

# Chicago-Kent Law Review

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Volume 76

Issue 1 *Symposium on the Second Amendment: Fresh Looks*

Article 1

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October 2000

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Chicago-Kent Law Review

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### Recommended Citation

Chicago-Kent Law Review, *Table of Contents - Issue 1*, 76 Chi.-Kent L. Rev. i (2000).

Available at: <https://scholarship.kentlaw.iit.edu/cklawreview/vol76/iss1/1>

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# CHICAGO-KENT LAW REVIEW

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VOLUME 76

2000

NUMBER 1

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### SYMPOSIUM ON THE SECOND AMENDMENT: FRESH LOOKS

SYMPOSIUM EDITOR  
CARL T. BOGUS

#### THE HISTORY AND POLITICS OF SECOND AMENDMENT SCHOLARSHIP: A PRIMER

*Carl T. Bogus* 3

The introductory Article to this Symposium reviews the history and politics of Second Amendment scholarship, beginning in 1960, when the first article endorsing the individual right model was published, challenging what had previously been the accepted view that the Second Amendment grants only a collective right to keep and bear arms within the government-organized militia. Bogus describes how gun rights organizations embarked on a bootstrap campaign to develop a large body of writing supporting the individual right model, much of it by lawyers directly employed by or representing gun rights organizations, and then argued that the sheer mass of this writing was significant. Bogus devotes most of this Article to critically assessing the work of the five most prominent scholars to endorse the individual right view: Sanford Levinson, Akhil Reed Amar, William Van Alstyne, Laurence H. Tribe, and Leonard W. Levy.

#### TO HOLD AND BEAR ARMS: THE ENGLISH PERSPECTIVE

*Lois G. Schworer* 27

This Article discusses the English background to the Second Amendment of the Constitution of the United States and undertakes to contest the prevailing opinion that the old medieval English duty of service in the militia, imposed theoretically on all males between the age of sixteen and sixty, was transformed at the time of England's Glorious Revolution in 1688–89 into the right of the individual to keep and bear arms. The author of that thesis, Professor Joyce Malcolm of Bentley College in Massachusetts, maintains that Article VII of the Declaration of Rights, 1689 (better known as the Bill of Rights, its statutory form) secured that right and bequeathed it to the American colonists who, when drafting the Second Amendment, broadened that legacy, sweeping aside "limitations" and forbidding any "infringement" upon the individual right to possess arms. This Article, however, argues that this thesis is unacceptable and offers a reading of the evidence and of the nature of late-seventeenth-century England society and thought that is different from that of Professor Malcolm. This Article maintains that throughout its long history, the English government, for reasons that changed over time, took steps to limit and/or supervise the possession of guns. At no time did majority opinion hold that there was either a natural law right or a constitutional right of all individuals, not even all Protestant individuals, to have arms. There was no unrestricted English right of the individual to possess guns for the colonists to inherit.

There are those who argue that the Second Amendment guarantees an unrestricted individual right to gun ownership. If the original intention of the framers of the Constitution and Bill of Rights is to inform contemporary debates, then we must know more about the historical context in which these documents were written. This Article explores the nature and extent of gun laws at the time the Second Amendment was ratified by the states, as well as those laws passed in the shadow of this Amendment. The continuing efforts of states to control access to and use of guns once the Second Amendment was part of the Constitution seemingly indicate a lack of concern for an individual right to own a gun. The absence of notable opposition to such state action, even when it extended to disarming a portion of the population, speaks to popular attitudes that failed to see gun ownership as a protected individual right. At the same time, the federal government came to see public indifference to firearms ownership as a major threat to national security, and responded by slowly building a standing army and beginning a program to provide guns directly to members of the militia at no cost. But popular disinterest undermined both efforts, with government censuses repeatedly revealing a surprising dearth of guns in American life.

### THE SECOND AMENDMENT: THE HIGHEST STAGE OF ORIGINALISM

*Jack N. Rakove* 103

Originalism is the theory of constitutional interpretation that holds that the meaning of the various provisions of the Constitution was fixed at the moment of their adoption, and that the goal of interpretation is to recover that historical meaning and apply it to current disputes. No subject of current constitutional controversy is more closely tied to originalist theories of interpretation than the debate over the meaning of the Second Amendment. But for all the lip service given to originalism and all the homage Americans pay to the wisdom of the founders, there is little agreement among scholars as to how one goes about recovering the original meaning of the Constitution. This Article examines the varieties of originalist arguments deployed on both sides in the current debate, and assesses their merits on the basis of the historically grounded approach to originalism developed in Rakove's 1996 book *Original Meanings: Politics and Ideas in the Making of the Constitution*. In particular, this Article contrasts the reliance that so-called "standard model" writers place on the deep background assumptions about the importance of a generally armed citizenry with the emphasis that their critics place on the quite specific concern of 1787–89 with the future status of standing armies and the value of the state militia. This Article offers further comments on the juridical authority of bills of rights circa 1789, and on the difficulty that the standard model faces when it is set against prevailing eighteenth- and nineteenth-century assumptions about the extent of the police power of the states.

### DISARMED BY TIME: THE SECOND AMENDMENT AND THE FAILURE OF ORIGINALISM

*Daniel A. Farber* 167

Originalism provides the core arguments for an individual right "to keep and bear Arms." The appropriate role of original intent in constitutional law, however, has been debated for the past two decades. In this Article, Farber illustrates how the Second Amendment exemplifies the classic, well-known criticisms of originalism. This does not prove, of course, that the conventional understanding of the Second Amendment should be retained. But, Farber concludes, advocates for a drastic expansion of Second Amendment rights will need something beyond the ambiguous historical record if they wish to show why, in today's world, gun rights warrant constitutional protection.

“A WELL REGULATED MILITIA”:  
THE SECOND AMENDMENT IN  
HISTORICAL PERSPECTIVE

*Paul Finkelman* 195

In this Article, Finkelman argues that the purpose of the Second Amendment was to protect the right of the states to maintain militias and arm them if the national government refused to do so. This Article, based on the debates over ratification and over the Bill of Rights, shows that some extreme Antifederalists wanted the national government to guarantee a personal right to own weapons. But, as the evolution of the Amendment and the final text of the Amendment make clear, Madison and the other Federalists who totally dominated Congress at the time thoroughly rejected these demands for the protection of a personal right to bear arms. Indeed, to have done so would have undermined other clauses in the Constitution and the general notion of creating a stable national government that could not be overthrown by a minority of disgruntled citizens.

NATURAL RIGHTS AND  
THE SECOND AMENDMENT

*Steven J. Heyman* 237

A growing body of scholarship claims that the Second Amendment was intended to enable individuals to exercise their natural right to self-defense against violence. In this Article, Heyman shows that this view is based on a misunderstanding of the natural rights tradition, as reflected in the works of Locke and Blackstone, the post-Revolutionary state declarations of rights, and the debates over the Constitution and the Bill of Rights. Natural rights theory held that, when individuals entered society, they largely gave up their right to use force against others in return for the protection that they received under the law. And while the people retained a right to resist and overthrow governmental tyranny, this was a right that belonged not to private individuals but to the community as a whole. In this way, Heyman argues, the natural rights tradition provides more support for a collective right than for an individual right interpretation of the Second Amendment.

WHAT DOES THE SECOND AMENDMENT  
MEAN TODAY?

*Michael C. Dorf* 291

Proponents of the “individual right” interpretation of the Second Amendment frequently contend that those who disagree with this view apply a double standard, dismissing robust protection for individual firearms ownership and possession, while recognizing rights with less support. However, the Second Amendment has not been unfairly orphaned. The courts and commentators that reject the individual right scholars’ claims are justified in doing so by the application of the same criteria commonly applied to other constitutional provisions, namely: doctrine; text; original understanding; structural inference; post adoption history; and normative considerations.

LOST AND FOUND: RESEARCHING  
THE SECOND AMENDMENT

*Robert J. Spitzer* 349

The recent proliferation of writings on the Second Amendment makes numerous claims including: (1) there has been little or no legal scholarship on the Second Amendment until recent times; (2) the “individualist” view of the Second Amendment is the dominant or mainstream paradigm; (3) the courts have committed a “deregulation of duty” insofar as they have been silent on, or indifferent to, interpretation of the Second Amendment; and (4) since three of the four Supreme Court cases concerning the Second Amendment were decided in the nineteenth century, the court doctrine is somehow defective, irrelevant, outdated, unclear, or “embarrassing.” In this Article, Spitzer rebuts these claims based on his detailed study of law journal literature on the Second Amendment and suggests that law journals provide a breeding ground for occasionally wayward theories of constitutional meaning.

THE SECOND AMENDMENT IN CONTEXT:  
THE CASE OF THE VANISHING  
PREDICATE

*H. Richard Uviller* 403  
& *William G. Merkel*

Uviller and Merkel argue that the Second Amendment right to keep and bear arms was intended by the framers (and, perhaps more importantly, understood by the ratifiers) to be intimately bound up in the ideal of service in the lawfully established militia—for many eighteenth-century Americans, the preferred alternative to that “bane of liberty,” the standing army. But as Uviller and Merkel set out to show, the historic common militia celebrated in the republican ideology of eighteenth-century Whigs was already on the road to obsolescence when the Second Amendment became law. By the middle of the nineteenth century, few citizens mustered on militia days, those who did arrive unarmed, and state after state simply chose to let the founders’ militia whither away. As a result, Congress established the National Guard in 1903 to replace the long defunct militia-of-the-whole. This statutory “militia” of today is federally armed and manned by trained volunteers who in large measure are paid and drilled by the U.S. Army. Not even a shadow of the eighteenth century’s self-armed, universal militia remains. Uviller and Merkel conclude that in this critically changed context, the Second Amendment right cannot be meaningfully applied.

## STUDENT NOTES AND COMMENTS

*RICE V. PALADIN ENTERPRISES:*  
WHY *HIT MAN* IS BEYOND  
THE PALE

*Beth A. Fagan* 603

This Comment examines the Fourth Circuit Court of Appeals decision in *Rice v. Paladin Enterprises, Inc.*, which held that the publisher of a criminal instruction manual could be held liable for civil aiding and abetting without running afoul of the First Amendment. Fagan analyzes the traditional rationales for protecting free speech to determine the appropriate level of protection for criminal instruction manuals and focuses on *Hit Man: A Technical Manual for Independent Contractors*, the book that facilitated the murders at issue in *Rice*. She assesses the First Amendment value of *Hit Man* and balances that value against the dangers posed to society by such manuals. After critiquing several methods for analyzing criminal instruction manuals, this Comment proposes a new approach which requires actual intent to assist criminal activity before finding a publisher liable for the consequences that stem from the proper use of such a manual.

MURDER MEDIA—DOES MEDIA INCITE  
VIOLENCE AND LOSE FIRST AMENDMENT  
PROTECTION?

*Christopher E. Campbell* 637

Society is increasingly inclined to hold publishers and producers responsible for the violent acts of their readers or viewers. This Note, however, argues that First Amendment protections should not be reduced to the lowest common denominator just because some sociopaths read the same books or view the same movies as the rest of society does. Instead, this Note contends that citizens should be encouraged to take responsibility for their actions and to know that they alone will be held accountable for their antisocial behavior. This Note reviews recent lawsuits against publishers and producers. It then discusses First Amendment theories as they relate to incitement analysis. Next, this Note analyzes the correlation between media and violence and concludes that more studies are needed to see if there is any causal link between violent media and antisocial behavior. Finally, this Note concludes that publishers and producers should have First Amendment protections unless it can be shown that they *intended* a specific crime to occur.

IF IT AIN'T BROKE DON'T FIX IT:  
AN ARGUMENT FOR THE CODIFICATION  
OF THE *QUILL* STANDARD FOR TAXING  
INTERNET COMMERCE

*Sidney S. Silhan* 671

The Internet Tax Freedom Act neither changed the status of the law nor did it create a new standard for taxability; it simply stopped any new taxes from being imposed while the economy adjusted to the explosion of Internet commerce. This Note will argue that the economy is adjusting, and indeed not all that much has changed in the sales tax collection arena. Furthermore, Quill continues to be the standard by which out-of-state sellers are taxed, and Congress should settle the issue by codifying the Quill requirement of substantial nexus before taxation can occur.

WHY SHOULD GANG MEMBERSHIP  
BE A "STATUS" SYMBOL?  
STATUS CRIMES AND *CITY*  
OF *CHICAGO v. YOUKHANA*

*Mark D. Brookstein* 703

In *City of Chicago v. Morales*, the Supreme Court struck down Chicago's anti-gang loitering ordinance on void-for-vagueness grounds. As a result, the Court did not answer the question left open by the Illinois Court of Appeals in *City of Chicago v. Youkhana* of whether the ordinance criminalized the status of being a gang member in violation of the Eighth Amendment's prohibition against cruel and unusual punishment. This Comment considers the question by examining the historical backdrop of status offenses as it relates to both constitutional and common law precedent. In order to determine whether an otherwise constitutional reenactment of the ordinance would nevertheless run afoul of the Eighth Amendment, Brookstein considers the factors courts have weighed in addressing status offenses and their applicability to gang membership. This Comment concludes by proposing an analytical model incorporating the explicit and implicit factors utilized by courts, which can be applied to determine whether gang membership is in fact a status under the Eighth Amendment.

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VOLUME 76

2000

NUMBER 1

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### SYMPOSIUM ON THE SECOND AMENDMENT: FRESH LOOKS

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*Carl T. Bogus*

#### *Carl T. Bogus*

Carl T. Bogus, Symposium Editor, teaches jurisprudence, torts, products liability, and evidence at Roger Williams University School of Law. He is the author of *The Hidden History of the Second Amendment* (U.C. DAVIS LAW REVIEW), in which he argued that the Second Amendment was written to assure the South that Congress would not undermine the slave system by disarming the state militia, on which the South relied for slave control. His many writings about guns include: *Gun Litigation and Societal Values* (CONNECTICUT LAW REVIEW); *Race, Riots and Guns* (SOUTHERN CALIFORNIA LAW REVIEW); and *The Strong Case for Gun Control* (AMERICAN PROSPECT). In 1991, he received the Ross Essay Award from the American Bar Association for *The Invasion of Panama and the Rule of Law* (INTERNATIONAL LAWYER). Professor Bogus testified about the Second Amendment before the U.S. Senate Judiciary Committee's Subcommittee on the Constitution in 1998. His book, WHY LAWSUITS ARE GOOD FOR AMERICA: DISCIPLINED DEMOCRACY, BIG BUSINESS AND THE COMMON LAW, will be published by New York University Press in 2001.

#### *Lois G. Schwoerer*

Lois G. Schwoerer is the Elmer Louis Kayser Professor Emeritus of History at the George Washington University. She is the author of "NO STANDING ARMIES!" THE ANTIARMY IDEOLOGY IN SEVENTEENTH-CENTURY ENGLAND (Johns Hopkins University Press), which won the Berkshire Conference of Women Historians' prize for the best book published by a woman historian in 1974; THE DECLARATION OF RIGHTS, 1689 (Johns Hopkins University Press), which received Honorable Mention in the John Ben Snow Prize competition; as well as LADY RACHEL RUSSELL: "ONE OF THE BEST OF WOMEN" (Johns Hopkins University Press). She edited THE REVOLUTION OF 1688-89: CHANGING PERSPECTIVES (Cambridge University Press) and helped edit THE VARIETIES OF BRITISH POLITICAL THOUGHT 1500-1800 (Cambridge University Press). Professor Schwoerer has written numerous articles, two of which won awards. POLITICS AND THE POLITICAL IMAGINATION IN LATER STUART BRITAIN is a collection of essays published in her honor. Professor Schwoerer is a Fellow of the Royal Historical Society and is a former president of the North American Conference on British Studies.

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Michael A. Bellesiles teaches legal history at Emory University and has also taught at Oxford and Stanford universities. He is the author of *REVOLUTIONARY OUTLAWS: ETHAN ALLEN AND THE STRUGGLE FOR INDEPENDENCE ON THE EARLY AMERICAN FRONTIER* (University Press of Virginia) and *ARMING AMERICA: THE ORIGINS OF A NATIONAL GUN CULTURE* (Alfred A. Knopf); the editor of three books, including *LETHAL IMAGINATION: VIOLENCE AND BRUTALITY IN AMERICAN HISTORY* (New York University Press); and the author of more than thirty professional articles and book chapters. Professor Bellesiles is the only person to ever win both of the top article-of-the-year prizes from the Organization of American Historians: the Louis Pelzer Award in 1986 and the Binkley-Stephenson Award in 1996.

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Daniel A. Farber is Associate Dean for Faculty and the Henry J. Fletcher Professor of Law at the University of Minnesota. He clerked for Justice John Paul Stevens at the Supreme Court, and taught at the University of Illinois College of Law before joining the Minnesota faculty. He is the author of *BEYOND ALL REASON: THE RADICAL ASSAULT ON TRUTH IN AMERICA* (Oxford University Press), *ECO-PRAGMATISM: MAKING SENSIBLE ENVIRONMENTAL DECISIONS IN AN UNCERTAIN WORLD* (University of Chicago Press), and co-author of leading casebooks in the fields of constitutional and environmental law. Professor Farber has also written more than forty law review articles and numerous book reviews and essays on subjects ranging from free speech to statutory interpretation. He was a founding editor of the journal *CONSTITUTIONAL COMMENTARY*, and is a member of the editorial board of *Foundation Press*.

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AGE OF JEFFERSON (M.E. Sharpe); and SLAVERY IN THE COURTROOM (Library of Congress), which won the Joseph L. Andrews Award from the American Association of Law Libraries.

### *Steven J. Heyman*

Steven J. Heyman is Professor of Law at Chicago-Kent College of Law, Illinois Institute of Technology, where he teaches constitutional law, criminal law, and torts. He is the editor of HATE SPEECH AND THE CONSTITUTION (Garland), as well as the author of many scholarly articles on American constitutional law and the natural rights tradition, including *Righting the Balance: An Inquiry into the Foundations and Limits of Freedom of Expression* (BOSTON UNIVERSITY LAW REVIEW); *The First Duty of Government: Protection, Liberty and the Fourteenth Amendment* (DUKE LAW JOURNAL); and *Foundations of the Duty to Rescue* (VANDERBILT LAW REVIEW), which received Honorable Mention in the 1994 Scholarly Papers Competition of the Association of American Law Schools. In 1998, he was elected to the American Law Institute. During the 2000–01 year, he is a visiting professor at Vanderbilt University Law School.

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Michael C. Dorf is Professor of Law and Vice Dean at Columbia University School of Law, where he teaches courses in constitutional law and civil procedure. Professor Dorf served as a law clerk to Justice Anthony M. Kennedy at the Supreme Court and taught at Rutgers University (Camden) before joining the Columbia faculty. Professor Dorf writes in constitutional law and related subjects. With Laurence H. Tribe, he is the co-author of ON READING THE CONSTITUTION (Harvard University Press). He has written numerous law review articles, including *The Supreme Court 1997 Term Foreword: The Limits of Socratic Deliberation* (HARVARD LAW REVIEW); *Incidental Burdens on Fundamental Rights* (HARVARD LAW REVIEW); and *Facial Challenges to State and Federal Statutes* (STANFORD LAW REVIEW).

### *Robert J. Spitzer*

Robert J. Spitzer is Distinguished Service Professor of Political Science at the State University of New York, College at Cortland. He is the author of six books, including THE POLITICS OF GUN CONTROL (Chatham House); THE PRESIDENTIAL VETO: TOUCHSTONE OF AMERICAN POLITICS (SUNY Press), and PRESIDENT AND CONGRESS: EXECUTIVE HEGEMONY AT THE CROSSROADS OF AMERICAN GOVERNMENT (McGraw Hill and Temple University Press). In addition, Professor Spitzer is the editor of four other books, including POLITICS AND CONSTITUTIONALISM (Praeger), and CONSTITUTIONALISM, INSTITUTIONS, AND IMPLICATIONS OF POWER (University Press of Kansas), and is the Book Series General Editor for the Series on American Constitutionalism published by SUNY Press. Professor Spitzer is also the author of more than one hundred articles and book chapters on a variety of American political subjects. He currently is Vice President and President-Elect of the Presidency Research Group of the American Political Science Association. He has testified before Congress on several occasions, including before the U.S. Senate Judiciary Committee's Subcommittee on the Constitution, Federalism, and Property Rights, at its hearing about the Second Amendment in 1998.

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H. Richard Uviller is the Arthur Levitt Professor at Columbia Law School, where he teaches courses on criminal procedure and evidence. He is the author of numerous scholarly articles and of four books: *THE TILTED PLAYING FIELD: IS CRIMINAL JUSTICE UNFAIR?* (Yale University Press); *VIRTUAL JUSTICE: THE FLAWED PROSECUTION OF CRIME IN AMERICA* (Yale University Press); *THE PROCESSES OF CRIMINAL JUSTICE* (West Publishing Company); and *TEMPERED ZEAL: A CRIMINAL LAW PROFESSOR'S YEAR ON THE STREETS WITH THE NEW YORK CITY POLICE* (Contemporary Books). His articles about the criminal process, evidence, and prosecutorial responsibility have appeared in the *Columbia*, *Duke*, *Michigan*, *University of Pennsylvania*, and *Vanderbilt* law reviews, among many others. Professor Uviller is a member of the American Law Institute and the Lawyers' Committee on Violence, and previously served on the Advisory Committee on Criminal Law and Procedure for the Office of Court Administration.

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William G. Merkel received his B.A. in history with departmental honors from Johns Hopkins in 1988. In 1996 he graduated from Columbia Law School, where he was a Harlan Fiske Stone Scholar, a Westmoreland Davis Fellow, and president of the Criminal Law Society, as well as the recipient of a Foreign Language and Area Studies Fellowship from the Department of Education. After practicing with a major Washington, D.C. law firm, Mr. Merkel returned to graduate studies in 1998. He is currently nearing completion of an Oxford University doctoral dissertation in modern history, entitled *Liberty, Racism, and Anti-Slavery: A Re-Evaluation of Thomas Jefferson, His Critics, and His Legacy*.

# CHICAGO-KENT LAW REVIEW

## Chicago-Kent College of Law Illinois Institute of Technology

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PUBLISHED BY THE STUDENTS OF  
CHICAGO-KENT COLLEGE OF LAW  
ILLINOIS INSTITUTE OF TECHNOLOGY  
565 WEST ADAMS STREET, CHICAGO, ILLINOIS 60661

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VOLUME 76

2000

NUMBER 1

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