OTHER WRITINGS

My Popular Mechanics columns are here.

My USA Today columns are here.

My New York Post columns are here.

My Washington Examiner columns are here.

My PCDaily / TechCentralStation columns are archived here.

My old MSNBC blog is here.

Previous columns written for FoxNews.com (I stopped in 2002) can be found here.

A (partial) list of my law review articles can be found here. It’s not usually up to date, but it’s the best I can do.

Also, downloadable copies of many of my law review articles can be found here, through SSRN.

Contributions to The Guardian are (mostly) rounded up here.

You may find my discussion of the state of the blogosphere with Cass Sunstein on the University of Chicago Faculty Blog interesting. Scroll forward from that link for the whole thing.

Some other items are listed below:

- Don’t track me, bro! The perils of tax by GPS, in Road & Track, November 4, 2013.
- Romney Goes Back To Basics With Ryan, in USA Today, August 12, 2013.
- Record Check an Ineffective Nuisance, in the Nashville Tennessean, January 29, 2012.
- Old Enough To Fight, Old Enough To Drink, in the Wall Street Journal, April 13, 2011.
- Bring Your Own Camera, in the New York Post, September 13, 2008.
- The Geek Shall Inherit the Earth, New York Post, September 7, 2008. (Reviewing Neal Stephenson’s Anathem.)
- We Can See Clearly Now, in The Wall Street Journal, June 16, 2008. (Reviewing Robert Zimmerman’s The Universe in a Mirror.)
- No Freedom to Keep Secrets, in USA Today, March 9, 2008.
- Mr. Friedman Explains Mr. Big, the New York Post, January 27, 2008. (Reviewing Tim Harford’s The Logic of Life.)
- Starship Enterprise: How Private Investment Has Launched a New Space Race, OpinionJournal.com, July 29,
the Supreme Court struck down an anti-gay-rights provision adopted in a Colorado referendum. The majority’s reasoning was with the liberals on (most) civil rights matters, and with the conservatives on (most) criminal matters.

Though critics of the majority opinion in

something else entirely.

White’s hardheadedness made him hard to pigeonhole: he voted for something far more radical than a new individual right.

White served as an Associate Justice of the United States Supreme Court at a time when compassion, as he meant this (mostly) as a compliment.

Like his colleague John Marshall Harlan, White was a kind of liberal, but he was a liberal of a species now nearly extinct, a

The milk of human kindness a well-known federal judge once remarked to me, does not flow through Whizzer’s veins. He meant this (mostly) as a compliment.

Byron White served as an Associate Justice of the United States Supreme Court at a time when compassion, as personified by judges like his colleague William J. Brennan, Jr. and federal appeals judges like J. Skelly Wright, was held to be the cardinal virtue of the bench. But, as beffited a man who was once the highest-paid professional football player in the nation, White favored a more strenuous approach.

Like his colleague John Marshall Harlan, White was a kind of liberal, but he was a liberal of a species now nearly extinct, a

As the Supreme Court’s only real liberal, not necessarily the foremost one, White was often called the right of privacy it recognized radical, White was in fact calling the temporary — so this piece is also below).

The right to privacy is the right to be left alone. It is the right to be free from unwarranted governmental intrusion into one’s private life. It is the right to live as you choose with whom you choose and to pursue your own happiness. It is the right to choose for yourself what is best for yourself.

For White, unlike the majority, the biggest problem with the law was not

that the law was intended to prevent premarital and extramarital sex, but the statute, and its enforcement, did not serve the purposes it was claimed to.


Gun by Gun, Legal Affairs, May-June 2002.


Whose Right on Bearing Arms? Second Amendment Means What It Says, Boston Globe, November 25, 2001. (A colloquy with Jack Rakove of Stanford; read his piece here). These links probably won’t last — Globe links tend to be temporary — so this piece is also below).


A Right of the People: The Meaning of the Emerson Decision, National Review Online, October 25, 2001 (with Dave Kopel).

Up With the People, National Review Online, October 10-11, 2001 (with Dave Kopel) (reviewing NBC’s miniseries Uprising, about the Warsaw Ghetto revolt).


Another Bad Treaty, National Review Online, September 6, 2001 (with Dave Kopel).

Persecuting Jenna, and Ourselves, National Review Online, June 5, 2001 (with Dave Kopel).

One Trigger-happy Attorney, National Review Online, April 30, 2001 (with Dave Kopel).

Should Cloning be Legal? It’s Not a Federal Question, National Review Online, April 16, 2001 (with Dave Kopel).


The New York Sun, April 16, 2002

Whizzer’s Legacy

Glenn Harlan Reynolds

"The milk of human kindness. a well-known federal judge once remarked to me, does not flow through Whizzer’s veins. He meant this (mostly) as a compliment."

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"As the Supreme Court’s only real liberal, not necessarily the foremost one, White was often called the right of privacy it recognized radical, White was in fact calling the"

"For White, unlike the majority, the biggest problem with the law was not that it infringed a fundamental right of privacy; it was that it did not make sense. The State of Connecticut claimed that its law against birth control was intended to prevent premarital and extramarital sex, but the statute, and its enforcement, did something else entirely."

"Wholly fail to see, he wrote, how the ban on the use of contraceptives by married couples in any way reinforces the State’s ban on illicit sexual relationships. . . . [The statute] has been quite obviously ineffective, and its most serious use has been against birth-control clinics rendering advice to married, rather than unmarried, persons. In short, White found, the law violated something as important as privacy the right to expect a law (and the arguments made in court supporting the law) to make sense. If the State of Connecticut had a legitimate government purpose for enacting the birth-control statute, then it had done a particularly bad job because the law simply didn’t serve the purposes it was claimed to."

"Though critics of the majority opinion in Griswold often call the right of privacy it recognized radical, White was in fact calling for something far more radical than a new individual right. White’s hardheadedness made him hard to pigeonhole: he voted with the liberals on (most) civil rights matters, and with the conservatives on (most) criminal matters."

"But his approach was in many ways a foreshadowing of what was to come. In the 1996 case of Romer v. Evans, for example, the Supreme Court struck down an anti-gay-rights provision adopted in a Colorado referendum. The majority’s reasoning was that the provision, which banned localities from adopting gay-rights ordinances, failed rational basis review because the"
Amenities produce means that chain stores typically can afford a better selection of books than the independents, too, which is known as the bookish version of the music geeks in the movie High Fidelity. The chains, however, aren’t in business for the people interested in offering the other amenities that Oldenburg calls important and that superstores offer, like coffee shops, comfy chairs, and people catching up on scheduling and messages, a claque of bible-studiers arguing about Job, and a leather-clad cyberpunk-looking youth sitting with his more conventional mother. By now, I know all the regulars by sight, and many by name. We keep up on each others’ lives in a casual sort of way.

In that, however, you would mostly be mistaken. While hostility toward book superstores has receded from its late-90s peak, it is still very real. Independent bookstores, we are told, are genuine; chain bookstores, they are said, are bad for small presses, bad for communities, and, as Carol Anne Douglas writes in Off Our Backs, bad for feminists, whose books apparently can only be bought at “feminist bookstores.”

The principle that laws should make sense is, in fact, a radical one. While it has a long way to go before it has the effect it has made great strides since Justice White began championing it. Like White himself, it will produce decisions that sometimes look conservative and sometimes look liberal. But it is really a species of muscular skepticism that, like White himself, is not made for ideological pigeonholes.

I have an office with a nice computer, and I have a study at home with a nicer computer. But I often pack up my laptop, or a book that I’m reading, or student papers to grade, and relocate to this third place: somewhere more congenial than the office, less isolated than home.

In 1989, they were. In 2001, they’re not — and you can thank the much-maligned “chain book superstores” for this. Of course, the point of a “third place” is to provide something that is neither home nor work. In 1989, Borders did not exist in the home state of Tennessee to strike down a law banning the sale of caskets by anyone other than a licensed funeral director, even though independent sellers could offer the same caskets at a fraction of the price. The state, asserted justifications, it was found, were irrational: no one ever protected a consumer by keeping markups at four hundred to six hundred percent.

As in the Bowers v. Hardwick decision is a fitting example of White’s legacy for another reason, too: it was criticized from both left and right. The left didn’t like it because it contained no ringing affirmation of gay rights. The right didn’t like it because it was insufficiently deferential to the state.

While White may have been unable to bring himself to follow his own lead in Bowers, the courts of many states have since struck down their sodomy laws on precisely the ground that they are irrational, and fail to advance a legitimate governmental purpose. In court after court, judges have examined the various justifications offered for laws banning homosexual sodomy (for example, that homosexual relationships can’t lead to children) and concluded that they didn’t make sense (after all, we allow heterosexuals who are sterile, or too old to reproduce, to have sex).

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Glen Harlan Reynolds is professor of law at the University of Tennessee and publisher of InstaPundit.Com.
Ashcroft and the Second Amendment

Glenn Harlan Reynolds

The Attorney General was asked a question at a Congressional hearing: "What in your opinion would be the constitutionality of a provision added to this bill which would require registration of firearms?" His answer: "I am afraid it would be unconstitutional."

The year is not 2001, but 1934, and the Attorney General is not John Ashcroft, but Homer Cummings. Cummings was hardly the first to think there were constitutional barriers to gun control. Throughout the nineteenth century, leading scholars like Thomas Cooley, Joseph Story, and St. George Tucker had found the Second Amendment protected an individual right to arms against federal interference. Congress agreed: the 1866 Freedmen's Bureau Act provided that "the constitutional right to bear arms shall be secured to and enjoyed by all the citizens."

Leading modern scholars of constitutional law agree. Laurence Tribe of Harvard has written that the Second Amendment protects an individual right. So have William Van Alstyne of Duke, Eugene Volokh of UCLA, Randy Barnett of Boston University, and many others. They also agree with Ashcroft's statement that this right does not bar reasonable regulations aimed at preventing crime, rather than disarming honest citizens.

The twentieth century Congress agreed with its nineteenth century counterpart: the 1986 Firearms Owners' Protection Act required additional legislation for their protection. An accompanying Senate Judiciary Committee report on the Second Amendment stated that "what is protected is an individual right of a private citizen to own and carry firearms in a peaceful manner." And in several cases, the Supreme Court has, though admittedly in dictum, lumped the right to arms together with clearly personal rights like free speech.

The lower federal courts are a different story. The lower courts' resistance to the individual-rights view has, at least until recently, been widespread, and those criticizing Ashcroft's position have been quick to point to these decisions as evidence that Ashcroft is somehow off the reservation. Yet on closer examination, the lower courts' opinions are less persuasive. In a recent article, Professor Brannon Denning of Southern Illinois University Law School analyzed all the lower court decisions on the Second Amendment, and concluded that, "lower courts have strayed . . . from the Court's original holding to the point of being intellectually dishonest." Many lower courts in fact have endorsed the National Guard theory. Of course, many of them also claim that Miller did the same, which it clearly did not, and to read these opinions in series is to see lower courts progressively and unashamedly moving the goalposts in order to ensure that regardless of the arguments offered by counsel no one could possibly succeed in a Second Amendment challenge. This line of cases is no great testament to the rule of law.

The U.S. Court of Appeals for the Fifth Circuit agreed with this last month when it essentially adopted Professor Denning's criticism of other lower court decisions and held that the Second Amendment protects an individual right. In response to this decision, Michael Barone noted that "it will now be very hard to say impossible for any intellectually honest judge to rule that the Second Amendment means nothing."

On analysis, therefore, it appears to be the lower federal courts (except, now, for the Fifth Circuit) who are out of the mainstream on this issue. So are the gun-control groups who so vigorously invoke the lower courts' opinions to deny any possibility that the Second Amendment (which is, after all, one-tenth of the Bill of Rights) does anything so uncouth as to create an enforceable constitutional right.

Glenn Harlan Reynolds is Professor of Law at the University of Tennessee, and writes for the Instapundit.Com website.