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 TCS/Daily 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.
- Record Check an Ineffective Nuisance, in the Nashville Tennessean, January 29, 2012.
- In the Wall To Fight, Ohio, 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.
- McF. Friedman Explains Mr. Bip, the New York Post, January 27, 2008. (Reviewing Tim Harford’s The Logic of Life.)
- Open Source War Fare: John Robb’s Chilling Brief on Postmodern Terrorism, in the City Journal, May 22, 2007.
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 Supreme Court struck down an anti-gay-rights provision adopted in a Colorado referendum. The majority's reasoning was that critics of the majority opinion in Griswold had done a particularly bad job because the law simply didn't serve the purposes it was claimed to.

"I wholly fail to see," he wrote, "how the ban on the use of contraceptives by married couples in any way reinforces the species for whom compassion was only one — and not necessarily the foremost one — among many values. With Harlan, 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 nation, White favored a more strenuous approach.

But his approach was in many ways a foreshadowing of what was to come. In the 1996 case of New York v. Interabundance, the Court found, the law against birth control was intended to prevent premarital and extramarital sex, but the statute, and its enforcement, did not 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 mere handiwork. He viewed 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 barred localities from adopting gay-rights ordinances, failed "rational basis" review because the Court could identify no legitimate governmental purpose behind it. Instead, the Court held, the provision was motivated by a desire to harm an unpopular group.

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 Romer 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.

It may seem odd to link White’s legacy to a gay-rights case, 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 sincere, despite the disingenuous claims of Georgia’s counsel at oral argument, it applied to homosexuals and heterosexuals 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 cannot lead to children) and concluded that they did not 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 than 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 “protected” a consumer by keeping markups at four 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.

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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 discarding 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 some quite recent the Supreme Court has, though admittedly in dictum, lumped the right to bear arms 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 discarding 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 its own 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, 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 does in fact protect an individual right. In response to this decision, Michael Barone noted that "It will now be very hard [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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