

## Topics in Constitutional Law: Gun Control and Gun Rights L4050

Fall 2019

**Professor** David B. Kopel

**Textbook:** David B. Kopel, et al., *Firearms Law and the Second Amendment: Regulation, Rights, and Policy* (Aspen Publishers, 2d ed. 2017). Assignment from this textbook are labeled “Kopel.” It is very important that you purchase the 2d edition, and not the 1st edition (from 2012) because the second edition has major revisions in organization and material. There are also online supplemental chapters, which are available on the public Internet.

**Course objectives:** Learning of substantive law on firearms (mainly federal and state statutes) that will be relevant to anyone practicing criminal law. While there are plenty of appellate cases in the materials, we will also work with a variety of other materials not found in typical casebooks, to enhance students’ familiarity with the wide range of materials that can be used in litigation. This includes but is not limited to legal history. More broadly, the class will delve into broad issues of social organization, particularly to control unjustified violence and how can free government can be maintained. Along the way, we will cover a substantial amount of constitutional law beyond the Second Amendment, particularly the Fourteenth Amendment.

The materials most suitable for objective testing will be covered before the mid-term.

**Political correctness requirements:** None. In some courses, the professor insists that students mimic the professor’s political point of view. This is not such a course. Ideological hegemony would make classroom discussions very dull. It is perhaps known to some students that I am a very active Second Amendment advocate. However, my advocacy work for the Second Amendment takes place outside the classroom. Trying to convince judges and newspaper op-ed readers to agree to with me is my job; convincing students in my classroom is not my job. Perhaps one reason that some professors engage in ideological bullying is that students are their only real audience. That’s not my situation. So you are very much encouraged to speak up for you own ideas and thoughts, and of course to treat anyone who disagrees with you

**Class 1. August 19.** Read the petitioners' US Supreme Court merits brief in *New York State Rifle & Pistol Assoc. v. New York City*.

[https://www.supremecourt.gov/DocketPDF/18/18-280/98789/20190507145223491\\_18-280%20NYSRPA%20v.%20NYC%20-%20Brief%20for%20Petitioners%20FINAL.pdf](https://www.supremecourt.gov/DocketPDF/18/18-280/98789/20190507145223491_18-280%20NYSRPA%20v.%20NYC%20-%20Brief%20for%20Petitioners%20FINAL.pdf) ([Links to an external site.](#))

The brief is written by Paul Clement, who served as Solicitor General under President George W. Bush. He is generally regarded as the leading appellate advocate in the United States today, so we will be studying the brief as model of legal writing, including in many details regarding formatting and the like.

The brief also provides an overview of Second Amendment litigation as it exists today. We will return to that topic in depth later.

**Class 2. August 21.** *District of Columbia v. Heller*. Majority opinion. Kopel, 751-74. Plus the following items in Notes & Questions (pp. 802-12): 4, 5, 10, 13, 15, 16, 21, 22, 25, 27, 32, 33.

Class discussion will focus on what issues on the extent to which *Heller* does and does not provide definitive guidance to lower courts.

**Class 3. August 26.** Kopel 774-802. *District of Columbia v. Heller*. Dissents. Justice Stevens' dissent, along with Justice Scalia's majority opinion, identify some key issues in Second Amendment originalism and precedent. Then, as we go through the semester and read the original materials, you can come to your own decisions about which analysis is more persuasive. Justice Breyer's dissent argues, that Second Amendment review should be a freestanding interest-balancing test; as you will see in some of the post-*Heller* cases from lower courts, many courts have in effect adopted this test.

**Class 4. August 28.** Kopel 3-34. *Empirical data on guns*. How many are there? How often are they used and misused? .

**Class 5. Sept. 4.** *English history*. Kopel 73-85 (Anglo-Saxon days, arms rights and duties, Magna Carta), 125-39 (Stuart gun control, the Glorious Revolution, the English Bill of Rights), 158-70 (philosophy of resistance to tyranny: Blackstone, Locke, Sidney, Adams). The centuries-long English struggle to put the government under the rule of law is enormously important to American constitutionalism, but it is typically overlooked in American education, including legal education. Today's readings provide some of the background that is essential to serious litigation or scholarship that involves the origins of the Constitution.

At the end of the readings, the Notes & Questions on pages 167-70 are various ways of considering some essential issues: is self-defense a human right? Under what conditions is forcible resistance to government morally legitimate? When is resistance pragmatic and prudent?

**Class 6. Sept. 9.** *The Colonial Period and the New American Gun Culture*. Kopel 171-78, 183 (Vir. & Conn.), 185-88 (just the 1st para. on 188), 190-96, 203-06, 225-27, 234-36, 238(start at e.) to 240.

Even before the first English immigrants landed in Virginia, their gun laws had begun to diverge from England's. Americans had written rights the English didn't. Similarly, the arms culture that the settlers had brought with them soon began to diverge from the arms culture back in England. In a New World, the colonists enacted many gun mandates and gun controls, based on the new conditions they faced. Most importantly, the settlers had to learn to match Indian arms skills and adopt much of Indian arms culture.

**Class 7. Sept. 11.** *The American Revolution*. Kopel 246-77, 281-85.

**Class 8. Sept. 16.** *The Second Amendment.* Kopel 334-58.

**Class 9. Sept. 18.** *The Early Republic.* Kopel 369-70 (ignore the questions); 371-92, 404-14. The foundational right to arms cases. Slavery.

**Class 10. Sept. 23.** *McDonald v. Chicago.* Kopel, 812-28 (Alito plurality), 848-54 (Thomas concurrence), 893-902 (modes of constitutional interpretation).

**Class 11. Sept. 25.** *Late 19th and early 20th century. National Firearms Act.* Kopel 487-90 (lynching and repeaters). 501-07 (Aliens and *People v. Nakamura*, Colo. 1936). 530-47 (National Firearms Act of 1934. Machine guns and other specially-restricted arms).

**Class 12. Sept. 30.** *National Firearms Act continued. World War II.* Kopel 547-67, 572 (start at III) to 582.

**Class 13. Oct. 2.** *The Gun Control Act of 1968* (the main federal gun control law). Kopel 606-18, 623-24, 630-34, 641-55.

**Class 14. Oct. 7.** *Gun Control Act continued. Terry stops. Protection of Lawful Commerce in Arms Act.* Kopel 656-64. 670-92.

**Class 15. Oct. 9.** *State rights to arms.* Kopel 693-710. 722-37.

**Class 16. Oct. 14.** *More on state constitutional rights.* Kopel 737-48 (state constitution texts). Concentrate on the bolded text, which is for current provisions. Dip into older texts as you wish. Also, selected portions of briefs from *Rocky Mountain Gun Owners v. Polis*, which will be argued in the Colorado Supreme Court on Nov. 13. Briefs are available in the "Files" folder on Canvas. Attorney General answer brief: pages i-ii (TOC), 2-4 (summary), 11-25 (argument). Barry Arrington reply brief: i-ii (TOC; the pages with this number are the *second* set of roman numeral pages), 7-20. Kopel amicus brief, for CLEFIA and Sheriffs: iii (TOC), 2 (Summary).

**Class 17. Oct. 16.** In-class midterm. Objective questions.

**Class 18. Oct. 21.** Write an op-ed on any arms-related topic of interest. The op-ed should be 600-700 words. Your topic can be set in any time period and cover any issue you want that is related to arms policy and/or law. and can be from any point of view. Here are some guidelines for op-eds:

This first article offers a good guideline for structure. You don't have to follow it rigidly, but it's a good starting point for organization.

<https://www.aacr.org/AdvocacyPolicy/SurvivorPatientAdvocacy/Pages/How-To-Write-an-Op-Ed.aspx>

This article from Carlton College is full of wise advice, and explains to professors (and, by extension, to other writers who are mainly used to writing in an academic setting) some of the

differences between writing for a general audience versus academic writing):  
[https://apps.carleton.edu/media\\_relations/about/op\\_ed\\_guidelines/](https://apps.carleton.edu/media_relations/about/op_ed_guidelines/)

This set of instructions, from a think tank, emphasizes the importance of providing useful suggestions to address the problem that is addressed in the op-ed. <https://atlantic-community.org/how-to-write-a-great-op-ed/>

Finally, columnist Bret Stephens of the New York Times offers some insightful, advanced tips. If you don't have access to the NYT, don't worry. Nothing here is essential. And of course all of the guidelines from the Times and elsewhere need to be adjusted for the context of this assignment. For example, Stephens accurately warns writers not to bother submitting a NYT op-ed unless the writer is an expert on the topic. This is true, but you don't have to be an expert on whatever topic you write about for this assignment.  
<https://www.nytimes.com/2017/08/25/opinion/tips-for-aspiring-op-ed-writers.html>

**Class 19. Oct. 23.** Kopel 903-10 (standards of review). 944-60 (*Heller III*, gun licensing).

**Class 20. Oct. 28.** Kopel 910-943 (*Heller II*, "assault weapons").

**Class 21. Oct. 30.** Kopel 983-1011 (right to carry).

**Class 22. Nov. 4.** Kopel 1012-32 (sensitive places).

**Class 23. Nov. 6.** Kopel 1032-56 (arms commerce).

**Class 24. Nov. 11.** Kopel 1056-73 (prohibited persons), 1076-93 (young adults).

**Class 25. Nov. 13.** Kopel. Kopel 1093-1100 (illegal aliens). 1100-36 (mentally ill).

**Nov. 15.** Second draft of op-ed due by 11:59 p.m.

**Class 26. Nov. 18.** *Non-firearms arms*. Kopel 1180-1201.

**Class 27. Nov. 20.** *Firing ranges and practice*. Kopel 1218-54 (*Ezell I & II*).

**Class 28. Nov. 25.** No assignment.