



# A Liberal Case for Gun Rights Helps Sway Judiciary

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Published: May 6, 2007

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

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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."

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