

The Right to Bear Arms: Some prominent legal scholars are taking a new look at the Second Amendment

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by Scott Heller

Any high school English teacher would take a red pen to the 27 words that make up the Second Amendment to the US Constitution: "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"

With its convoluted phrasing and clauses whose relation to each other is fuzzy, the amendment begs a number of questions. What makes a "militia", and what makes it "well regulated"? Who are the "people"? What kinds of "arms" can be kept and borne? Most crucially, does this amendment's second half refer to all citizens, or only to members of a militia?

Until recently, constitutional scholars have had remarkably little to say about the Second Amendment, though interpretations have been volleyed back and forth in the political battles over gun control.

"It's a scandal, the extent to which the legal academy has dodged this issue" says Sanford Levinson, a law professor at the University of Texas, who wrote an article on the subject in 1989. The debate, he says, has been dominated by advocacy groups who fight it out in op-ed pages, talk shows, and court briefs.

Now several articles by prominent legal scholars are taking seriously the argument—once associated only with the National Rifle Association and its partisans—that the Constitution protects and individual's right to own a gun.

A FORMIDABLE VOTING BLOC

According to the Justice Dept., 41 percent of Americans say they have a gun in their home. They make up a potentially formidable voting bloc. What's more, the growth of private militias, and recent efforts at gun control, including the Brady Bill, have added urgency to an already fierce debate.

Constitutional scholars who have entered the fray in support of the individual rights argument find themselves feeling the heat. One recent article accused them, in so many words, of fronting for the gun lobby and misleading the public.

"The majority of these articles could have been spewed out by the NRA's word processor," says Andrew D. Herz, a visiting assistant professor at Touro College's law school. This spring, the Boston University Law Review published his biting 96 page article, "Gun Crazy: Constitutional False Consciousness and Dereliction of Dialogic Responsibility." In it he maintains that a coterie

of scholars and lawyers is trying to create a false consensus by ignoring a decisive stream of court rulings that have limited the right to bear arms.

Mr. Herz is hardly dispassionate. "America's gun love is a disease," he wrote, "just as surely as drug and alcohol abuse are societal diseases." A vocal minority so dominates public debate that "it will be difficult for our national leaders to order the radical surgery so desperately needed to stem the tide of gun violence."

Among the scholars he criticizes is Mr. Levinson, whose article in the Yale Law Journal, "The Embarrassing Second Amendment," raised eyebrows because it came from a liberal democrat and long time advocate of civil liberties. In the article, he wonders whether scholars have avoided the Second Amendment because they fear that persuasive interpretations will inevitably block efforts at gun control (He counts himself among those who support such legislation).

Mr. Levinson disagrees with scholars who read the preamble to the amendment as restricting the personal right to bear arms. *Like it or not, he says, the historical record demonstrates that the Framers drew up the amendment to allow citizens to resist government, if necessary. By this reasoning, militias refer to the whole population, not a sanctioned army.*

"A scholar of the stature of Stanford Levinson was able to get a lot of attention by saying, 'Maybe we need to give this another look'", says Carl T. Bogus, a visiting law professor at Rutgers University's Camden campus, who has debated the professor on CNN.

Last year, William Van Alstyne, a leading constitutional scholar at Duke University, weighed in with his own thoughts about the amendment in the Duke Law Review. Ahkil Amar, a professor of law at Yale University has published two related pieces. Robert J. Cottrol, of Rutgers, and Raymond Diamond, of Tulane University have considered the amendment in relation to African-American history.

THE STANDARD MODEL

The flurry of recent scholarship so conclusively points in a single direction that legal academics can now refer to a "standard model" of Second Amendment interpretation, says Glenn J. Reynolds, an associate professor of law at the University of Tennessee. As part of a set of articles on the Second Amendment and gun control in the next issue of the Tennessee Law Review, he publishes a detailed critical guide to scholarship on the amendment.

The scholarship has not had much impact in the courts. But it cannot be wished away, says Cass Sunstein, a constitutional scholar who has followed the debate. "This was a frivolous crazy position and it no longer is anymore", says Mr. Sunstein, a professor of law at the University of Chicago. "The historical research has shown there is some complexity there."

Much of the research involves returning to the historical record, here and in England, to tease out what the founding fathers meant by a "well regulated militia," and how they intended to strike a balance between government and citizens' rights.

In his article, *Mr. Van Alstyne turns to the history of federalism and anti-federalism, arguing that the right to bear arms explicitly applied to the whole body of citizens, not merely to trained soldiers, and was meant to protect the people against the incursions of the federal government. Furthermore, he reads the adoption of the 14th amendment as bolstering the individual rights position, since it restricts state governments' power to limit personal rights.*

But the case law, Mr. Van Alstyne wrote, is "scant and utterly underdeveloped." He concludes with the hope that the US Supreme Court will take steps to clarify the meaning and scope of the amendment. It has refused to do so, turning down many cases since its 1939 ruling in *US v. Miller*.

'TOTALLY IRRESPONSIBLE'

Mr. Herz argues that constitutional theorizing is largely beside the point, The Supreme Court's 1939 decision, while murky, he says, affirmed that the amendment's purpose is to guarantee an effective militia. In subsequent cases, the Court found that the National Guard is the equivalent of earlier militias. Ten circuit courts have agreed, finding that *Miller* refers to individuals serving in well-regulated militias, he says. "It's totally irresponsible to ignore this judicial consensus."

The Tennessee Law Review will include pieces by some of the scholars and lawyers whom Mr. Herz takes to task. They include Don Kates and Stephen Halbrook, who practice firearms law, and Mr. Reynolds who is among 48 scholars that signed an open letter arguing the individual rights view. The letter was published in the *New Republic* and the *National Review* under the auspices of the group called Academics for the Second Amendment.

Quinten A. Daulton, the editor-in-chief of the Tennessee Law Review, admits that the journal "doesn't raise both sides" of the gun-control debate.

"We approached a number of people who we thought would contribute more than some hysterical 'I-hate-guns' piece and could contribute to the scholarship," says Mr. Daulton, who mentioned Alan Dershowitz and Robert Bork as among those who were asked but turned the journal down.

The Review will include a lengthy denunciation of the "emotional anti-gun agenda", that substitutes for scholarship about firearms in the medical and public-health journals, especially the New England Journal of Medicine. The critique was written by Mr. Kates, two Harvard University psychiatrists, another doctor, and a genetics professor.

Mr. Kates, a former professor at St. Louis University, helped to launch Academics for the Second Amendment in 1992. According to its fund raising literature, the organization encourages "intellectually honest discourse" on the individual right to keep and bear arms. The group does not rule out "sensible" gun laws, according to its open letter.

2 ACADEMIC CONFERENCES

Among its activities have been two conferences on the Second Amendment, held along with the annual meeting of the Association of American Law Schools. The conferences are designed to generate scholarship on the amendment. Scholars who are invited have their expenses paid in exchange for a promise to publish on the topic, no matter their position.

The group's president, Joseph Olson, a professor of law at Hamline University, is on the board of directors of the National Rifle Association. But of the \$90,000 raised by the Academics for the Second Amendment, only \$6,000 has come from the NRA, he says.

The Firearms civil rights legal defense fund, a research arm of the NRA, has provided other financing, though Mr. Olson refused to say how much. He also would not say who has been invited to the scholarship conferences. So far only those who support the individual rights position have written articles after attending, he says.

According to its reports, the firearms fund in 1992 contributed \$5,000 to pay expenses for scholars attending the Academics for the Second Amendment meeting. In 1993, the fund approved \$99,000 for undisclosed "right to bear arms research and education."

In his article, Mr. Herz maintains that members of the Academics for the Second Amendment "spread the gun lobby's gospel" in law review articles that make little mention of the contrary judicial findings. He has signed his name to an advertisement taken out by the Center to Prevent Handgun Violence but says he has no ties to any gun-control organization.

Several scholars named by Mr. Herz point out that just because the courts decide one way doesn't rule out alternative constitutional interpretations. And they dispute that their scholarship is politically motivated. "In Mr. Herz's piece, the insinuations are extremely ungracious and flatly false", says Mr. Van Alstyne. Contrary to Mr. Herz's claim, he says, he is not a member of the Academics for the Second Amendment and has not received support from the NRA or its subsidiaries. He did sign the Academic group's open letter. Mr. Levinson has written to the Boston University Law Review to say that while he signed the letter, he is not a member of the group.

Mr. Kates is even more blunt about Mr. Herz. "This guy is a liar and an incompetent buffoon," he says. Randy E. Barnett, a Boston University law professor, adds, "These McCarthyite ad hominem attacks ought to have been substantiated by some new scholarship." Mr. Kates and Mr. Barnett say they will write a lengthy refutation to Mr. Herz's piece, which they say includes a misreading of the court findings.

Such vitriolic exchanges have discouraged many legal scholars from speaking about the second amendment, says Mr. Herz. "This topic is as full of angry vicious crosstalk as any politically," he says.

ESCALATING RHETORIC

The rhetoric has only escalated since the Oklahoma City bombing, which was addressed hurriedly by a few writers in the Tennessee Law Review.

Mr. Reynolds wrote an addendum to his guide to Second Amendment scholarship, which was in press at the time. He points out that gun-control advocates may have gotten more than they bargained for by arguing that the Second Amendment refers only to militias, since members of paramilitary groups use that defense for their own stockpiling of weaponry. He also urges scholars not to demonize gun enthusiasts.

In fact, Mr. Reynolds says that ignoring the new legal scholarship may only fan the flames of zealotry. "Once you realize you have a respectable constitutional argument and realize your being rejected in spite of that," he says, "people tend to feel the whole game is rigged, and that encourages the growth of conspiracy theories."