


## Sex, Guns, and God!

### The 1st and 2nd Amendments and Local Regulation



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and Daniel J. Bolin  
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## Sex, Guns and God!

We will present a survey on the intersection between local land use regulation and Constitutional rights and privileges

- ▶ First Amendment
  - Freedom of Religion
  - Freedom of Speech
- ▶ Second Amendment
  - Right to Bear Arms



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## Sex, Guns and God!

- ▶ First Amendment
  - Freedom of Speech
    - What does freedom of speech have to do with zoning?
    - What level of governmental control and/or limitation is permitted over protected "speech"
  - Freedom of Religion
    - Do religious land uses have special zoning rights?
    - If so, how can you create a plan acknowledging such rights?



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## Sex, Guns and God!

- ▶ Zoning, Expressive Conduct and Adult Uses
  - Scope of Protection
  - Exception for Obscenity
  - Content Neutrality and the "Secondary Effects Doctrine"

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## Sex, Guns and God!

- ▶ Zoning, Expressive Conduct and Adult Uses
  - Scope of Protection
    - The portrayal of sex in art, literature and scientific works is not itself sufficient reason to deny material constitutional protection of freedom of speech.
    - Expressive conduct is considered a form of protected speech under the First Amendment

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## Sex, Guns and God!

- ▶ Zoning, Expressive Conduct and Adult Uses
  - Exception for Obscenity - Narrow
    - Appeals to the "prurient interest" (shameful, morbid interest)
    - Has no redeeming scientific, literary, artistic or educational value
    - Must depict sexual conduct in a patently offensive way
  - Justice Stewart, "*I know it when I see it.*"

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## Sex, Guns and God!

- ▶ Zoning, Expressive Conduct and Adult Uses
  - Content Neutrality and the “Secondary Effects Doctrine”
    - Regulation motivated by the content of the expression is subject to strict scrutiny and is presumed unconstitutional
    - Regulation motivated by the secondary effects of expression is considered content-neutral
      - Does it advance a substantial governmental interest?
      - Does it allow for *reasonable alternative channels of communication*?

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## Sex, Guns and God!

- ▶ Zoning and Adult Uses
  - Available Zoning Techniques
  - Issue of Total Exclusion
  - Amortization Provisions
  - Special Uses

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## Sex, Guns and God!

- ▶ Zoning and Adult Uses
  - Available Zoning Techniques
  - Issue of Total Exclusion
    - Statutory Limitations
    - Distribution/Buffer Zones
    - District limitations (commercial, industrial, manuf.)

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## Sex, Guns and God!

- ▶ Zoning and Adult Uses
  - Amortization Provisions
  - Special Uses
    - Must have clear, objective criteria and limits discretion
    - Must provide clear, measurable opportunity for prompt action on application and prompt judicial review
    - Approved generally by Northern District of Illinois based on its interpretation of Illinois zoning law

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## Sex, Guns and God!

- ▶ Licensing and Adult Uses
  - Statutory Authority for Licensing
    - Home Rule
    - Non-Home Rule

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## Sex, Guns and God!

- ▶ Licensing and Adult Uses
  - Constitutional Considerations
    - Censorship
    - Procedural Safeguards

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## Sex, Guns and God!

- ▶ Zoning and Religious Land Uses
  - Religious Land Uses and Institutionalized Persons Act
    - 42 U.S.C. §2000cc
  - Religious Freedom Restoration Act
    - 775 ILCS 35/15

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## Sex, Guns and God!

- ▶ Zoning and Religious Land Uses
- ▶ Religious Land Uses and Institutionalized Persons Act
  - Substantial Burden Test
  - Discrimination Test
  - Exclusion Test

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## Sex, Guns and God!

- ▶ Zoning and Religious Land Uses
- ▶ Religious Land Uses and Institutionalized Persons Act
- ▶ Substantial Burden Test

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## Sex, Guns and God!

- ▶ Zoning and Religious Land Uses
- ▶ Religious Land Uses and Institutionalized Persons Act
- ▶ Discrimination Test

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## Sex, Guns and God!

- ▶ Zoning and Religious Land Uses
- ▶ Religious Land Uses and Institutionalized Persons Act
- ▶ Exclusion Test

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## Sex, Guns and God!

- ▶ Zoning and Religious Land Uses
- ▶ Religious Land Uses and Institutionalized Persons Act
- ▶ Remedies
  - There are no monetary remedies available against state or local governments under RLUIPA
  - Only injunctive relief

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## Sex, Guns and God!

- ▶ Zoning and Religious Land Uses
- ▶ Religious Land Uses and Institutionalized Persons Act
- ▶ Recent Application
  - Irshad Learning Center v. County of DuPage
  - 2013 WL 1339728 (N.D. Ill. 2013)

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## Sex, Guns and God!

- ▶ Zoning and Religious Land Uses
  - Religious Freedom Restoration Act
    - Government may not substantially burden a person's exercise of religion, even if the burden results from a rule of general applicability, unless it demonstrates that application of the burden to the person (i) is in furtherance of a compelling governmental interest and (ii) is the least restrictive means of furthering that compelling governmental interest.

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## Sex, Guns and God!

- ▶ The last word – Government Speech

When the government speaks, or chooses not to speak, it does not violate the freedom of speech or implicate the establishment clause, absent conditions which indicate selective enforcement of rules for participation in a public forum.

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## The New Second Amendment

- ▶ "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed."
- ▶ Militia Right or Individual Right?

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## The New Second Amendment

- ▶ *Heller and McDonald*
  - Fundamental Right to have a Handgun for Self-Defense, Especially in the Home
- ▶ Analytical Frameworks
  - Two Part Test (3d, 4<sup>th</sup>, 7<sup>th</sup>, 10<sup>th</sup>, D.C. Circuits)
  - Substantial Burden Test (9<sup>th</sup> Circuit)

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## The New Second Amendment

- ▶ Two Part Test
  - Burden on conduct within scope of Second Amendment Guarantee?
    - Core Right: Strict Scrutiny
      - Least restrictive means to serve compelling state interest
    - Presumptively lawful regulatory measures are outside scope
      - Possession by felons and the mentally ill
      - Sensitive places
      - Conditions and qualifications on the commercial sale of arms

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## The New Second Amendment

- ▶ Two Part Test
  - Burden on the Margins of Second Amendment Right
    - Intermediate Scrutiny: narrowly tailored, substantial relationship to important government interest

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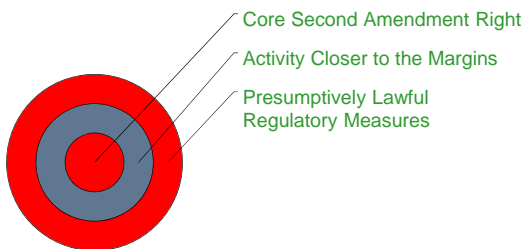
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## The New Second Amendment



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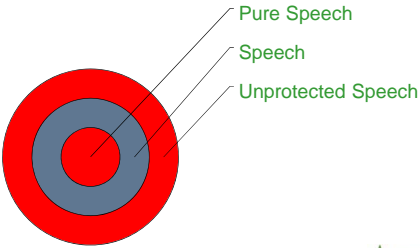
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## The First Amendment



Pure Speech  
Speech  
Unprotected Speech

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## *Ezell v. City of Chicago* 651 F.3d 684 (7<sup>th</sup> Cir. 2011)

Facts:

- City ordinance requires firing range training to obtain permit
- City ban on gun firing ranges within the City limits.

Outcome:

- Heightened Scrutiny ("not quite strict")
- Ordinance struck down

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## Does the Second Amendment Extend Outside the Home?

- No.
  - *Kachalsky v. Cnty. of Westchester*, 701 F.3d 81, 83 (2d Cir. 2012).
- Yes.
  - *Moore v. Madigan*, 702 F.3d 933, 936 (7th Cir. 2012).

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## Concealed Carry

- ▶ Preemption
  - public gatherings requiring a local permit
- ▶ Prohibited Areas
  - schools
  - areas within 1,000 feet of school grounds
  - day cares
  - government buildings
  - jails
  - hospitals
  - public transit vehicles
  - establishments primarily serving alcohol
  - playgrounds
  - parks
  - universities
  - racetracks and casinos
  - stadiums
  - libraries
  - airports
  - amusement parks
  - zoos
  - museums

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## Zoning and The Second Amendment

- ▶ Considerations for the Regulation of Gun-Related Land Uses
  - Complete Ban on Possession of Handguns in the Home for Self-Defense
  - Presumptively Lawful Regulations
  - Everything in Between

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## Gun Shops

- ▶ Can Zoning Prohibit Gun Shops near Schools? Probably.
  - *Teixeira v. Cnty. of Alameda*, C 12-03288 SI, 2013 WL 707043 (N.D. Cal. Feb. 26, 2013).
- ▶ Must Gun Sales be Allowed as a Home Occupation? Maybe.
  - *Morgan v. Fed. Bureau of Alcohol, Tobacco & Firearms*, 509 F.3d 273, 276 (6th Cir. 2007)



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## Sex, Guns, and God!

- ▶ Questions
- ▶ Next Time, the Third Amendment?



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