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 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.
- The Bandwagon of Perdition. Oz: There’s One Reality Concerning Pattern All of Biden’s Cabinet Nominees Have in Common.
Although "rational basis" analysis was long taught in law schools as being synonymous with "the law will be upheld," White was long a champion of a more rigorous approach. The Court could identify no legitimate governmental purpose behind it. Instead, the Court held, the provision was motivated by a "bare desire to harm an unpopular group." The Court could not find that the provision "which barred localities from adopting gay-rights ordinances . . ." had a legitimate purpose. White, writing for a bare majority, wrote that the provision "failed rational basis review because the Court could not identify any legitimate governmental purpose behind it. Instead, the Court held, the provision was motivated by a desire to harm an unpopular group."
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.

It may seem odd to link White’s legacy to gay-rights cases, given that his most unpopular opinion was probably the majority opinion he authored in the 1986 case of Bowers v. Hardwick. The Bowers case involved the constitutionality of a Georgia law making homosexual (and, actually, heterosexual) sodomy a felony punishable by up to twenty years imprisonment. White’s majority opinion upheld the law, finding no fundamental right of homosexuals to engage in sodomy.

White’s opinion was, in my own opinion, wrong. Under the logic of Griswold and Romer, the Georgia law is irrational (though, since, despite the disingenuous claims of Georgia’s counsel at oral argument, it applied to heterosexuals and homosexuals alike, it was at least nondiscriminatory).

But though White may have been unable to bring himself to follow his own lead in Bowers, the courts of many states including Georgia 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). White’s methodology, it turns out, may have had more impact on the opinion he authored.

What’s more, this principle is spilling over from traditionally liberal subjects like gay rights to those generally regarded as conservative. We see even economic regulations once almost immune from judicial scrutiny being examined in terms of rational basis and governmental legitimacy today. Just recently, for example, the Institute for Justice persuaded a court in my 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’s asserted justifications, it was found, were irrational: no one ever bought a casket by keeping markups at four hundred to six hundred percent.

The principle that laws should make sense is, in fact, a radical one. While it has a long way to go before it has occupied the field, 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.

Glenn Harlan Reynolds is Professor of Law at the University of Tennessee, and publishes the InstaPundit.Com website.

Wall Street Journal, December 28, 2001

Of Capitalism and Third Places

Glenn Harlan Reynolds

Senators have hideaway offices, and so do I. Theirs are scattered in various nooks and crannies around the Capitol. Mine is at the local Borders. Theirs are more prestigious, but mine has better coffee.

I have an office with a nice computer, and I have a study at home with a nice 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.

Others must feel the same way, because when I’m there I find myself surrounded by people of all sorts. On a typical day there will be two or three with laptops intently writing, well, something. There will be tables full of high-school or college students, alternatingly studying and flirting, a home-schooling parent drilling a child on Babylonian history, one or two road-warrior salespeople catching up on scheduling and messages, a clique 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 name. We keep up on each other’s lives in a casual sort of way.

This third place, of course, is the Third Place that sociologist Ray Oldenburg called essential to civilization in his 1989 book, The Great Good Place. The third place had several characteristics: it had to be free or inexpensive, offer food and drink, be accessible, draw enough people to feel social, and foster easy conversation. Another characteristic that Oldenburg identified was that such places were disappearing.

In 1989, they were. In 2001, they’re not and you can thank the much-maligned chain bookstores for this. Certainly when I moved to my upscale Knoxville suburb in 1989, there weren’t many such places. Nor had there been many in Washington, D.C., when I moved here from Los Angeles in 1990. At Kramerbooks was the closest thing, but it didn’t really fill the bill. When I lived in New Haven, the famous Atticus books was like a poor man’s Borders – without public restrooms. (They’ve since added them, in the face of competition from the palatial Barnes & Noble – operated Yale Co-op down the street.)

Now, within about a mile of each other, are three big bookstore/café complexes: Borders, Barnes & Noble, and Books-a-Million. All seem to be doing well.

They’re doing well because they’ve identified a need, and they’re meeting it. You’d think that this would make a lot of people happy, and of course, it does, as I can tell just by looking around. But you’d think it would make more than just the customers happy; you’d think that it would please the people who are always worrying about America’s need for community.

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 are all about marketing. Chain bookstores are bad for small presses, bad for communities, and as Carol Anne Douglas writes in Of Our Backs, they’re bad for feminists, whose books apparently can only be bought at feminist bookstores.

I don’t know about the feminists, but small press sales appear to be up thanks to chain bookstores’ larger selection of titles. Communities are surely benefiting from the introduction of pleasant third places where such diversity exist before. And what’s more, with the exception of a handful of independents, chain bookstores are better at being third places.

That’s because independent bookstores have traditionally been run by people who like books. Those people generally aren’t interested in offering the other amenities that Oldenburg calls important and that superstores offer, like coffee shops, comfy chairs, and live music performances. At many independent bookstores, they like books better than people, and want you to know it – the bookish version of the music geeks in the movie High Fidelity. The chains, however, aren’t in business for personal gratification. They just want to keep customers coming back. Want coffee? Got it! Want a triple mocha latte, and handmade fresh salads from the Tomato Head restaurant downtown? Got it! And, interestingly, the extra traffic that these amenities produce means that chain stores typically can afford a better selection of books than the independents, too, which is why small presses are benefitting right along with latte-lovers.

Well, no surprise there. That’s what capitalism is all about. Funny that it’s a dirty word to some people.

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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 together with clearly personal rights like free speech.

Despite this, Attorney General John Ashcroft’s recent statement that the Second Amendment protects an individual right was treated as a lurching departure from settled law by some. Yet Ashcroft’s interpretation sits rather comfortably with the mass of opinion from other branches.

The chief opposition to the individual-rights view comes from gun-control advocacy groups. I’ve never quite understood why gun-control groups have felt it necessary to adopt an absolutist no-right-to-bear-arms position, when it is clear that the individual right view leaves room for reasonable regulation, so long as that regulation is really about preventing criminals from getting guns, not disarming ordinary citizens. (I myself have written that gun registration wouldn’t violate the Second Amendment). But such absolutism is one of the dynamics of our ongoing culture war, on the left as much as on the right.

Some critics of Ashcroft’s view have claimed that it conflicts with United States v. Miller, the 1939 Supreme Court case that is Ashcroft’s only opinion directly addressing a Second Amendment argument in the past hundred years. Miller, we are told, makes clear that the Second Amendment only protects the National Guard. There are two major problems with this argument. One is that Miller never mentions the National Guard. The other is that the only action actually taken in Miller was to remand the case back to the District Court (which had previously held the National Firearms Act unconstitutional on Second Amendment grounds) for factfinding on the issue of whether a sawed-off shotgun was the kind of weapon the Second Amendment protects. Whatever Miller did, it did not endorse the “National Guard” theory.

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. 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 does in fact protect an individual right. In response to this decision, Michael Barone noted that “it will now be very hard, I would 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 unenforceable constitutional right.

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