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A Liberal Case for Gun Rights Sways Judiciary

By ADAM LIPTAK

Correction Appended

In March, for the first time in the nation's history, a federal appeals court struck down a gun control law on Second Amendment grounds. Only a few decades ago, the decision would have been unimaginable.

There used to be an almost complete scholarly and judicial consensus that the Second Amendment protects only a collective right of the states to maintain militias. That consensus no longer exists — thanks largely to the work over the last 20 years of several leading liberal law professors, who have come to embrace the view that the Second Amendment protects an individual right to own guns.

In those two decades, breakneck speed by the standards of constitutional law, they have helped to reshape the debate over gun rights in the United States. Their work culminated in the March decision, Parker v. District of Columbia, and it will doubtless play a major role should the case reach the United States Supreme Court.

Laurence H. Tribe, a law professor at Harvard, said he had come to believe that the Second Amendment protected an individual right.

"My conclusion came as something of a surprise to me, and an unwelcome surprise," Professor Tribe said. "I have always supported as a matter of policy very comprehensive gun control."

The first two editions of Professor Tribe's influential treatise on constitutional law, in 1978 and 1988, endorsed the collective rights view. The latest, published in 2000, sets out his current interpretation.

Several other leading liberal constitutional scholars, notably Akhil Reed Amar at Yale and Sanford Levinson at the University of Texas, are in broad agreement favoring an individual rights interpretation. Their work has in a remarkably short time upended the conventional understanding of the Second Amendment, and it set the stage for the Parker decision.

The earlier consensus, the law professors said in interviews, reflected received wisdom and political preferences rather than a serious consideration of the amendment's text, history and place in the structure of the Constitution. "The standard liberal position," Professor Levinson said, "is that the Second Amendment is basically just read out of the Constitution."

The Second Amendment says, "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." (Some transcriptions of the amendment omit the last comma.)

If only as a matter of consistency, Professor Levinson continued, liberals who favor expansive interpretations of other amendments in the Bill of Rights, like those protecting free speech and the rights of criminal defendants, should also embrace a broad reading of the Second Amendment. And just as the First Amendment's protection of the right to free speech is not absolute, the professors say, the Second Amendment's protection of the right to keep and bear arms may be limited by the government, though only for good reason.

The individual rights view is far from universally accepted. "The overwhelming weight of scholarly opinion supports the near-unanimous view of the federal courts that the constitutional right to be armed is linked to an organized militia," said Dennis A. Henigan, director of the legal action project of the Brady Center to Prevent Gun Violence. "The exceptions attract attention precisely because they are so rare and unexpected."

Scholars who agree with gun opponents and support the collective rights view say the professors on the other side may have been motivated more by a desire to be provocative than by simple intellectual honesty.

"Contrarian positions get play," Carl T. Bogus, a law professor at Roger Williams University, wrote in a 2000 study of Second Amendment scholarship. "Liberal professors supporting gun control draw yawns."

If the full United States Court of Appeals for the District of Columbia Circuit does not step in and reverse the 2-to-1 panel decision striking down a law that forbids residents to keep handguns in their homes, the question of the meaning of the Second Amendment is almost certainly headed to the Supreme Court. The answer there is far from certain.

That too is a change. In 1992, Warren E. Burger, a former chief justice of the United States appointed by President Richard M. Nixon, expressed the prevailing view.

"The Second Amendment doesn't guarantee the right to have firearms at all," Mr. Burger said in a speech. In a 1991 interview, Mr. Burger called the individual rights view "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."

Even as he spoke, though, the ground was shifting underneath him. In 1989, in what most authorities say was the beginning of the modern era of mainstream Second Amendment scholarship, Professor Levinson published an article in The Yale Law Journal called "The Embarrassing Second Amendment."

"The Levinson piece was very much a turning point," said Mr. Henigan of the Brady Center. "He was a well-respected scholar, and he was associated with a liberal point of view politically."

In an interview, Professor Levinson described himself as "an A.C.L.U.-type who has not ever even thought of owning a gun."

Robert A. Levy, a senior fellow at the Cato Institute, a libertarian group that supports gun rights, and a lawyer for the plaintiffs in the Parker case, said four factors accounted for the success of the suit. The first, Mr. Levy said, was "the shift in scholarship toward an individual rights view, particularly from liberals."

He also cited empirical research questioning whether gun control laws cut down on crime; a 2001 decision from the federal appeals court in New Orleans that embraced the individual rights view even as it allowed a gun prosecution to go forward; and the Bush administration's reversal of a longstanding Justice Department position under administrations of both political parties favoring the collective rights view.

Filing suit in the District of Columbia was a conscious decision, too, Mr. Levy said. The gun law there is one of the most restrictive in the nation, and questions about the applicability of the Second Amendment to state laws were avoided because the district is governed by federal law.

"We wanted to proceed very much like the N.A.A.C.P.," Mr. Levy said, referring to that group's methodical litigation strategy intended to do away with segregated schools.

Professor Bogus, a supporter of the collective rights view, said the Parker decision represented a milestone in that strategy. "This is the story of an enormously successful and dogged campaign to change the conventional view of the right to bear arms," he said.

The text of the amendment is not a model of clarity, and arguments over its meaning tend to be concerned with whether the first part of the sentence limits the second. The history of its drafting and contemporary meaning provide support for both sides as well.

The Supreme Court has not decided a Second Amendment case since 1939. That ruling was, as Judge Stephen Reinhardt, a liberal judge on the federal appeals court in San Francisco acknowledged in 2002, "somewhat cryptic," again allowing both sides to argue that Supreme Court precedent aided their interpretation of the amendment.

Still, nine federal appeals courts around the nation have adopted the collective rights view, opposing the notion that the amendment protects individual gun rights. The only exceptions are the Fifth Circuit, in New Orleans, and the District of Columbia Circuit. The Second Circuit, in New York, has not addressed the question.

Linda Singer, the District of Columbia's attorney general, said the debate over the meaning of the amendment was not only an academic one.

"It's truly a life-or-death question for us," she said. "It's not theoretical. We all remember very well when D.C. had the highest murder rate in the country, and we won't go back there."

The decision in Parker has been stayed while the full appeals court decides whether to rehear the case.

Should the case reach the Supreme Court, Professor Tribe said, "there's a really quite decent chance that it will be affirmed."

Correction: May 7, 2007

Because of a production error, the continuation of a front-page article yesterday about a rethinking of interpretation of the Second Amendment was omitted in some copies. The complete article is reprinted today on Page A18. It is also online: nytimes.com/national.