Exhibit "6"

http://reason.com/archives/2010/06/15/free-speech-and-guns

Free Speech and Guns

Legal superstar Eugene Volokh on the Bill of Rights in 2010

Eugene Volokh & Ted Balaker from the July 2010 issue

Few scholars have led a life as varied as Eugene Volokh's. Born in the Soviet Union in 1968, Volokh immigrated with his family to the United States at age 7. A prodigy, he entered the University of California at Los Angeles at 12 and graduated at 15 with a degree in math and computer science. At the same time he contributed to the family software business, which became very successful thanks in large part to Eugene's programming skills.

In his 20s, interested in new challenges, Volokh went to law school, starting on a path that would eventually lead to clerkships with U.S. Supreme Court Justice Sandra Day O'Connor and the libertarian-leaning 9th Circuit Judge Alex Kozinski. Since 1994 he has taught law at UCLA. As a professor he has achieved not just a strong reputation among his peers, thanks to his scholarship on subjects ranging from cyberspace law to the Second Amendment, but a considerable following outside the legal profession as well, thanks to *The Volokh Conspiracy*, a consistently interesting website he launched in 2002.

(It was originally called *The Volokh Brothers*, adopting its present name after the roster of bloggers extended beyond Eugene and his sibling Sasha.) On their blog, Volokh and his collaborators, most of whom share his generally libertarian orientation, cover a wide range of legal and political issues, from the Supreme Court to the Middle East.

reason.tv producer Ted Balaker sat down with Volokh in December for a wide-ranging discussion about the state of civil liberties in the United States today. For a video version of the interview, go to reason.tv/video/show/eugene-volokh.

reason: Do threats to free speech these days come mostly from the left or from the right?

Eugene Volokh: There are some of each kind. There are also quite a few that come from no side at all. They come from government officials who are busy pursuing whatever goals they might have and just pay no attention to free speech. Even on issues where you'd think

there might be mostly left-wing attempts to restrict speech, such as speech that's allegedly racist or allegedly biased against particular religions, if you look at the polls, it turns out that liberals and conservatives, Democrats and Republicans, have pretty much the same percentages supporting speech and supporting restrictions.

Likewise, if you look at judges, especially Supreme Court justices, the ones who take a pretty broad view of free speech come from both the left and the right. The recently retired Justice Souter on the moderate left, and Justice Kennedy and Justice Thomas on the center-right and the right, all take a very broad view of free speech. On the other hand, justices who have a narrower view of free speech have also come from the left and the right. Chief Justice Rehnquist and Justice O'Connor took a relatively narrow view, still fairly broad but relatively narrow compared to the other justices. But so does Justice Breyer, who was a Clinton appointee and a moderate liberal.

It does turn out, though, that if you look not at the voters or the justices but at the backers—the intellectual, academic, and institutional backers of some restrictions—there is something of a liberal-conservative divide. For example, campus speech codes seem to be backed by a combination of mostly liberal university administrators and professors, based partly on a nonpolitical desire to suppress stuff that causes a mess and causes a fuss. This isn't to say that most liberals support campus speech codes, but most supporters of campus speech codes are liberals.

There are also attempts to restrict speech from the right, including speech with sexual themes. Generally speaking, it's more conservatives than liberals who favor giving government the broad right to fire government employees for their speech, including whistleblowing speech. So it depends on the particular controversy.

Let me give an example of something that people haven't much noticed. In child custody cases, when courts decide which parent gets custody, the standard is the best interests of the child. And there are quite a few cases in which the judge says, more or less, "This parent is more religious than the other parent, and it's in the best interests of the child to be raised in a more religious environment. Therefore we're going to give custody to the more religious parent." Or sometimes, "We're going to bar this parent from saying something that we think is against the child's best interest"—bar a parent from saying racist things, or bar a parent from saying pro–gay rights things, or bar a parent from saying anti-gay things, especially when the other parent turns out to be a lesbian.

You might say, "Well, it's conservatives who are trying to suppress atheist speech, and it's liberals who are trying to suppress, say, anti-gay speech." But what really seems to be going on is that judges say: "All we care about is this legal standard, best interests of the child. Free speech, religious freedom, separation of church and state—we're not going to

pay any attention to any of that. We're just fixated on our daily job, which is to apply this standard." And I think that's true with regard to a lot of speech restrictions. It's often government officials, whether judges or prosecutors or administrative officials, who just don't pay any attention to free speech. It's not about politics to them. It's about getting the things they want done notwithstanding any constitutional constraints.

reason: As Americans, we fancy ourselves defenders of free speech, regardless of whether we personally find it offensive. It sounds like we're not quite living up to that standard. How well are we doing?

Volokh: I think most Americans support free speech. They just have different visions of what speech should be free. I think even libertarians recognize certain kinds of speech ought to be restrictable—death threats, for example. And one can support free speech but take a narrower view or a broader view. If you look at the views of American citizens to the extent that they're polled on these subjects, it turns out that there's pretty broad support for protecting even speech that is seen as extremist, racist, or harshly anti-religious. There's broad support for protecting it. There's also broad support for restricting it.

reason: Would you say the First Amendment enjoys more popular support and more real -world protection than other amendments in the Bill of Rights?

Volokh: It's very hard to compare the relative force of various constitutional amendments, in part because they're written in different ways. Many people say, "The Fourth Amendment is not being enforced enough." But the Fourth Amendment does not prohibit searches and seizures; it prohibits *unreasonable* searches and seizures. Built into the Fourth Amendment is the notion that some searches and seizures are permissible, and lines need to be drawn between what's reasonable and what's unreasonable. Many judges take a view that a wide range of searches and seizures are reasonable. So is the Fourth Amendment being enforced less strictly than the First Amendment? It's hard to say. It may just be that it's written less strictly, so it ends up authorizing a lot of government action.

The right to a jury trial is very strongly enforced. If you're being prosecuted for a criminal offense, and the maximum sentence for that offense is more than six months, you are entitled to a trial by jury. There's no balancing test; the government can't say, "We've got a compelling interest in not giving you a trial by jury." At the same time, the right has some built-in limitations. For petty offenses, you don't get a right to a trial by jury. That's not in the text of the Constitution, but it's been understood as a historical exception.

Likewise, if you're being detained as an enemy combatant, there has been debate about what kind of rights you have, but you clearly don't have a constitutional right to a

standard, civilian criminal jury trial, and you never have. With a lot of these rights, there is a core that is very well protected, but the core might be relatively small; there may be a lot of things that look on their face like they'd be covered by the text but aren't. It's very hard to do comparisons between rights that are very different, have very different histories, have very different texts, and have different social functions.

reason: If you had to choose one or two of the biggest threats to free speech these days, what would they be?

Volokh: One is the notion of hostile environment harassment: that people expressing their views, people making jokes, sometimes people posting sexually themed material, sometimes people making political statements or religious proselytizing, can become legally punishable discrimination simply because it is—and I'm quoting here the very vague language of the law—"severe or pervasive enough to create a hostile, abusive, or offensive environment" based on race, religion, sex, sexual orientation, and the like. This could be in employment, in education, in public accommodations. There is the limitation that it can support a lawsuit only if it creates a hostile environment for a reasonable person, but it's obviously a very vague and very broad standard.

This rule has become essentially a nationwide speech code for America's workplaces. The code is not just imposed by the private property owners who run the workplaces, who of course are entitled to restrict speech on their property and by their employees. Rather, it is imposed by the government; employers are being coerced into suppressing certain kinds of speech by fear of massive liability. And once that theory is recognized in the workplace, it becomes applicable in other places as well. The latest generation of campus speech codes is based on the theory that if students or professors say things that in the aggregate are offensive enough to people based on certain attributes that speech stops being constitutionally protected speech and magically becomes the conduct of discrimination, which is legally punishable.

You also see cases where the same logic is applied to public accommodations. So there was a case several years ago in Boston, where a bar was found liable for having an allegedly racist display as part of its decor and allowing allegedly racist political statements by the bartender. I think that's a very dangerous thing, partly because it applies to a wide range of speech, including clearly political speech, speech that obviously should be constitutionally protected. The standards are so vague and potentially so broad that it can very easily lead to back-door suppression of speech that we'd always assumed was constitutionally protected.

There was a lawsuit—which fortunately was rejected, but it took a trip to the California Supreme Court to do it—against Warner Brothers for allowing sexually themed speech in

the writers' office for the television show *Friends*. A writer's assistant found this created a sexually hostile environment for her because there were all these sexually themed and occasionally misogynistic comments being made. And one might say, well, of course it's constitutionally protected, but it's still a workplace. We say it's constitutionally protected even though it's in the workplace because speech should be protected from government suppression everywhere.

reason: That standard would shut down most Hollywood scriptwriting meetings.

Volokh: That's right. But even if you get out of this zone of what some might call communicative workplaces —workplaces that are all about the creation of speech —still for most people, whether they work at a factory, at a coffee shop, or wherever else, that's where they spend a third of their hours. That's where they have conversations with their coworkers. For many people that's the most they have by way of conversation outside of their family. And here the government is coming in and—indirectly but quite clearly, through the coercive force of the threat of massive liability—suppressing speech because it conveys allegedly offensive viewpoints.

reason: Before fingerprinting, cops took mug shots as a way of identifying us, and until recently they were pretty reluctant to release mug shots unless there was a Freedom of Information Act request. These days, cops are not only giving them out; they're placing mug shots on their own websites as a way of shaming johns, prostitutes, shoplifters, and so on. There's also this cottage industry that's emerging of local tabloid newspapers that point out who the wrongdoers are in the local community. What do you make of this? Is there tension between free speech on the one hand and protection of due process on the other?

Volokh: The government has no legal obligation to release mug shots. If the government were to say, "We're not going to release any more mug shots, except in unusual circumstances—say, when there's a manhunt going on and we want people to help identify somebody," that wouldn't violate anyone's free speech rights. The government can just say, "Hey, we took the photos, they're our property, and we're not going to hand them out to you." At the same time, while people may have a privacy right to be free from unreasonable searches and seizures, they have no constitutional privacy right in their pictures. The government generally can put out pictures of people. So it's hard to figure out from first principles what the right answer is in this kind of situation.

The government has legitimate reasons for releasing photographs. Often it does help people figure out, for example, if somebody was arrested for some robbery and maybe it was somebody who robbed them before. Sometimes if it's announced that John Smith is

arrested for such and such, seeing this picture may help you realize it's not the John Smith you work with but a completely different John Smith.

At the same time, releasing the mug shot might inflict a kind of punishment before conviction. It might ruin people's reputations and cause them undue embarrassment even before there's any trial. Perhaps they're vindicated at trial, but all that people remember is their mug shot on the evening news. That's a danger that we have had with our open criminal justice system even before photographs, simply because names were always released. But it's a danger that's exacerbated now.

reason: A Chicago artist was protesting a local ordinance that banned selling art on the street. He knew he was going to be arrested for selling his art, so he recorded what happened. He was charged with felony eavesdropping. Under what circumstances can you record someone in a public space?

Volokh: This is what I call the dark side of privacy laws. Everyone likes the idea of privacy, and eavesdropping sounds bad. But legislatures often target it without sufficient attention to free speech rights. In some states, the law essentially bars anybody from recording conversations without the permission of all the parties.

Those laws apply even when the conversations are in a public place, even when they're on a nonconfidential matter, even when one of the people in the conversation is doing the recording, and even when the conversation is with government officials, including police officers. The Massachusetts Supreme Judicial Court rejected a First Amendment challenge to a criminal prosecution in such a case several years ago. I think that's very bad. I think it's very important that we be able to gather information this way, especially concerning interactions with police officers but also in other situations, such as when we're being blackmailed or something along those lines, where the recording could be our only way of clearing ourselves.

The law varies a lot from jurisdiction to jurisdiction. In many states, it's OK to record a conversation so long as one party agrees. So if you're talking to someone and you want it recorded, you can record it without getting the other person's permission. In some states, you need the permission of all the parties when the conversation is confidential communication or private communication, and often the law is not clear about what that means. In a few states, you need the permission of all the parties without any such qualifier.

In those states, if you are recording a conversation with a police officer who is trying to arrest you because you want to prove that it's a bad arrest, that itself is a crime. I think that's going way too far. If you're going to have laws that restrict recording even when one

party agrees, and I'm not sure we should have such laws, you need to have some pretty clear exceptions for recording things in which nobody has any legitimate privacy interest. Police officers have no legitimate privacy interests in their conversations with citizens, and in those cases there is a very important interest in gathering information.

reason: We have a series at **reason.tv** called Nanny of the Month. One month we picked the Alabama Supreme Court for upholding a state ban on selling sex toys. You said we shouldn't have done that. Why?

Volokh: As I understand it, when you say "nanny," you mean somebody who is restricting people's liberty, supposedly for their own good, but without any attention to what they themselves want. I think that it's right to take to task government officials who act as nannies in this way. It's the job of legislators to impose only those legal rules that are genuinely necessary to protect individual liberty or some very important social interest.

But that's not the job of judges. The job of judges is to follow the law and to enforce the law. It's far from clear to me that the Alabama Constitution and the U.S. Constitution protect the right to have sex toys. One could argue that they should, but it's perfectly reasonable for a court to say: "Look, there's nothing in our Constitution that interferes with legislative judgment here. This could be a silly law, it could be an illiberal law, it could be a nanny law, but it's not our job to act as protectors against the nannies. The protectors against the nannies should be other legislators and the voters. If you don't like the nannies in the legislature, vote them out. Our job is to strike down only those laws that violate the Constitution, not the laws that we simply think are unreasonable or excessive or too nannyish."

reason: So by definition, judges can't be nannies?

Volokh: Judges can be nannies when it comes to creating legal rules. Historically in the Anglo-American legal system, many basic legal rules of contract, of property law, of tort law, even of criminal law, have been created by judges. The earliest restrictions on private sexual contact were actually judge-made rules. Likewise, a lot of tort law rules are judge-made rules. So judges could be nannies if they set up tort law rules that are unduly paternalistic—for example, that protect people so much from ordinary hazards that they drive useful products off the market or interfere with private actions in an excessive way.

But there the judges are themselves making the rules. When somebody is making the rules, you can ask if they're being a nanny or not. When somebody's deciding whether somebody else is authorized to make the rules, the question is different. It becomes what the proper role is for the judiciary, as opposed to the legislature, in making these rules.

reason: What are the implications of the 2008 Supreme Court case *District of Columbia v. Heller* for gun control?

Volokh: The Supreme Court held in *D.C. v. Heller* that the Second Amendment secures, among other things, an individual right to keep and bear arms, including handguns, in self-defense. But 44 state constitutions have a specifically guaranteed right to keep and bear arms, and at least 40 of them have been interpreted as securing an individual right to keep and bear arms in self-defense. The state courts in those states have applied those provisions, so we have a pretty good idea of what happens in court when there's no dispute about whether there's an individual right to keep and bear arms in self-defense.

The courts in those states strike down the most aggressive and restrictive gun control laws and uphold a great many other laws that are seen as mere regulations rather than prohibitions on keeping and bearing arms. That's been true for almost 200 years, ever since state supreme courts in the early 1800s started upholding bans on concealed carry of guns. Those were the first in a major wave of gun control laws in America.

So what I think will happen, even if the Supreme Court holds in the coming Chicago case that the right to keep and bear arms applies to state and local governments, is that if there's a total gun ban or total handgun ban, that will be struck down. Possibly some other laws will be overturned as well: maybe total bans on carrying guns, maybe bans on possessing guns in public housing complexes.

But bans on so-called assault weapons, various waiting period laws, licensing and registration laws—I think courts are going to say those are permissible regulations rather than total prohibitions. I think a lot of these laws are pretty foolish. The bans on so-called assault weapons are a classic example—even some of the pro–gun control forces have acknowledged that such laws have virtually no effect on crime because they ban guns based on aesthetic features rather than any practical difference between the banned guns and allowed guns. But generally speaking courts will leave legislatures with a great deal of discretion in enacting those laws so long as they don't substantially burden the ability to own some useful guns for self-defense purposes.

reason: Does media coverage have a big impact on how people view guns?

Volokh: Media coverage of guns is skewed in various ways. At many media outlets, the people who write about the subject are somewhat anti-gun, and as a result the coverage ends up being anti-gun. Sometimes they are just ignorant of basic distinctions. You occasionally hear talk about assault weapons that implies they are fully automatic weapons, which they are not. So there are institutional biases. There is also a news bias: It's not news if a gun is used the way most guns are used, which is somebody breaks into

somebody else's home, the homeowner takes out a shotgun and pumps it, and the burglar hears that familiar sound and runs away. That's a very common and beneficial use of a gun, but it's not going to make the news.

At the same time, entertainment is biased, whether intentionally or not, in favor of guns. Guns are glamorous things in television programs and in movies. My sense is also that people who use guns in movies use them much more successfully than guns are actually used in real life. The fact is that, especially under combat conditions, it is very hard to hit somebody the first time around. Even trained police officers, when they actually get into a shootout (which for most police officers is a very rare thing), end up missing most of the time. I don't think that television and movies accurately capture that fact. As a result, they make guns seem more effective than they actually are. So it could be that these biases counteract each other to some extent.

Whether or not they do, it is quite clear that despite all the hopes of the gun control movement that coverage of mass shooting incidents would lead to a groundswell of support for gun control, it hasn't happened. Despite these high-profile incidents, support for gun control has declined rather than increased.

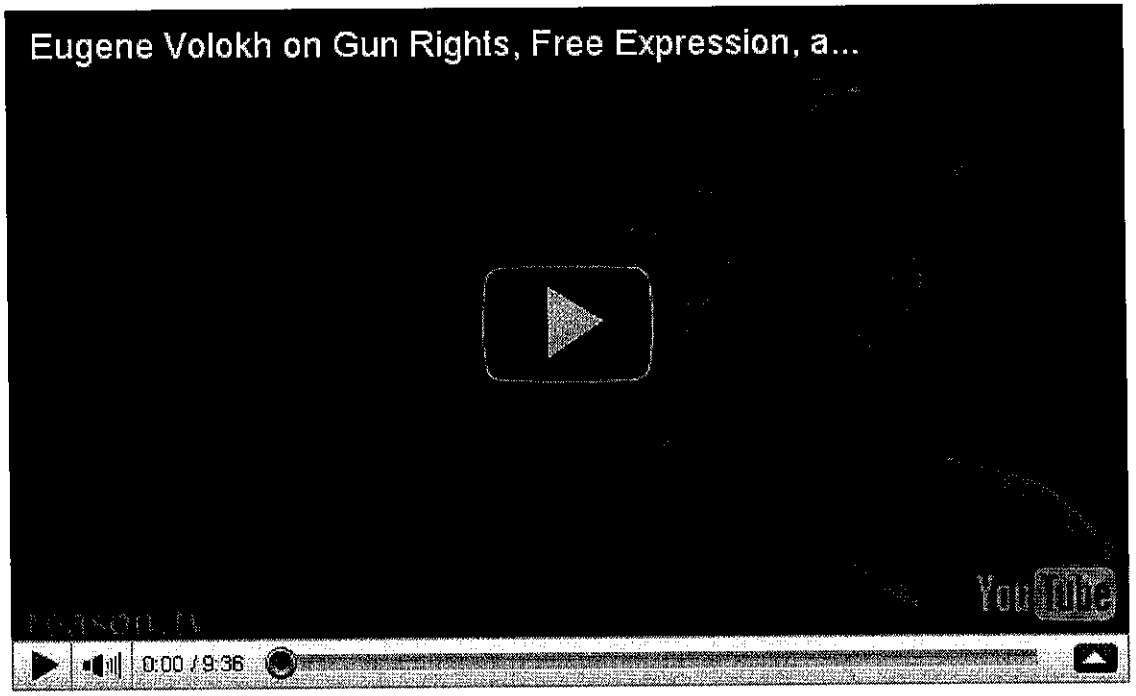
reason: Do you agree with the "more guns, less crime" thesis?

Volokh: It's very hard to tell what the precise effects are of allowing more law-abiding citizens to get concealed carry licenses. It is pretty clear that the overwhelming majority of people who get concealed carry licenses use their guns responsibly. It is quite clear that we have not seen any massive increase in crime, even though we have shifted from a situation where about 10 states allowed nearly every law-abiding adult to get a concealed carry license to a situation where 40 states do. So the fears of gun control proponents certainly have not materialized.

On the other hand, it's very hard to tell whether nondiscretionary license policies lead to a small but measurable increase in crime, a small but measurable decrease in crime, or neither. There are competing arguments, competing data sets, competing models. I think that's something there needs to be more research on. But it is pretty clear that the increase in legal concealed carry has not had massive effects one way or the other.

In that kind of situation, we should err on the side of liberty: People should be free to have the weapons that are necessary to effectively defend themselves.

Bonus Reason.tv Video: Watch Eugene Volokh discuss free speech and guns with Reason.tv's Ted Balaker.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http://reason.com/archives/2001/06/04/squeamish-librarians

Squeamish Librarians

A Minnesota library case about Internet porn imperils the First Amendment

Eugene Volokh | June 4, 2001

Workplace harassment law, the nation's number-one form of speech code, has taken yet another step toward controlling what we may read and say. Libraries, the federal Equal Employment Opportunity Commission has just ruled, may be breaking the law if they dare to give adult patrons complete and unfiltered Internet access.

One can argue about whether libraries have a constitutional duty to provide totally unfiltered access, even to adults. Some people say that a library should have the power to control what happens on its property, and to stop patrons from accessing sexually themed materials on library computers. Others say that even when government computers and buildings are involved, libraries may not censor Internet access.

But until now, most people had assumed that a library had a right to provide such access, if that's how it understood its professional obligation. Not so, says the EEOC: Because some material accessed by patrons may be offensive to the *librarians* who end up seeing it, the law can punish libraries for allowing such unlimited access.

The case arose in Minneapolis, which used to provide unfiltered access to adults in its libraries. Many libraries do this, and this is, in fact, the approach suggested by the American Library Association.

Several librarians, however, filed an EEOC complaint based on what they say was "repeated exposure to sexually explicit materials," and an environment "which is increasingly permeated by [pornographic] images on computer screens, [and] is also barraged by hard copies of the same, created on Library provided printers." Other library employees likewise signed a letter saying that "Every day we...are subjected to pornography left (sometimes intentionally) on the screens and in the printers....We feel harassed and intimidated by having to work in a public environment where we might, at any moment, be exposed to degrading or pornographic pictures."

In late May, the EEOC agreed, concluding that the library's toleration of unfiltered access crated a "sexually hostile work environment." If the library doesn't settle with the librarians, the EEOC may sue it to force compliance. According to press accounts, the EEOC is encouraging the library to settle the case by paying the librarians a total of $900,000.

Now I sympathize with the librarians -- I wouldn't want to work around pornography, either. Maybe the library could and should take steps to boost employee morale, even if that means constraining patrons in some measure; as I said, that's a tough constitutional question.

But under the First Amendment, the librarians ought not be able to use the federal government, and the threat of massive legal liability, to force the library into making this decision. Remember that the law the EEOC is using against the Minneapolis libraries also applies to private libraries, such as libraries at private universities--and, for that matter, to private cyber-cafes and other access points, such as Kinko's. The federal government has no right to pressure all these organizations to suppress their patrons' Internet access. Librarians' offense, even understandable offense, can't justify restrictions on First Amendment rights.

This is just the latest great leap forward for harassment law. Harassment law already forces employers to suppress sexually suggestive displays (not by any means limited to pornography), sexual jokes, politically offensive statements, and religious proselytizing.

During the Clinton scandals, employment experts sensibly suggested that employers had to suppress Clinton-Lewinsky jokes, because such jokes might have helped create a "sexually hostile work environment." The Department of Education's Office for Civil Rights has argued that "educational harassment law" -- a body of law developed by analogy to workplace harassment law -- requires universities to implement student speech codes. The U.S. Civil Rights Commission has likewise argued that public accommodations harassment law outlaws American Indian team names and mascots, on the grounds that such symbols are racially offensive. The Massachusetts Commission Against Discrimination forced a Boston bar to take down a display that supposedly expressed racist viewpoints.

Workplace harassment law has already been used to suppress art displayed in universities and in government buildings. It was only a matter of time before it stepped in to censor libraries.

And of course workplace harassment law applies to racially and religiously offensive material as much as to sexually offensive material. Librarians can equally complain about

patrons accessing supposedly racist material -- not just Nazi sites, but also Web pages for the sports teams with American Indian names that the U.S. Civil Rights Commission says are racially harassing. The same goes for patrons accessing supposedly religiously bigoted or blasphemous material.

Once the law tries to suppress offensive viewpoints--especially under the vague rubric of speech that is "severe or pervasive enough" to create a "hostile, abusive, or offensive work environment" based on race, religion, sex, and so on--the logic of the law keeps it spreading further and further outward. The strange career of harassment law is a sobering reminder that "slippery slope" arguments, while often abused, have a lot of truth to them. In a legal system such as ours, which is built on precedent and analogy, it's easy for even initially narrow speech restrictions to grow dramatically over time.

Some people argue that libraries should use technological solutions short of filtering--putting up privacy screens on their computers, for instance. Such screens, though, are far from perfect: People might still be able to see the screen when they walk by directly in front of the computer. Moreover, they do nothing about librarians' complaints about seeing offensive material in a printer bin. Setting up privacy screens gives libraries no immunity from massive legal liability.

But more important, even if it's wise for libraries to implement such solutions voluntarily, focusing on them misses the big question: Should the government be in the business of creating a nationwide speech code -- for public and private workplaces, universities, stadiums, libraries, and bars -- that use the force of law to suppress offensive speech and offensive viewpoints?

When the federal government insists that even libraries must become offense-free-zones--on pain of massive liability if the libraries should choose a more liberal approach--our First Amendment rights are in serious jeopardy.

http://reason.com/archives/2008/06/27/the-second-amendment-goes-to-c

The Second Amendment Goes to Court

Civil libertarians respond to *D.C. v. Heller*

Jacob Sullum, Brian Doherty, Joyce Lee Malcolm, David B. Kopel, Randy Barnett, Glenn Reynolds, Alan Gura & Sanford Levinson | June 27, 2008

For the past three decades, Washington, D.C. has enforced one of America's most draconian gun control laws—a total ban on the possession of handguns, not to mention strict gun lock provisions for rifles and shotguns, that has left law-abiding citizens unable to legally defend themselves and their homes. In March, the U.S. Supreme Court heard oral arguments in the case of *District of Columbia v. Heller*, in which seven D.C. residents challenged the constitutionality of the ban. At the center of the case is the question of whether the Second Amendment protects an individual or collective right to keep and bear arms.

Yesterday, the Court issued its long-awaited opinion, ruling 5-4 in favor of an individual right to own guns. **reason** assembled a panel of 8 leading civil libertarians to help make sense of what the Court said, what it means, and what's likely to come next.

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Alan Gura: Yesterday's decision is a huge victory for liberty. First, we saved the Second Amendment. That much should be obvious from the opinion. Yesterday, federal courts in 47 states were telling Americans they had no Second Amendment rights. The score is now 50-0, plus the capital, in the other direction. For budding lawyers, "individual right" is now the correct answer on the Multi-State Bar Exam. The movement to end private firearm ownership in America is dead and buried. Yes, we've got some work to do to make sure it stays that way. It will.

The case is "narrow but broad." Narrow, in the sense that our objective was merely to secure the individual nature of Second Amendment rights, and demonstrate—with a judgment—that the right has substance. Broad, in the sense that this simple principle can now be applied in other contexts. This is not just about flat-out gun bans in Washington, D.C. homes. All regulations that touch upon Second Amendment rights will get a well-

deserved constitutional look. Instant background checks and felon-in-possession laws will survive. Laws meant to harass gun possession, while at best advancing only a hypothetical public benefit, will not. The Second Amendment is now a normal part of the Bill of Rights. It's not realistic to expect one Second Amendment case to answer all right to arms questions for all time, just as we have no one decision telling us what a Fourth Amendment "reasonable search" in all circumstances. We may not win every case. We'll win a good amount of them. The next step is obviously 14th Amendment incorporation. I'm looking forward to leading that fight. Learn more at www.chicagoguncase.com.

Libertarians can be impatient. Would anyone prefer the quick certainty of *Kelo*? Or *McConnell v. FEC*? It may be a tough slog to restore the Takings Clause and free political speech. Restoring the Second Amendment will take time, too. Today, with the right to keep and bear arms, we start from a position of strength.

Alan Gura argued District of Columbia v. Heller *before the Supreme Court. He is a partner at Gura & Possessky.*

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Glenn Reynolds: My first thought on *Heller* is that many gun-rights supporters never thought they'd live to see a Supreme Court opinion to the effect that "The Second Amendment protects an individual right to possess a firearm unconnected with service in a militia, and to use that arm for traditionally lawful purposes, such as self-defense within the home." Bob Levy, who brought the case against the advice of many gun-rights supporters, should feel very good about that.

My second thought is that this is a gift to the Obama campaign. While this won't take the gun issue off the table, it also won't energize the gun-rights crowd (which cost Al Gore the election in 2000 when he failed to carry Tennessee, largely because of his support for gun control) the way a contrary opinion would have. Obama's record of strong support for sweeping gun control would hurt him much more if gun owners felt more vulnerable.

My third thought is that whether this has much impact on the real world depends on how the next several cases proceed. In the 1990s the Supreme Court announced a major shift in Commerce Clause doctrine that offered the hope of paring back federal power considerably. But right-leaning public interest law groups didn't take up the challenge and bring carefully selected cases to advance the principle, leading it to be characterized by some (including me) as a constitutional revolution where nobody showed up. Gun-rights advocates are already talking about follow-on challenges in places like Chicago or Morton Grove. How well those are brought will have a lot to do with whether the *Heller* opinion is a milestone, or just a speedbump.

Glenn Reynolds is a law professor at the University of Tennessee. He blogs at Instapundit.com.

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Randy Barnett: Justice Scalia's historic opinion will be studied for years to come, not only for its conclusion but for its method. It is the clearest, most careful interpretation of the meaning of the Constitution ever to be adopted by a majority of the Supreme Court. Its analysis of the "original public meaning" of the Second Amendment stands in sharp contrast with Justice Stevens' inquiry into "original intent" or purpose and with Justice Breyer's willingness to balance an enumerated constitutional right against what some consider a pressing need to prohibit its exercise. The differing methods of interpretation employed by the majority and the dissent also demonstrate why appointments to the Supreme Court are so important. In the future, we should be vetting Supreme Court nominees to see if they understand how Justice Scalia reasoned in *Heller* and if they are committed to doing the same. Now if we can only get a majority of the Supreme Court to reconsider its previous decisions—or "precedents"—that are inconsistent with the original public meaning of the text.

Randy Barnett is the Carmack Waterhouse Professor of Legal Theory at Georgetown University Law Center and author of Restoring the Lost Constitution: The Presumption of Liberty.

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Brian Doherty: The *Heller* decision was exciting for fans of American liberty—even the dangerous and disreputable end of that liberty, where weapon possession and use rights abide in the minds of many good-hearted people who think guns are just ugly and awful and appeal to the worst aspects of human nature.

Scalia's opinion did a thorough job of fileting, layer by layer, the lame and unsupportable "collective right" beliefs about the Second Amendment—including lots of sadly necessary exegesis on how the word "keep" means that people have a right to, yes, keep arms in their homes.

But *Heller* represents no happy ending to our legal and public policy duels over guns. Scalia's opinion does admit that we do have a constitutionally protected right to some degree to defend ourselves and our property with weapons.

But the opinion also stresses that right is still regulatable in many, many ways. It leaves plenty of room (which you can be sure will be filled rapidly) for future court challenges and

public policy fights to define the degree to which the government, at any level, can restrict or regulate the sale, possession, and use of weapons. It may well turn out that anything less severe than D.C.'s total ban will withstand scrutiny even under the newly revived Second Amendment.

The "eternal vigilance is the price of liberty" part: four members of the Supreme Court think that it's A-OK for the government to completely bar citizens from using guns for the protection of their lives and homes. That can't make sleeping at night any easier. That said, the *Heller* victory was a sweet one for the recognition that there are limits to what democracy can do to individual rights, and is worth celebrating for that.

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Sanford Levinson: The majority obviously found that the Second Amendment does protect an individual right to bear arms, and they applied this right in the easiest possible case, i.e., a functionally absolute prohibition against handgun possession.

What cannot be determined from the opinion is what the future impact of *Heller* will be, beyond further litigation. I am reminded of a cartoon in the *New Yorker* several years ago, of a conversation at a suburban cocktail party where a woman says to a well-dressed man, who is carrying a rifle slung over his shoulder, "I've never met a Second Amendment lawyer before." I suspect that there will be more such lawyers in the next few years, but this says nothing about the prospects of winning such cases. For all of the rhetorical bluster of Scalia's opinion, it not only focuses on the extreme nature of the D.C. ordinance, but also goes out of its way in effect to legitimize a plethora of existing federal legislation regarding guns. And, of course, there is no way of knowing who will be appointing the all-important "inferior" federal judges, beginning in January 2009, who will play a far more important role than the Supreme Court in deciding the operational meaning of the Second Amendment.

Finally, Scalia should take a certain pleasure that Justice Stevens, by confining the entirety of his opinion to an "originalist" analysis of the Second Amendment (that obviously came to a completely different conclusion), seemed to concede the overarching importance of original meaning. Neither Justice was willing to pay any attention to the "dynamic" aspect of the Second Amendment. Scalia was presumably unwilling to cite Chief Justice Taney's opinion in *Dred Scott*, but it's the strongest single piece of evidence for the proposition that by mid-19th century an individual right to bear arms (at least if you were an American citizen) had become the conventional wisdom.

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Jacob Sullum: The most important aspect of *D.C. v. Heller*, of course, is the Supreme Court's recognition that the Second Amendment protects an individual right to arms. From that premise it almost inevitably follows that the District of Columbia's gun law—which, as the Court noted, "bans handgun possession in the home" and "requires that any lawful firearm in the home be disassembled or bound by a trigger lock at all times, rendering it inoperable"—is unconstitutional. If such a law does not violate the right to armed self-defense, it's hard to imagine what law would. That's why the Court did not bother to specify what level of scrutiny is appropriate for purported violations of the Second Amendment. It concluded that the D.C. law is invalid "under any of the standards of scrutiny the Court has applied to enumerated constitutional rights."

By the same token, however, this decision does not give a clear sense of the line between constitutional and unconstitutional forms of gun control. The Court indicates that laws regulating the sale of firearms and prohibiting concealed carry, gun ownership by "felons and the mentally ill," possession of "unusual and dangerous weapons" (as opposed to weapons in common use for lawful purposes), and possession of firearms in "sensitive places" such as schools and government buildings are consistent with the Second Amendment. But it is not clear whether a law against *openly* carrying guns would pass muster, or what kinds of guns count as "unusual and dangerous," or how onerous licensing and registration requirements can be before they run afoul of the Second Amendment.

On that last point, the Court says licensing and registration are not necessarily unconstitutional, but it sounds like it would look askance at conditions attached to them.

"Assuming that [plaintiff Dick] Heller is not disqualified from the exercise of Second Amendment rights," the Court says, "the District *must* permit him to register his handgun and *must* issue him a license to carry it in the home." (Emphasis added.) It's harder to predict which weapons will end up being covered by the Second Amendment, except that they will include handguns but evidently not machine guns or bazookas.

Finally, the majority opinion does not address the question of whether the Second Amendment, either directly or via the 14th Amendment, applies to the states as well as a federal domain like the District of Columbia. But it's hard to imagine why it wouldn't now that the Court has clearly acknowledged the right to armed self-defense as a fundamental aspect of liberty protected by the Constitution.

Jacob Sullum is a senior editor at **reason** *and a nationally syndicated columnist.*

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Dave Kopel: *Heller* is a tremendous victory for human rights and for libertarian ideals. Today's majority opinion provides everything which the lawyers closely involved in the case, myself included, had hoped for. Of course I would have preferred a decision which went much further in declaring various types of gun control to be unconstitutional. But Rome was not built in a day, and neither is constitutional doctrine.

For most of our nation's history, the U.S. Supreme Court did nothing to protect the First Amendment; it was not until the 1930s when a majority of the Court took the first steps towards protecting freedom of the press. It would have been preposterous to be disappointed that a Court in, say, 1936, would not declare a ban on flag-burning to be unconstitutional. It took decades for the Supreme Court to build a robust First Amendment doctrine strong enough to protect even the free speech rights of people as loathsome as flag-burners or American Nazis.

Likewise, the Equal Protection clause of the Fourteenth Amendment was, for all practical purposes, judicially nullified from its enactment until the 1930s. When the Court in that decade started taking Equal Protection seriously, the Court began with the easiest cases—such as Missouri's banning blacks from attending the University of Missouri Law School, while not even having a "separate but equal" law school for them. It was three decades later when, having constructed a solid foundation of Equal Protection cases, the Court took on the most incendiary racial issue of all, and struck down the many state laws which banned inter-racial marriage.

So too with the Second Amendment. From the Early Republic until the present, the Court has issued many opinions which recognize the Second Amendment as an individual right. Yet most of these opinions were in dicta. After the 1939 case of *United States v. Miller*, the Court stood idle while lower federal courts did the dirty work of nullifying the Second Amendment, by over-reading *Miller* to claim that only National Guardsmen are protected by the Amendment.

Today, that ugly chapter in the Court's history is finished. *Heller* is the first step on what will be long journey. Today, the Court struck down the most freakish and extreme gun control law in the nation; only in D.C. was home self-defense with rifles and shotguns outlawed. *Heller* can be the beginning of a virtuous circle in which the political branches will strengthen Second Amendment rights (as in the 40 states which now allow all law-abiding, competent adults to obtain concealed handgun carry permits), and the courts will

be increasingly willing to declare unconstitutional the ever-rarer laws which seriously infringe the right to keep and bear arms.

As the political center of gravity moves step by step in a pro-rights direction, gun control laws which today might seem (to most judges) to be constitutional will be viewed with increasing skepticism. The progress that the pro-Second Amendment movement has made in the last 15 years has been outstanding. As long as gun owners and other pro-Second Amendment citizens stay politically active, the next 15, 30, and 45 years can produce much more progress, and the role of the judiciary in protecting Second Amendment rights will continue to grow.

Dave Kopel is Research Director at the Independence Institute, in Golden, Colorado. He was one of three lawyers at the counsel table who assisted Alan Gura at the oral argument on March 18. His brief for the International Law Enforcement Educators and Trainers Association was cited four times in the Court's opinions.

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Joyce Lee Malcolm: What a great day for individual rights. The majority of the Supreme Court retrieved the original intent of the Second Amendment to permit individuals the right and ability to defend themselves. For thirty years those convinced that ordinary people can't be trusted with guns have dominated the discussion. In order to ban civilian ownership of weapons, the original meaning of the Second Amendment had to be reinterpreted, and unfortunately with its awkward language—which was well-understood at the time—that wasn't too difficult. Generations of law students have been taught that the Second Amendment merely protected the right of states to have a militia, a right already incorporated into the body of the Constitution. The nearly complete control over the militia by the federal government was not altered in any way by the amendment, but no mind. The linguistic efforts to deny an individual right were quite inventive—"the people" only in this amendment meant a group, not an individual, "bear arms" implied an inclusively military context, that awkward word "keep" was to be erased by linking it with "bear" in order to make it exclusively military, and so on. And it all nearly worked. But not quite.

Thanks to the scholarly efforts of many people, the overwhelming evidence for an individual right to keep and have weapons for self-defense was uncovered and published. It was that evidence that the justices relied upon.

My only disappointment with an otherwise great decision was how narrow it was. Four justices ignored the evidence in order to preserve the gun control measures meant to deny individuals the right to be armed. In the process, they were prepared to erase a basic right

and uphold the stringent and ineffective D.C. gun ban, a law that went so far as to forbid reassembling a gun in the home in the case of a break-in.

Still, it was a great day for every American, one that will ensure a safer America than any number of gun bans ever could.

Joyce Lee Malcolm is professor of legal history at George Mason University School of law. She is the author To Keep and Bear Arms: The Origins of an Anglo-American Right.