

# NYU SCHOOL OF LAW BRENNAN CENTER FOR JUSTICE KEYNOTE: *THE SECOND GENERATION OF SECOND AMENDMENT LAW & POLICY*

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## KEYNOTE

On December 14th, 2012, my political career, already fourteen years old, changed course. That morning, I was standing on a train platform in Bridgeport, Connecticut, readying to take my four year-old and one year-old boys to New York City to see the Rockefeller Plaza Christmas tree. I received a call that a shooting had occurred at Sandy Hook Elementary School in Newtown, Connecticut. There were reports of children being among the victims. A few hours later, I was at the firehouse adjacent to the school, as twenty sets of parents were told that their children lay dead on the floor of their first grade classrooms.

Sometimes in this business, you pick the issues on which you work. Other times, the issues pick you.

Before that day, fighting for laws to reduce gun violence was not at the top of my political priority list—as a Congressman, I simply did not represent any cities with epidemic levels of gun violence. But it has become my singular focus as a U.S. Senator, because in the wake of Sandy Hook, my eyes have opened to the catastrophe of gun violence in America, and the inability to explain our exceptionally high levels of gun homicide with any data points but our gun ownership rates and our lax gun laws.

You're hearing today from a number of constitutional law experts about the legal issues, precedents, court decisions, and historical interpretations around the Second Amendment. I'll leave that analysis to the legal professionals. I think what I can help provide is a sense of the current political climate around these issues, and the dysfunctional way in which we talk about guns in America.

From the center to the left of the political spectrum, the conversation about guns in America is largely about the mechanics of how guns are regulated—how they flow into the hands of law-abiding citizens and criminals, which weapons should be legal and which should be illegal, what the data tells us are the best rules to reduce the number of crimes committed with guns. On the left, our debate starts and ends in the concrete details of gun laws.

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The dysfunction in our dialogue over guns largely results from the fact that this conversation is foreign to those that inhabit the center to right half of the political spectrum. They are having a completely different conversation that has nothing to do with gun laws, and everything to do with abstract concepts of liberty and freedom and revolution, and how the discussion over guns is simply a prism through which to discuss these founding principles of our nation. On the right, the debate starts and ends in the abstract of these big ideas.

Put another way, the debate on the right is in the clouds, while the debate on the left is in the weeds. So it's no wonder that Republicans and Democrats can't get together to find common ground. If we start on different planets, then it's kind of hard to find a room to all sit down together in.

So, now my prejudices come in. I, of course, believe that Republicans should come over to our planet. And I have chosen to skip over the part of the talk where I try to convince you that our side is right. Not because I assume that you're all on the same side as I am, but because I think it's much more interesting to talk about what stops the other side, the right, from making that leap across space.

I break it down into two modern realities—the increasingly anti-government, neo-anarchist bent of the Republican party, and the new economic model of the gun industry in an America where a smaller number of people are buying guns, but in much larger quantities.

The modern Republican Party, especially since the election of America's first African-American President, Barack Obama, has become increasingly hostile to government. Not inefficient government. Not overreaching government. Just government. And you can see why. In an era where cable news covers politics as soap opera, the villains and the ribald story lines get all the attention, and all the ratings. Bashing government is big money for television and the internet, and Republicans, already the party favoring smaller government, are just picking up the dominant media narrative. Second, in an era of unprecedented economic anxiety, many Americans are looking for someone to blame for their plight. Republicans, not terribly excited for blame to fall on the private sector, offer government up as the culprit. This combination of the media covering only the dysfunctional storylines out of Washington and the natural tendency of economic hard times flowing toward scapegoats pushes the right further and further toward hardline anti-government rhetoric.

And that's how they get to guns. Because as school children were taught, no one hated their government more than the founding fathers. They hated their government so much that they took up arms against it. They were willing to die for their anti-government beliefs, and then, after casting off their oppressors, they carried their anti-government beliefs into the drafting room of the founding document of a new nation. They wrote a section of this document that would assume that oppression would return, and that the guarantor of the people's right to cast off a second coming of autocracy was the private right of gun ownership.

If you want to prove your bona fides as an anti-government activist, advocating for the right of people to take up arms against their government is

pretty much the coin of the realm. So in an era where anti-government positioning is a hallmark of the modern right, it shouldn't surprise anyone that increasingly Republicans are absolutist in their views on the right of citizens to own guns. They want to preserve the right of revolution as a means of showing how much they truly hate the current government, administered by President Obama.

And of course, to be honest, guns are in many ways at the core of American mythology, beginning with that story of a rag-tag bunch of patriots and running through romanticized ideals about the freedom of the Wild West. Even if it is subconscious, the right's argument has a seductive ring to many Americans who may not endorse the idea of armed insurrection against the government but nonetheless find this appeal to our founding ethos compelling.

And to be clear, the founders of our republic were concerned with defending against tyranny, and yes, enshrining the right to bear arms was an important element of that concern. But an equally important defense against tyranny—or perhaps more important, given its pride of place—was the First Amendment, with its protections of free speech, freedom of the press, and freedom of assembly.

But to show you how far our Second Amendment debate has drifted from the rest of our rights talk, there is no movement among First Amendment purists insisting that laws banning child pornography or yelling “fire” in a crowded theater are a slippery slope to tyranny. And whether it's Hulk Hogan's lawsuit against Gawker or journalists being ordered to reveal anonymous sources, our understanding of First Amendment guarantees continues to evolve amid new technology and changing social norms. Or take the Fourth Amendment's protection against unlawful search and seizure, and the tension between privacy and security that played out in the struggle between the FBI and Apple over a terrorist's phone. These are important, difficult questions that have an immense bearing on the potential reach of government into our everyday lives. And members of both the Republican and Democratic parties can—and often do—come down on either side of these questions without being accused of apostasy. A government surveillance bill might find Dianne Feinstein siding with Richard Burr, while Rand Paul and Mike Lee might join with Bernie Sanders on the other side. And the public is better off for the debate.

That is not true of the Second Amendment. I held five town halls on guns in Connecticut in 2013, and at each one I heard my constituents talk about gun rights as God-given, parroting the recent words of a conservative writer who wrote, “We don't have the right to keep and bear arms because the Bill of Rights says so. Rather, the Bill of Rights says so because the right to keep and bear arms is intrinsic to our very being: It is a right with which we were endowed by our Creator.”

My point is that there is a reason for this mystical, brook-no-compromise treatment of the Second Amendment within the modern right: it fits naturally

into their need to become more and more extreme in their campaign to undermine the legitimacy of government.

The second cause for the hardening of the right's position on guns, I believe, is the changing economic model of the gun industry. Only one-third of Americans today are buying guns, as opposed to half of Americans thirty years ago, meaning that the industry is reliant on a smaller number of gun owners buying large caches of expensive weapons like the AR-15. The number of buyers has shrunk, so the simple solution, the industry realized, was to just sell more weapons to this smaller market. How do you do this? How do you convince someone who really only needs to buy one or two weapons to protect his home or to hunt or to shoot for sport, to instead buy five or ten or twenty? Well, first you make guns a collectible. And the dizzying array of models that are now offered by gun makers has certainly turned gun collecting into a sort of hobby. Acquiring lots of lots of killing machines is not a hobby I understand, but there are plenty of reasonable, good people who participate in this exercise.

But something else is going on with the gun industry's marketing. The other motivation they feed for the stockpile of firearms is that same revolutionary theory that became, over time, so attractive to the Republican Party. The gun industry, in cahoots with the gun lobby—the NRA and the Gun Owners of America—created a fantasy construct of a world in which citizens need to arm themselves against an out-of-control government. Instead of one gun, you need ten or twenty or forty, so that you can arm your neighborhood when the black helicopters start landing in your backyards. Oh, and you better stockpile years' worth of ammunition—just in case.

Further, the industry has figured out that in the wake of increasing fear of domestic terror attack, gun ownership can be marketed as a way of protecting average Americans from the blast radius of violent extremism. The NRA counsels that every American needs to have a “security plan”, which, unsurprisingly, means owning one or perhaps many expensive firearms. And the reason Americans need a security plan is because, as the gun lobby tells us, no law can keep us safe. This is an essential element of the gun industry's new positioning—the illegitimacy of the law or government as a means to protect us all from harm. The gun industry's hope is that if Americans lose faith in the law's ability to provide for the public's safety, then the natural turn will be to massive private firearms ownership. Thus, the gun lobby opposes every single law designed to keep Americans away from gun violence—because to acknowledge the efficacy of law would be to undermine the importance of guns.

How else can you explain the transformation of the NRA's positioning on background checks? In 1999, in the wake of Columbine, the NRA was prowling Capitol Hill asking for Congress to pass a background checks law—a law very similar to the one they fought tooth and nail to defeat in 2013. It's not coincidental that over that period time, the industry, which provides a sizeable chunk of their financing, changed, and to perpetuate itself it needed for the gun lobby to help it create a new motivation for large volumes of gun purchases.

This is the new reality on the right—an absolutism, a complete refusal to engage in a conversation about gun policy, because to do so would be compromise on the notion that at the heart of American freedom and American liberty is the unrestricted right to stockpile weapons to be used, in case of emergency, against a despotic government.

Which is so regrettable, because even if you think that the Supreme Court got it wrong in the *Heller* decision when it held that the Second Amendment protects a responsible, law-abiding citizen's right to possess a handgun in the home for self-defense, the Court still confirmed clearly and unequivocally that the Amendment protects only a limited right. The late Justice Scalia wrote that “nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms.” The Court also recognized that the government could prohibit the “the carrying of ‘dangerous and unusual weapons.’” The law, then, is crystal clear that the Second Amendment should not be understood as conferring, as Scalia himself cautioned, a “right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose.”

And as clear as the law is today, even clearer is the data surrounding policy solutions to the epidemic of gun violence. And to me, this is the most tragic part of this story. Because the right is so captured, so imprisoned by this conversation about God-given rights and revolutionary rhetoric, we all miss the fact that there are clear changes in the law, supported by the majority of Americans, that would unquestionably reduce gun deaths.

For instance:

- Connecticut passed a strict handgun licensing law in 1995 that resulted in a 40% reduction in our firearm-related homicide rate. At about the same time, Missouri repealed a similar law, which resulted in a 25% increase in firearm homicide rates there.
- 46% fewer women are shot to death in states with universal background checks. 48% fewer on-duty police officers are shot and killed in states with universal background checks.
- 2 out of 3 gun related deaths are suicides, and states with gun purchase waiting periods have 51% fewer gun suicides.

Gun safety measures are constitutional. They work. And they are popular.

And yet they go nowhere in Congress, time after time, because the two sides of the political system are living on different planets when it comes to this issue.

So, what do we do? Or maybe more accurately, what do I do about it, as someone who has committed my Senate career to passing meaningful anti-gun violence legislation.

First, I remind myself that all politics is still local. If the political force around anti-gun violence measures becomes strong enough, its will cannot be resisted. So we keep building up our grassroots organizations, we keep pushing more

voters to elevate this issue on their priority lists when evaluating candidates, and we work toward a day when the voters will force the right to moderate its stance on guns in order to win elections.

Second, we take the gun lobby head on, and unmask it for what it is—a spokesman for the gun makers, not the gun owners. Eighty percent of gun owners, even NRA members, support universal background checks, and yet they belong to an organization that lobbies contrary to its members' wishes. More political leaders need to call out the gun lobby's double game, and make their endorsement a little less meaningful.

And lastly, we need to resist trying to remake the modern right. If they are moving toward a type of neo-anarchy where everything the government touches is sullied ground, then we shouldn't try to think those of us on the side of stronger gun laws can stop this march.

The solution, then, also lies in Democrats moving away from our safe space and recognizing that the right's slide away from defending the legitimacy of government isn't going to magically abate, especially if a Democrat occupies the White House.

We have to be ready to meet Republicans in their space in the sense that we should be thinking about another outlet for Republicans to show their anti-government bona fides other than drawing a line in the sand on gun laws. Many Republicans in the Congress that I talk to want to be more reasonable on the issue of guns, but they are stuck in a party where your position on guns is a sort of litmus test for how much you hate government. There have got to be other proxies to demonstrate ideological purity in this respect, and we should be working with sympathetic Republicans to find another path forward, not simply yelling at them for refusing to work with us.

Following the tragedy at Sandy Hook, former Supreme Court Justice John Paul Stevens said, "the law should encourage intelligent discussion of possible remedies for what every American can recognize as an ongoing national tragedy." That intelligent discussion is not happening now, but rather than simply continuing to occupy our separate planets, the time of those of us who are leading the charge to take on gun violence would be better spent trying to fix the bugs in the system that cause us to talk past each other.

Not until Democrats commit to poking our heads out from the weeds, and Republicans promise to descend every now and again from the clouds, will the day arrive when we are on a common road to common ground. For the 80 Americans dying every day from gun violence, a rate 20 times that of other advanced nations, that day is long, long overdue.