Sign Them Up

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They rush to join legal briefs, but professors often don’t know what they’re talking about. **By Neal Devins and John McGinnis**

Academics lately have begun behaving more and more like interest groups. Whether the issue is gun control, abortion, bankruptcy reform, or any other human rights, they have banded together to join gun letters and briefs to tell courts and Congress what they, as “concerned scholars,” think. But expertise is often not a prerequisite to signing these missives, which creates a troubling phenomenon for both the academic and the political world.

Therefore, such documents give a false impression of the weight of expert opinion. They also undermine academic freedom, because the whole premise of giving academics special deference is that they will benefit us through their independent judgment and learning.

A striking example of such academic lobbying is a brief filed recently by 53 law professors and historians, including many from our most prominent universities, supporting the government’s appeal of a case that invalidated a gun control ordinance on Second Amendment grounds. According to the brief, the purpose of the amendment was to prevent the federal government from disarming the state’s organized militia and that “the right to keep and bear arms” does not extend to citizens as individuals.

These broad claims, however, are in tension with the greatly consider and weight of recent scholarship. In the last decade, the Second Amendment has received renewed attention by a wide range of scholars—left, right, and center—who have contended that the Second Amendment provides “the people” with the individual right to carry a gun just as the First Amendment provides “the people” with the individual right to petition the government.

Perhaps the signers have responses to these arguments, but they do not include them in the brief. In fact, they cite none of the voluminous recent scholarship contending that the Second Amendment is an individual right. This failure in itself is curious, because a primary responsibility of scholars is to confront directly opposing arguments with tightly reasoned arguments of their own. It is perhaps less surprising, although no more excusable, in light of the fact that only a sixth of the signing law professors have ever written on the Second Amendment. Indeed, only one half of the brief’s law professor signatories teach constitutional law.

Even among professors of constitutional law, moreover, there is little reason to think that these individuals have expertise on the Second Amendment. With no important Supreme Court decisions on the subject, most constitutional law casebooks omit the Second Amendment altogether. Thus, for many of the signers, the claim at the beginning of the brief that they “have strong scholarly, teaching and professional interests in the Court’s interpretation of the Amendment” is false at least in some respect.

‘NON SPECIALIST’ EXPERTS

David Yassky, a Brooklyn law professor and organizer of the academics’ brief, blithely confirms this point. Noting that the lower court had placed great emphasis on recent academic writing on the Second Amendment, Yassky set out to show that “non specialists” thinking on the subject contradicted the findings of individuals who had written on this topic.

Consequently, in soliciting signers for the brief, he posted notices on law professor Web sites (so that any professor of constitutional law could sign on). In his effort to increase the ranks of the signers of the brief, Yassky also placed copies of the brief in his school’s faculty lounge and sent query letters to prominent law professors.

To try to ensure that the academics fulfilled their duty to read and think about arguments on both sides of an issue before speaking out as experts, Yassky said that no one could sign onto the brief without first receiving a copy of it. (Some, he has said, were quite willing to sign on without seeing the brief.) But even if all signatories examined the brief, reading alone does not an expert make. The credibility of academics is tied to their purported willingness (as Arthur Schlesinger Jr. puts it) to speak “truth to power.” It is a perversion of this bedrock principle to seek out “non specialists” to appear in the guise of academic experts.

LEFT AND RIGHT ALIKE

Many of the briefs come from the liberal side of the spectrum for the simple reason that many academics are liberal. But conservatives too are willing to engage in similar collective action when the opportunity presents itself. Academics favoring a broader construction of Second Amendment rights recently submitted a brief to the U.S. Court of Appeals for the 5th Circuit considering the gun control ordinance. While more of the signers of this latter brief were experts in the Second Amendment, not all were. The organizer of this brief solicited signatures on law professor Web sites whose subject matter would give little reason to believe that the users were familiar with the literature on the right to bear arms. At least one of the signers sent it to nonexperts, urging them to sign it on the basis of his endorsement. Examples are not limited to litigation briefs. Last year, a letter opposing proposed gun control legislation was distributed to law professors and other academics over e-mail. The message stated that “there is a good chance that the Wall Street Journal will mention the letter on their editorial page” and that “if everyone who is sending this to get even a couple other people in your department to sign this, we will end up with well over a few hundred signatures.” The letter itself called attention to the “real cost” of waiting periods and gun locks, issues that few law professors could claim expertise in.

1,000 PROFESSORS

Similarly, a thousand “professors of law” and “historians” signed a letter stating that it would be unconstitutional for Congress to impeach President Bill Clinton. Among the law professors, only one-third of the signatories teach constitutional law. Among the historians, most were not constitutional specialists.

At one level, the lesson here is simple. Given their lack of any background in the subject, many of the signatories of these letters and briefs appear to have been influenced by partisanship, not scholarship. Non-specialist signatories may not know about the particulars of impeachment, gun control, or the Second Amendment, but they do know their own views on whether they like the president and whether they think that gun control legislation is politically desirable.

Needless to say, academics are entitled to speak out on political issues. And there is nothing wrong with academics pursuing a research agenda consistent with their personal beliefs. At the same time, the trust that society has placed in professors and the resources it has provided them is grounded in certain assumptions about academic conduct. The price of academic freedom is that scholars are exhaustively considered and study an issue before taking a position as an academic, whether political or not. Indeed, devices that allow scholars to register positions without first obtaining expertise might undermine academic freedom for all by fueling attacks that professors are using their privileged positions to pursue their personal political goals instead of academic enlightenment.

But more is at stake than preserving professors’ autonomy. A well-regulated society needs academics to assess the value of its competing ideas as much as it needs independent scholars to refine the weight of its endless societal forces. The ability of such ideas to persuade depends on the perception that scholars are operating in an impartial and professional plane. By moving from mass and indiscriminately into the world of interest group politics, modern academics threaten to diminish an essential element of self governance.

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