

# Cass Sunstein Quotes

## Second Amendment

Consider the view that the Second Amendment confers an individual right to own guns. The view is respectable, but it may be wrong, and prominent specialists reject it on various grounds. As late as 1980, it would have been preposterous to argue that the Second Amendment creates an individual right to own guns, and no federal court invalidated a gun control restriction on Second Amendment grounds until 2007. Yet countless Americans politicians, in recent years, have acknowledged that they respect the individual right to bear arms, at least in general terms. Their views are a product of the energetic efforts of meaning entrepreneurs – some from the National Rifle Association, who have press a particular view of the Second Amendment.

--Cass R. Sunstein, *A Constitution of Many Minds*, Princeton University Press, 2009, p. 172-173

The National Association of Broadcasters and others with similar economic interests typically use the First Amendment in precisely the same way the National Rifle Association uses the Second Amendment. We should think of the two camps as jurisprudential twins. The National Association of Broadcasters is prepared to make self-serving and outlandish claims about the First Amendment before the public and before the courts, and to pay lawyers and publicists a lot of money to help establish those claims. (Perhaps they will ultimately succeed.) The National Rifle Association does the same thing with the Second Amendment. In both cases, those whose social and economic interests are at stake are prepared to use the Constitution, however implausibly invoked, in order to give a veneer of principle and respectability to arguments that would otherwise seem hopelessly partisan and self-interested.

--Cass R. Sunstein, *Republic 2.0*, Princeton University Press, 2007, p. 173

“[A]most all gun control legislation is constitutionally fine. And if the Court is right, then fundamentalism does not justify the view that the Second Amendment protects an individual right to bear arms.”

- Cass Sunstein, writing in his book, “Radicals in Robes”

In 1991, Warren E. Burger, the conservative chief justice of the Supreme Court, was interviewed on the MacNeil/Lehrer NewsHour about the meaning of the Second Amendment's "right to keep and bear arms." Burger answered that the Second Amendment "has been the subject of one of the greatest pieces of fraud--I repeat the word 'fraud'--on the American public by special interest groups that I have ever seen in my

lifetime." In a speech in 1992, Burger declared that "the Second Amendment doesn't guarantee the right to have firearms at all. "In his view, the purpose of the Second Amendment was "to ensure that the 'state armies'--'the militia'--would be maintained for the defense of the state."

It is impossible to understand the current Second Amendment debate without lingering over Burger's words. Burger was a cautious person as well as a conservative judge, and the chief justice of the Supreme Court is unlikely to offer a controversial position on a constitutional question in an interview on national television. (Chief Justice John Roberts is not about to go on Fox News to say that the claimed right to same-sex marriage is a fraud on the American people perpetrated by special interest groups.) Should we therefore conclude that Burger had a moment of uncharacteristic recklessness? I do not think so. Burger meant to describe what he saw as a clear consensus within the culture of informed lawyers and judges—a conclusion that was so widely taken for granted that it seemed to him to be a fact, and not an opinion at all.

-- Cass R. Sunstein, "The Most Mysterious Right," *National Review*, November 12, 2007

...[T]he Second Amendment seems to specify its own purpose, which is to protect the "well regulated Militia." If that is the purpose of the Second Amendment (as Burger believed), then we might speculate that it safeguards not individual rights but federalism

-- Cass R. Sunstein, "The Most Mysterious Right," *National Review*, November 12, 2007

...[T]he Supreme Court is now being asked to decide whether the Second Amendment creates an individual right to own guns. There is a decent chance that the Court will say that it does. Whatever the Court says, we have seen an amazingly rapid change in constitutional understandings--even a revolution--as an apparently fraudulent interpretation pushed by "special interest groups" (read: the National Rifle Association) has become mainstream.

-- Cass R. Sunstein, "The Most Mysterious Right," *National Review*, November 12, 2007

Even if the Second Amendment does confer an individual right, and therefore imposes limits on national gun-control legislation, a further question remains. Does the Second Amendment apply to the states? By its plain terms, the original Bill of Rights applies only to the national government. To be sure, most (but not all) of the listed rights are now understood to have been "incorporated" in the Fourteenth Amendment and made applicable to the states through that route. But is the Second Amendment incorporated as well?

-- Cass R. Sunstein, "The Most Mysterious Right," *National Review*, November 12, 2007

How did the individual rights position, so marginal and even laughable among judges and lawyers for so long, come to be treated as a respectable view--and even to be described as the standard model by 2007? It is certainly relevant that the National Rifle Association, and other like-minded groups and individuals, have sponsored and funded an endless stream of supportive papers and research. The Second Amendment revolution has been influenced by an intensely committed social movement with political and legal arms. But it is also true that for many decades lawyers and law professors paid hardly any attention to the Second Amendment.

-- Cass R. Sunstein, "The Most Mysterious Right," *National Review*, November 12, 2007

But whatever the founding generation may have thought, the Second Amendment has become a shorthand, or a rallying cry, for a deeply felt commitment on the part of tens of millions of Americans. There would be not merely prudence, but also a kind of charity and respect, in judicial decisions that uphold reasonable restrictions without rejecting that commitment, and without purporting to untangle the deepest mysteries about the meaning of the Constitution's most mysterious provision.

-- Cass R. Sunstein, "The Most Mysterious Right," *National Review*, November 12, 2007

In the context of use of guns, it might be helpful to emphasize that the National Rifle Association is funded in large part by gun manufacturers, and that manufacturers of guns are often behind efforts to claim that the Constitution guarantees rights of gun ownership.

In 2008 the Supreme Court ruled, for the first time, that the Second Amendment confers an individual the right to own guns for nonmilitary purposes. In doing so, the Court was greatly influenced by the social setting in which it operated, where that judgment already had broad public support. In recent years, there has come to be a general social understanding that the Second Amendment does protect at least some kind of individual right; and that understanding greatly affects American politics. The Supreme Court's ruling in favor of an individual's right to bear arms for military purposes was not really a statement on behalf of the Constitution, as it was written by those long dead; it was based on judgments that are now widespread among the living.

--Cass R. Sunstein, *A Constitution of Many Minds*, Princeton University Press, 2009, p. 5

But there is a radically different reading of *Heller*. The constitutional text is ambiguous, and many historians believe that the Second Amendment does not, in fact, create a right to use guns for nonmilitary purposes.<sup>8</sup> In their view, the Court's reading is untrue to the relevant materials. If they are right, then it is tempting to understand *Heller* not as *Marbury* but as a modern incarnation of *Lochner v. New York*, in which the Court overrode democratic judgments in favor of a dubious understanding of the Constitution.

--Cass R. Sunstein, "Second Amendment Minimalism," *Harvard Law Review*, Vol. 122: 246

## **Hunting & Animal Rights**

"We ought to ban hunting"

- Cass Sunstein, in a 2007 speech at Harvard University

"[Humans'] willingness to subject animals to unjustified suffering will be seen ... as a form of unconscionable barbarity... morally akin to slavery and the mass extermination of human beings."

- Cass Sunstein, in a 2007 speech at Harvard University

But I think that we should go further. We should focus attention not only on the "enforcement gap," but on the areas where current law offers little or no protection. In short, *the law should impose further regulation on hunting, scientific experiments, entertainment, and (above all) farming to ensure against unnecessary animal suffering*. It is easy to imagine a set of initiatives that would do a great deal here, and indeed European nations have moved in just this direction. There are many possibilities.

--Cass R. Sunstein, "The Rights of Animals: A Very Short Primer," John M. Olin Law & Economics Working Paper No. 157, The Law School, The University of Chicago

If we understand "rights" to be legal protection against harm, then many animals already do have rights, and the idea of animal rights is not terribly controversial... Almost everyone agrees that people should not be able to torture animals or to engage in acts of cruelty against them. And indeed, state law includes a wide range of protections against cruelty and neglect. We can build on state law to define a simple, minimalist position in favor of animal rights: The law should prevent acts of cruelty to animals.

--Cass R. Sunstein, Martha C. Nussbaum. *Animal Rights: Current Debates and New Directions*. (Oxford University Press, USA, 2004). Introduction

"We could even grant animals a right to bring suit without insisting that animals are persons, or that they are not property. A state could certainly confer rights on a pristine area, or a painting, and allow people to bring suit on its behalf, without therefore saying that that area and that painting may not be owned. It might, in these circumstances, seem puzzling that so many people are focusing on the question of whether animals are property. We could retain the idea of property but also give animals far more protection against injury or neglect of their interests."

--Cass R. Sunstein, Martha C. Nussbaum. *Animal Rights: Current Debates and New Directions*. (Oxford University Press, USA, 2004). P. 11

Do animals have standing? To many people, the very idea seems odd. But several cases suggest that the answer might be yes.

In a remarkably large number of cases in the federal courts, animals appear as named plaintiffs.

...Indeed, I have not been able to find any federal statute that allows animals to sue in their own names. As a rule, the answer is therefore quite clear: Animals lack standing as such, simply because no relevant statute confers a cause of action on animals.

It seems possible, however, that before long, Congress will grant standing to animals to protect their own rights and interests. Congress might do this in the belief that in some contexts, it will be hard to find any person with an injury in fact to bring suit in his own name. And even if statutes protecting animal welfare are enforceable by human beings, Congress might grant standing to animals in their own right, particularly to make a public statement about whose interests are most directly at stake, partly to increase the number of private monitors of illegality, and partly to bypass complex inquiries into whether prospective human plaintiffs have injuries in fact. Indeed, I believe that in some circumstances, Congress should do just that, to provide a supplement to limited public enforcement efforts.

--Cass R. Sunstein, Martha C. Nussbaum. *Animal Rights: Current Debates and New Directions*. (Oxford University Press, USA, 2004). P. 259-260

In the future, legislative decisions on such questions will have considerable symbolic importance. But they will not only be symbolic, for they will help define the real-world meaning of legal texts that attempt to protect animal welfare – statutes that now promise a great deal but deliver far too little.

--Cass R. Sunstein, Martha C. Nussbaum. *Animal Rights: Current Debates and New Directions*. (Oxford University Press, USA, 2004). P. 261

Do animals have rights? Almost everyone believes in animal rights, at least in some minimal sense; the real question is what that phrase actually means. By exploring that question, it is possible to give a clear sense of the lay of the land—to show the range of possible positions, and to explore what issues, of theory or fact, separate reasonable people. On reflection, the spotlight should be placed squarely on the issue of suffering and well-being. This position requires rejection of some of the most radical claims by animal rights advocates, especially those that stress the “autonomy” of animals, or that object to any human control and use of animals. But this position has radical implications of its own. It strongly suggests, for example, that there should be extensive regulation of the use of animals in entertainment, in scientific experiments, and in agriculture. It also suggests that there is a strong argument, in principle, for bans on many current uses of animals.

--Cass R. Sunstein, “The Rights of Animals: A Very Short Primer,” John M. Olin Law & Economics Working Paper No. 157, The Law School, The University of Chicago

...[R]epresentatives of animals should be able to bring private suits to ensure that anticruelty and related laws are actually enforced. If, for example, a farm is treating horses cruelly and in violation of legal requirements, a suit could be brought, on behalf of those animals, to bring about compliance with the law.

--Cass R. Sunstein, "The Rights of Animals: A Very Short Primer," John M. Olin Law & Economics Working Paper No. 157, The Law School, The University of Chicago

Now turn to some quite radical suggestions. Suppose that we continue to believe that animal suffering is the problem that should concern us, and that we want to use the law to promote animal welfare. We might conclude that certain practices cannot be defended and should not be allowed to continue, if, in practice, mere regulation will inevitably be insufficient—and if, in practice, mere regulation will ensure that the level of animal suffering will remain very high. To make such an argument convincing, it would be helpful, whether or not necessary, to argue not only that the harms to animals are serious, but also that the benefits, to human beings, of the relevant practices are simply too small to justify the continuation of those practices. Many people who urge radical steps—who think, for example, that people should not eat meat—do so because they believe that without such steps, the level of animal suffering will be unacceptably severe.

--Cass R. Sunstein, "The Rights of Animals: A Very Short Primer," John M. Olin Law & Economics Working Paper No. 157, The Law School, The University of Chicago

Of course the largest issue involves eating meat. I believe that that meat-eating would be acceptable if decent treatment is given to the animals used for food. Killing animals, whether or not troublesome, is far less troublesome than suffering. But if, as a practical matter, animals used for food are almost inevitably going to endure terrible suffering, then there is a good argument that people should not eat meat to the extent that a refusal to eat meat will reduce that suffering. Of course a legal ban on meat-eating would be extremely radical, and like prohibition, it would undoubtedly create black markets and have a set of bad, and huge, side-effects. But the principle seems clear: People should be much less inclined to eat meat if their refusal to do so would prevent significant suffering.

--Cass R. Sunstein, "The Rights of Animals: A Very Short Primer," John M. Olin Law & Economics Working Paper No. 157, The Law School, The University of Chicago

We should increase the likelihood that animals will have good lives—we should not try to ensure that there are as many animals as possible.

--Cass R. Sunstein, "The Rights of Animals: A Very Short Primer," John M. Olin Law & Economics Working Paper No. 157, The Law School, The University of Chicago

Every reasonable person believes in animal rights. Even the sharpest critics of animal rights support the anticruelty laws. I have suggested that the simple moral judgment behind these laws is that animal suffering matters, and that this judgment supports a significant amount of reform. Most modestly, private suits should be permitted to prevent illegal cruelty and neglect.

--Cass R. Sunstein, "The Rights of Animals: A Very Short Primer," John M. Olin Law & Economics Working Paper No. 157, The Law School, The University of Chicago

Less modestly, anticruelty laws should be extended to areas that are now exempt from them, including scientific experiments and farming. There is no good reason to permit the level of suffering that is now being experienced by millions, even billions of living creatures.

--Cass R. Sunstein, "The Rights of Animals: A Very Short Primer," John M. Olin Law & Economics Working Paper No. 157, The Law School, The University of Chicago

Those who emphasize suffering have a simple answer to this objection: Everything depends on whether and to what extent the animal in question is capable of suffering. If rats are able to suffer, then their interests are relevant to the question of how, and perhaps even whether, they can be expelled from houses.

--Cass R. Sunstein, Martha C. Nussbaum. *Animal Rights: Current Debates and New Directions*. (Oxford University Press, USA, 2004). P. 12

The idea here is that animals, species as such, and perhaps even natural objects warrant respect for their own sake, and quite apart from their interactions with human beings. Sometimes such arguments posit general rights held by living creatures (and natural objects) against human depredations. In especially powerful forms, these arguments are utilitarian in character, stressing the often extreme and unnecessary suffering of animals who are hurt or killed. The Animal Welfare Act reflects these concerns.

--Cass R. Sunstein, *After the Rights Revolution: Reconceiving the Regulatory State*, Harvard University Press, 1993, p. 69

## **Free Speech**

...[M]any discussion groups and websites, less and often more extreme, that can be found on the Internet. Discussion groups and websites of this kind have been around for a number of years... On the National Rifle Association's 'Bullet N' Board,' a place for discussion of matters of mutual interest, someone calling himself "Warmaster" explained how to make bombs out of ordinary household materials. Warmaster explained, "These

simple, powerful bombs are not very well known even though all the materials can be easily obtained by anyone (including minors).”

--Cass R. Sunstein, *Republic 2.0*, Princeton University Press, 2007, p. 47

To the extent that they weaken the power of the general interest intermediaries and increase people's ability to wall themselves off from topics and opinions that they would prefer to avoid, emerging technologies, including the Internet, create serious dangers. I don't want government regulation of the blogosphere in the form of mandated links or mandated civility or, you know, if you're doing liberal ideas on your site you have to have conservative ideas too. I don't want any of that stuff... But I do have some ideas and they're about private voluntary solutions. One is that blog providers, either writers or those who operate them should, if they are involved in opinion – at least most of the time, work hard to obey norms of, let's call them, civility and diversity. So not complete diversity. You're entitled to have a point of view. But to think that some of the time if people are reading you it's good to catch their eye with something that might irritate them a bit.

-- Bloggingheads.tv, Cass R. Sunstein, University of Chicago Law School and Eugene Volokh, The Volokh Conspiracy, UCLA Law School video debate, recorded May 27, 2008 and posted June 2, 2008.

A legislative effort to regulate broadcasting in the interest of democratic principles should not be seen as an abridgment of the free speech guarantee.

--Cass R. Sunstein, *Democracy and the Problem of Free Speech*, The Free Press, 1995, p. 92

I have argued in favor of a reformulation of First Amendment law. The overriding goal of the reformulation is to reinvigorate processes of democratic deliberation, by ensuring greater attention to public issues and greater diversity of views. The First Amendment should not stand as an obstacle to democratic efforts to accomplish these goals. A New Deal for speech would draw on Justice Brandeis' insistence on the role of free speech in promoting political deliberation and citizenship. It would reject Justice Holmes' "marketplace" conception of free speech, a conception that disserves the aspirations of those who wrote America's founding document.

--Cass R. Sunstein, *Democracy and the Problem of Free Speech*, The Free Press, 1995, p. 119

Consider the "fairness doctrine," now largely abandoned but once requiring radio and television broadcasters:

...[I]n light of astonishing economic and technological changes, we must doubt whether, as interpreted, the constitutional guarantee of free speech is adequately serving democratic goals. It is past time for a large-scale reassessment of the appropriate role of the First Amendment in the democratic process.



--Cass R. Sunstein, *Democracy and the Problem of Free Speech*, The Free Press, 1995, p. xi

A system of limitless individual choices, with respect to communications, is not necessarily in the interest of citizenship and self-government.

--Cass Sunstein, arguing for a Fairness Doctrine for the Internet in his book, *Republic.com 2.0* (Princeton University Press, 2007), p.137

[M]any people all over the world have become even more concerned about the risks of a situation in which like-minded people speak or listen mostly to one another...Democracy does best with what James Madison called a 'yielding and accommodating spirit,' and that spirit is at risk whenever people sort themselves into enclaves in which their own views and commitments are constantly reaffirmed... [S]uch sorting should not be identified with freedom, and much less with democratic self-government.

--Cass Sunstein, arguing for a Fairness Doctrine for the Internet in his book, *Republic.com 2.0* (Princeton University Press, 2007), p. xii

## **Civil Liberties**

[C]ourts should ordinarily require restrictions on civil liberties to be authorized by the legislature, not simply by the executive.

--Cass R. Sunstein, *Fear & Liberty*, working paper, December 12, 2004

The availability heuristic and probability neglect often lead people to treat risks as much greater than they in fact are, and hence to accept risk-reduction strategies that do considerable harm and little good. Civil liberties may be jeopardized for precisely this reason. And when the burdens of government restrictions are faced by an identifiable minority rather than by the majority, the risk of unjustified action is significantly increased.

--Cass R. Sunstein, *Fear & Liberty*, working paper, December 12, 2004

## **Taxes**

Sunstein scolds readers like small-minded, selfish children for opposing the size, scope, expansion and skyrocketing expense of government:

"In what sense is the money in our pockets and bank accounts fully 'ours'? Did we earn it by our own autonomous efforts? Could we have inherited it without the assistance of probate courts? Do we save it without the support of bank regulators? Could we spend it if there were no public officials to coordinate the efforts and pool the resources of the community in which we live?... Without taxes there would be no liberty. Without taxes

there would be no property. Without taxes, few of us would have any assets worth defending. [It is] a dim fiction that some people enjoy and exercise their rights without placing any burden whatsoever on the public fisc. ... There is no liberty without dependency. That is why we should celebrate tax day ...”

-- Cass R. Sunstein, “Why We Should Celebrate Paying Taxes,” *The Chicago Tribune*, April 14, 1999

## **Second Bill of Rights**

My major aim in this book is to uncover an important but neglected part of America’s heritage: the idea of a second bill of rights. In brief, the second bill attempts to protect both opportunity and security, by creating rights to employment, adequate food and clothing, decent shelter, education, recreation, and medical care.

-- Cass R. Sunstein, *The Second Bill of Rights: FDR’s Unfinished Revolution and Why We Need it More Than Ever*, Basic Books, New York, 2004, p. 1

Much of the time, the United States seems to have embraced a confused and pernicious form of individualism. This approach endorses rights of private property and freedom of contract, and respects political liberty, but claims to distrust “government intervention” and insists that people must fend for themselves. This form of so-called individualism is incoherent, a tangle of confusions.

-- Cass R. Sunstein, *The Second Bill of Rights: FDR’s Unfinished Revolution and Why We Need it More Than Ever*, Basic Books, New York, 2004, p. 3

Those of us who have plenty of money and opportunities owe a great deal to an active government that is willing and able to protect what we have.

-- Cass R. Sunstein, *The Second Bill of Rights: FDR’s Unfinished Revolution and Why We Need it More Than Ever*, Basic Books, New York, 2004, p. 4

In a nutshell, the New Deal helped vindicate a simple idea: No one really opposes government intervention. Even the people who most loudly denounce government interference depend on it every day.

-- Cass R. Sunstein, *The Second Bill of Rights: FDR’s Unfinished Revolution and Why We Need it More Than Ever*, Basic Books, New York, 2004, p. 19

For better or worse, the Constitution’s framers gave no thought to including social and economic guarantees in the bill of rights.

-- Cass R. Sunstein, *The Second Bill of Rights: FDR’s Unfinished Revolution and Why We Need it More Than Ever*, Basic Books, New York, 2004, p. 115

## **The Judiciary**

[I]t is reasonable to suggest that the meaning of federal statutory law should not be based on whether a litigant has drawn a panel of judges appointed by a president from a particular party—or on whether the Supreme Court is dominated by judges of any particular ideological stripe.

--Thomas J. Miles & Cass R. Sunstein, *Do Judges Make Regulatory Policy? An Empirical Investigation of Chevron*, AEI-Brookings Joint Center for Regulatory Studies, Working Paper 06-15, May 2006

## **Government Regulation**

No institution in the executive branch, moreover, is currently responsible for long-range research and thinking about regulatory problems. It would be highly desirable to create such an office under the President, particularly for exploring problems whose solutions require extensive planning, most notably the environment. Nor is there an office charged with acting as an initiator of as well as a brake on regulation. Some entity within the executive branch, building on the ombudsman device, should be entrusted with the job of guarding against failure to implement regulatory programs. Such an entity would be especially desirable in overcoming the collective action and related problems that tend to defeat enforcement.

--Cass R. Sunstein, *After the Rights Revolution: Reconceiving the Regulatory State*, Harvard University Press, 1990, p. 108

The Office of Information and Regulatory Affairs (OIRA) has been entrusted with the power to coordinate regulatory policy and to ensure reasonable priority-setting. In the Clinton Administration, OIRA appears to have become an advisory body, more limited in its power than it was in the Bush and Reagan administrations. In view of the absence of good priority-setting, and the enormous room for savings costs and increasing regulatory benefits, this is highly unfortunate.

-- Cass R. Sunstein, *Free Markets & Social Justice*, Oxford University Press, 1997, p. 315

OIRA should see, as one of its central assignments, the task of overcoming governmental myopia and tunnel vision, by ensuring aggregate risks are reduced and that agency focus on particular risks does not mean that ancillary risks are ignored or increased.

-- Cass R. Sunstein, *Free Markets & Social Justice*, Oxford University Press, 1997, p. 315

Congress should add to existing legislation a general requirement that agencies consider a range of risks to life and health, including substitute risks, to the extent that this is

feasible. Finally, OIRA should undertake the process of scrutinizing risk regulations to show that agency action does not suffer from the kind of tunnel vision exemplified by so much of modern risk regulation.

Problems of selective attention, interest-group power, and myopia have created a range of irrationalities and injustices in modern government.

-- Cass R. Sunstein, *Free Markets & Social Justice*, Oxford University Press, 1997, p. 316