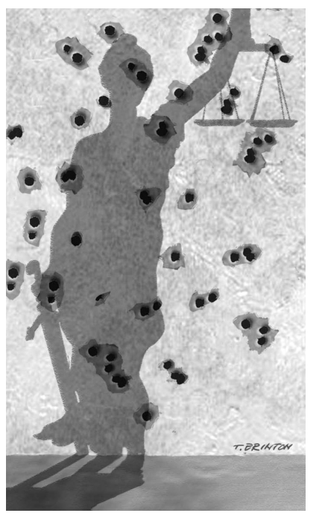
Right and Left Must Unite to Fix America's Gun Violence Problems

By Chuck McCutcheon

In the wake of another spate of gun mayhem — this time in Red Lake, Minn., just nine days after a mass shooting in Brookfield, Wis. — the question resurfaces: Why can't a gun control compromise be found to prevent such incidents?

The answer is complex politically and morally, advocates on both sides say.

Gun control measures are being debated in state legislatures from California to Florida, but the topic has largely vanished from the national political agenda. Relatively few lawmakers are willing to risk alienating the influential National Rifle Association and its supporters.



With Republicans controlling the White House and Congress, Democrats remain at a disadvantage in advancing gun control legislation. Two of the Democratic Party's leading figures — Senate Minority Leader Harry Reid of Nevada and Democratic National Committee Chairman Howard Dean — support some gun rights.

Peter Hamm, spokesman for the Brady Campaign to Prevent Gun Violence/Million Mom March in Washington, said the political climate deeply frustrates activists, particularly whenever a mass shooting occurs.

"We always feel like we're stuck in the position of saying 'We told you so' time and time again when these happen," Hamm said. "You have politicians in Washington doing everything they can to ignore what's going on, because it doesn't fit with the political equation to maximize votes to one party or another. The end result is a remarkable series of incidents these last few months. Everything's going in the wrong direction."

In a recent interview, Sen. Orrin Hatch, R-Utah, said the situation merely reflects Democrats' inability to successfully make their case to the public.

"All these Democrats who thought they had a real big issue with guns, they've all backed off," said Hatch, a longtime champion of gun rights. "The only people who haven't backed off are a very liberal minority."

Some activists said they need to better convey their belief that gun violence is morally wrong.

"It's important that we look at this from a moral values framework," said Joshua Horwitz, executive director of the Educational Fund to Stop Gun Violence, a Washington lobbying group. "We need to have a real discussion. The solutions aren't just legislative."

Horwitz and some gun-control proponents said politicians should approach the issue with the same fervor surrounding the debate over Terri Schiavo, the brain-damaged Florida woman whose family is fighting over whether she should be kept alive. Congress passed emergency legislation over the weekend allowing federal courts to hear a case brought by Schiavo's parents in favor of keeping her on nutritional support.

"Our leaders are preaching about the culture of life," Brady Campaign President Michael Barnes said in a statement. "They should spend the same amount of energy taking steps to stop our nation's culture of death."

But opponents and skeptics of gun control respond that putting gun control in a moral context is fraught with problems.

"If you start casting this in moral terms, people will say, 'What about the moral obligation to protect my family from a criminal attack?'" said University of Central Florida sociology professor James Wright, author of several books on guns and society.

UCLA law professor Eugene Volokh, a frequent commentator on Second Amendment issues, agreed that such arguments are unlikely to carry much weight.

"If (gun control advocates) are to prevail, they would have to make a pragmatic argument: 'Even though we're going to take away some of your self-defense rights, we're going to give you something back with more value, more safety,'" Volokh said. "However, given that people quite rightly estimate that people will always be able to get guns, it seems many of their initiatives are unilateral disarmament."

Instead of focusing so much on guns, Volokh said, society might prevent mass shootings by adding more security guards in schools, or by perhaps toning down sensationalized media coverage in an attempt to discourage "copycat offenders."

But given the current state of affairs, Wright said he doesn't see much room for a middle ground.

"I've always felt that the terms of the debate around gun control are so white-hot that it's almost impossible for any central position to emerge or be argued for," he said. "I've never figured out what the pro-gun-control people want us to do. Practically everything kids do to acquire firearms is already against the law."

Chuck McCutcheon is a columnist for Newhouse News Service.

High Court Must End Developers' Relitigation Campaign

By Timothy J. Dowling

The chief executive officer of the National Association of Home Builders once candidly referred to the threat of federal court litigation as a "hammer to the head" of local officials.

This graphic locution recognizes that developers use litigation threats during land-use negotiations to extract favorable permit terms at the expense of neighboring landowners and the community at large. Because 90 percent of municipalities have populations of less than 10,000 and cannot afford even one full-time attorney, the hammer often proves effective.

Today, the U.S. Supreme Court will hear oral argument in *San Remo Hotel v. San Francisco*, 04-340, to consider whether developers and other takings claimants should be given two hammers. The developers lobby urges the court to allow regulatory takings claimants to relitigate, in federal court, factual and legal issues already fully litigated and resolved in state court.

The homebuilders association advances this position notwithstanding the express commands of the federal Full Faith and Credit Act, which requires federal courts to give a state court judgment the same preclusive effect it would have in the state's own courts.

Proper respect for state court rulings has special significance in regulatory takings cases. In *Williamson County v. Hamilton Bank*, 473 U.S. 172 (1985), the court held that no federal takings claim arises against a state or local government until the claimant seeks compensation in state court.

In the words of *Williamson*, "if a State provides an adequate procedure for seeking just compensation, the property owner cannot claim a violation of the Just Compensation Clause until it has used the procedure and been denied compensation."

The specific question presented in *San Remo* is whether federal courts should respect state court rulings in cases filed by takings claimants in accordance *Williamson*'s mandate. Underlying the case, however, is a relentless campaign by the homebuilders association to secure as many "hammers to the head" of local officials as it can get.

The developers lobby dislikes *Williamson*'s state-court mandate because it would rather threaten local officials with litigation in a distant, unfamiliar federal court, where the proceedings often are costlier and more time-consuming. During the 1990s, the homebuilders association launched a well-financed campaign to overturn *Williamson* through federal legislation, and thereby allow developers to sue local officials in federal court without going to state court first. After drafting the bill, the association backed it up with a phalanx of lobbyists and a mountain of campaign contributions.

Sen. Patrick Leahy, D-Vt., ranking member of the Senate committee with jurisdiction over the bill, declared he had "rarely seen anything so arrogantly special interest," adding that the bill "wouldn't pass the smell test in any town in America."

Because the homebuilders association bill would have shifted the balance of power in favor of developers and against neighboring landowners and the public, it provoked a firestorm of opposition, including the National Governors Association, 40 state attorneys general, religious and labor organizations, environmental groups and virtually every group that represents local governments.

The Judicial Conference of the United States, chaired by Chief Justice William Rehnquist, and the Conference of State Chief Justices also opposed the bill.

In the House of Representatives, 13 of the bill's original co-sponsors voted against it, perhaps a record for co-sponsorship abandonment. They explained they had been misled into believing that the bill was an uncontroversial procedural tweak. Fortunately, the bill died in the Senate.

The developers lobby then turned to the American Bar Association for help. Homebuilders association functionaries helped organize a "takings retreat," co-sponsored by the American Bar Association Section on State and Local Government Law, to recommend changes to takings law. Although local government groups and other opponents of the homebuilders association bill were excluded from the retreat, the developers lobby and the so-called property rights movement were well represented. The report produced by the retreat was so one-sided that the sponsoring ABA section refused to endorse it.

The developers lobby continued its campaign in the lower courts, going so far as to argue in the 8th U.S. Circuit Court of Appeals that *Williamson* had been overruled by a 1997 decision. The court rejected this argument because the 1997 ruling nowhere mentions *Williamson*, and because the Supreme Court emphatically reaffirmed *Williamson* in 1999 in *City of Monterey v. Del Monte Dunes*, 526 U.S. 687.

Of course, at no time during its legislative campaign did the developers lobby argue that *Williamson* was no longer good law, a contention that would have rendered its bill largely moot. Such inconsistencies seldom deter the homebuilders association juggernaut.

Fast-forward to 2005. The developers lobby now seeks to have its cake and eat it too. In *San Remo*, the homebuilders association asks the court to give every takings claimant two bites at the apple (or, in the developers' delicate phrasing, two hammers) by ignoring the unequivocal mandate of the Full Faith and Credit Act and allowing takings claimants to relitigate issues in federal court after they have been resolved by state courts.

San Remo is hardly the ideal litigant to press the issue. Much as the developers lobby relentlessly forum-shopped its campaign to overturn *Williamson*, San Remo forum-shopped its takings challenge to San Francisco's affordable housing ordinance.

San Remo first filed a mandamus action in state court in 1993, which it failed to prosecute for five years. It then filed a takings suit in federal court, "relating" the case to others pending before a judge who had publicly criticized the ordinance. When that judge died, the case was reassigned, and the new judge dismissed San Remo's facial claim — the central claim in the case — as time-barred, not surprising given that the ordinance was 12 years old when San Remo filed its federal suit. He also dismissed San Remo's as-applied takings claim because San Remo had failed to seek compensation in state court as required by *Williamson*.

San Remo appealed to the 9th Circuit, and for the first time asked the appeals court to abstain from deciding its federal claims. Although the 9th Circuit recognized that the request appeared designed to secure a tactical advantage in view of San Remo's loss in the trial court, the appeals court granted the request with respect to San Remo's facial takings claims. It also affirmed dismissal of San Remo's as-applied takings claim due to San Remo's failure to seek compensation in state court.

San Remo then returned to state court in 1998 and added takings claims to its mandamus action. It litigated these claims through the entire state judicial system, ultimately losing in the California Supreme Court.

After fully and fairly litigating its takings claims to no avail in state court, San Remo returned to federal court to file federal takings claims virtually identical to its state claims, seeking to relitigate every factual and legal issue already decided by the California judiciary. The federal district court ruled that because federal and California takings law are co-extensive, the Full Faith and Credit Act requires the court to respect the state court judgment. The 9th Circuit affirmed.

Now, 24 years after enactment of the challenged ordinance and 12 years after it first filed suit, San Remo urges the U.S. Supreme Court to give it yet another bite at the litigation apple.

The federal Full Faith and Credit Act, one of the oldest provisions in the U.S. Code, has been described as "a critical part of the architecture of federalism" because it promotes "comity between state and federal courts that has been recognized as a bulwark of the federal system." *Noel v. Hall*, 341 F.3d 1148 (9th Cir. 2003).

The provision is so important that the Conference of State Chief Justices has made an exceedingly rare amicus appearance in *San Remo*, urging affirmance of the rulings below to vindicate comity, finality and federalism.

In contrast, the homebuilders association and San Remo's other amici take an ostrich-like approach to the act, with only one of its nine amici even mentioning it. Evidently recognizing that the act compels the application of issue preclusion, San Remo's amici instead ask the court to overrule *Williamson*, an issue not raised by the petition for certiorari and thus not properly before the court.

Of the several takings cases pending before the high court this term, *San Remo* is the most straightforward. For municipal groups that fought against the homebuilders association's takings bill, the takings retreat report and other association efforts to secure additional hammers, the case is an unpleasant walk down memory lane. Time and again, the homebuilders association has been rebuffed. After each defeat, it has shifted ground to mount a new attack.

The Supreme Court should do some hammering of its own and drive a final nail into the coffin of the homebuilders association's interminable campaign.

Timothy J. Dowling is chief counsel of the Washington, D.C.-based public interest firm Community Rights Counsel, which prepared an amicus brief in *San Remo* in support of San Francisco on behalf of California municipalities and the American Planning Association.

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In Blake Versus Peterson, Difference Was Defense Strategy

By Robert L. Shapiro

Why did Scott Peterson get the death penalty while Robert Blake got to go home?

Some commentators have suggested that as both cases were based on circumstantial evidence the results should have been the same. Certainly the public view is that Peterson got what he deserved while Blake got off.

Others point to the differences between the victims. Laci, a young, pregnant, beautiful woman captured the hearts of America, while Bonnie Lee was portrayed as a grifter who exploited lonely men. In this view, the persona of the accused also played a role. Both proclaimed their innocence — though neither took the stand. Yet the desperation of Blake, an aging actor supposedly manipulated by Bonnie Lee, generated some sympathy. The womanizing, smug Peterson generated none.

I don't dismiss that personalities have some bearing on a jury's thinking. But I contend that the single most important difference in the outcome of these cases was the strategy employed by the lawyers.

Mark Geragos, Peterson's lawyer, took the position that his client was stone-cold innocent. He told the public that this was not a case of reasonable doubt, and that they would find the real killer.

In contrast, Gerald Schwartzbach, Blake's attorney, rested his case primarily on reasonable doubt and asked the jury to carefully follow the judge's instructions. He argued successfully that even if jurors believed Blake may have killed his wife, that was not enough under the law. Proof in our justice system must be beyond that elusive concept of a reasonable doubt.

Blake jurors afterwards didn't evidence huge sympathy for the defendant. There was little discussion of his innocence. It's likely that, like most of the public, jurors came away thinking it was probably Blake who committed the crime.

Blake's defense wisely focused on the scientific evidence, or lack thereof, and this played well with a jury conditioned by television shows that establish conclusive proof of guilt, always in less than an hour, with fancy technology. The absence of such certainty focused the jury's attention on whether the prosecution had established the case or left reasonable doubt.

In Peterson's case, the lawyers focused the jury's attention on the implausible contention that someone else committed the crime.

But under the law, juries don't have to believe that someone else committed — or even could have committed — the crime. Most defense attorneys naturally jump at any such alternative scenario, however unlikely. Schwartzbach was wise not to make this mistake. His strategy for Blake's defense reminds us that an alternative explanation isn't necessary. A jury can believe a defendant committed a crime and still acquit, in fact must acquit, if the prosecution didn't sufficiently make the case.

My argument about the importance of legal skill and strategy can be taken to underscore the view that defendants in the American justice system get the best defense that money can buy. And there is some truth to this. But in these two cases, the lawyers representing Peterson and Blake both were well compensated and substantial legal figures. Yet even the best lawyers will bring subtly different approaches to similar situations. And as in almost all things, the devil is in the details. Slight adjustments of legal strategies could well have sent Peterson home and Blake to prison.

There were no significant errors by the Blake prosecution, poor decision-making by the jury or misplaced sympathy for the defendant, simply shrewd choices by a brilliant defense lawyer.

Robert L. Shapiro is a partner in the Los Angeles office of Christensen, Miller, Fink, Jacobs, Glaser, Weil & Shapiro.