

Book Review



Reviewed by Richard A. Forsten, Esquire

On Target?: *Out of Range, Why the Constitution Can't End the Battle Over Guns*

by Mark Tushnet (Oxford Univ. Press, 2007)

On March 18, 2008, the Supreme Court heard arguments in *District of Columbia v. Heller*, a case in which the D.C. Circuit Court of Appeals held that certain restrictions placed on handguns by the District of Columbia were unconstitutional under the Second Amendment. The lower court held that the Second Amendment's right to keep and bear arms was a personal right, as compared to a "collective" or states' right to organize and control militias; and, in so doing, the D.C. Circuit joined a minority of circuits in holding the Amendment does protect an individual right. Barring some unexpected development, the Supreme Court is expected to resolve this split in the circuits and address this fundamental question concerning the scope of the Second Amendment: does the Second Amendment protect an individual right to keep and bear arms?

The Second Amendment itself consists of only twenty-seven words and three commas: "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." Yet those twenty-seven words have led to at least two competing camps over exactly what they mean. The "standard" model holds that the right to keep and bear arms is an individual right. The "collective right" (or states' right) model, in contrast, contends that the Second Amendment was adopted to protect the states' right to organize and control their own militias. The scope of the Second Amendment is important because if the Second Amendment does

not protect individuals, but only states, then states are presumably free to enact regulations as they see fit.

In his timely new book, *Out of Range: Why the Constitution Can't End the Battle Over Guns*, Georgetown law professor Mark V. Tushnet offers something rarely found in the literature concerning the Second Amendment—a short, highly readable analysis of the arguments on both sides of the debate, which evaluates the strengths and weaknesses of *both* sides of the question. In the end, one gets the sense that Tushnet is surprised by his own conclusions, such as they are.

Starting with the debate over an individual or collective right, Tushnet concludes that those who support the standard model have the slightly better argument, at least in terms of the Constitution itself. That is, Tushnet concludes that the Second Amendment supports an individual right to bear arms and was written to protect individuals and not the states (he is not alone in this conclusion; other constitutional scholars, such as Harvard's Laurence Tribe, have reached the same conclusion). The reasons for this include language (a right of the people, not the states), placement in the Bill of Rights (all of the other first eight amendments protect individual rights, such as freedom of religion, freedom of speech, etc.), and history itself (English law recognized an individual right to bear arms). There are, of course, arguments that go the other way, and Tushnet evaluates these as well (why does the Second Amendment refer to a "well regulated Militia" and the "security of a free State?"). In the end, while

he finds the question close, he believes that the standard model is stronger.

Yet even as Tushnet concludes that the standard model appears stronger, he nevertheless points out that, in his view, public policy, as well as past precedent, provides stronger support for the collective right model. He looks at the "more guns/less crime" studies as well as other arguments concerning gun control and believes that studies on both sides of the question have flaws, and that many gun control proposals really aren't all that helpful because they won't or don't lead to less violence.

In the end, having looked at the arguments from both sides, Tushnet believes a plausible argument can be made for either interpretation. In Tushnet's view, the battle over the meaning of the Second Amendment is part of the larger culture wars, and regardless of whether the amendment provides an individual or collective right, those wars will continue. Moreover, Tushnet does not believe that an individual right to bear arms means that no regulations can be put in place. However, so long as both sides are focused more on legal arguments about the Second Amendment, rather than policies that may reduce violence, Tushnet believes that very little can be done to reduce violence. It will be interesting to see what the Supreme Court decides and how its decision will affect future policy. Tushnet's book provides a helpful summary of the issues before the Court, but also anticipates arguments that will be made regardless of how the Court decides the issue before it.

One final and interesting note about the debate on the Second Amendment, that has received little attention, is the ground over which the debate is being fought—the intent of the founders, or, put another way, originalism. Originalism is often derided and ridiculed as a way to determine constitutional meaning, yet in making their arguments, both sides argue about what was intended by the amendment and what the language means. No one is seriously arguing the “living Constitution” view that the

meaning of the Second Amendment has changed over time and that while an individual right to bear arms may have made sense in the late eighteenth century, our Constitution has evolved beyond that. No matter how the Court ultimately decides the issues regarding the Second Amendment itself, the lasting legacy of the case may be further support for the view that originalism has a role to play in interpreting the Constitution. ❏