

## **Seminar: The Second Amendment (L01.3586.001)**

**Professor Adam M. Samaha**

**Wednesdays at 4:00–5:50 p.m. in Room VH208**

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**Description:** This seminar investigates constitutional rights to keep and bear arms in the United States. The focus of the seminar will be the Second Amendment — its history, its contested meaning over time, its role in politics, and, ultimately, its enforcement by federal courts to protect an individual right of some dimension. The seminar will touch on the existing regulatory regime and state constitutional law regarding weaponry. Students also will study the question whether a federal constitutional right to keep and bear arms should be enforced against state and local action. Grades will be based on short reaction papers and class participation. An additional paper may be written for substantial writing credit.

**Readings:** Below is a list of readings for our 14 class sessions. Links have been provided to full-text electronic versions of nearly all of the readings. I have tested these links on my office computer but, if the links are not working for you, please let me know. You may also access HeinOnline on your own to obtain many of the readings. There are a few exceptions in which no link is provided for an assigned reading. A few of these sources will be posted on the Blackboard website for the seminar. Other exceptions include judicial opinions, which you can access on Westlaw or Lexis, as well as excerpts from three books. Copies of the three books will be placed on reserve at the law library. However, you might wish to purchase these books. Links to online booksellers have been provided, and you should be able to buy new or used copies of the books for under \$10 each. Note that often I have assigned *only part* of the source in question; you are responsible *only* for the page ranges listed below.

**Reaction Papers:** Starting with the second reading assignment (*i.e.*, the assignment for our September 15 class meeting), groups of students will be writing short reaction papers. These papers will be only 2–3 pages in length, they will not require any additional research, and you will not have to write a reaction paper for every class meeting. But they will allow you to express thoughtful opinions about one or more of the readings, and they will help form the foundation for in-class discussions. I will discuss these reaction papers in more detail during our first class meeting on September 1.

**Class Participation:** Class participation is important to a successful seminar. It sharpens your own understanding of the subject matter and it instigates learning for the group. Please read the assignments thoughtfully, and then be willing to explore ideas during our class meetings. Reaction papers will be one source of discussion, but those students not writing reaction papers for a given class meeting should be full participants, as well. To keep your workload manageable, different students will be assigned to “take the lead” in presenting different readings for our second and subsequent class meetings. I will offer more thoughts on class participation during our first class meeting on September 1. I look forward to seeing you then.

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**(#1) Sept. 1, 2010 — Regulatory background and Second Amendment models**

**(Note: No reaction papers will be written for this class meeting.)**

- Philip J. Cook, Jens Ludwig & Adam M. Samaha, Gun Control After Heller: Threats and Sideshows From a Social Welfare Perspective, 56 UCLA L. Rev. 1041–1057 (2009), <http://heinonline.org/HOL/Page?handle=hein.journals/uclalr56&id=1&size=2&collection=journals&index=journals/uclalr#1051>
- Legal Community Against Violence, Regulating Guns in America (2008), [http://www.lcav.org/publications-briefs/reports\\_analyses/RegGuns.entire.report.pdf](http://www.lcav.org/publications-briefs/reports_analyses/RegGuns.entire.report.pdf) (simply glance at this document)
- Sanford Levinson, The Embarrassing Second Amendment, 99 Yale L.J. 637–659 (1989), [http://heinonline.org/HOL/Page?public=false&handle=hein.journals/ylr99&men\\_hide=false&men\\_tab=citnav&collection=journals&page=637](http://heinonline.org/HOL/Page?public=false&handle=hein.journals/ylr99&men_hide=false&men_tab=citnav&collection=journals&page=637)

**(#2) Sept. 15, 2010 — Second Amendment history**

**(Note: The seminar does not meet on September 9, which is a Legislative Monday.)**

- Sanford Levinson, The Embarrassing Second Amendment, 99 Yale L.J. 637–659 (1989) (recall the analysis in this article, which was assigned for our first class session)
- Joyce Malcolm, To Keep and Bear Arms: The Origins of an Anglo-American Right 135–164 (1994), on reserve at the library or available for purchase at <http://www.amazon.com/Keep-Bear-Arms-Origins-Anglo-American/dp/0674893077>
- William Van Alstyne, The Second Amendment and the Personal Right to Bear Arms, 43 Duke L.J. 1236–1255 (1994), [http://www.heinonline.org/HOL/Page?public=false&handle=hein.journals/duklr43&men\\_hide=false&men\\_tab=citnav&collection=journals&page=1236](http://www.heinonline.org/HOL/Page?public=false&handle=hein.journals/duklr43&men_hide=false&men_tab=citnav&collection=journals&page=1236)
- Mark Tushnet, Out of Range: Why the Constitution Can't End the Battle Over Guns 1–28 (2007), on reserve at the library or available for purchase at [http://www.amazon.com/Out-Range-Constitution-Battle-Inalienable/dp/0195304241/ref=sr\\_1\\_6?s=books&ie=UTF8&qid=1281993163&sr=1-6](http://www.amazon.com/Out-Range-Constitution-Battle-Inalienable/dp/0195304241/ref=sr_1_6?s=books&ie=UTF8&qid=1281993163&sr=1-6)

**(#3) Sept. 22, 2010 — Second Amendment history, continued**

- Saul Cornell, A Well-Regulated Militia: The Founding Fathers and the Origins of Gun Control in America 1–7, 39–70 (2006), on reserve at the library or available for purchase at [http://www.amazon.com/Well-Regulated-Militia-Founding-Fathers-Origins/dp/0195341031/ref=tmm\\_pap\\_title\\_0](http://www.amazon.com/Well-Regulated-Militia-Founding-Fathers-Origins/dp/0195341031/ref=tmm_pap_title_0)
- Reva B. Siegel, Dead or Alive: Originalism as Popular Constitutionalism in Heller, 122 Harv. L. Rev. 191–195, 201–236 (2008), [http://www.heinonline.org/HOL/Page?public=false&handle=hein.journals/hlr122&men\\_hide=false&men\\_tab=citnav&collection=journals&page=191](http://www.heinonline.org/HOL/Page?public=false&handle=hein.journals/hlr122&men_hide=false&men_tab=citnav&collection=journals&page=191)
- United States v. Miller, 307 U.S. 174–183 (1939), available on Westlaw or Lexis

**(#4) Sept. 29, 2010 — State constitutional rights**

- Eugene Volokh, State Constitutional Rights to Keep and Bear Arms, 11 Tex. Rev. L. & Politics 191–217 (2006), [http://heinonline.org/HOL/Page?public=false&handle=hein.journals/trlp11&men\\_hide=f](http://heinonline.org/HOL/Page?public=false&handle=hein.journals/trlp11&men_hide=f)

[alse&men\\_tab=citnav&collection=journals&page=191](#)

- Saul Cornell, A Well-Regulated Militia: The Founding Fathers and the Origins of Gun Control in America 137–165 (2006)
- Aymette v. State, 21 Tenn. 154 (1840), available on Westlaw or Lexis
- Nunn v. State, 1 Ga. 243 (1846), available on Westlaw or Lexis
- State v. Chandler, 5 La. Ann. 489 (1850), available on Westlaw or Lexis
- Adam Winkler, The Reasonable Right to Bear Arms, 17 Stan. L. & Pol’y Rev. 597–613 (2006),  
[http://heinonline.org/HOL/Page?public=false&handle=hein.journals/stanlp17&men\\_hide=false&men\\_tab=citnav&collection=journals&page=597](http://heinonline.org/HOL/Page?public=false&handle=hein.journals/stanlp17&men_hide=false&men_tab=citnav&collection=journals&page=597)

**(#5) Oct. 6, 2010 — Handgun bans: The D.C. example**

- Loftin, McDowall, Wiersema & Cottey, Effects of Restrictive Licensing of Handguns on Homicide and Suicide in the District of Columbia, 325 New England J. Med. 1615–1620 (1991) (this article will be made available to you on the Blackboard website)
- Britt, Kleck, & Bordua, A Reassessment of the D.C. Gun Law, 30 Law & Soc. Rev. 361–380 (1996),  
[http://heinonline.org/HOL/Page?public=false&handle=hein.journals/lwsocrw30&men\\_hide=false&men\\_tab=citnav&collection=journals&page=361](http://heinonline.org/HOL/Page?public=false&handle=hein.journals/lwsocrw30&men_hide=false&men_tab=citnav&collection=journals&page=361)
- McDowall, Loftin, & Wiersema et al., Using Quasi-Experiments to Evaluate Firearm Laws, 30 Law & Soc. Rev. 381–391 (1996),  
[http://heinonline.org/HOL/Page?public=false&handle=hein.journals/lwsocrw30&men\\_hide=false&men\\_tab=citnav&collection=journals&page=361#391](http://heinonline.org/HOL/Page?public=false&handle=hein.journals/lwsocrw30&men_hide=false&men_tab=citnav&collection=journals&page=361#391)

**(#6) Oct. 13, 2010 — On empirical study**

- Mark Tushnet, Out of Range: Why the Constitution Can’t End the Battle Over Guns 73–99 (2007)
- Philip J. Cook & Jens Ludwig, Aiming for Evidence-Based Gun Policy, 25 Journal of Policy Analysis and Management 691–699, 701–703, 705–728 (2006) (this article will be made available to you on the Blackboard website)
- Dan M. Kahan & Donald Braman, More Statistics, Less Persuasion: A Cultural Theory of Gun-Risk Perceptions, 151 U. Pa. L. Rev. 1291–1327 (2003),  
[http://heinonline.org/HOL/Page?public=false&handle=hein.journals/pnlr151&men\\_hide=false&men\\_tab=citnav&collection=journals&page=1291](http://heinonline.org/HOL/Page?public=false&handle=hein.journals/pnlr151&men_hide=false&men_tab=citnav&collection=journals&page=1291)
- Philip J. Cook & Jens Ludwig, Fact-Free Gun Policy?, 151 U. Pa. L. Rev. 1329–1339 (2003),  
[http://heinonline.org/HOL/Page?public=false&handle=hein.journals/pnlr151&men\\_hide=false&men\\_tab=citnav&collection=journals&page=1329](http://heinonline.org/HOL/Page?public=false&handle=hein.journals/pnlr151&men_hide=false&men_tab=citnav&collection=journals&page=1329)

**(#7) Oct. 20, 2010 — Federal judicial review begins**

- District of Columbia v. Heller, 128 S.Ct. 2783 (2008),  
<http://www.supremecourt.gov/opinions/07pdf/07-290.pdf>

**(#8) Oct. 27, 2010 — Afterward: The District’s response**

- Complete our discussion of *Heller*
- DC's new ordinance (this source will be made available to you on the Blackboard website)
- *Heller v. District of Columbia*, 698 F. Supp. 2d 179 (D.D.C. 2010) (*Heller II*), available on Westlaw or Lexis

**(#9) Nov. 3, 2010 — Afterward: Analyzing Second Amendment claims**

- Philip J. Cook, Jens Ludwig & Adam M. Samaha, Gun Control After Heller: Threats and Sideshows From a Social Welfare Perspective, 56 UCLA L. Rev. 1041, 1057–1068 (2009),  
<http://heinonline.org/HOL/Page?handle=hein.journals/uclalr56&id=1&size=2&collection=journals&index=journals/uclalr#1051>
- Mark Tushnet, Permissible Gun Regulations After Heller: Some Speculations About Method and Outcomes, 56 UCLA L. Rev. 1425–1442 (2009),  
[http://heinonline.org/HOL/Page?public=false&handle=hein.journals/uclalr56&men\\_hide=false&men\\_tab=citnav&collection=journals&page=1041#1435](http://heinonline.org/HOL/Page?public=false&handle=hein.journals/uclalr56&men_hide=false&men_tab=citnav&collection=journals&page=1041#1435)
- Lawrence Rosenthal, Second Amendment Plumbing After Heller: Of Standards of Scrutiny, Incorporation, Well-Regulated Militias, and Criminal Street Gangs, 41 Urb. Law. 1–6, 45–48, 78–84 (2009), available on Westlaw or Lexis
- Eugene Volokh, Implementing the Right to Keep and Bear Arms for Self-Defense: An Analytical Framework and a Research Agenda, 56 UCLA L. Rev. 1443–1475 (2009),  
[http://heinonline.org/HOL/Page?public=false&handle=hein.journals/uclalr56&men\\_hide=false&men\\_tab=citnav&collection=journals&page=1443](http://heinonline.org/HOL/Page?public=false&handle=hein.journals/uclalr56&men_hide=false&men_tab=citnav&collection=journals&page=1443)

**(#10) Nov. 10, 2010 — Afterward: The Second Amendment in litigation**

- Brannon P. Denning & Glenn H. Reynolds, Heller, High Water(mark)? Lower Courts and the New Right to Keep and Bear Arms, 60 Hastings L.J. 1245–1268 (2009),  
[http://www.heinonline.org/HOL/Page?public=false&handle=hein.journals/hastlj60&men\\_hide=false&men\\_tab=citnav&collection=journals&page=1245](http://www.heinonline.org/HOL/Page?public=false&handle=hein.journals/hastlj60&men_hide=false&men_tab=citnav&collection=journals&page=1245)
- Don B. Kates & Clayton E. Cramer, Second Amendment Limitations and Criminological Considerations, 60 Hastings L.J. 1339–1441, 1359–64 (2009),  
[http://heinonline.org/HOL/Page?public=false&handle=hein.journals/hastlj60&men\\_hide=false&men\\_tab=citnav&collection=journals&page=1245#1379](http://heinonline.org/HOL/Page?public=false&handle=hein.journals/hastlj60&men_hide=false&men_tab=citnav&collection=journals&page=1245#1379)
- C. Kevin Marshall, Why Can't Martha Stewart Have a Gun?, 32 Harv. J.L. & Pub. Pol'y 695–735 (2009),  
[http://www.heinonline.org/HOL/Page?public=false&handle=hein.journals/hjlpp32&men\\_hide=false&men\\_tab=citnav&collection=journals&page=695](http://www.heinonline.org/HOL/Page?public=false&handle=hein.journals/hjlpp32&men_hide=false&men_tab=citnav&collection=journals&page=695)
- *U.S. v. Skoien*, \_\_ F.3d \_\_ (7th Cir. July 13, 2010) (No. 08-3770), available on Westlaw or Lexis
- *Britt v. State*, 681 S.E.2d 320–325 (N.C. 2009), available on Westlaw or Lexis

**(#11) Nov. 17, 2010 — Incorporation: Some history and analytical tools**

- Saul Cornell, A Well-Regulated Militia: The Founding Fathers and the Origins of Gun Control in America 167–197 (2006)

- Robert J. Cottrol & Raymond T. Diamond, The Second Amendment: Toward an Afro-Americanist Reconsideration, 80 Geo. L.J. 309–361 (1991), [http://heinonline.org/HOL/Page?public=false&handle=hein.journals/glj80&men\\_hide=false&men\\_tab=citnav&collection=journals&page=309](http://heinonline.org/HOL/Page?public=false&handle=hein.journals/glj80&men_hide=false&men_tab=citnav&collection=journals&page=309)
- Presser v. Illinois, 116 U. S. 252–269 (1886), available on Westlaw or Lexis
- Duncan v. Louisiana, 391 U. S. 145–193 (1968), available on Westlaw or Lexis

**(#12) Nov. 24, 2010 — Incorporation: The Supreme Court today**

- McDonald v. Chicago, 130 S.Ct. 3020 (2010), <http://www.supremecourt.gov/opinions/09pdf/08-1521.pdf>

**(#13) Dec. 1, 2010 — Afterward: Chicago’s response**

- Complete our discussion of *McDonald*
- Chicago’s new ordinance (this source will be made available to you on the Blackboard website)
- The Complaint in *Benson v. Chicago* (this source will be made available to you on the Blackboard website)

**(#14) Dec. 8, 2010 — New York City’s system: Constitutionally problematic?**

- Sean Gardiner & Michael Howard Saul, High Court Ruling Seen as Challenge to N.Y. Gun Permits, Wall St. J., June 29, 2010, <http://proquest.umi.com/pqdweb?index=0&did=2068376481&SrchMode=1&sid=1&Fmt=3&VInst=PROD&VType=PQD&RQT=309&VName=PQD&TS=1282247947&clientId=9269>
- New York Penal Law § 400.00, available on Westlaw or Lexis
- New York City Police Department’s Pistol License Division, Handgun License Application, <http://www.nyc.gov/html/nypd/downloads/pdf/permits/HandGunLicenseApplicationFormsComplete.pdf>
- People v. Kuri, 132 Misc.2d 1036–1038, 506 N.Y.S.2d 245–246 (N.Y. City Crim. Ct. 1986), available on Westlaw or Lexis
- Fondacaro v. Kelly, 234 A.D.2d 173–177, 652 N.Y.S.2d 604–607 (Sup. Ct. App. Div. 1996), available on Westlaw or Lexis