

Out of Range: An Interview with Mark Tushnet on the Second Amendment

James H. Landman

This September, Oxford University Press is publishing Out of Range: Why the Constitution Can't End the Battle Over Guns. Written by Mark Tushnet, the William Nelson Cromwell Professor of Law at Harvard Law School, Out of Range explores competing interpretations of the Second Amendment and discusses how the entanglement of our views on guns in our nation's culture wars is affecting our ability to reach a neutral compromise on gun policies. Out of Range is the third volume in the Oxford University Press series on Inalienable Rights, which is designed to educate the public about our nation's foundational ideals and to stimulate the kind of widespread critical engagement that is the hallmark of a healthy democracy. In July, Professor Tushnet discussed Out of Range with "Looking at the Law" editor James Landman.



Professor Tushnet, you identify two basic models that define debates over interpretation of the Second Amendment. These include the "Standard Model" (also described as the "individual rights" model) and the "Traditional Model" (also called the "collective rights" or "states' rights" view). Can you briefly explain the major points of difference between these models and the significance of these differences for interpretation of the Second Amendment?

Under the Standard Model, which has become common over the past generation, the idea is that the Second Amendment was designed to secure rights in individuals to own weapons to use in defense of the country or in their own defense. The earlier view, which I call the traditional view, was that the Second Amendment guaranteed a right in connection only with one's ability to participate in the organized militia of the country. Originally, these were state-organized militias that would be the equivalent today of the National

Guard. The basic disagreement between the models is over whether individuals have a right independent of their membership in a state-organized militia to own weapons for purposes such as self defense.

Amendment II

A well regulated Militia being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.

Much attention has been paid to the "preamble" of the Second Amendment (also called the "prefatory clause"). The preamble of the amendment describes "A well regulated Militia, being necessary to the security of a free State." As you explain in Out of Range, the preamble can be interpreted either as an explanation of the right of the people to keep and bear arms, or as a limitation on that right. What are the implications of these possible interpretations for the Standard Model? For the Traditional Model?

The easiest place to begin is by looking at the preamble as a limitation. The idea behind this view is that the preamble is designed to say that *only* those people who are participating in militia have a right to keep and bear arms.

Those who look at the preamble as an explanation, however, say that the preamble is simply meant to explain to us why it is that each of us has a right to keep and bear arms. And the reason is that if we have that right, we will be able to participate in well-organized militia that have various attractive qualities. But again, it's an explanation, not a limitation, on our right to bear arms and should not impose constraints on our application of the amendment.

Focusing solely on the understanding of the Second Amendment at the time it was adopted in the late eighteenth century, you argue that the evidence in favor of an individual rights interpretation of the Second Amendment is slightly stronger than the evidence supporting a collective rights view of

Polarized viewpoints on gun control have made political compromise difficult to achieve. Here, a woman looks at a quilt displaying photos of victims of gun violence during the second “Million Mom March” in 2004.

(AP Photo/Adele Starr)



the amendment. What evidence do you think tips the balance in favor of an individual rights view?

It is, I think, a reasonably close question. It’s relatively straightforward to read the evidence about people’s discussions of why we have the right to bear arms at the time the amendment was adopted as supporting an individual right. Although there’s not a night-and-day difference between evidence supporting an individual right and evidence that the right was limited to participation in a militia, the evidence for the more limited right is just a bit weaker, or not quite as extensive, as the evidence supporting the individual right.

You also argue, however, that patterns in statutes and cases since the mid-nineteenth century have moved toward the collective rights interpretation of the Second Amendment, in which the amendment imposes “at most extremely weak . . . limitations on the government’s power to regulate the use and possession of weapons.” As you note, in virtually all other

areas of constitutional interpretation, tradition and precedent matter as least as much, and perhaps more, than original understandings of the Constitution. Why do arguments based on original understandings of the Second Amendment continue to figure so prominently in debates over its meaning?

That’s a very hard question that I thought about quite a bit as I was writing the book. I ended up thinking that the reason why arguments based on original understandings remain so strong is that both sides think they can win by invoking original understandings. Neither side, then, has much of an incentive to move away from treating Second Amendment issues as somehow special in constitutional law or as an unusual place in constitutional interpretation where we don’t worry about what has happened since the founding. But it remains something of a puzzle why the focus is so clearly on original understanding.

It is certainly true that lawyers don’t have much to work with when they are

dealing with Second Amendment cases. The most recent case in the Supreme Court is from 1939 (*U.S. v. Miller*, 307 U.S. 174). This summer, however, the District of Columbia decided to appeal to the Supreme Court a recent decision invalidating the District’s quite restrictive gun-control law. The U.S. Court of Appeals for the D.C. Circuit held earlier this year essentially in favor of an individual rights interpretation in striking down the District’s gun-control law. The District of Columbia’s decision to appeal the court’s decision suggests that we will be hearing more from the Supreme Court on the meaning of the Second Amendment sooner rather than later.

[Note to readers: In a March 9, 2007, decision in Parker v. the District of Columbia, Docket No. 04-7041, the U.S. Court of Appeals for the D.C. Circuit struck down as unconstitutional a gun-control law in the District of Columbia that included a near-total ban on handgun ownership; an apparent ban on moving a handgun from room to room in one’s own home; and a requirement that any registered firearm

be kept unloaded and disassembled or bound by a trigger lock.]

Your analysis of the framers' understanding of the Second Amendment suggests that the framers almost certainly saw the citizen's right to keep and bear arms as a check on potential government tyranny. You also note that technological change has resulted in government armed forces whose fire power overwhelms any arms that citizens could reasonably muster against government oppression. Does this mean that technological change has rendered a primary purpose—perhaps the purpose—of the Second Amendment obsolete?

Again, this turns out to be quite a difficult question. If the primary purpose of the Second Amendment is to defend against government oppression, this raises what I refer to in the book as the “bazooka problem.” In other words, in order to defend against an oppressive government today, you have to have bazookas, armored personnel carriers, and similar weaponry. No one thinks that is the answer to the problem of how to interpret the Second Amendment. So one can say that this purpose of the Second Amendment can no longer be fulfilled. But one can also say, as some people do, that if you look at experiences around the world, citizens armed with small arms can cause a lot of trouble for an oppressive government. They can't defeat tanks, but they can harass soldiers and cause other difficulties for the government. In this view, there may still be something to be said for the individual right to bear arms, even for the purpose of resisting government oppression.

The other thing that defenders of the individual right say is that even though defending against an oppressive government was a primary purpose of the amendment, there was a secondary purpose, which was for the use of weapons in self-defense against marauders. You could even characterize this as a need to have the right to defend yourself in case the government does not do its job of defending you. And so it is possible even under modern

circumstances to say that some aspects of the Second Amendment remain vibrant.

Doesn't there remain a question, however, of who can decide whether the right to resist government oppression has been triggered? As you note in the book, even if the Second Amendment makes it unconstitutional for the government to confiscate ordinary weapons, “it does not establish a right to anarchy.”

It is a real problem for advocates of the individual rights interpretation to explain why we should say individuals have a right to say “this is an oppressive government” rather than waiting for some official conclusion—by a state legislature, perhaps—that the federal government has gone off the tracks.

The introduction to Out of Range opens by describing the photo of then presidential candidate John Kerry, “fully decked out in camouflage gear and carrying a 12-gauge shotgun,” that was released by the Kerry campaign a few weeks before the 2004 election. For many Americans, hunting rights have become strongly linked to the Second Amendment, and photos of politicians outfitted for a hunt are designed to send a message about support for gun rights. It seems, however, that the right to keep and bear arms had little to do with the right to hunt, either at the time the amendment was drafted or in subsequent interpretations of the amendment. Is there a legitimate connection between hunting rights and the Second Amendment?

If you have an individual right to keep and bear arms, of course you could use the arms that you owned for hunting purposes. But I don't think the amendment was designed or understood at the outset to have much to do with hunting as such. The ability to use weapons for hunting was a collateral benefit of the right that you had for other purposes. People have come to see guns or the right to own guns as more

closely connected with hunting than it was when the amendment was adopted.

One reason why the right to hunt may not have that much bearing on the national constitution is that the Pennsylvania state constitution contained an explicit enumeration of a “liberty to fowl and hunt in seasonable times.” And so the thought is that if the right to hunt was specifically included in an early state constitution, but was not referred to in the Second Amendment to the U.S. Constitution, the amendment could not be about a right to hunt.

You express a good deal of skepticism about the value of social science data in resolving disputes over the efficacy of gun-related policies. What are the reasons for your skepticism? Can social science data be of better value in other areas of legal debate?

Social scientists, of course, disagree. Doing a good social scientific study is hard. There are always ambiguities in the data and complications or complexities in the evidence or in the model you use to describe the reality that you are trying to deal with. And because this area is so highly charged politically, interest groups are very alert to problems with the data. So it seems to me unlikely that this particular controversy will be much affected by how we assess social scientific evidence. There may be other areas where we could perhaps make progress by paying attention to social science material, but this one, I think, is just unpromising.

I think the places where social science data can be very useful are areas that are understood to involve important policies but are mostly technical in their contours. Where the policies are central to the way some significant group understands itself or understands the nation, then that group will use whatever ambiguities there are in the evidence to undermine the case of the other side and support its own side.

A primary argument in Out of Range is that the Second Amendment has become so enmeshed in our nation's “culture wars”—the struggle to define

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RESOURCES

Advocacy Groups

As the interview with Professor Tushnet suggests, the debate over guns in the United States is highly polarized. Some of the more established organizations advocating gun rights, on the one hand, and gun laws, on the other, include

In support of gun rights

The Cato Institute. The Cato Institute is a non-profit public policy research foundation that “seeks to broaden the parameters of public policy debate to allow consideration of the traditional American principles of limited government, individual liberty, free markets and peace.” It supports an individual rights interpretation of the Second Amendment and offers studies, articles, and opinion and commentary at www.cato.org/ccs/2nd-amendment.html.

The National Rifle Association. Founded in 1871, the NRA describes itself as “America’s foremost defender of Second Amendment rights.” The website for the NRA’s Institute for Legislative Action (www.nraila.org) features an interactive map of state firearms laws and updates on legislation at the state and federal levels.

In support of gun laws

The Brady Center to Prevent Gun Violence. Named in honor of both Jim Brady, press secretary to President Reagan who was wounded in an assassination attempt in 1981, and Brady’s wife, Sarah, the Brady Center describes itself as “the largest national, non-partisan, grassroots organization leading the fight to prevent gun violence.” Its website, www.bradycenter.org, also features an interactive map of state gun laws, frequently asked questions on key issues and initiatives, and a Legal Action Project feature that provides updates on current cases and legislative efforts.

The Coalition to Stop Gun Violence. The Coalition “is comprised of 45 national organizations working to reduce gun violence.” Along with its

sister organization, the Educational Fund to Stop Gun Violence, it pursues a four-prong strategy that includes a legislative agenda to close illegal gun markets, grassroots organization and activism, support of pro-gun control political leaders, and litigation. Its website, www.csgv.org, offers research reports, fact sheets, and statistics.

Publications

Mark V. Tushnet, *Out of Range: Why the Constitution Can’t End the Battle Over Guns* (Oxford University Press, 2007). Includes chapters on different models for interpreting the Second Amendment, original understandings of the amendment, developments since 1791, and gun control and public policy.

ABA Division for Public Education, “Gun Laws and Policies: A Dialogue,” *Focus on Law Studies*, vol. XVIII, no. 2 (Spring, 2003). A dialogue among eight humanities, social science, policy, and legal scholars on the place and regulation of guns in the United States and abroad. Available for free download at www.abanet.org/published/focus/spring_03.pdf.

Other Resources

The American Bar Association’s Conversations on the Constitution website, www.abaconstitution.org, will offer new discussion topics on the Second Amendment and a lesson plan on Second Amendment issues for Constitution Day on September 17. The site offers a wide range of resources for exploring different concepts and clauses of the Constitution with your students.


The U.S. Court of Appeals for the District of Columbia Circuit’s March 2007 decision in *Parker v. the District of Columbia*, which struck down the District’s gun control laws, is available for free download at pacer.cadc.uscourts.gov/docs/common/opinions/200703/04-7041a.pdf.

who we are as Americans—that a compromise between gun-rights proponents and gun-control advocates seems highly unlikely. You also suggest that this particular battle in the culture wars may very well be distracting us from policies unrelated to gun control that could be far more effective in reducing crime and violence. Is it time for a cease fire in the battle over guns? If so, what would be necessary for the two sides to arrive at a truce?

This is something I arrived at while working on the book, and it is not something I expected to conclude when I started the project. If you look at effective policies on the control of violence, virtually everybody would place limitation on access to weapons relatively low on the list of things that are important to do. It's not that it is unimportant to control weapons, it's just that there seem to be better ways to limit violence. The problem is that we have gotten so hung up on the question of gun control, it gets in the way of thinking about

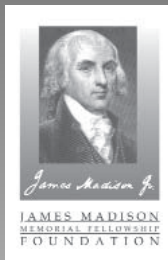
other crime-control or violence-control policies. Every time someone proposes a limitation on access to weapons, a critic will say we are moving in the direction of the kind of extensive gun control that will erode our Second Amendment rights.

Now whether we can achieve, as you put it, a cease fire is a very hard question because it is so bound up in our understandings of who we are. I suggest in the book that some day some prominent politician will say, "I'm not going to vote in favor of or against any gun policy," or "I will vote against any gun policy that anyone proposes and defend that decision on the grounds that it is distracting us from more important or more effective things we could do." It will take some leadership from a fairly astute politician to pull off this cease fire because there are interest groups on both sides of the issue who have commitments to pursuing gun policies one way or the other. They are not going to abandon those commitments, and so we need a political leader who will do what political leaders should do and take the lead.

These are issues that people care a lot about because they see them as defining who we are as a nation. When we have a situation like that, it takes a very careful or astute politician to figure out how to get people to move off of what is distracting us and onto more significant and more effective policies. I think the only way to effectively speak to both sides these days is to say, "I'm not going to go along with either side's favored programs. I'm going to chart my own course and will pursue effective policies rather than interest group driven policies." 

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