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Right to Bear Arms: A Second Look

By WILLIAM GLABERSON

The Second Amendment, the orphan of the Bill of Rights, has been written off as a legal backwater for decades. Judges and legal scholars have glossed over its guarantee of the right "to keep and bear arms" as if it were so much propaganda for the National Rifle Association.

But now, just as gun control is gaining momentum, the provision one legal scholar calls "the embarrassing Second Amendment" is being taken seriously for the first time in modern memory, with some scholars and at least one federal judge saying it may guarantee individual citizens some rights to guns, after all.

Here, for example, is a comment made by one prominent constitutional expert in an interview last week: "It becomes impossible to deny that some right to bear arms is among the rights of American citizens." Charlton Heston? No. It was Laurence Tribe, the influential liberal constitutional law expert at Harvard Law School who personally favors gun control.

Perhaps because there are so many guns already in circulation, most people, polls show, have always believed the Amendment gives individuals a right to firearms. But for some 60 years courts have ruled that the Amendment merely guarantees a collective right to arms—by state militias, for example—and extends no such right to individuals.

Now some mainstream legal scholars, including some liberals, say a new expansive interpretation has persuaded them that the Second Amendment may have to be pulled out of the courthouse dustbin. In something of a nightmare for gun-control advocates, a conservative federal judge in Lubbock, Texas, tried to do just that last month. Contrary to all modern legal precedents, the judge, Sam R. Cummings, said the Amendment gives individuals some rights to weapons. He cited new assertions in recent years that the Amendment's history shows it was intended to guarantee individuals such rights.

Constitutional experts say it is too early to tell if the Second Amendment will gain real force. But if an individual's right were established under the Second Amendment, courts would have to weigh any gun-control legislation that limits ownership by individuals to determine whether it meets some reasonable governmental purpose.

These experts say the Texas case could well go to the Supreme Court. Two justices, Clarence Thomas and Antonin Scalia, have indicated that they are sympathetic to the expanded definition of the Second Amendment. But it is unclear whether other justices would agree.

Even if the Texas case doesn't get past the federal appeals court where it is now headed in New Orleans, Cummings' ruling shows that the new interpretation of the Second Amendment has given gun advocates rhetorical strength.

"There is a certain surface plausibility to interpreting the Second Amendment as protecting a right to private gun ownership," said Michael C. Dorf, a professor of constitutional law at Columbia Law School who favors gun control. "When you dig beneath the surface, you can refute that interpretation but it would be better if we didn't have to engage in that argument at all."

Critics have said for several years that the reinterpretation of the Second Amendment is partisan work by scholars supported by the NRA. In a 1995 article in *The New York Review of Books*, Garry Wills attacked the new scholarship as a simple-minded mixture of "humbug with history."

But some constitutional law experts say the recent scholarship proves that the Second Amendment gives citizens a right to weapons. "There was never even a suggestion that it would be appropriate for the national government to deny gun ownership to a private person," said William Van Alstyne, a constitutional

law professor at Duke University and a gun owner who said he has been examining the Amendment more closely in recent years.

The new scholarship began in the 1980s, when scholars started to challenge the prevailing view of the Amendment. They poked through history and found what they said was clear evidence that the drafters meant to give individuals the right to bear arms.

One source they cited was the British Bill of Rights of 1689, which they said was a model for the Second Amendment. The British Bill said, "The subjects which are Protestants may have arms for their defenses suitable to their conditions and as allowed by law." This and other texts, they said, showed that the Second Amendment was meant to protect private citizens.

The new thinking spread beyond the margins of academia. A respected constitutional expert at the University of Texas, Sanford Levinson, argued in an influential 1989 Yale Law Journal article, "The Embarrassing Second Amendment," that the liberal legal establishment had ignored the provision because it could be a barrier to gun control. Such a cold shoulder would never be offered, he said, to Bill of Rights provisions that intellectuals found less embarrassing, like the fashionable First Amendment.

Gun-control advocates have worked hard to undermine the new analysis. The Amendment deserved to atrophy, they say, because it is more like the outdated Third Amendment, which prohibits the quartering of troops in peacetime, than the First Amendment, with its modern-sounding free-speech guarantees.

Scholars supporting gun control have also mined history for nuggets they say prove the Amendment was limited to collective arms possession. In a law review article last year, Carl T. Bogus, a law professor at Roger Williams University in Bristol, R.I., argued that James Madison included the Second Amendment merely to win support for the Bill of Rights from Southerners who wanted armed units to control slaves.

Some of these scholars agree that the language of the British Bill of Rights was reflected in the Second Amendment a century later. But the British Bill's language permitting gun ownership "as allowed by law," they say, was really a form of gun control because there had long been curbs on owning weapons. The purpose of the measure, they say, was to make it clear after the reign of the Catholic King James II that Parliament, not the monarch, would decide who would have what weapons.

The back-and-forth is probably just beginning. But it is clear the argument over the Second Amendment has become much more serious than it was only a few years ago.

Tribe said he had re-examined the issue because of the recent burst of scholarship. His study of the Amendment's language and historical context, he said, caused him to believe that the provision had been cast aside too easily.

But even if there is some individual right to arms, Tribe said, he is persuaded that most existing and proposed gun-control measures would probably be constitutional anyway.

Still, he expects legal experts to be startled when they learn that a new edition of his influential treatise, "American Constitutional Law," to be published this summer, will for the first time include an extensive section suggesting that the prevailing view of the Second Amendment as guaranteeing only collective rights to weapons may have been simplistic.

"A lot of people who are coming to the conclusion that the Second Amendment is not just limited to the states are themselves quite liberal," Tribe said. "It's not just the 'hired guns for the NRA.'"

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