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Pro-gun Scholars Twist Constitution

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Pro-gun scholars twist Constitution

November 21, 2007 | By Kenneth Lasson

In the endless war of words about gun rights, the academic community has done little but pock the discourse with vague, theoretical utterances. Unfortunately, the courts have been listening.

Earlier this year, the Court of Appeals for the District of Columbia became the first federal tribunal to strike down a local gun-control law, holding that the Founding Fathers would have allowed all private citizens to arm themselves. In so doing, Judge Laurence H. Silberman adopted the National Rifle Association's selective history of the Second Amendment. The case has been appealed to the Supreme Court, where Justices Antonin Scalia and Clarence Thomas have already indicated a willingness to follow that view. The high court announced yesterday that it will grant a hearing.

Judge Silberman, Justices Scalia and Thomas and others have been spurred by the recent revisionist writings of several big-name law professors, whose scattershot scholarship can be fashioned to fit almost any favored thesis. But the blunderbuss proliferation of newly minted gun-rights advocacy perverts both the historical context and plain meaning of the Second Amendment.

Until 1989, virtually all law professors had endorsed the view that citizens have a collective right to raise an army but no inherent individual right to carry guns. Then the Yale Law Journal published a confounding essay by Sanford Levinson of the University of Texas that appeared to advocate "insurrectionist" theory - that the Second Amendment was designed to ensure the people's ability to confront a tyrannical government. In short order, Akhil Reed Amar of Yale and William Van Alstyne, then of Duke, published similarly ambiguous pieces (the latter suggesting that the right extends to handguns but not howitzers).

Buoyed by such high-profile support, the NRA undertook aggressively to promote still more friendly scholarship. In 1992, it funded Academics for the Second Amendment. In 1994, it launched an annual essay contest, offering \$25,000 for the piece that best reflected its positions. In 2003, it gave \$1 million to George Mason University School of Law to establish the Patrick Henry Professorship of Constitutional Law and the Second Amendment. More than 50 articles endorsing the individual right have been published in the last 15 years, many of them written by lawyers who worked for gun-rights organizations.

Law professors' agendas are not always so clear. Harvard's Laurence H. Tribe opined, obscurely, that, "the core meaning of the Second Amendment is a populist/republican/federalism one." Writing together, Mr. Tribe and Mr. Amar said the essence of the right to bear arms is "self-protection." But they both joined other academics in a 2000 New York Times ad, stating, "The law is well-settled that the Second Amendment permits broad and intensive regulation of firearms."

It has been almost 70 years since the Supreme Court was last called upon to interpret the simple language of the Second Amendment: "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." In 1939, the court was unequivocal, finding unanimously that the Constitution guarantees citizens only a collective right to carry guns. For the last half-century, lower courts at all levels have consistently ruled likewise.

The overwhelming weight of available historical evidence is that the Founding Fathers' primary concern was to empower state militias. Records of gun regulation in eight of the original 13 states - Maryland among them - strongly suggest that private ownership and use of firearms were not countenanced.

The Founders gave the first clause of the Second Amendment careful attention, revising it several times and considering it essential to the whole. Though the sentence can be parsed in a variety of ways, it's very hard to deny that the first clause modifies the one that follows - that the right to bear arms is dependent upon the need to maintain a well-regulated militia.

Too bad law professors, generally neither grammarians nor historians, have so roiled the waters. Sometimes it's hard to tell what our game is; maybe to make a literary splash in the largely unread law reviews, or a political statement, or money - or, perhaps, to posture for a position on the high court.

The justices should recognize that law professors are not always straight shooters.

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