January 1, 2020 Version

SECOND AMENDMENT: HISTORY, THEORY, AND PRACTICE

Professor Joseph Blocher & Jake Charles
Duke Law School
Spring 2020
Tuesday, 10:30am – 12:20pm, Room 3000

A dozen years ago, the Supreme Court's decision in *District of Columbia v. Heller* established that the right to keep and bear arms extends beyond the organized militia and includes an individual right to possess arms for certain private purposes, including self-defense in the home. In the decade since, in more than 1,000 cases, hundreds of scholarly articles, and millions of public debates, the modern Second Amendment has begun to take shape.

In this course, we will attempt to come to grips with the right to keep and bear arms as a matter of law. We will do so by thoroughly examining the constitutional history, theory, and practice of gun rights and regulation in the United States. We will cover the foundational Supreme Court cases—*Heller* and *McDonald v. City of Chicago*—as well as the broader historical and political debates in which they are embedded, and the theoretical questions they raise. Our goal is to understand both the relevant legal doctrine and the context in which that doctrine is embedded.

Office Hours: We will have joint office hours on Tuesdays from 1:30 to 3:00 in Prof. Blocher's office (3174) or by appointment. Please feel free to come by with questions or comments. You can also e-mail us any time at blocher@law.duke.edu and jacob.charles@law.duke.edu.

Readings: The only required course book is JOSEPH BLOCHER & DARRELL MILLER, THE POSITIVE SECOND AMENDMENT: RIGHTS, REGULATION, AND THE FUTURE OF *HELLER* (2018). The majority of the reading, however, will consist of articles, heavily edited cases, commentary, and other materials. This is a fast-moving area of law, where court cases, legislative actions, and public debate are intertwined—the reading assignments reflect as much.

As an optional companion volume, we recommend PHILIP J. COOK & KRISTIN A. GOSS, THE GUN DEBATE: WHAT EVERYONE NEEDS TO KNOW (2014). We will not be assigning readings from it, but it provides an excellent overview of many legal and policy issues.

There are also some helpful guides to firearm mechanics (*How a Handgun Works: 1911 .45*) (*Caliber, cartridges, and bump stocks: guns, explained for non-gun people*) and the variation among state laws and policies (*e.g.*, Giffords Law Center, National Shooting Sports Foundation) that are useful if you have further interest in any specific area.

Class: Class will meet Tuesdays from 10:30am to 12:20pm. Attendance and active participation are required and will factor heavily into your final grade. This is a discussion class, and we expect to hear from everyone multiple times each week.

Grading: Grades will be determined by class participation and by your work on either (1) six response papers of approximately five pages each, or (2) one longer paper of approximately thirty pages.

If you choose the response paper option, these should be e-mailed to Theresa Boyce (theresa.boyce@law.duke.edu) by 5pm the Monday before class so that we can review them ahead of time. Although your preparation and class participation will be evaluated every week, you can write papers for any six weeks you choose. If you write more than six papers (up to a maximum of nine) we will count only the best six towards your final grade. Unless you have received approval from us to write about something else, the response papers should be tied to the reading, though you need not limit them to a single week's assignment.

For the longer paper option, the guidelines below apply:

> 1) *Choosing a topic*. You are free to write about whatever you like, so long as it relates to some aspect of the Second Amendment or firearms law. We are happy to discuss topics any time in person or over email.
>
> 2) *Following the schedule*. Please make note of these dates:
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> Week 2 (Jan. 21) – Topic
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> Before the second week of class, you will produce something akin to an abstract: a few-sentence-long description of the issue you plan to explore. You will not be locked in to your topic, however, and can change if need be.
>
> Week 7 (Mar. 3) – Detailed Outline
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> The outline should be a few pages long, and must deliver a roadmap of where you think the paper will go. Formatting is irrelevant, and it doesn't need to be neat.

We just want to see what you have in terms of arguments, questions, sources, and avenues for further exploration.

Week 13 (April 7) – First Draft

Your first draft is only that—a draft—but it is essential, whether or not you are writing your paper to satisfy the Law School's research paper requirement. The draft does not need to be proofed or Bluebooked, but it must demonstrate that you have read and processed the relevant sources, and that you have found a way to construct your own argument based on them. Page count is less important than engagement with the materials and your own thesis.

May 1 - Final Paper

By this point the paper should be completed, fully cited, proofed, and Bluebooked.

Sakai: You can find more information about the course on Sakai, including the readings and syllabus, and any announcements about changes in the reading. There is also a "Forums" section, which we encourage you to take advantage of. It will not be a substitute for attendance and in-class discussion, but thoughtful postings will count towards your class participation.

This syllabus is subject to change throughout the semester.

SECOND AMENDMENT SEMINAR – READINGS

Week 1: The Origins of the Right to Keep and Bear Arms

A. The English Bill of Rights

- *The English Bill of Rights* (1689) (skim)
  - "That the subjects which are Protestants may have arms for their defence suitable to their conditions and as allowed by law"

B. Early American Understanding

- SAUL CORNELL, A WELL-REGULATED MILITIA : THE FOUNDING FATHERS AND THE ORIGINS OF GUN CONTROL IN AMERICA Chapter 2 (2006) (available online through the library)
- The Federalist Papers No. 29 (Hamilton); The Federalist Papers No. 46 (Madison)
- JOSEPH BLOCHER & DARRELL A.H. MILLER, THE POSITIVE SECOND AMENDMENT Chapter 1 (2018)

C. The Early Court View

- *State v. Reid*, 1 Ala. 612 (1840)
- *Nunn v. State*, 1 Ga. 243 (1846)
- Eric M. Ruben & Saul Cornell, *Firearm Regionalism and Public Carry: Placing Southern Antebellum Case Law in Context*, 125 YALE L.J. FORUM 121, 124-135 (2015)
- *City of Salina v. Blaksley*, 72 Kan. 230, 83 P. 619 (1905)

Week 2: From *Miller* to *Heller*

A. *United States v. Miller*

- *United States v. Miller*, 307 U.S. 174 (1939)
- BLOCHER & MILLER, Chapter 2

B. The Road to *Heller*

- Sanford Levinson, *The Embarrassing Second Amendment*, 99 YALE L.J. 637 (1989)
- Robert J. Spitzer, *Lost and Found: Researching the Second Amendment*, 76 CHI.-KENT L. REV. 349, 363-384 (2000)
- *Emerson v. United States*, 270 F.3d 203 (5th Cir. 2001) (skim)

Week 3: *Heller*, *McDonald*, and Constitutional Interpretation

A. *Heller* & Method

- *District of Columbia v. Heller*, 554 U.S. 570, 573-636 (2008); *id.* at 636-81 (Stevens, J., dissenting)
- Reva Siegel, *Dead or Alive: Originalism as Popular Constitutionalism in* Heller, 122 HARV. L. REV. 191, 191-95, 236-45 (2008)

B. Incorporation

- *McDonald v. City of Chicago*, 561 U. S. 742 (2010) (excerpts from majority opinion of Justice Alito and dissenting opinions of Justices Stevens and Breyer)
- BLOCHER & MILLER, 90-98

Week 4: Guns in *Heller*'s America

A. Contemporary Gun Ownership

- Pew Research Center, *Perspectives of Gun Owners, Non-Owners: Why Own a Gun? Protection Is Now Top Reason* (March 12, 2013)
- RAND Corporation, *The Challenge of Defining and Measuring Defensive Gun Use* (accessed Dec. 18, 2018)
- Tom Doherty, *How to Count the Defensive Use of Guns*, Reason.com (March 9, 2015)

B. The Constitution and Cost-Benefit Analysis

- *District of Columbia v. Heller*, 554 U.S. 570, 631-35 (2008); *id.* at 681-723 (Breyer, J., dissenting)
- *Heller v. District of Columbia*, 670 F.3d 1244 (D.C. Cir. 2011) (excerpts from majority opinion of Judge Ginsburg and dissenting opinion of Judge Kavanaugh)

C. The Empirical Debates

- RAND Corporation, *Gun Policy Research Review* (2018)
- NAT'L RESEARCH COUNCIL, FIREARMS AND VIOLENCE 1-10, 269-75 (2004)
- Philip K. Cook, Jens Ludwig, Adam M. Samaha, *Gun Control After* Heller*: Threats and Sideshows from a Social Welfare Perspective*, 56 UCLA L. REV. 1041, 1041-44, 1073-93 (2009)

Week 5: Post-*Heller* Doctrinal Development

A. Doctrinal Building Blocks

- BLOCHER & MILLER, Chapters 4 & 5
- *U.S. v. Masciandaro*, 638 F.3d 458 (4th Cir. 2013) (excerpts)

B. An Overview of Post-*Heller* Litigation

- CONGRESSIONAL RESEARCH SERVICE, POST-*HELLER* SECOND AMENDMENT JURISPRUDENCE pp. 12-47 (March 2019)

Week 6: Public Carry and Good Cause Restrictions

A. The Public Carry Debate

- *What You Need to Know About Open Carry in America*, THE TRACE (July 18, 2016)
  - *Optional*: GUNS TO CARRY, *Gun Laws By State: The Complete Guide*
- John J. Donahue et al., *Right-to-Carry Laws and Violent Crime: A Comprehensive Assessment Using Panel Data and a State-Level Synthetic Controls Analysis*, 16 J. EMPIRICAL L. STUD. 198 (2019)

B. Public Carry Bans

- *Moore v. Madigan*, 702 F.3d 933 (7th Cir. 2012) (excerpts)
- *Peruta v. Cty. of San Diego*, 824 F.3d 919 (9th Cir. 2016) (en banc) (excerpts)

C. Good Cause Restrictions

- *Wrenn v. District of Columbia*, 864 F.3d 650 (D.C. Cir. 2017) (excerpts)
- *Gould v. Morgan*, 907 F.3d 659 (1st Cir. 2018) (excerpts)

Week 7: Regulating "Arms"

A. Dangerous and Unusual Weapons and the "Common Use" Test

- 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, 1475-91 (2009)
- *Caetano v. Massachusetts*, 136 S. Ct. 1027 (2016)

B. Assault Weapons & Large Capacity Magazines

- Maggie Hartman, *What Makes a Gun an Assault Rifle?*, N.Y. MAGAZINE (Jan. 30, 2013) (review online; contains videos)
- Jeremy White, *When Lawmakers Try to Ban Assault Weapons, Gunmakers Adapt*, N.Y. TIMES (July 31, 2019) (review online)
- *Kolbe v. Hogan*, 849 F.3d 114 (4th Cir. 2017) (en banc) (excerpts)
- *Worman v. Healey*, 922 F.3d 26 (1st Cir. 2019) (excerpts)
- *Friedman v. City of Highland Park*, 784 F.3d 406 (7th Cir. 2015) (excerpts)
- *Friedman v. City of Highland Park,* 136 S.Ct. 447 (2015) (Thomas, J., dissenting from denial of cert) (excerpts)
- *Duncan v. Becerra*, 366 F. Supp. 3d 1131 (S.D. Cal. 2019) (excerpts)

Week 8: Classes of "the People" and As-Applied Challenges

A. Past Convictions

- *U.S. v. Skoien*, 614 F.3d 638 (7th Cir. 2010) (excerpts)
- *Medina v. Whitaker*, 913 F.3d 152 (D.C. Cir. 2019)
- *Kanter v. Barr*, 919 F.3d 437 (7th Cir. 2019) (Barrett, J., dissenting) (excerpts)
- Michael Luo, *Felons Finding It Easy To Regain Gun Rights*, N.Y. TIMES (Nov. 13, 2011)

B. Other Classes of Persons

- *United States v. Meza-Rodriguez*, 798 F.3d 664 (7th Cir. 2015) (specified non-citizens) (excerpts)
- *Nat'l Rifle Ass'n of Am., Inc. v. Bureau of Alcohol, Tobacco, Firearms, & Explosives*, 700 F.3d 185 (5th Cir. 2012) (minors) (excerpts)
- Adam Winkler, *Time for a "No Buy" List on Guns*, N.Y. TIMES (June 13, 2016)

C. Background Checks

- Danielle, Kurtzleben, *Research Suggests Gun Background Checks Work, But They're Not Everything*, NPR.org (Jan. 9, 2016)
- Editorial, *Deception on Background Checks*, N.Y. TIMES (May 24, 2013)
- Glenn Kessler, *The Stale Claim That 40 Percent of Gun Sales Lack Background Checks*, WASH. POST (Jan. 21, 2013)

Week 9: Firearms & Mental Health

A. Scope of Federal Prohibition

- *Tyler v. Hillsdale Cnty Sheriff's Dept.*, 837 F.3d 678 (6th Cir. 2016) (en banc) (excerpts)

B. Mental Illness and Suicide

- Jeffrey W. Swanson et al., *Mental Illness and Reduction of Gun Violence and Suicide: Bringing Epidemiological Research to Policy*, 25 ANNALS OF EPIDEMIOLOGY 366 (2015) (skim)
- Ian Ayres & Fredrick E. Vars, *Libertarian Gun Control*, 167 U. PENN. L. REV. 922-28, 970-71

C. Red Flag Laws

- Excerpted Examples of Red Flag Laws (California, Connecticut, Indiana)
- Jeffrey W. Swanson, et. al., *Implementation and Effectiveness of Connecticut's Risk-Based Gun Removal Law: Does It Prevent Suicides?*, 80 L. & CONTEMP. PROBS. 179, 191-208 (2017)

- Garen J. Wintemute, et al., *Extreme Risk Protection Orders Intended to Prevent Mass Shootings: A Case Series*, ANNALS OF AM. MEDICINE (2019)
- Joseph Blocher & Jacob D. Charles, *Firearms, Extreme Risk, and Legal Design: "Red Flag" Laws And Due Process*

Week 10: "Sensitive Places"

A. Government Property

- *United States v. Class*, 930 F.3d 460 (D.C. Cir. 2019) (excerpts)
- *Bonidy v. United States Postal Service*, 790 F.3d 1121 (10th Cir. 2015) (excerpts)

B. Schools

- Antonia Okafor, *Why I Bring My Gun to School*, NYTimes.com (July 24, 2017)
- David B. Kopel, *Pretend "Gun-Free School Zones": A Deadly Legal Fiction*, 42 CONN. L. REV. 515 (2009)

C. Churches, Bars, Restaurants, and other Private Property

- *GeorgiaCarry.org., Inc. v. Georgia*, 687 F.3d 1244 (11th Cir. 2012) (excerpts)

Week 11: What Is the Second Amendment For?

- BLOCHER & MILLER, Chapter 6
- Eric Ruben, *An Unstable Core: Self-Defense and the Second Amendment* 108 CAL. L. REV. 101(forthcoming 2020)
- JOHNSON, KOPEL, MOCSARY & O'SHEA, FIREARMS LAW AND THE SECOND AMENDMENT: REGULATION, RIGHTS, AND POLICY 1256-63 (2d ed 2018)
- Charles L. Dunlap, Jr., *Revolt of the Masses: Armed Civilians and the Insurrectionary Theory of the Second Amendment*, 62 TENN. L. REV. 643, 649-56 (1995)
- Darrell A.H. Miller, *Retail Rebellion and the Second Amendment*, 86 IND. L.J. 939, 939-68, 977 (2011)

Week 12: Federalism, Local Control & Sanctuary Counties

A. State Constitutional Guarantees

- Adam Winkler, *The Reasonable Right to Bear Arms*, 17 STAN. L. & POL'Y REV. 597-609 (2006)
- *Britt v. State*, 681 S.E.2d 320 (N.C. 2009) (excerpts)
- Strict Scrutiny Amendments from Alabama, Louisiana, and Missouri
- *State v. Clay*, 481 S.W.3d 531 (Mo. S. Ct. 2016) (en banc) (excerpts)

B. State and Regional Variation

- Joseph Blocher, *Firearm Localism*, 123 YALE L.J. 90-107 (2013)
- Concealed Carry Reciprocity Act of 2017
- NRA-ILA, *House Passes Concealed Carry Reciprocity* (Dec. 6, 2017)

C. Preemption and Local Control

- Matt Valentine, *Disarmed: How Cities are Losing the Power to Regulate Guns*, THE ATLANTIC (Mar. 6, 2014)
- NRA-ILA, *Firearm Preemption Laws*
- NRA-ILA, *Washington: NRA and SAF File Lawsuit Against City of Seattle* (July 20, 2018)
- Giffords Law Center to Prevent Gun Violence, *Preemption of Local Laws*

D. Sanctuary Cities and Counties

- Ashley Powers, *The Renegade Sheriffs*, THE NEW YORKER (Apr. 30, 2018)
- Katherine, Rosenberg-Douglas, *Second Amendment "Sanctuary County" Movement Expands as Organizers Take Aim at New Gun Laws*, CHICAGO TRIBUNE (Apr. 17, 2019) (review online and browse ordinances as well)

Week 13: Intersecting Interests & Emerging Trends

A. Race and Gender

- James Q. Wilson, *Just Take Away Their Guns*, N.Y. TIMES (March 20, 1994)
- MARY ANNE FRANKS, THE CULT OF THE CONSTITUTION 89-103 (2019)
- NICOLAS JOHNSON, NEGROES AND THE GUN 297-318 (2014)
- Kristin Goss & Jennifer Carlson, *Gendering the Second Amendment*, 80 LAW & CONTEMP. PROBS 103 (2017)

B. Stand Your Ground Laws

- CAROLINE E. LIGHT, STAND YOUR GROUND : A HISTORY OF AMERICA'S LOVE AFFAIR WITH LETHAL SELF-DEFENSE Chapter 7 (2017)

C. Mass Movements

- Matt Vasilogambros, *After Parkland, States Pass 50 New Gun-Control Laws* PEW CHARITABLE TRUST (Aug. 2, 2018)
- Kristin Goss, *Whatever Happened to the 'Missing Movement'? Gun Control Politics Over Two Decades of Change*, in JENNIFER CARLSON, ET AL. (EDS.) GUN STUDIES: INTERDISCIPLINARY APPROACHES TO POLITICS, POLICY, AND PRACTICE (2019)