

FOREWORD

A LOADED DEBATE: THE RIGHT TO KEEP AND BEAR ARMS IN THE TWENTY-FIRST CENTURY

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*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.*¹

INTRODUCTION

The *Albany Law Review* hosted its annual fall symposium on October 9, 2014 at Albany Law School. Continuing in our proud tradition of hosting symposia on interesting, timely, and exciting legal topics each year,² this symposium brought scholars, activists, and politicians from across the country to Albany to discuss what is without question one of the most deceptively complex and divisively controversial single sentences in American History: the Second Amendment of the U.S. Constitution.

The symposium was entitled: *A Loaded Debate: The Right to Keep and Bear Arms in the 21st Century*. It featured two panels: one providing an overview of Second Amendment issues broadly and from various perspectives, and another highlighting Second

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¹ U.S. CONST. amend. II.

² For previous *Albany Law Review* symposia see e.g., Michael L. White, Foreword, *Fractured Communities: Hydraulic Fracturing and the Law in New York State*, 77 ALB. L. REV. 643 (2013/2014); Transcripts, *What Are We Saying? Violence, Vulgarity, Lies . . . and the Importance of 21st Century Free Speech*, 76 ALB. L. REV. 753 (2012/2013); Symposium, *Protecting Workers' Rights in a Post-Wisconsin World: Strategies for Organizing and Action in an Era of Diminished Resources and Embattled Unions*, 75 ALB. L. REV. 411 (2011/2012); Elise C. Powers, Foreword, *Big Oil, Big Consequences, and the Big Unknown: Exploring the Legal, Regulatory, and Environmental Impact of the Gulf Oil Spill*, 74 ALB. L. REV. 475 (2010/2011); Jeremy A. Cooney, Foreword, *Main Street, Wall Street, and K Street: Regulating Financial Markets in New York and Beyond*, 73 ALB. L. REV. 363 (2010); Vincent Martin Bonventre, Introduction, *Race: A Legal, Historical, Scientific, and Personal Issue*, 72 ALB. L. REV. 855 (2009); Transcripts, *Conference Honoring the Scholarship and Work of Professor Alan Dershowitz*, 71 ALB. L. REV. 987 (2008).

Amendment issues faced by New York State, focusing specifically on the New York Secure Ammunition and Firearms Enforcement Act of 2013 (the SAFE Act).

MODERATORS

We were honored to have the Honorable Richard S. Hartunian moderate the first panel. Mr. Hartunian is the forty-eighth United States Attorney for the Northern District of New York. He earned a B.A. from Georgetown University, *cum laude*, and a J.D. from Albany Law School. After law school, Mr. Hartunian worked for the law firm of Devine, Piedmont and Rutnik. He then left private practice to serve as an assistant district attorney with the Albany County District Attorney's Office. His work on narcotics and violent crimes cases ultimately led to his designation as a Special United States Attorney. Before long Mr. Hartunian became an Assistant United States Attorney. He was nominated by President Barack Obama to be the United States Attorney for the Northern District of New York in 2009, and was confirmed by the Senate in 2010.

The second panel was moderated by President Penelope "Penny" Andrews. President Andrews was the seventeenth president and dean of Albany Law School. She is the first female president of the school since it opened in 1851. President Andrews was previously an associate dean for academic affairs and professor of law at the City University of New York School of Law (CUNY). She also served as professor of law and director of international studies at Valparaiso Law School. President Andrews has taught at law schools in Germany, Australia, Holland, Scotland, Canada, and South Africa. She earned a B.A. and LL.B from the University of Natal in Durban, South Africa, and an LL.M from Columbia University School of Law.

PANELISTS

Dr. Robert Spitzer is the distinguished service professor and chair of the Political Science Department at the State University of New York at Cortland. He is also a visiting professor at Cornell University. He is the author of fourteen books and nearly 500 articles, and has written extensively on gun control and gun politics. Dr. Spitzer has a B.A., *summa cum laude*, from SUNY Fredonia and an M.A. and Ph.D. from Cornell University.

Allen K. Rostron is the William R. Jacques constitutional law scholar and professor of law at the University of Missouri-Kansas

City School of Law. Professor Rostron earned his B.A. from the University of Virginia with Highest Distinction, and his J.D. from Yale Law School. Professor Rostron served as a law clerk for the Honorable Thomas S. Ellis III, United States district judge for the Eastern District of Virginia. After clerking for Judge Ellis, Professor Rostron was a litigation associate at Cravath Swaine & Moore in New York City. Before coming to UMKC School of Law, Professor Rostron worked in Washington D.C. as a senior staff attorney at the Brady Center to Prevent Gun Violence.

Ann E. Tweedy is an assistant professor of law at Hamline University School of Law and currently serves as tribal counsel for the Muckleshoot Indian Tribe, a federally recognized Indian tribe located in western Washington. Professor Tweedy clerked for the Honorable Ronald M. Gould of the United States Court of Appeals for the Ninth Circuit. She also clerked for the Honorable Rex Armstrong of the Oregon Court of Appeals. Professor Tweedy has focused her career on representing Indian tribes, first serving as in-house counsel for the Swinomish Indian Tribal Community and then as an associate at Kanji & Katzen, PLLC. Professor Tweedy received an A.B., *cum laude*, from Bryn Mawr College, and a J.D. from the University of California, Berkeley School of Law (Boalt Hall), where she was inducted into the Order of the Coif.

The Honorable Michelle Schimel is currently serving in her fifth term in the New York State Assembly for the Sixteenth Assembly District. She serves in a leadership role in the Assembly as the vice chair of the Majority Conference. She sits on the Assembly Standing Committees on Governmental Operations, Local Governments, Environmental Conservation, Transportation, and Veterans' Affairs. Assembly Member Schimel has served on the Board of New Yorkers Against Gun Violence (NYAGV), the largest citizen's group in New York State dedicated to reducing gun-related violence, for nearly twenty years. In 2011 Assembly Member Schimel was elected as the co-chair of the New York Chapter of State Legislators Against Illegal Guns (SLAIG). She assembled a broad coalition of support among state legislators for an eight-point plan to reduce gun violence. Many of these measures were adopted into law as part of the New York SAFE Act. Assembly Member Schimel earned a B.S. from the University of Pennsylvania.

The Honorable Brian Kavanaugh is currently serving in his fifth term in the New York State Assembly representing the Seventy-Fourth Assembly District on the East Side of Manhattan. He has been a member of the New York State Assembly since January

2007. Assembly Member Kavanagh is a co-chair of the New York Chapter of SLAIG. Assembly Member Kavanagh was an attorney in private practice before serving in the Assembly. He earned a B.A. from Princeton University and a J.D. from New York University School of Law, where he was a Dean's Scholar.

Robert L. Schulz is the founder and chairman of We The People of New York, Inc. Mr. Schulz has brought dozens of precedent-setting court challenges against government action over the last thirty-five years. In 2014 Mr. Schulz brought an action challenging the constitutionality of the New York SAFE Act in state court. Mr. Schulz served in the U.S. Air Force and was honorably discharge in 1959. He received an engineering degree from the Merchant Marine Academy and an M.B.A. from Xavier University.

IN THIS ISSUE

This year's symposium issue features carefully-selected articles related to the topic of the symposium. The first article, *New York State and the New York Safe Act: A Case Study in Strict Gun Laws* by Dr. Robert J. Spitzer, examines New York State's gun laws and offers insight into the effect of strict gun laws on the relationship between the armed citizen and the government.³ Dr. Spitzer posits that New York's gun laws "preserve gun rights in the context of a feasible regulatory scheme."⁴ He concludes that implementation of the New York SAFE Act is feasible and there is evidence suggesting that enactment of the SAFE Act was a matter of sound public policy.

Dr. Steven P. Halbrook argues in *New York's Not So Safe Act: The Second Amendment in an Alice-in-Wonderland World Where Words Have No Meaning* that the Second Amendment guarantees the right to keep firearms that are commonly possessed by law abiding citizens for lawful purposes and that the New York SAFE Act unconstitutionally bans firearms that satisfy the *Heller* test for protected arms.⁵

In *The Continuing Battle Over the Second Amendment*, Professor Allen Rostron "provides an updated look at the ongoing battle over

³ Robert J. Spitzer, *New York State and the New York SAFE Act: A Case Study in Strict Gun Laws*, 78 ALB. L. REV. 749 (2014/2015).

⁴ *Id.* at 750.

⁵ Stephen P. Halbrook, *New York's Not So "SAFE" Act: The Second Amendment in an Alice-in-Wonderland World Where Words Have No Meaning*, 78 ALB. L. REV. 789 (2014/2015).

the Second Amendment in the lower courts.”⁶ Professor Rostron explains that in the lower courts judges have generally applied a form of intermediate scrutiny that is highly deferential to legislative determinations with respect to public safety concerns. He also notes that lower courts are increasingly integrating more historical reflection into their Second Amendment analyses. Professor Rostron identifies a minority view that has arisen that focuses entirely on constitutional text, history, and tradition. The article contends that the standard approach observed in lower court decisions applying some form of intermediate scrutiny while incorporating history into the analysis is a sound methodology and is preferable to an approach that focuses exclusively on historical reflection.

In *The History of Firearm Magazines and Magazine Prohibitions*, Professor David B. Kopel details the history of firearm magazines and of magazine prohibition.⁷ The article analyzes the constitutionality of gun laws through a historical lens. It also discusses the history of ten-round magazines, which have been the subject of many proposed bans, and discusses whether particular guns and their magazines are “in common use” and are “typically possessed by law-abiding citizens for lawful purposes.”⁸

Finally, in *Indian Tribes and Gun Regulation: Should Tribes Exercise Their Sovereign Rights to Enact Gun Bans or Stand-Your-Ground Laws?*, Professor Anne E. Tweedy provides a fascinating look at the right to keep and bear arms in the context of Indian tribes.⁹ Professor Tweedy begins with the premise that the inapplicability of the Second Amendment to Indian tribes gives them freedom to experiment with various forms of firearm regulations. She details different firearm regulations that tribes have enacted, including permit requirements, concealed weapons laws, restrictions on carrying firearms in certain places, and regulations as to types of firearms and barrel lengths. The article discusses gun bans and stand-your-ground laws and posits that, though they may be appealing in some respects, enforcement of either would be very difficult. The article argues that the best

⁶ Allen Rostron, *The Continuing Battle Over the Second Amendment*, 78 ALB. L. REV. 819, 821 (2014/2015).

⁷ David B. Kopel, *The History of Firearm Magazines and Magazine Prohibitions*, 78 ALB. L. REV. 849 (2014/2015).

⁸ *Id.* (quoting *District of Columbia v. Heller*, 554 U.S. 570, 624–25, 627 (2008)).

⁹ Ann Tweedy, *Indian Tribes and Gun Regulation: Should Tribes Exercise Their Sovereign Rights to Enact Gun Bans or Stand-Your-Ground Laws?*, 78 ALB. L. REV. 885 (2014/2015).

solution for tribes may be to enact comprehensive gun regulations, using civil and criminal forfeiture as a penalty for violations. Professor Tweedy concludes that enacting laws providing for an expanded right to self-defense may prove harmful to the very tribal members for whose protection such laws would be designed.

CLOSING THOUGHTS

It is my sincere hope that you will find this symposium issue to be informative, interesting, and insightful. I would like to thank President Penelope Andrews and the Honorable Richard S. Hartunian for moderating the symposium with great skill, knowledge, and enthusiasm. I would also like to thank the panelists for their time and effort, and for making this event not only educational, but also entertaining. I am very grateful to the authors whose well-written, impassioned, and enlightening articles make this a truly special issue. In addition I must express my sincere thanks to the faculty and staff of Albany Law School for all of their help and support. Finally, I owe a great debt of gratitude to the *Albany Law Review*, volume 78 members, associate editors, and editorial board. It has been a pleasure working alongside you this year and I am proud to call each of you classmates, colleagues, and friends.

You can be sure that *Albany Law Review* will be back next year with another exciting symposium as we continue in our mission of tackling the most pressing legal issues of our time.

Thank you.