

SECOND AMENDMENT: HISTORY, THEORY, AND PRACTICE

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Duke Law School
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Tuesday, 8:55-10:45, Room 4044

In 2008, 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 after *Heller*, the modern Second Amendment began to take shape through more than 1,000 lower-court cases, hundreds of scholarly articles, and millions of public debates.

The Court's June 2022 decision in *New York State Rifle & Pistol Association v. Bruen* altered that shape substantially, setting forth a new legal test focused on text, history, and tradition. While the dust from *Bruen* has only just begun to settle, the Court has already agreed to hear another Second Amendment case—*United States v. Rahimi*—which may clarify some aspects of the *Bruen* test and the role of historical analysis more broadly. The Court will hear oral argument in *Rahimi* this fall.

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 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 open office hours on Tuesdays from 10:45 to 12:30 in Professor Blocher's office (2010, located within the Dean's suite), 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 andrew.willinger@duke.edu.

Readings: Along with Jacob Charles (Pepperdine), Jody Madeira (Indiana), and Darrell A.H. Miller (Duke), Professor Blocher is currently writing a Second Amendment casebook, the draft chapters of which will be posted to Sakai and will comprise the reading assignments throughout the semester. The book is a work in progress, and we

invite your feedback throughout the semester on discussion questions, notes, case selection, and the like.

As an optional companion, we recommend PHILIP J. COOK & KRISTIN A. GOSS, *THE GUN DEBATE: WHAT EVERYONE NEEDS TO KNOW* (2d ed 2020). We will not be assigning readings from it, but it provides an excellent overview of many legal and policy issues.

Class: 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 every 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 Taylor Clark (taylor.clark@law.duke.edu) by 5:00 pm 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 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:

Week 2 (Aug. 29) – Topic

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.

Week 7 (Oct. 3) – Detailed Outline

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 12 (Nov. 14) – 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.

December 15 - 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. We encourage you to post or comment on developments in gun law and policy—of which we expect there will be many throughout the fall. Thoughtful postings are a substitute for attendance and in-class discussion, but will count towards your class participation.

This syllabus is subject to change throughout the semester.

SECOND AMENDMENT SEMINAR – READINGS

Week 1 - August 22

Chapter 2: *Heller* and Constitutional Grammar

Week 2 - August 29

Chapter 3: Reconstruction and Incorporation

Topics for long papers due

Week 3 – September 5

Chapter 4: Second Amendment Implementation and Methodology

Week 4 – September 12

Chapter 5: Where the Second Amendment Extends

Week 5 – September 19

Chapter 8: Gun Rights and Equality

Week 6 – September 26

Chapter 9: Conflicting & Reinforcing Rights & Interests

Week 7 – October 3

Chapter 10: Gun Rights Outside the Constitution

Outlines for long papers due

Week 8 – October 10

Guest Speaker: Brandon Beck, Assistant Professor, Texas Tech University School of Law, former assistant federal public defender/lead counsel in *United States v. Rahimi* (*Non-chapter reading posted to Sakai*)

Week 9 – October 24

Chapter 7: Who the Second Amendment Covers

Week 10 – October 31

What the Second Amendment Covers (*Non-chapter reading posted to Sakai*)

In-class workshopping of long paper outlines

Week 11 – November 7

Rahimi discussion and Oral Argument (*Non-chapter reading posted to Sakai*)

Week 12 – November 14

Guest Speaker: Erin Murphy, Partner, Clement & Murphy PLLC, Counsel for Petitioners in *NYSRPA v. Bruen*

First draft of long papers due

Week 13 – November 28

Chapter 11: Civil Liability of Manufacturers, Platforms, and Governments

Second Amendment Reading List: This list is entirely optional; we will not be assigning any readings from these books, and we have no expectation that you will read them. The list is included here only for those who are interested in further reading material in this subject area:

- CAROL ANDERSON, *THE SECOND: RACE AND GUNS IN A FATALLY UNEQUAL AMERICA* (2021)
- CARL BOGUS, *MADISON'S MILITIA: THE HIDDEN HISTORY OF THE SECOND AMENDMENT* (2023)
- JOSEPH BLOCHER & DARRELL MILLER, *THE POSITIVE SECOND AMENDMENT: RIGHTS, REGULATION, AND THE FUTURE OF HELLER* (2018)
- ANTHONY BRAGA & PHILIP COOK, *POLICING GUN VIOLENCE: STRATEGIC REFORMS FOR CONTROLLING OUR MOST PRESSING CRIME PROBLEM* (2023)
- JENNIFER CARLSON, *POLICING THE SECOND AMENDMENT: GUNS, LAW ENFORCEMENT, AND THE POLITICS OF RACE* (2020)
- SAUL CORNELL, *A WELL-REGULATED MILITIA: THE FOUNDING FATHERS AND THE ORIGINS OF GUN CONTROL IN AMERICA* (2008)
- STEPHEN HALBROOK, *THE FOUNDERS' SECOND AMENDMENT: ORIGINS OF THE RIGHT TO BEAR ARMS* (2012)
- DAVID KOPEL, *THE MORALITY OF SELF-DEFENSE AND MILITARY ACTION: THE JUDEO-CHRISTIAN TRADITION* (2017)
- CAROLINE LIGHT, *STAND YOUR GROUND: A HISTORY OF AMERICA'S LOVE AFFAIR WITH LETHAL SELF-DEFENSE* (2017)
- NOAH SHUSTERMAN, *ARMED CITIZENS: THE ROAD FROM ANCIENT ROME TO THE SECOND AMENDMENT* (2020)
- MICHAEL WALDMAN, *THE SECOND AMENDMENT: A BIOGRAPHY* (2015)
- ADAM WINKLER, *GUNFIGHT: THE BATTLE OVER THE RIGHT TO BEAR ARMS IN AMERICA* (2013)