

BROTHERS IN LAW COMMENTARY

Four answers to the justices in *Wolford v. Lopez*

AA VA By AKHIL AMAR & VIKRAM AMAR

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(Jimmy Woo via Unsplash)

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On Tuesday, the court heard oral argument in a high-profile case

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that revolved around matters that Americans argue passionately about: gun rights, property rights, and race rules.

The case, [Wolford v. Lopez](#), involves a Hawaii law that says gun toters who wish to carry their guns on private property generally open to the public – places such as shops and restaurants – must secure the *affirmative* consent of the private property owner. Gun toters cannot simply presume that their guns are allowed. The private-property owner must *affirmatively* indicate consent – for example by posting a “guns welcome” sign on the premises or by orally indicating that guns are permitted.

What follows are four sets of questions that various justices who seemed skeptical of the Hawaii law asked at oral argument, alongside what we think are the best answers.

First, various justices repeatedly asked if Hawaii was in effect treating the Second Amendment as a second-class right. If a political activist has a right to wear on his blazer a campaign button at a restaurant without affirmative consent to the button from the restaurant owner, why are the rules for guns different? Why, several justices asked, should the Second Amendment be treated worse than the First Amendment?

Our answer comes verbatim from what Akhil [published in 1999](#) – in a piece arguing *for* robust (but not unlimited!) gun rights, and arguing for these rights *long before* the Supreme Court began to take gun rights seriously:

[T]he mere fact that, say, the First Amendment has been read expansively is not an automatic argument for equal treatment for the Second. For example, violent felons, even while in prison and especially after their release, obviously have a First Amendment right to print their opinions in newspapers. Yet such felons have never had a Second Amendment right to own guns. Even the NRA accepts this double standard. But what underlies it? The obvious . . . idea that sticks and stones and guns in the hands of dangerous felons can indeed hurt others in ways that their words cannot.

Obviously, an activist sporting a campaign button while seated at a restaurant table – or while standing on a homeowner’s front porch, for that matter – is utterly different from an activist toting a gun in these very same privately owned spaces.

Second and related, some justices repeatedly asked whether Hawaii had comparable laws on its books regulating other items brought into restaurants, etc., without the affirmative consent of the proprietor. In its briefs and at [oral argument](#), Hawaii and its amici have pointed to a few such laws, involving among other things cars and trash.

We would go further. Surely a state could pass laws requiring express proprietor approval for bringing, say, marijuana or hard liquor into various restaurants or shopping malls. This pot-and-booze answer, we submit, might well appeal to a law-and-order traditionalist such as Justice Samuel Alito, who first raised this question at oral argument.

Of course, Alito could respond to us that the Constitution explicitly mentions “arms” but not pot. And we admit that the Constitution likewise does not mention cars or trash. But in our

view, Hawaii's law is ultimately best understood not as a gun law but a property law. Thus, Hawaii should be allowed to treat guns on private property not just the same way that the state *has already* treated cars and trash on private property, but also the way that Hawaii *could tomorrow* treat pot or booze on private property.

Third, several justices repeatedly asked about Hawaii's reliance on an 1865 Louisiana [law](#) that prohibited "any person or persons [from] carry[ing] firearms on the premises or plantations of any citizen, without the consent of the owner or proprietor." Time and again, these justices hammered Hawaii for relying on this law, which, they repeatedly asserted, was part of Louisiana's infamous "Black Codes."

Here is our honest if blunt answer to these justices:

No, no, no, your Honors, no! With the greatest of respect, you are simply wrong on the facts. This 1865 law was not really a Black Code law. What made a law a typical Black Code law was that it regulated Blacks as such. But this 1865 law was emphatically race neutral. Read it! It said "any person or persons." It nowhere used the word "Black" or anything like it. And that law protected all property "owners" and "proprietors" from unwanted guns, including Black property owners. Also, this law stayed on the books in Louisiana throughout the ensuing decade and beyond, and indeed did so at a time (1868-1877) when Louisiana had a higher percentage of Black government officials than just about any other state in the Union. Plus, the very Reconstruction Congress that backed the Fourteenth Amendment and its gun-rights promises in 1866-68 in fact expressly approved the Louisiana government [on June 25, 1868](#), in the process of readmitting Louisiana to the Union. And as Vik has emphasized in [landmark scholarship](#), Congress in that very same era threw Georgia back out the union for adopting laws that DID violate the Reconstruction Amendments, as Congress understood these Amendments. But Congress did NOT do this for Louisiana or for this Louisiana law. Rarely does one have such powerful evidence from the very Congress that enacted a given amendment.

Fourth, Justice Brett Kavanaugh asked about how many states *currently* have laws closely analogous to Hawaii's. In their filings, Hawaii and its amici have pointed to four or five states. Standing alone, this number may well lose Kavanaugh's vote, as it makes Hawaii's gun law (which implicates guns on private premises) look rather close to New York's law in [New York State Rifle and Pistol Ass'n v. Bruen](#) (which implicated guns on public property). In his short *Bruen* concurrence, Kavanaugh repeatedly emphasized that the New York law at issue in that case was endorsed by only six other states.

But we submit that the number of *current* states is not the only thing for Kavanaugh to ponder. He should also consider whether many other states might well want to follow Hawaii's lead *in the months ahead*.

Akhil specifically discussed a more general version of this point in his 2015 book, [America's Unwritten Constitution](#). In chapter three of that book, Akhil analyzed and generally embraced what is known as the court's [Glucksberg](#) test, which lay at the heart of Kavanaugh's question:

If judges may properly strike down highly unusual state . . . laws that intrude on a lived experience of liberty, there is a risk that governmental innovation and experimentation might be unduly stifled. Trigger-happy judges might kill the first glimmerings of legal reform whenever new issues arise and new approaches begin to win popular support. But this risk can be minimized if the judges proceed with caution and humility, with close attention to the danger of what might be called “judicial lock-in.”

The danger is that once a particular government practice has been invalidated by judges, the practice will wither away and remain forever off-limits, even if a broad swath of Americans would like to see the practice revived at some later point. Such a judicially induced lock-in would turn proper unenumerated-rights jurisprudence on its head. Doubtful laws should be judicially invalidated because they are unusual, not unusual simply because they have been judicially invalidated . . . If many states were to enact new laws similar to a law previously struck down—new laws with delayed start dates so as to allow for anticipatory judicial review—such enactments themselves would be new data [for judges] to ponder.

For more than two centuries, the Supreme Court’s oral arguments have occurred in open court. This grand tradition offers not just the lawyers inside the bar of the court, but also the rest of the world, a chance to “draw nigh.” We especially applaud the court’s modern practice of live streaming these fast-paced oral colloquies, thereby offering friends of the court in the broadest sense (such as SCOTUSBlog columnists) the opportunity to answer the justices’ questions.

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