Liberals Have Second Thoughts on the Second Amendment

Rule of Law

By Collin Levey

It's the year of Littleton, "smart guns" and city lawsuits against gun makers. So where are the law professors speaking up for gun control? In the past few years, many of the premier constitutional experts of the left have come to a shocking conclusion: The Second Amendment must be taken seriously.

Back in 1989, the University of Tennessee's Sanford Levinson became something of a maverick by writing an article in the Yale Law Journal called "The Embarrassing Second Amendment," in which he maintained that the amendment guaranteed an individual right to own guns. Mr. Levinson's argument flew in the face of the interpretation that had prevailed since a 1939 Supreme Court ruling, which held that the amendment's reference to a "well-regulated militia" meant it only guaranteed a "collective" right to bear arms.

Until recently, few legal scholars had done much research on the Second Amendment. "One came up knowing it was a collective right—not because we learned about it in law school, but because we read the occasional op-ed," says Dan Polsby of Virginia's George Mason Law School. "Sandy Levinson made it respectable to think that heterodoxy might be possible."

The most prominent of the converts is Harvard's Laurence Tribe, once touted as a potential Supreme Court appointee in a Democratic administration. Mr. Tribe surprised many of his fellow liberals when the latest edition of his widely used textbook, "American Constitutional Law,' appeared this year. Previous versions had virtually ignored the Second Amendment. The new one gives it a full work-up—and comes down on the side of Mr. Levinson.

Mr. Tribe believes the right to bear arms is limited, subject to "reasonable regulation in the interest of public safety," as he and Yale Law Professor Akhil Reed Amar wrote in the New York Times last month. But Mr. Tribe has written that people on both sides of the policy divide face an "inescapable tension. . . between the reading of the Second Amendment that would advance the policies they favor and the reading of the Second Amendment to which intellectual honesty, and their own theories of Constitutional interpretation, would drive them."

Journalist Daniel Lazare, a liberal gun-control advocate, acknowledges the tension, writing in Harper's: "The truth about the Second Amendment is something that liberals cannot bear to admit: The right wing is right." Mr. Lazare argues for amending the Constitution to repeal the Second Amendment.

What accounts for the change in Second Amendment interpretation? One of the catalysts has been a recently unearthed series of clues to the Framers' intentions. These include early drafts of the amendment penned by James Madison in 1789. In his original version he made "The right of the people" the first clause, indicating his belief that it is the right of the people to keep and bear arms that makes a well-regulated militia possible. State constitutions of the era confirm this interpretation: Pennsylvania accorded its citizens the "right to bear arms for the defense of themselves and the state."

In a letter to English Whig John Cartwright, Thomas Jefferson wrote that "the constitutions of most of our states assert, that all power is inherent in the people; . . . that it is their right and duty to be at all times armed." These cross-Atlantic discussions are important, since the Framers were distinguishing the right of Americans to bear arms from English law's treatment of the question. Joyce Lee Malcolm, a professor at Bentley College, has examined the Second Amendment in light of English law. She concludes that the Colonists had intended to adopt basic ideas of English governance but to strengthen the people's rights. A right to "keep and bear" was seen as a bulwark against oppressive government.

Other scholars have found supporting evidence in the 14th amendment, which bars states, in addition to the federal government, from restricting certain rights of citizens. According to Robert Cottrell of George Washington University, in the aftermath of slavery, with no real police presence, this protection was critical to preventing the monopoly of guns from resting in the hands of white officials, many of whom moonlighted in white hoods. The 14th Amendment has been a powerful force in constitutional law, playing a key role in the development of free-speech jurisprudence.

> *"A well-regulated Militia, being necessary to the security of a free State, tile right of the people to keep and bear Arms, shall not be infringed."*

"The emaciated condition of the Second Amendment now is very similar to the condition of the First Amendment in 1908," says Duke University Law professor William Van Alstyne. In the aftermath of World War I, Supreme Court Justices Oliver Wendell Holmes and Louis Brandeis began writing dissents in favor of a broader reading of the First Amendment. But not until the 1930s did courts begin adopting their arguments.

The new reading of the Second Amendment may get a hearing if a gun control case, Emerson v. Texas, makes it to the Supreme Court. In a divorce proceeding, Timothy Joe Emerson was issued what's been called a "y'all be civil" restraining order—routine in Texas divorce cases. Unknown to him, one provision barred him from possessing a gun. When he took his 9mm Beretta out of a desk drawer during an argument with his wife, he was charged with violation of a federal gun control law.

U.S. District Judge Sam Cummings ruled that the order violated Mr. Emerson's Second Amendment rights. As Mr. Polsby puts it, "If you're simply attaching a firearms forfeiture to a person who has no such designation as a dangerous person, that's not acceptable if the Second Amendment means anything."

The state of Texas has appealed to the Fifth U.S. Circuit Court of Appeals. If that court's ruling makes it to the Supreme Court, it would be the first gun-control case heard by the justices since 1939's *U.S. v. Miller*, which set the precedent for the collective-right interpretation. In that case, the Supreme Court held that a bootlegger was rightly convicted of transporting a sawed-off shotgun across state lines, on the grounds that the weapon had no legitimate use in a militia.

Today, two Supreme Court justices have suggested interest in a reading of the Second Amendment as guaranteeing an individual right. Clarence Thomas has noted the law-review articles piling up on the side of an expanded interpretation, suggesting it may be time to reconsider Miller. And Antonin Scalia, in a decision on an unrelated matter, referred to" 'the people' protected by the Fourth Amendment, and by the First and Second Amendments."

"As a liberal and a humanist," Prof. Tribe says today, "people thought I was betraying them by saying that the Second Amendment is part of the Constitution." But, he adds, "what is being knocked away now is a phony pillar and a mirage."

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