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A SHORT REPLY TO PROFESSOR VOLOKH

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Response to: Eugene Volokh, The First and Second Amendments, 109 Colum. L. Rev. Sidebar 97 (2009).

Analogies are temperamental things. If it strikes someone wrong, no matter how scrupulously you explain yourself, no matter how defensible your position, people who may otherwise agree with you half of the time never seem to get past the analogy. Arguments in hotly contested areas of the culture wars tend to run against how the thing is expressed, rather than what is expressed. Race, abortion, sexual orientation: Very often, discourse on these topics degenerates into debates about legitimate ways to talk about the thing, rather than talking about the thing itself. The same phenomenon applies to talk of guns. Further evidence, in my opinion, that Second Amendment discourse is not so much about guns or gun policy, but "much ado about something else."[1]

This is how I read Professor Volokh's occasionally strident response[2] to my recent piece, *Guns as Smut: Defending the Home-Bound Second Amendment*.[3] Much of Professor Volokh's rebuttal is a mordant challenge to the accuracy of the analogy, rather than to arguments that underpin the analogy and independently justify the home-bound Second Amendment. I gather that Professor Volokh believes that if he can show that the facts supporting an analogy to obscenity are faulty, then those same facts supporting a home-bound Second Amendment must be faulty

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1. See Maxine Burkett, Much Ado About . . . Something Else: *D.C. v. Heller*, The Racialized Mythology of the Second Amendment, and Gun Policy Reform, 12 J. Gender Race & Just. 57, 58 (2008) (discussing gun debate as method of racialized discourse); Dan M. Kahan, The Secret Ambition of Deterrence, 113 Harv. L. Rev. 413, 451 (1999) (arguing gun debate is not about guns or crime so much as it is about contesting groups' attempts to use prestige of law to confirm their worldview).

2. Eugene Volokh, The First and Second Amendments, 109 Colum. L. Rev. Sidebar 97 (2009), http://www.columbialawreview.org/Sidebar/volume/109/97_Volokh.pdf.

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

as well. Fair enough.

Nevertheless, I propose a thought experiment: For those who flinch at the title, and can't get past the suggestion that a right to private possession and use of firearms might look like the right to private possession and use of smut, read the piece as if the analogy did not appear until the very end. Or, if you rather, read the piece in reverse.

The argument now goes roughly like this: People want a voice in the debate on use of guns in public, if polling is to be believed. The history of public bearing of arms for self-defense is deeply contested—especially during the Reconstruction period when public bearing of arms was so politically volatile. Contrast this with the private possession and use of firearms for defense of the home, which has almost universal historical support for several centuries. Judges generally should defer to political and local branches of government when history does not provide definitive guidance as to the scope of a constitutional right. The home is the one place where possession and use of arms has been universally historically supported. Therefore, the federal constitutional right to keep and bear arms should be limited to the home where the history is most certain, with political judgments or local constitutions regulating (or protecting) guns everywhere else. What other federal constitutional right is limited to the home, with political judgments governing the right everywhere else?

Obscenity.

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