

# SECOND AMENDMENT HISTORY, THEORY, AND PRACTICE<sup>1</sup>

## SYLLABUS

<u>Class Information</u>	<u>Instructor Information</u>
Days: Tuesday	Professor: Darrell Miller
Time: 10:30 am – 12:20 pm	Email: <a href="mailto:dmiller@law.duke.edu">dmiller@law.duke.edu</a>
Room: 3171	Telephone: 919-613-8517
Course #: 556-01	Office: Room 4014
	Office Hours: Friday 10-12 or by appointment

**Materials:** Posted on Sakai, by link, or available through Hein Online, Lexis, or Westlaw.

Where a page range is indicated, you will only be responsible for the page numbers assigned.

SAKAI: Everyone will be responsible for assignments and communication posted through SAKAI.

### **Description:**

The Supreme Court's decisions in District of Columbia v. Heller and McDonald v. City of Chicago have ushered in a whole new era of Second Amendment theory, litigation, and politics. Current events keep issues of firearms, gun violence, gun safety, and self-defense constantly in the news. This seminar will explore the Second Amendment and the various state constitutional analogs historically, theoretically, and pragmatically. Students will be introduced to the historical and public policy materials surrounding the Second Amendment, the regulatory environment concerning firearms, and the political and legal issues pertaining to firearm rights-enforcement and policy design. Evaluation for the seminar will be based on eight short reaction papers and in-class participation. 2 Credit Hours.

### **Attendance:**

I will take attendance every day. Everyone in class has four no-fault passes. A pass can be used for any or no reason. Use of a pass has no effect on your class participation grade. These four passes should be

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<sup>1</sup> Subject to revision as necessary.

sufficient to cover any contingency. You may also use a pass if you feel unprepared, or if your contribution in class displays that you are unprepared. These rules are subject to modification on a case-by-case basis for students who demonstrate serious hardship.

### **Grading:**

Grades will be determined based on eight reaction papers and class participation. The eight reaction papers should offer your personal reaction and commentary on the reading for the immediately forthcoming class session. The papers should be between three to five pages, double-spaced and page-numbered, and should be emailed to me by 5:00 pm the day before class. There are no reaction papers for the first class: other than that, students may respond to whatever eight readings they wish.

The email and the reaction paper itself should be clearly labeled with your name and the class session for which the reaction paper is submitted. You may, of course, write the reaction paper at any time, but in no event should the reaction paper be sent to me more than a week before the class for which you are writing. (In other words, papers for Tuesday, Sept. 9, should be sent by 5:00 pm Monday, Sept. 8, but not before the end of our class session on Tuesday, Sept. 2.)

Reaction papers will be graded on a high pass, pass, and fail scale, and will include brief feedback from me. Although short, the reaction papers should display the same type of professional care and attention as that of an attorney writing a commentary for a bar journal, newspaper, or client newsletter. They should have a clear thesis, clear development, and a conclusion. No footnoting is necessary, but they should give adequate attribution in the commentary where required.

I will select points or passages from your reaction papers, as well as points of my own, to serve as the catalyst for our class discussions.

Class participation is a qualitative evaluation of your engagement in the class and your contribution to the seminar project. Even if you do not write a reaction paper for a certain class, you are expected to have read and be able to participate in the class session.

Your overall grade will be based on a combination of your reaction papers and class participation, and will conform to Duke's policy concerning upper-level grade medians.

### **Laptops:**

There should not be much need for laptops in this class. Nevertheless, laptops and other electronic devices may be used in class for note taking, for reviewing the assigned reading materials, or other seminar-related tasks. Laptops or other electronic devices may not be used in class for e-mailing, e-Baying, instant messaging, texting, or other such uses. I reserve the right to ban the use of laptops altogether, if I deem they are becoming a distraction.

## Recording:

No audio or video recording of any of our class sessions is allowed. Exceptions can be made for extraordinary circumstances, subject to restrictions.

## Week 1 (no reaction papers)

### *History, Doctrine, and Heller*

Text of the Second Amendment

[http://www.law.cornell.edu/constitution/second\\_amendment](http://www.law.cornell.edu/constitution/second_amendment)

Ross E. Davies, Which is the Constitution?, 11 Green Bag 2d 209 (2008)

[http://www.greenbag.org/v11n2/v11n2\\_davies.pdf](http://www.greenbag.org/v11n2/v11n2_davies.pdf)

England's Declaration of Right

[http://avalon.law.yale.edu/17th\\_century/england.asp](http://avalon.law.yale.edu/17th_century/england.asp)

Act for Disarming of Papists

<http://www.british-history.ac.uk/report.aspx?compid=46301>

Robert Shalhope, The Ideological Origins of the Second Amendment, 69 J. Am. Hist. 599 (1981)  
(available on JSTOR)

District of Columbia v. Heller, 554 U.S. 570 (2008)

## Week 2

### *History, Doctrine, and Heller (cont.)*

District of Columbia v. Heller, 554 U.S. 570 (2008) (cont.)

Reva Siegel, Dead or Alive: Originalism as Popular Constitutionalism in *Heller*,  
122 Harv. L. Rev. 191 (2008)

[http://www.law.yale.edu/documents/pdf/Faculty/Siegel\\_DeadOrAliveOriginalismAsPopularConstitutionalismInHeller.pdf](http://www.law.yale.edu/documents/pdf/Faculty/Siegel_DeadOrAliveOriginalismAsPopularConstitutionalismInHeller.pdf)

J. Harvie Wilkinson, Of Guns, Abortion, and the Unravelling Rule of Law, 95 Va. L. Rev. 253  
(2009)

<http://virginialawreview.org/content/pdfs/95/253.pdf>

Diarmuid F. O'Scannlain, The Natural Law in the American Tradition, 79 Fordham L. Rev. 1513  
(2011)

<http://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=4739&context=flr>

### Week 3

#### *History and Doctrine Redux*

Examples of Black Codes (available on Sakai) (reprinted from Johnson, Kopel, Mocsary & O'Shea, Firearms Law and The Second Amendment: Regulation, Rights and Policy)

Second Freedmen's Bureau Act, 14 Stat. 173 (1866)

Civil Rights Act of 1866, 14 Stat. 27 (1866)

McDonald v. City of Chicago, 130 S. Ct. 3020 (2010)

### Week 4

#### *History and Doctrine Redux (cont.)*

McDonald v. City of Chicago (cont.)

Presser v. Illinois, 116 U.S. 252 (1886) (**skim**)

Stephen P. Halbrook, The Right of Workers to Assemble and to Bear Arms: Presser v. Illinois—One of the Last Holdouts against Application of the Bill of Rights to the States, 76 U. Det. Mercy L. Rev. 943 (1999)

Carole Emberton, The Limits of Incorporation: Violence, Gun Rights, and Gun Regulation in the Reconstruction South, 17 Stan. L. & Pol'y Rev. 615 (2006)

Excerpts from the Ku Klux Klan Trials pp. 425–426,  
<http://archive.org/stream/proceedingsinkuk00united#page/424/mode/2up>

Apodaca v. Oregon, 406 U.S. 404 (1972) (**skim**)

Williams v. Florida, 399 U.S. 78 (1970) (**skim**)

## Week 5

### Tests?

United States v. Marzzarella, 614 F.3d 85 (3d Cir. 2010)

Peruta v. County of San Diego, No. 10-56971, (9th Cir. 2014)

<http://cdn.ca9.uscourts.gov/datastore/opinions/2014/02/13/10-56971%20web.pdf>

Moore v. Madigan, 702 F.3d 933 (7th Cir. 2012)

Heller v. District of Columbia (Heller II), 670 F.3d 1244 (D.C. Cir. 2011)  
(Judge Kavanaugh's dissent) (**skim**)

National Rifle Ass'n, Inc. v. Bureau of Alcohol, Tobacco, Firearms, and Explosives,  
714 F.3d 334 (5th Cir. 2013) (denying en banc review) (**skim**)

<http://www.ca5.uscourts.gov/opinions%5Cpub%5C11/11-10959-CV1.wpd.pdf>

## Week 6

### *The Second Amendment and Constitutional Implementation*

Eugene Volokh, Implementing the Right to Keep and Bear Arms for Self-Defense: An Analytical Framework and a Research Agenda, 56 UCLA L. Rev. 1443–1483 (2009)

Lawrence Rosenthal, Second Amendment Plumbing After Heller: Of Standards of Scrutiny, Incorporation, Well-Regulated Militias, and Criminal Street Gangs,  
41 Urban Lawyer 1–6, 45–48, 78–84 (2009)

Joseph Blocher, Categoricalism and Balancing in First and Second Amendment Analysis, 84 N.Y.U. L. Rev. 375, 381–393 (2009)

[http://scholarship.law.duke.edu/faculty\\_scholarship/2104/](http://scholarship.law.duke.edu/faculty_scholarship/2104/)

Darrell A.H. Miller, Text, History and Tradition: What the Seventh Amendment Can Teach Us About the Second, 122 Yale L. J. 852, 855–71 (2013)

<http://www.yalelawjournal.org/images/pdfs/1128.pdf>

## Week 7

### *Empirical Studies and Their Relevance*

- Nat'l Research Council of the Nat'l Acads., *Firearms and Violence* (2004)  
[http://www.nap.edu/openbook.php?record\\_id=10881&page=25](http://www.nap.edu/openbook.php?record_id=10881&page=25) (read only the Executive Summary, Wilson Dissent and Response)
- State Variation in Hospital Use and Cost of Firearm Assault Injury  
<http://www.urban.org/publications/413210.html> (also on Sakai)
- Dan M. Kahan & Donald Braman, *More Statistics, Less Persuasion: A Cultural Theory of Gun-Risk Perceptions*, 151 U. Pa. L. Rev. 1291 (2003)  
[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=286205](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=286205)
- Philip J. Cook & Jens Ludwig, *Fact-Free Gun Policy?* 151 U. Pa. L. Rev. 1329 (2003)  
[http://home.uchicago.edu/~ludwigj/papers/UPenn\\_Law\\_Review\\_2003.pdf](http://home.uchicago.edu/~ludwigj/papers/UPenn_Law_Review_2003.pdf)
- Josh Blackmun, *The Constitutionality of Social Cost*, 34 Harv. J. L & Pub. Pol'y 951, 952-963, 979-984, 1004-1042 (2013)
- Gowder v. City of Chicago*, 2012 WL 2325826 (N.D. Ill June 19, 2012) (**skim**)

## Week 8

### *State Constitutional Provisions and State Cases*

- Eugene Volokh, *State Constitutional Rights to Keep and Bear Arms*, 11 Texas Rev. of Law & Politics 191 (2006)  
[http://www.trolp.org/main\\_pgs/issues/v11n1/Volokh.pdf](http://www.trolp.org/main_pgs/issues/v11n1/Volokh.pdf)
- Aymette v. State*, 21 Tenn. 154 (1840)
- Nunn v. State*, 1 Ga. 243 (1846)
- State v. Chandler*, 5 La. Ann. 489 (1850)
- English v. State*, 35 Texas 473 (1872)
- Britt v. State*, 681 S.E.2d 320 (N.C. 2009)
- Adam Winkler, *The Reasonable Right to Bear Arms*, 17 Stan. L. & Pol'y Rev. 597 (2006)
- William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 Harv. L. Rev. 489 (1977)

## Week 9

### *Politics and Policy: Protections and Prohibitions*

C. Kevin Marshall, Why Can't Martha Stewart Have a Gun?, 32 Harv. J.L. & Pub. Pol'y 695, 695–713, 728–35 (2009)

Fredrick E. Vars & Amanda Adcock Young, Do the Mentally Ill Have a Right to Bear Arms?, 48 Wake Forest L. Rev. 1 (2013)

“Guns to Work” Law

Florida Statutes Annotated § 790.251

Florida Retail Ass’n v. Attorney General, 576 F. Supp. 2d 1281 (N.D. Fla. 2008) (skim)

Joseph Blocher, The Right Not to Keep or Bear Arms, 64 Stan. L. Rev. 1-18, 31-54 (2012)

Protection of Lawful Commerce in Arms Act, Pub. L. No. 109-92, 119 Stat. 2095 (2005)

## Week 10

### *Guns, Citizenship, and Race*

Angela R. Riley, Indians and Guns, 100 Geo. L. J. 1675 (2102)

<http://georgetownlawjournal.org/files/2012/06/Riley.pdf>

Pratheepan Gulasekaram, Guns and Membership in the American Polity, 21 William and Mary Bill of Rights Journal 619 (2010)

<http://scholarship.law.wm.edu/cgi/viewcontent.cgi?article=1643&context=wmborj>

Robert J. Cottrol & Raymond T. Diamond, The Second Amendment: Toward an Afro- Americanist Reconsideration, 80 Geo. L.J. 309 (1991)

Robert J. Cottrol & Raymond T. Diamond, “Never Intended To Be Applied to the White Population”: Firearms Regulation and Racial Disparity—The Redeemed South's Legacy to a National Jurisprudence?, 70 Chi.-Kent L. Rev. 1307 (1995) (skim)

U.S. v. Portillo-Munoz, 643 F.3d 437 (5th Cir. 2011)

## Week 11

### *Guns, Gender, and Age*

National Rifle Ass'n of America, Inc. v. Bureau of Alcohol, Tobacco, Firearms, and Explosives, 700 F.3d 185 (5th Cir. 2012) (majority opinion)

Katherine Hunt Federle, The Second Amendment Rights of Children, 89 Iowa L. Rev. 609, 611–616, 651–657 (2004)

Lindsay K Charles, Feminists and Firearms: Why Are So Many Women Anti-Choice?, 17 Cardozo J.L. & Gender 297 (2011)

Jeannie Suk, The True Woman: Scenes from the Law of Self-Defense, 31 Harv. J.L. & Gender 237 (2008)

Robin West, A Tale of Two Rights, 94 B. U. L. Rev. 893 (2014)

DeShaney v. Winnebago County, 489 U.S. 189 (1989) (**skim**)

## Week 12

### *Politics and Policy: Stand Your Ground*

Florida's "Stand Your Ground" Law, 2005 Fla. Sess. Law Serv. Ch. 2005-27 (C.S.C.S.S.B. 436) (available on Westlaw, FL LEGIS 2005-27 )

Sean Sullivan, "Everything You Need to Know About 'Stand Your Ground Laws'" Washington Post July 15, 2013, available at <http://www.washingtonpost.com/blogs/the-fix/wp/2013/07/15/everything-you-need-to-know-about-stand-your-ground-laws/>

Patrick Jonsson, Racial Bias and "Stand Your Ground Laws": What the Data Show, Christian Science Monitor (Aug. 6, 2013) (available on Sakai)

L. Song Richardson & Phillip Atiba Goff, Self-Defense and the Suspicion Heuristic, 98 Iowa L. Rev. 293 (2012)

A hypothetical statute (To be distributed)



## Week 13

### *New Technology, Corporations, and the Future*

Peter Jensen-Haxel, Comment, 3D Printers, Obsolete Firearm Supply Controls, and the Right to Build Self-Defense Weapons Under Heller, 42 Golden Gate U. L. Rev. 447 (2012)

Jana Winter, Homeland Security bulletin warns 3D-printed guns may be 'impossible' to stop, Fox News (May 23, 2013) (available on Sakai)

NPR, Can 'Smart Gun' Technology Help Prevent Violence? (March 18, 2013) (available on Sakai)

Craig S. Lerner & Nelson Lund, Heller and Nonlethal Weapons 60 Hastings L.J. 1387 (2009)

Gene J. Koprowski, "Smart gun technologies making weapons more accurate—and more deadly" <http://www.foxnews.com/tech/2013/07/19/smartgun-technologies-transform-hunting-tracking/#ixzz2dCau00ek>

Darrell A.H. Miller, Guns, Inc.: Citizens United, McDonald and the Future of Corporate Constitutional Rights, 86 N. Y. U. L. Rev. 887, 887–905, 946–956 (2011)