup>11</sup>

None of this analysis applies to guns. Possessing guns is traditionally legal. Guns do serve the self-defense value that the Court has found to be embodied in the Second Amendment. And, *Heller* held, ordinary guns are at the core of "arms," not on the margin.<sup>12</sup>

Even carrying guns in public places is traditionally legal (though often with license requirements),<sup>13</sup> and serves the constitutional value of armed self-defense. But I need not rely on that: The premise of the Court's obscenity decisions is that obscenity lacks constitutional value without regard to the place in which it may be present,<sup>14</sup> though it may not be suppressed via intrusions into the home. That premise does not extend to private gun ownership under *Heller*.

And naturally *Guns as Smut's* unsound premise leads to unsound results. If guns were really like obscenity, the government would be free to ban the buying of guns and not just their public possession. *Guns as*

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5. See, e.g., *id.* at 1472, 1548.

6. Darrell A.H. Miller, *Guns as Smut: Defending the Home-Bound Second Amendment*, 109 Colum. L. Rev. 1278, 1280 (2009).

7. See *Roth v. United States*, 354 U.S. 476, 483–84 (1957) (relying heavily on history in concluding obscenity is constitutionally unprotected); *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 57, 61, 67, 69 (1973) (relying on *Roth* and on history in reaffirming obscenity exception).

8. *R.A.V. v. City of St. Paul*, 505 U.S. 377, 383 (1992).

9. *Slaton*, 413 U.S. at 67.

10. *Id.* at 54.

11. *United States v. 12 200-Foot Reels of Super 8mm. Film*, 413 U.S. 123, 127 (1973) (quoting *Poe v. Ullman*, 367 U.S. 497, 551 (1961) (Harlan, J., dissenting)).

12. *District of Columbia v. Heller*, 128 S. Ct. 2783, 2791, 2817 (2008).

13. Steven W. Kranz, *A Survey of State Conceal and Carry Statutes*, 29 Hamline L. Rev. 638, 647, 657 (2006).

14. *12 200-Foot Reels of Super 8mm. Film*, 413 U.S. at 126 ("[O]bscene material is not protected by the First Amendment. . . . *Stanley* depended, not on any First Amendment right to . . . possess obscene materials, but on the right to privacy in the home." (citing *Stanley v. Georgia*, 349 U.S. 557, 569 (Stewart, J., concurring))); *Slaton*, 413 U.S. at 67.

*Smut*'s conclusion indeed suggests that it “remain[s] unresolved” whether the government could “so restrict[] the commercial availability of guns that only guns in situ in the home, or those made by enterprising amateur gunsmiths, would be beyond regulation”; the Article’s interpretation of *Heller* “will not, and cannot, provide [an] answer[]” to that question.<sup>15</sup>

Yet *Heller* expressly holds that the Second Amendment secures an individual right to possess handguns “for the core lawful purpose of self-defense.”<sup>16</sup> Whatever such a right might mean, it must include the right to accomplish that core lawful purpose by acquiring the handgun.<sup>17</sup> No sensible interpretation of *Heller* can leave the status of that right “unresolved.” And no sensible analogy between the Second and First Amendments can analogize typical privately owned arms to material that the Court has expressly held lacks First Amendment value.

## II. THE SUPPOSED ANALOGY TO OTHER CONSTITUTIONAL RIGHTS

*Guns as Smut* also claims that limiting the Second Amendment to the home is supported by a special role for the home “located . . . in ‘the Bill of Rights as a whole.’”<sup>18</sup> Yet most of the rights to which the Article points as support for that proposition apply outside the home as well.

Warren and Brandeis’s (nonconstitutional) “right of determining, ordinarily, to what extent [a person’s] thoughts, sentiments and emotions shall be communicated to others,” a right lost “only when the author himself communicates his production to the public,” isn’t about the home: It would apply equally to thoughts communicated privately outside the home as to those communicated within it.<sup>19</sup> The right “to educate one’s children”<sup>20</sup> is usually exercised outside the home (including in the very cases the Article cites, *Pierce v. Society of Sisters*<sup>21</sup> and *Meyer v. Nebraska*<sup>22</sup>). The right to decide “whether and when to have a family”<sup>23</sup> is exercised partly by getting contraceptives (or having abortions) outside the home, again including in one of the very cases the Article cites, *Eisenstadt v. Baird*.<sup>24</sup> Though the Fourth Amendment has

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15. Miller, *supra* note 6, at 1356.

16. *Heller*, 128 S. Ct. at 2797, 2818.

17. The prohibition on banning possession of obscenity doesn’t include the right to buy obscenity precisely because obscenity is seen as far from the core of First Amendment protection. See, e.g., *United States v. Reidel*, 402 U.S. 351, 358–59 (1971) (Harlan, J., concurring).

18. Miller, *supra* note 6, at 1305 (quoting Michael C. Dorf, *Does Heller Protect a Right to Carry Guns Outside the Home?*, 59 *Syracuse L. Rev.* 225, 232 (2008)).

19. See *id.* at 36 n.198; Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 *Harv. L. Rev.* 193, 198–99 (1890).

20. Miller, *supra* note 6, at 1305.

21. 268 U.S. 510, 536 (1925) (striking down law requiring public school attendance).

22. 262 U.S. 390, 403 (1923) (striking down law prohibiting teaching of foreign languages in school).

23. Miller, *supra* note 6, at 1304.

24. 405 U.S. 438, 454–55 (1972) (striking down law prohibiting distribution of

been read as giving extra protection in the home, dozens of cases make clear that it provides substantial protection outside the home as well.<sup>25</sup>

*Guns as Smut* returns to the Fourth Amendment late in the Article, pointing out how convenient a home-only Second Amendment would be for legislators who wouldn't have to deal with any possible "fact intensive, arbitrary, and incomprehensible [Second Amendment] doctrine akin to Fourth Amendment search and seizure jurisprudence."<sup>26</sup> Yes, radically limiting the scope of any constitutional constraint would be convenient for legislators and courts. But fortunately, such a radical limitation ("privacy as smut"?) has not happened with the Fourth Amendment. Despite the difficulties of articulating Fourth Amendment doctrine outside the home, and despite the Amendment's textual reference to "homes," courts have not thrown up their hands and concluded that freedom from unreasonable searches and seizures should only cover the home.

Two rights do indeed apply only within the home, or similar places. *Guns as Smut* points to the Third Amendment,<sup>27</sup> but that Amendment is textually limited to "house[s]." The Article also points to the right to consensual sexual activity,<sup>28</sup> but this just illustrates why analogies between constitutional rights, while often helpful, are often limited. A ban on public sexual activity is, for nearly all people, a modest burden on the right, because it leaves people free to shift to a private place. At most, it makes sex slightly less convenient and less spontaneous. (Exhibitionists might see the restriction as burdensome, but the law doesn't treat such unusual tastes as deserving of accommodation.)

But self-defense can't be shifted to a more convenient time or location. You can't invite a robber back to your place, where you might have a gun available to defend against him, the way you can invite a lover to your place to have sex. To borrow from the First Amendment's "time, place, and manner restrictions" doctrine, a ban on public sex leaves open "ample alternative channels" through which one can derive the benefit of the right—develop relationships, beget children, and enjoy sex.<sup>29</sup> A ban on public possession of arms does not leave open ample channels to defend oneself when the need arises.<sup>30</sup>

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contraceptives to unmarried persons).

25. See Miller, *supra* note 6, at 1304–05. For examples from just this past year, see *Safford Unified School Dist. No. 1 v. Redding*, 129 S. Ct. 2633, 2635 (2009) (holding middle school search of student's underwear violated Fourth Amendment), and *Arizona v. Gant*, 129 S. Ct. 1710, 1713 (2009) (finding search of car unreasonable under Fourth Amendment where defendant was arrested for driving with suspended license).

26. Miller, *supra* note 6, at 1351.

27. *Id.* at 1304.

28. *Id.*

29. See Volokh, *supra* note 3, at 1515, 1516 n.308.

30. *Id.*

### III. THE SUPPOSED HISTORICAL ARGUMENTS FOR LIMITING GUN RIGHTS TO THE HOME

*Guns as Smut* likewise errs in its arguments that the right has historically been seen as limited to the home. To take one example, the Article argues that “Blackstone lumped low or no-value speech acts and the public carrying of firearms in the very same category in his *Commentaries*: Libel and ‘challenges to fight’ fall just behind riot, unlawful hunting, and ‘riding or going armed, with dangerous or unusual weapons’ as offenses to the public peace.”<sup>31</sup>

Blackstone, though, was writing a brief summary of the Statute of Northampton, which he rendered as “[t]he offense of riding or going armed with dangerous or unusual weapons, is a crime against the public peace, by terrifying the good people of the land.”<sup>32</sup> And the Statute was understood by the Framers as covering only those circumstances where carrying of arms was unusual and therefore terrifying.

Thus, Justice James Wilson—a leading drafter of the U.S. Constitution,<sup>33</sup> and the first prominent American legal commentator—described the prohibition as covering “a man arm[ing] himself with dangerous and unusual weapons, in such a manner, as will naturally diffuse a terrour among the people.”<sup>34</sup> This was a nearly literal quote from the leading English commentator Serjeant Hawkins,<sup>35</sup> who also went on,

[N]o wearing of arms is within the meaning of this statute, unless it be accompanied with such circumstances as are apt to terrify the people; from whence it seems clearly to follow, That persons of quality are in no danger of offending against this statute by wearing common weapons . . . for their ornament or defence, in such places, and upon such occasions, in which it is the common fashion to make use of them, without causing the least suspicion of an intention to commit any act of violence or disturbance of the peace. And from the same ground it also follows, That persons armed with privy coats of mail, to the intent to defend themselves, against their adversaries, are not within the meaning of this statute, because they do nothing in *terrorem populi*.<sup>36</sup>

American benchbooks for justices of the peace echoed this, citing Hawkins,<sup>37</sup> though of course any class-based limitation to “persons of

31. Miller, *supra* note 6, at 1308.

32. 4 William Blackstone, *Commentaries* \*148–\*149.

33. See, e.g., Ralph Rossum, Wilson, James, *in* *Encyclopedia of the American Constitution* 2908 (Leonard W. Levy & Kenneth L. Karst eds., 2d ed. 2000).

34. 2 James Wilson, *The Works of James Wilson* 654 (Robert McCloskey ed., Harvard Univ. Press 1967) (1804) (printing one of Justice Wilson’s lectures on law); *id.* at 67 (noting lectures were delivered in 1790 and 1791).

35. 1 William Hawkins, *A Treatise of the Pleas of the Crown* 135, ch. 63, § 4 (photo. reprint 1978) (1716).

36. *Id.* at 136, ch. 63, § 9.

37. See, e.g., William W. Hening, *The New Virginia Justice, Comprising the Office*

quality” could no longer be sustained.<sup>38</sup> Only public carrying “accompanied with such circumstances as are apt to terrify the people” was thus seen as prohibited; “wearing common weapons” in “the common fashion” was legal.<sup>39</sup> And this is consistent with the pre-Civil-War American legal practice of treating open carrying of weapons as not only legal but constitutionally protected.<sup>40</sup>

#### IV. PUBLIC GUN POSSESSION AS THREAT TO PUBLIC DEBATE?

*Guns as Smut* also argues that “the presence of a gun in public has the effect of chilling or distorting . . . public deliberation and interchange. . . . [E]veryone is deterred from free-flowing democratic deliberation if each person risks violence from a particularly sensitive fellow-citizen who might take offense.”<sup>41</sup>

This is an intriguing speculation. One could also engage in the intriguing rival speculation that people’s ability to defend themselves may *support* public interchange, by assuring minority speakers that they can protect themselves against violent suppression. Private gun ownership was sometimes used this way during the civil rights era.<sup>42</sup>

But fortunately we don’t need speculation; we have ample experience. In Vermont, people have long been free to carry concealed weapons without a license. In New Hampshire and the state of Washington, law-abiding adults have been legally entitled to concealed carry licenses for over 50 years.<sup>43</sup> Today, law-abiding adults can get such licenses in all states except California, Delaware, Hawaii, Illinois, Maryland, Massachusetts, New Jersey, New York, Rhode Island, and Wisconsin.<sup>44</sup> In many states, such as Arizona, Delaware, and Maine, law-abiding adults may carry guns openly, even without licenses.<sup>45</sup>

Is public debate on balance especially inhibited in any of these

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and Authority of a Justice of the Peace, in the Commonwealth of Virginia 17–18 (Richmond, T. Nicolson 1795); James Parker, Conductor Generalis; or the Office, Duty and Authority of Justices of the Peace 11 (New York, John Patterson 1788); see also *Simpson v. State*, 13 Tenn. 356 (1833).

38. See, e.g., Hening, *supra* note 37, at 18 (“[T]he wearing of common weapons . . . merely for ornament or defence, where it is customary to make use of them [is not illegal].” (citing Hawkins, *supra* note 35, at 136, ch. 63, § 9)).

39. Hawkins, *supra* note 35, at 136, ch. 63, § 9.

40. See Volokh, *supra* note 3, at 1517–18 n.312.

41. Miller, *supra* note 6, at 1309–10.

42. Robert Cottrol & Ray Diamond, *The Second Amendment: Toward an Afro-Americanist Reconsideration*, 80 *Geo. L.J.* 309, 355–58 (1991) (suggesting private gun ownership and gun carrying emboldened some civil rights activists and deterred terrorists who would have otherwise attacked the activists).

43. Kranz, *supra* note 13, at 647, 657.

44. *Id.*; Kan. Stat. Ann. § 75-7c03 (Supp. 2008) (statute enacted after Kranz article was published); Neb. Rev. Stat. § 69-2430 (Supp. 2008) (same).

45. *Compendium of State Firearms Laws*, 217 *PLI/Crim* 203, 205 (2009) (compiled by the NRA Institute for Legislative Action, but submitted by Art Parker from the Office of the Attorney General of the District of Columbia).

categories of states? Is speech in Arizona, Vermont, and Washington less free than in Hawaii, Maryland, or New York, which try to limit the supposed “smut” of guns to the home? I know of no evidence for this, and *Guns as Smut* doesn’t point to any.

### V. ANXIETY ABOUT SELF-DEFENSE

*Guns as Smut* also seems to express concern about public self-defense more broadly.

The Article suggests that early American law was “ambivalent”<sup>46</sup> towards armed self-defense in public. No; there was no doubt at the Framing of people’s right to defend themselves in public using deadly force against murder, rape, or robbery, so long as the use of deadly force was genuinely necessary. (The necessity requirement explains the “duty to retreat” that’s imposed in many states—if one can defend oneself safely without killing, then the killing isn’t necessary.<sup>47</sup>)

Nor did Blackstone “specifically reject[] the Lockean notion that a man had a right to kill an aggressor in public” when it came to genuine self-defense against serious crime.<sup>48</sup> Blackstone expressly said that, “If any person attempts a robbery or murder of another . . . and shall be killed in such attempt, the slayer shall be acquitted,” and likewise for “a woman killing one who attempts to ravish her.”<sup>49</sup> Blackstone’s disagreement is simply with Locke’s assertion that deadly force can be used to resist “all manner of force,”<sup>50</sup> including force other than robbery, rape, or murder. Justice Wilson likewise made clear that homicide was protected “when it is necessary for the defence of one’s person,” and not just for the defense of one’s home.<sup>51</sup>

The Article also argues that terrorist or revolutionary mobs may publicly carry arms under the pretext of self-defense.<sup>52</sup> Yet the legal system has had, and should have, little difficulty distinguishing individual citizens’ permissible legal possession for self-defense from mob action aimed at attacking or terrorizing. Past refusals to suppress some mob action—which left victims to fend for themselves, sometimes with their private arms<sup>53</sup>—have stemmed from deliberate governmental underenforcement of normal criminal law, not from law-abiding citizens’ right to carry guns.

Finally, the Article worries that a right to bear arms outside the

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46. Miller, *supra* note 6, at 1343.

47. See, e.g., *United States v. Travers*, 28 F. Cas. 204, 206 (C.C.D. Mass. 1814) (No. 16,537).

48. Miller, *supra* note 6, at 1343 n.410.

49. Blackstone, *supra* note 32, at \*180–\*181.

50. *Id.*

51. 3 Wilson, *supra* note 34, at 84–85.

52. Miller, *supra* note 6, at 1332–34.

53. See *supra* note 42.

home may lead to the constitutionalizing of self-defense law.<sup>54</sup> And indeed the right to bear arms in self-defense has been used as a support for the well-established criminal law of self-defense. Justice James Wilson spoke of this in 1791,<sup>55</sup> and courts have discussed it since (as well as relying on explicit constitutional rights to self-defense mentioned in state constitutions).<sup>56</sup>

But that's not much of a horrible for *Guns as Smut's* parade. Even under the narrow *Washington v. Glucksberg* test, the Constitution protects unenumerated "fundamental rights and liberties which are, objectively, 'deeply rooted in this Nation's history and tradition.'"<sup>57</sup> The right to self-defense should indeed qualify under that test, even without support from the Second Amendment. Nor should recognizing such a right cause much change in the law, given that the core of the right—the right to use even deadly force when necessary to protect against the most serious crimes—is uncontroversially recognized by statutes and the common law.

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I have reached my allotted word limit, so I leave the rest of *Guns as Smut's* 79 pages to others. Suffice it to say that, whatever sound arguments there might (or might not) be for limiting gun rights to the home, the arguments that *Guns as Smut* gives do not qualify.

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Preferred Citation: Eugene Volokh, *The First and Second Amendments*, 109 COLUM. L. REV. SIDEBAR 97 (2009), [http://www.columbialawreview.org/Sidebar/volume/109/97\\_Volokh.pdf](http://www.columbialawreview.org/Sidebar/volume/109/97_Volokh.pdf).

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54. Miller, *supra* note 6, at 1354.

55. 3 Wilson, *supra* note 34, at 84–85.

56. See generally Eugene Volokh, *State Constitutional Rights of Self-Defense and Defense of Property*, 11 *Tex. Rev. L. & Pol.* 399 (2007).

57. 521 U.S. 702, 720–21 (1997).