1986

Book Review: That Every Man Be Armed, the Evolution of a Constitutional Right. by Stephen P. Halbrook.

F. Smith Fussner

THAT EVERY MAN BE ARMED, THE EVOLUTION OF A CONSTITUTIONAL RIGHT. By Stephen P. Halbrook.[1] Albuquerque, N.M.: University of New Mexico Press. 1984. Pp. xii, 274. $19.95.

F. Smith Fussner[2]

This book informs, challenges, and should change people's understanding of the second amendment and of past and present policy debates. The title is from Patrick Henry; the subtitle describes the book's contents. Halbrook summarizes his purpose in the introduction: "After investigating the philosophical, common law, and historical backgrounds of the right to keep and bear arms, this work analyzes the state and federal court opinions on this topic during the last century, concluding with some reflections on public policy."

The questions that Halbrook has settled as well as those he has raised are extremely important. Whether one wants more laws restricting guns, fewer restrictions on gun rights, or legal and historical evidence about what the second amendment really means, the book will provide new facts and insights. The author does not exaggerate when he says that this is "the most comprehensive constitutional history of the right to keep and bear arms published to date." Beyond that, however, the book implies a range of questions and difficult problems about which new books will have to be written.

Within the limits of a constitutional history of the second amendment the work is conclusive—that is, it demonstrates beyond reasonable doubt that the second amendment was meant to guarantee an individual right, not an exclusively collective right. It further demonstrates that, except for the "black codes" in the South, most American laws and court decisions have upheld the right of individual Americans to keep and bear arms. And Halbrook argues that the precedents that seem to imply a "collective right only" are misleading, mistaken, or irrelevant.

I

In order to establish the context of the amendment Halbrook begins by examining the intellectual traditions pertaining to arms. Unfortunately, these early chapters—"The Elementary Books of Public Right" and "The Common Law of England"—are the weakest in the book. Halbrook is not a trained historian. His surveys of

1. Attorney and author of *Social Philosophy* (1972).
2. Professor Emeritus, Reed College.

Greco-Roman philosophy, of sixteenth and seventeenth-century politics and political theory, and of the English common law tradition are superficial. Faults and flaws should not be confused with deliberate limitation, but Halbrook ought to have explained why he omitted biblical and other religious references to arms, violence, and the right of self-defense. Historical collaboration would have improved and strengthened this pioneering effort to survey the traditions of armed self-defense.

It is instructive to consider some of the flaws and errors in Halbrook's early chapters, because a more accurate, better balanced account would enhance Halbrook's main arguments in later chapters. Aside from thinking that King John succeeded Henry II, that an act of Charles II in 1670 was aimed at forcing "idle, disorderly and mean persons" to *continue* "in a position of serfdom," and other historical solecisms, most of Halbrook's errors are negative: failure to define terms, failure to convey historical complexity, and a naive trust in scissors-and-paste methods.

Halbrook tends to see the English and European past in black and white. He describes a Manichean struggle between commoners and aristocrats, rulers and populace, absolutists and republicans—in short, a long war between benighted elitists, defending force, submission, and monarchial absolutism, and The People, whose philosophical allies defended freedom and republican virtue.

If Halbrook had tried to define "absolutism," "divine right," "feudalism," "aristocracy," "commoners," "peasants," "serfs" and other historical terms including "Whig," he might have presented a truer picture of the fight for freedom. He would not have written that the death knell of feudalism was struck when "serfs and burghers" began to acquire firearms, or that "statutes of Henry VII, Henry VIII and James II sought to disarm the aspiring bourgeois and peasant classes." Arms control legislation did encompass discrimination, but that is scarcely the whole story.

The reason for criticizing Halbrook's version of English history is that the "tensions" and struggles between common law and statute, between crown and commons, and between gentry and commonalty, were much more complex than Halbrook assumes; and America's Founding Fathers were not unmindful of historical ironies and complexities. The American Constitution, including the second and other amendments, owed almost as much to English and American history and legal practice as it did to theory.

II

The remainder of the book, which discusses American history,

is much better: clear, concise, and very seldom marred by oversimplification.

A recurrent question in American history was what the role of the standing army should be, as opposed to the "national guard" and the militia (i.e., the armed commonalty). Behind this, of course, lay the English experience with dangers to liberty (especially Protestant liberty) of a standing army. It is not surprising that "the cry for independent militias, composed of citizens who would keep their own arms, spread through the colonies at the end of 1774 and during the beginning of 1775." Halbrook quotes, appropriately enough, Tom Paine's "Thoughts on Defensive War" (1775): "arms like laws discourage and keep the invader and the plunderer in awe, and preserve order in the world as well as property."

The phrasing of the second amendment was directly influenced by the American experience of having to rely at first on the militia to confront the British regular army. The second amendment reads: "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." Every word and phrase in the amendment was carefully chosen, as Halbrook demonstrates. The meaning of the word "militia" was, and still is, "the armed citizenry," not "the Armed Forces" in uniform. The militia, consisting of able-bodied males from eighteen to forty-five years of age, is today a legally defined group which may be called up in emergencies, as it was in 1941 in Hawaii after the attack on Pearl Harbor.

Halbrook discusses the Federalist promise to trust the people with arms, and the Anti-Federalist fears that a "select militia," or standing army would become a threat to freedom, unless the people's right to arms was guaranteed in a Bill of Rights. Tench Coxe, a prominent Federalist, urged that "the unlimited power of the sword is not in the hands of either the *federal or state governments*, but, where I trust in God it will ever remain, *in the hands of the people.*" Federalists and anti-Federalists might quarrel with each other about the need for a Bill of Rights, but they all agreed that the people at large had the right to keep and bear arms (their own common, private weapons), not only for self-protection, but for the defense of freedom and a "free state." Halbrook draws a most important but frequently disregarded conclusion:

> In recent years it has been suggested that the Second Amendment protects the "collective" right of states to maintain militias, while it does not protect the right of "the people" to keep and bear arms. If anyone entertained this notion in the period during which the Constitution and Bill of Rights were debated and ratified, it remains one of the most closely guarded secrets of the eighteenth century, for no known writing surviving from the period between 1787 and 1791 states such a the-

> sis. The phrase "the people" meant the same thing in the Second Amendment as it did in the First, Fourth, Ninth and Tenth Amendments—that is, each and every free person.

What was the origin, then, of the view that the second amendment did not apply to the states? The answer, Halbrook makes clear, lay in "the context of slavery." Antebellum commentators were unanimous in declaring that the right to keep and bear arms was recognized by common law, and was specified in the Bill of Rights, but the crucially important question, was whether or not slaves were "people" in the context of constitutional rights.

Halbrook observes that the North Carolina Supreme Court upheld a slave code provision denying even "free people of color" the right to carry firearms, on the ground that they "cannot be considered as citizens." The *Dred Scott* decision frankly recognized that if blacks were to be considered citizens then they would have all the rights of citizens, including the right to keep and bear arms. Deprivation of arms was the invisible bracelet of the slave.

After the Civil War the states of the old Confederacy tried to use pretexts of various kinds to keep blacks from acquiring and using arms. The various "black codes" were in effect attempts to retain slavery without the name. Congress reacted by passing legislation that culminated in the Civil Rights Act of 1866 and the fourteenth amendment.

Halbrook contributes greatly to our understanding of the Constitution by demonstrating exactly how and why the courts construed the fourteenth amendment as incorporating the second. By establishing the meaning and chronology of second amendment incorporation Halbrook disposes of two well-publicized gun prohibitionist arguments: that the second amendment applies only to the federal government (states should therefore be free to prohibit private gun ownership); and that the second amendment guarantees only the right of states to arm their own militias (National Guards). Halbrook's summary is uncompromising: "A comprehensive survey of the committee reports of all states reveals not the slightest suggestion that the Fourteenth Amendment failed to protect the individual right to keep and bear arms from state infringement" (p. 122).

Perhaps the most striking declaration of incorporation was delivered by Justice Brown. Brown wrote that:

> The law is perfectly well settled that the first ten amendments to the Constitution, commonly known as the Bill of Rights, were not intended to lay down any novel principles of government, but simply to embody certain guaranties and immunities which had from time immemorial been subject to certain well recognized exceptions arising from the necessities of the case. In incorporating these principles into the

> fundamental law there was no intention of disregarding the exceptions, which continued to be recognized as if they had been formally expressed. Thus, the freedom of speech and of the press (art. 1) does not permit the publication of libels, blasphemous or indecent articles, or other publications injurious to public morals or private reputation; the right of the people to keep and bear arms (art. 2) is not infringed by laws prohibiting the carrying of concealed weapons . . . .[3]

Halbrook has framed his arguments in these central chapters with exceptional care for legal meanings and implications, and also with an eye for the apt, and often eloquent, quotation. His own style is clear and plain, which suits his purpose—to inform and argue, not to persuade by turns of phrase. He makes no concessions to the bumper-sticker mentality. Reading his book requires concentration but is well worth the effort, It would be unfair to try to summarize his arguments and epitomize his evidence. I shall therefore only touch upon a few of the central arguments before proceeding to discuss the policy implications of the book.

Just as geographical benchmarks may be misinterpreted, either carelessly or deliberately, so may court decisions. Halbrook demonstrates in some detail why the leading Supreme Court cases offer no support to the gun prohibitionists.

In *United States v. Miller*[4] the Court restricted the arms that an individual might lawfully possess to personal military or militia arms and sidearms. At the same time, however, the Court recognized that the militia was composed of "the entire armed population—not simply the organized armed minorities on the payroll of the U.S. or state governments." Recent decisions have not defined the extent to which the fourteenth amendment incorporates the second, but after examining what he calls the "methodology," and the sources used by the Supreme Court in various cases, Halbrook concludes that

> in the minds of its framers and the people who adopted it, the Fourteenth Amendment protected the fundamental individual right to own and possess firearms from state deprivation. If the Supreme Court adheres to its historical methodology . . . it will someday be compelled to recognize the full worth of this constitutional right. (P. 176).

In his review of state and federal judicial opinions Halbrook confronts some of the most controversial, and recklessly argued issues in recent legislative and court history. Pretexts, bad history, misrepresentations, logical fallacies, political rhetoric, lies, and myths have sprouted like weeds in the fields of argument. The great merit of this book is that it sets the historical record straight. That,

---

3. Robertson v. Baldwin, 165 U.S. 275, 281-82 (1897).
4. 307 U.S. 174 (1939).

of course, does not settle all policy questions, but it does settle some important ones. Halbrook is perhaps right to urge that "[o]verly restrictive interpretations of the second amendment are associated with reactionary concepts in several respects, including elitism, militarism, and racism" (p. 195). But the irony is that it is liberals who have been leading the fight to destroy the second amendment by misinterpreting it.

III

The real question is not the constitutional status of the right to bear arms, but the extent of regulation that may be allowed without impairing the purposes of the amendment. On this there is controversy. Kates has argued that since, in the eighteenth century, military arms, militia arms, and private arms were much the same (cannon excepted) and in the twentieth century they are not, the second amendment cannot be interpreted to mean that a citizen has the right to arm himself with heavy ordnance—mortars, tanks, howitzers, etc.—or with "gangster" weapons (e.g., sub-machine guns).[5] Legitimate weapons for self-defense (or for the defense of freedom by militiamen) must be "lineally descended" from the kinds of militia arms known to the Founders. Restrictions on the size, purpose, calibre, and nature of weapons do not violate the second amendment, according to Kates. Furthermore, "neither registration nor permissive licensing are *per se* violative of the amendment since they operate only to exclude gun ownership by those upon whom the amendment confers no rights"—namely, felons, juveniles, and madmen.

Halbrook took issue with Kates.[6] In a subsequent debate Kates accepted Halbrook's evidence that "to *keep* and *bear* arms," means that individual citizens may bear arms in public (carrying weapons is not just for members of the organized militia). But Kates maintained that other legal restrictions—on "carrying concealed," for example—are still fully constitutional. What strikes this reader is the extent to which Kates and Halbrook agree about ends, and their willingness to be persuaded by evidence as to means.

Recent scholarship has helped to dispel two myths—the one, propounded by gun control advocates, is that only ignorant, rowdy red-necks oppose gun controls; the other, favored by a few writers in the popular gun press, is that the worst "gun grabbers" are media

5. Kates, *Handgun Prohibition and the Original Meaning of the Second Amendment*, 82 MICH. L. REV. 204 (1983).

6. Halbrook *To Bear Arms for Self-Defense: Our Second Amendment Heritage*, AM. RIFLEMAN, Nov. 1985, at 28.

elitists and cracked eggheads in universities. What is obvious is that many people, including scholars, are polarized over the issues of gun control, crime control, and the strategies for achieving each.

The greater the disagreements, the more strident the arguments, the more likely it is that evidence, reason, and compromise will give way to slogans, hatreds, and ultimatums. What the Constitution means is not only what the founders thought and wrote (history records the fact that slavery was once constitutional), but also what we today, after our best efforts to understand the aspirations embodied in the document, make of it. The Constitution and its history constitute common ground, disputed but still shared by those who would limit and by those who would extend the right to keep and bear arms.

That Every Man Be Armed challenges the constitutional interpretation of gun prohibitionists. Halbrook's evidence cannot be ignored, nor can his arguments be dismissed. Those who choose to go on believing prohibitionist pronouncements about the meaning of the second amendment will have to do so in spite of the facts.

CONTEMPORARY CONSTITUTIONAL LAWMAKING: THE SUPREME COURT AND THE ART OF POLITICS.

By Lief H. Carter.[1] New York: Pergamon Press. 1985. Pp. xviii, 216. Cloth, $29.50; paper, $12.95.

Gregory Leyh[2]

> If a play is any good, any act of it, any scene of it, any character of it, can be interpreted fifteen different ways, each one as good as the other. . . . The script itself is merely the raw material on which a group of collaborators have got to work. It is not the finished article. That idea is merely the invention, for the most basely materialistic reasons, of literary professors.
>
> Tyrone Guthrie

This is a time of political and intellectual ferment in constitutional theory. Several impressive books arguing for one or another preferred theory of constitutional jurisprudence have recently caught our attention. Increasingly, also, constitutional scholars are turning to philosophy for clarification of the central issues in constitutional interpretation. The general effort to forge a conscious

---

1. Professor of Political Science, University of Georgia.

2. Assistant Professor of Political Science, Illinois Wesleyan University. I would like to thank Karen Gervais for her comments on an earlier draft.