

KEYNOTE ADDRESS

**PUTTING THE GUN CONTROL DEBATE IN
SOCIAL PERSPECTIVE**

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INTRODUCTION

Imagine that it is the year 2087. On the occasion of the tricentennial celebration of the Constitution, the United States calls a constitutional convention to draft a new document for America's fourth century. The delegates meet in Philadelphia as they did three centuries earlier. There is universal agreement among the delegates that the new constitution should contain a statement of fundamental individual rights. Assuming that social attitudes about firearms are the same as today, will the new constitution contain an amendment about the right of individuals to bear arms? If there were a constitutional convention now, would a provision like the Second Amendment remain?

Putting the issue this way requires that the issue of guns be put in a larger social and political context. The reality, of course, is that conservatives will favor such an amendment and liberals will oppose it. There will be a geographic divide, with more rural residents wanting such an amendment, and more urban residents opposing it. There will be a gender divide, with more men than women wanting constitutional protection for gun ownership.

The political context is ironic. Conservatives, who generally favor more narrow interpretations of individual rights, urge a broad view of the Second Amendment, and for progressives it is just the opposite. John Ashcroft, who certainly has taken a very restrictive view of the protections of Bill of Rights provisions, such as the First and Fourth Amendment, takes an expansive approach to the Second Amendment.¹ But for liberals, just the opposite is true; their usually

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1. See Letter from John Ashcroft, United States Attorney General, to James J. Baker, Executive Director, Institute for Legislative Action, National Rifle

broad view of individual liberties does not include the Second Amendment.

It is now familiar that liberals and conservatives have very different views about what the Second Amendment means.² The former argue that it is about “collective rights”; that the Second Amendment was meant only to limit the ability of Congress to regulate firearms in a way that would keep state governments from protecting themselves. The latter contend that the Second Amendment is about an “individual right”: protecting the right of individuals to have guns.³

Ultimately, the constitutional convention in 2087 must choose between these two views. More specifically, it will have to decide whether to put any provision regarding guns in the new constitution. Inescapably, this choice will require deciding whether the constitution should safeguard a right of individuals that would limit the ability of the government to engage in gun control.

I find it difficult to predict what a constitutional convention would do on this issue. Probably, the outcome would depend on the political composition of the body and perhaps what deals need to be struck in order to produce a document. But I also find it hard to predict what the United States Supreme Court ultimately will do when it must decide the meaning of the Second Amendment.⁴

In this Essay, I want to make three points about this choice, whether it is faced at a mythical constitutional convention or in the Supreme Court. First, ultimately the choice between these competing theories is not about constitutional theory or evidence; it is a political and value choice. Second, the political and value choice must be understood in a cultural context. But third, focusing on the politics and culture can obscure the legal issues regarding gun control that are likely to arise and be faced by courts.

Association (May 17, 2001), *reprinted in* Mathew S. Nosanchuk, *The Embarrassing Interpretation of the Second Amendment*, 29 N. Ky. L. Rev. 705, 799-800 (2002).

2. See, e.g., *Symposium on the Second Amendment: Fresh Looks*, 76 Chi.-Kent L. Rev. 3 (2000) (containing articles describing both views).

3. Obviously, there are other theories and nuanced and sophisticated variations of these arguments. For example, at this Symposium, Professor Saul Cornell offered a different approach, suggesting that the Second Amendment be understood as being about the right of individuals to have guns for service in the militia. See Saul Cornell & Nathan DeDino, *A Well-Regulated Right: The Early American Origins of Gun Control*, 73 Fordham L. Rev. 487 (2004).

4. Actually, I predict that the Court will avoid the choice between the individual and the collective rights views by holding that under either view gun control laws can be upheld. Even if the Second Amendment is interpreted from the individual rights perspective, that does not mean that there is an absolute right. The Supreme Court could uphold virtually all gun control laws by concluding that they serve a sufficiently important social interest as to be constitutional under either approach to the Second Amendment. As described *infra* in Part III, the Court may well be able to avoid a choice between the two views of the Second Amendment by deciding that the Second Amendment is not incorporated and does not apply to state and local governments, and that federal gun control laws only need meet rational basis review.

My focus is on the debate over the meaning of the Second Amendment. As a matter of legal and political rhetoric, it is fascinating and unlike any other area of constitutional law. I do not seek to take and defend a position in this debate; there already has been so much written on both sides, I doubt I have anything to add in that regard. But as a scholar who has followed this literature closely, without ever writing on the topic, I want to offer a few thoughts on the gun control debate.

I. INTERPRETING THE SECOND AMENDMENT

When preparing my Constitutional Law casebook,⁵ I wanted to include material on the Second Amendment. This issue is an important constitutional one and students are interested in it, but it generally was given no attention in constitutional law casebooks. Still, I was unsure about what to include or where to place it in the book. The last Supreme Court decision on the Second Amendment, *United States v. Miller*,⁶ was in 1939 and its discussion is relatively brief. After a lot of thought, I decided to use the Second Amendment as an illustration of the debate over constitutional interpretation.

Both sides of the debate over the Second Amendment have arguments based on the constitution's text, the framers' intent, tradition, and social policy. One side emphasizes the preamble to the Second Amendment, that it is about protecting a well-regulated militia, while the other side stresses the latter part of the Amendment concerning the right of individuals to keep and bear arms. Each side has a strong argument of what the framers intended.⁷

The two sides of the debate disagree vehemently over the relevance of social policy. Supporters of gun control and the collective rights approach point to the human costs of guns. It has been estimated that economically the cost of gun violence is on the border of \$100 billion per year.⁸ In 2002, 71.1% of murders,⁹ 42.1% of robberies¹⁰ and 19% of aggravated assaults¹¹ committed in the United States involved firearms. In 2001, nearly 30,000 Americans died as a direct result of

5. Erwin Chemerinsky, *Constitutional Law* (2001).

6. 307 U.S. 174, 178 (1939).

7. Contrast the review of the history and intent of the Second Amendment in *United States v. Emerson*, 270 F.3d 203 (5th Cir. 2001), *reh'g en banc denied*, 281 F.3d 1281 (5th Cir. 2001), *cert. denied*, 536 U.S. 907 (2002) (finding that history supports the individual rights approach) with *Silveira v. Lockyer*, 328 F.3d 567 (9th Cir. 2003) (finding that history supports the collective rights approach).

8. Jon S. Vernick et al., *Technologies to Detect Concealed Weapons: Fourth Amendment Limits on a New Public Health and Law Enforcement Tool*, 31 J.L. Med. & Ethics 567 (2003).

9. FBI, U.S. Dep't of Justice, *Crime in the United States 22* (2002), at http://www.fbi.gov/ucr/cius_02/pdf/2section2.pdf. There were 16,204 incidents of murder in 2002. *Id.* at 19.

10. *Id.* at 32. The total number of robberies was 420,637. *Id.* at 31.

11. *Id.* at 38. The total number of aggravated assaults was 894,348. *Id.* at 37.

gunfire, whether by murder, suicide, or accident.¹² An additional 63,012 Americans were injured by firearms and 1433 youths under the age of 18 were killed by firearms.¹³

But opponents of gun control dismiss the relevance of these statistics in determining the meaning of the Second Amendment. They argue that the text and framers' intent, and not social policy, should control constitutional interpretation. Also, of course, they will dispute whether gun control is likely to make any difference as to these harms.¹⁴

Ultimately, there are persuasive arguments on both sides, on every level, over the meaning of the Second Amendment.¹⁵ I thus have found that the Second Amendment works very well as a vehicle for discussing the methods of constitutional interpretation. Inevitably, there is a spirited discussion among students who are fairly evenly divided between the two camps, with each side making the appropriate arguments to support their position.

Consistently, I find that the more liberal students defend the individual rights approach to the Second Amendment and the more conservative students advocate the collective rights approach. Discussion rarely, if ever, changes anyone's mind.

Not surprisingly, this is no different for judges. The Fifth Circuit panel that decided *United States v. Emerson*¹⁶ was, by any measure, more conservative than the Ninth Circuit panel which decided *Silveira v. Lockyer*.¹⁷ As would be expected, the Fifth Circuit adopted the individual rights approach and the Ninth Circuit took the collective rights view. Both panels conscientiously looked at all available material, but the choice of the theory was seemingly driven by underlying ideology. Nor is it surprising that the one Justice on the current Court who has signaled his view on the Second Amendment is Justice Thomas, likely the most conservative member of the Court.¹⁸

12. Nat'l Ctr. for Injury Prevention and Control, Ctr. for Disease Control and Prevention, Web-based Injury Statistics Query Reporting System (July 7, 2004), available at <http://www.cdc.gov/ncipc/wisqars>.

13. *Id.*

14. See, e.g., Todd Barnet, *Gun "Control" Laws Violate the Second Amendment and May Lead to Higher Crime Rates*, 63 Mo. L. Rev. 155 (1998).

15. There is truly voluminous literature debating the meaning of the Second Amendment. For articles reflecting some of these views, see Sanford Levinson, *The Embarrassing Second Amendment*, 99 Yale L.J. 637 (1989); Glenn Harlan Reynolds, *A Critical Guide to the Second Amendment*, 62 Tenn. L. Rev. 461 (1995); and David Yassky, *The Second Amendment: Structure, History, and Constitutional Change*, 99 Mich. L. Rev. 588 (2000).

16. 270 F.3d 203 (5th Cir. 2001). *reh'g en banc denied*, 281 F.3d 1281 (5th Cir. 2001), *cert. denied*, 536 U.S. 907 (2002).

17. 312 F.3d 1052 (9th Cir. 2002).

18. See *Printz v. United States*, 521 U.S. 898, 936-39 (1997) (Thomas, J., concurring).

The point is that the meaning of the Second Amendment is not determined by the application of constitutional theory or interpretive methodologies. It is a product entirely of the values and politics of the individual. This does not deny that legal arguments are made in terms of text, framers' intent, tradition, and social policy. Rather, in an area such as this, with strong arguments and views on each side, a judge or scholar inevitably will come to a conclusion and then justify it based on the ample available material. The choice is going to depend on the ideology of the interpreter. This phenomenon, of course, is not unique to the Second Amendment. But the Second Amendment is an excellent illustration of the difference between discovery and justification; how people discover their views is quite different from how those views are justified. This is true for both sides of the Second Amendment debate: each side, based on its political ideology, has a position and each is defended based on all available materials. In the hypothetical constitutional convention or in the Supreme Court or for any person trying to decide, whether there is an individual right to have guns is a value choice; it is not a decision that can be made by applying constitutional theories or interpretive methodologies.

II. THE CULTURAL CONTEXT

The political and value choice described above must be understood in the larger cultural context. Society is obviously deeply divided over the issue of gun control and the meaning of the Second Amendment. There appears to be no bridge between the two sides. Those who oppose gun control espouse a romantic individualism where guns are part of individual freedom and the right of people to protect themselves. Those who favor gun control stress the collective good and the harms guns cause to society. These are radically different visions.

But what is interesting and puzzling is why this divide developed; what accounts for the differing visions? One possibility is that it is a reflection of differences in personal experience. For example, some in our society hunt, some abhor hunting; without question, the former oppose gun control, while the latter favor it. For some, hunting is an exhilarating hobby. For others, it is not a fair sport at all when one side is an unarmed animal and the other is a hunter with a rifle with a super-scope and the latest technology.

While this provides some of the explanation for the difference in views about guns, it does not really account for why conservatives consistently take the individual rights position, while progressives take the collective rights approach. It is not clear why hunters would want to protect weapons that never could be used for that purpose, such as handguns or machine guns that would shred an animal. Nor does this explain why gun control foes oppose strict background checks and

registration; hunters would seemingly have no problem with this so long as it allowed them to retain the guns they needed for hunting.

Nor does the likelihood that a person has been or might be a victim of crime account for the difference. One might expect that those most vulnerable to violent crimes—city dwellers, women—would be the strongest opponents of gun control. Yet, the opposite is true as these are groups that consistently favor laws restricting ownership of guns.

A second possible cultural explanation for the divide in attitudes over firearms might be that it is based on the perceived need to protect oneself from tyrannical government. A frequent theme in anti-gun control literature is that a right to own guns is important so that people can stage a revolution if necessary and oppose a tyrannical government. Obviously, this argument has rhetorical appeal to some in society; it expresses a rugged individualism where people can stand up to the government, with arms if necessary.

But for those who don't share this perspective, the argument seems silly. With the possible exception of the Civil War, never in the 217-year history of the United States have people needed guns for this purpose. If ever there were a truly tyrannical government in the United States, it is highly questionable that individuals having their own guns would make much difference. Interestingly, Robert Bork put this best when he said: "The Second Amendment was designed to allow states to defend themselves against a possibly tyrannical national government. Now that the federal government has stealth bombers and nuclear weapons, it is hard to imagine what people would need to keep in the garage to serve that purpose."¹⁹ The incredibly remote chance that guns might be helpful against a tyrannical government hardly seems a reason to accept the tremendous human costs of guns.

Also, I always have found an irony to this argument. One would imagine that those who fear a tyrannical government would be most likely to favor robust judicial protection of individual rights and equal protection. Courts enforcing constitutional rights are one of the best checks to prevent tyranny. But, of course, it is conservatives who oppose gun control who also urge the most limited role for the courts and the narrowest scope for individual rights.²⁰

A third possible cultural explanation for differences of opinions over guns is that it relates to perceived distrust in the government. Slippery slope arguments play a critical role in gun control debates. Those who take the individual rights approach oppose all forms of government regulation of guns and frequently express their fear that

19. Robert H. Bork, *Slouching Towards Gomorrah* 166 note (1996).

20. Robert Bork, quoted above, obviously is an exception to this pattern, in that he is a conservative who does not view the Second Amendment as protecting an individual's right to have guns. *Id.*

once the government begins regulating, there is no stopping it. Background checks or registration are perceived as just the first step to the government confiscating every gun.

But this, too, doesn't succeed in explaining the political divide over guns. Surely liberals distrust the government just as much as conservatives. In fact, in the area of criminal procedure, it generally is conservatives who favor more deference to the police, and liberals who want more constitutional limits on police behavior through the Fourth and Fifth Amendments. This seems at odds with the distrust in the government and law enforcement that underlies the individual rights position. Also, slippery slope arguments have rhetorical appeal, but are much weaker as a matter of logic; there is no reason why registration is the first step to a progression that will lead to the confiscation of all guns.

This brief review of possible cultural explanations for the difference in views between liberals and conservatives about guns leaves me puzzled. There does not seem to be a rational account for why conservatives consistently take the individual rights view, while liberals take the collective rights position. One could imagine it having turned out just the other way, as liberals would urge a broad view of the Second Amendment, as they do for other Bill of Rights provisions. But something else is going on to account for why guns and gun control have become such powerful symbols in our cultural divide. This issue seems a fascinating one, but so far has not been addressed in the huge literature of the Second Amendment.

III. OBSCURING THE LEGAL ISSUES

My goal thus far has been to center the gun control debate in the larger political and cultural context. But I fear that doing so obscures the legal issues that are likely to confront courts. Indeed, having read so much of the scholarly literature in the gun control debate, I have the sense that relatively little of it has anything to do with the legal issues concerning guns that will need to be addressed in the courts in the years ahead. The question before courts is not going to be whether the government can ban all ownership of firearms. Yet, that seems to be the underlying question debated in so much of the scholarly literature.

The major recent cases concerning guns involved laws limiting ownership of guns by those subject to restraining orders in domestic relations cases,²¹ and a ban on assault weapons.²² Proposals for further control of guns include: universal background checks; a

21. See *Emerson*, 270 F.3d at 203 (upholding the law, though adopting the individual rights approach).

22. See *Lockyer*, 328 F.3d at 567 (upholding the ban on assault weapons, while adopting the collective rights approach).

national registry for guns; more limits on the ability of those with a history of mental illness or violence to have guns; greater restrictions on particular types of guns and ammunition that are likely to cause grave harms; and more liability for gun manufacturers in civil cases.

What are likely to be the legal issues when existing laws, like those in *Emerson*²³ or *Lockyer*,²⁴ or possible future laws, like those mentioned above, are challenged in the courts? One issue is sure to be whether the Second Amendment applies to state and local governments. The Supreme Court has never held that the Second Amendment is incorporated or that it even applies to state and local governments. Although I agreed with the Ninth Circuit's analysis and conclusions in *Silveira* in upholding California's assault weapons ban, I found it very troubling that the court simply assumed that the Second Amendment applies to the states. If the Second Amendment is not incorporated, then there was no need for the court to even consider whether the individual or collective rights approach is best. The case should have been decided simply on the grounds that the Second Amendment did not apply at all. The court, apparently out of a desire to express its views on the constitutional debate, begged the question of whether the Second Amendment is incorporated.

A second major legal issue concerns what level of scrutiny should be used, even assuming that the individual rights position is accepted. The assumption in the debate seems to be that an individual rights approach would mean strict scrutiny would be used when courts appraise the constitutionality of gun control measures. But there is no reason why this must necessarily be so. There are claims of individual rights under textual provisions of the Constitution which receive only rational basis review. Claims of economic liberties, such as freedom of contract under the Due Process Clause, have received only rational basis review.

A third issue which will need to be resolved by courts concerns what is an infringement of the right to bear arms, even assuming an individual rights approach is taken. Is a requirement for background checks a violation of an individual's rights under the Second Amendment? Does liability for gun manufacturers violate this right? It is easy to imagine that even if the individual rights approach is taken, courts could allow such regulation and liability on the grounds that they do not infringe upon the rights protected by the Second Amendment.

Indeed, it is striking that the intense debate in the public and scholarly arenas over the meaning of the Second Amendment seems to have so little relevance to these legal questions. It is easy to imagine a court accepting the individual rights approach and then

23. *Emerson*, 270 F.3d at 203.

24. *Lockyer*, 328 F.3d at 567.

upholding every likely gun restriction. State and local laws could be upheld by courts reaffirming that the Second Amendment is not incorporated. Federal laws could be upheld by courts using rational basis review.

Put another way, the debate between the individual and collective rights approaches to the Second Amendment might be completely irrelevant to resolving the legal issues actually likely to arise and confront courts. The enormous attention focused on this choice between perspectives of the Second Amendment obscures the real legal issues likely to be litigated and faced by courts.

CONCLUSION

The debate over the meaning of the Second Amendment will never be resolved. Guns have become such a symbol and the debate is so visceral that it is difficult to imagine a bridge between the two sides. For one side, guns are a symbol of individual freedom; gun ownership is seen as a fundamental personal right, and gun control is regarded as a major step towards tyranny. For the other side, guns inflict enormous death and pain and suffering and gun control is an essential step towards protecting public safety. For those on this side, like myself, it is inconceivable why someone would want to be near, let alone own, a gun.

The debate over the Second Amendment can be phrased in the fanciest language and each side can develop sophisticated arguments as to the meaning of the Constitution's text, supported by apt quotations from relevant framers. But in the end, these arguments are just ways in which each side defends its deeply held views about guns and gun control.

At any point in time, certain issues define who is a liberal and who is a conservative. Guns today seem to be such an issue. Certainly, politically this is so, and if *Emerson* and *Lockyer* are predictors, this proposition will be true in the courts as well, and judges' decisions will reflect their underlying ideologies. With regard to the meaning of the Second Amendment, conservative judges are likely to take the individual rights approach and liberal judges are likely to take the collective rights approach.

Yet, I wonder if the abstract choice between the two competing world views of the Second Amendment will really be necessary. If the Second Amendment is not deemed to be incorporated, and if only rational basis review is used, then virtually all gun control can be upheld, no matter which approach is taken.

Notes & Observations