

SECOND AMENDMENT FUNDAMENTALISM: SEMINAR
UNIVERSITY OF MIAMI SCHOOL OF LAW

Professor Mary Anne Franks

Course Description: Though primarily associated with religion, the concept of fundamentalism can be used to diagnose a range of ideological attitudes, including interpretations of the U.S. Constitution. Constitutional fundamentalism is characterized by selective, emotionally charged, and rigid interpretations of particular constitutional rights or provisions. This seminar focuses on Second Amendment fundamentalism and its impact on the legal doctrine, public policy, and popular understanding of the right to bear arms. In addition to studying the evolution of Second Amendment interpretation, we will consult case law, legal scholarship, and current events to explore the influence of Second Amendment fundamentalism on the legal and social conceptions of self-defense, harm, and risk. We will examine the role of gender, racial, and cultural identity in gun rights debates as well as the influence of the National Rifle Association (NRA) and the firearms industry in shaping law and policy. This seminar involves lengthy reading assignments and requires consistent, extensive participation by each student.

Reading Materials: Joseph Blocher and Darrell A. H. Miller, *The Positive Amendment: Rights, Regulation, and the Future of Heller* (2018); other materials available on TWEN or online.

Electronic Device Policy: In order to maintain focus on class discussion, it is requested that you do not use laptops, cell phones, or other electronic devices in class. An exception will be made for a student volunteer willing to make their notes available to the entire class. If you would like to volunteer, please do so either in person or via email as soon as possible after the first meeting of the seminar. In the interests of cultivating an environment of uninhibited discussion, students may not make any recordings (audio or visual) of seminar proceedings.

Method of Evaluation: Your grade will be determined by writing assignments (70%) and class participation (30%).

Writing Assignments. There are four writing assignments. These are their word counts and respective percentages of your grade:

Writing Assignment 1: Reflection Paper (2500-3000 words) – 15%

Writing Assignment 2: Reflection Paper (2500-3000 words) – 15%

Writing Assignment 3: Op-ed (1200-1500 words) – 20%

Writing Assignment 4: Judicial Opinion (3000-4000 words) – 20%

Reflection Papers: Choose any two classes from classes 2-10 as the subject of your reflection papers. These papers should focus on 1-3 main points communicated in the readings for those classes. Consider questions such as: which points were particularly interesting or useful? What did you disagree with and why? How does a particular piece contextualize the issues we are studying? You may also pose two or three questions designed to stimulate discussion in class, and offer thoughts on answers.

You must provide full citations for cases and other materials but citations do not need to be in full Bluebook form. Initial citations to cases should include the full name of the case + date + page number (if citing to specific portion); subsequent citations can be short form + page number. Initial citations to other materials should include the author's full name + title + date + page number (if citing to specific portion); subsequent citations can be author's last name + page number.

Reflection papers are due by **5pm the Tuesday before the chosen class**. For example, if you choose to write a paper about the materials for Class 5 (Feb 14), your paper would be due at 5pm on Tuesday, Feb 12.

Op-ed: The op-ed should be devoted to a single topic discussed in class and written in the op-ed style of publications such as the New York Times or the Wall Street Journal. Do not use footnotes or formal citations. It is due by **5pm on Monday, March 25**. We will discuss the op-eds in Class 11 (April 4).

Judicial Opinion: You will be given a prompt that details a fictional court decision on a Second Amendment issue for which the U.S. Supreme Court has granted review. Your assignment is to write the majority opinion for the Court. Provide full citations for cases and other materials in Bluebook format. The judicial opinion is due by **5pm on Thursday, April 25**.

All writing assignments must be submitted via email to my assistant in Microsoft Word with **title, name, and word count** displayed at the top of the page (word counts will be double-checked; erroneous word counts will be penalized). The papers must be single-spaced, with 1-inch margins, in 12-point Times New Roman font. Assignments submitted after the deadline will not be accepted.

Participation: The remaining 30% of your grade will be determined by your contribution to class discussion, which includes regular attendance as well as **at least one substantive contribution to nearly every class discussion**. Substantive posts on the TWEN Discussion Forum (involving questions, comments, news stories, cases, etc.) will also count toward class participation.

Attendance: All students are required to attend class, to be prepared, and to be on time. Absences and excuses should be submitted through the office of the Dean of Students. Repeated absences will have a negative effect on your final grade.

Disability: If you have a disability, or suspect that you may have a disability, the Law School encourages you to contact the Office of Disability Services for information about available opportunities, resources, and services. You may also visit the Office of Disability Services website at www.law.miami.edu/disability-services.

Class Schedule

(Subject to change. All materials apart from the Blocher & Miller text available on TWEN or online)

- 1. Jan. 17** **Introduction**
- THE POSITIVE SECOND AMENDMENT (Blocher and Miller), 1-71
 - Duncan Kennedy, *American Constitutionalism As Civil Religion: Notes of an Atheist*, 19 Nova L. Rev. 909 (1995)
- 2. Jan. 24** **Reading *Heller***
- *District of Columbia v. Heller*, 554 U.S. 570 (2008)
 - Blocher and Miller, 72-147
 - Reva B. Siegel, *Dead or Alive: Originalism As Popular Constitutionalism in Heller*, 122 Harv. L. Rev. 191 (2008)
- 3. Jan. 31** **The Role of the NRA**
- Roxanne Dunbar-Ortiz, “The Second Amendment as a Covenant” and “White Nationalism, The Militia Movement, and Tea Party Patriots” from *LOADED* (2018) 109-127; 149-172.
 - Scott Melzer, “The Ties that Bind,” and “Framing Threats to Gun Rights” from *GUN CRUSADERS: THE NRA’S CULTURE WAR* (2009), 73-109; 224-245.
 - Michael Waldman, [How the NRA Rewrote the Second Amendment](#), Politico (May 19, 2014)
- 4. Feb. 7** **Race and the Second Amendment**
- *United States v. Cruikshank*, 92 U.S. 542, 545, 23 L. Ed. 588 (1875)
 - Robert J. Cottrol & Raymond T. Diamond, *The Second Amendment: Toward an Afro-Americanist Reconsideration*, 80 Geo. L.J. 309 (1991)
 - Katherine J. King, *Heller As Popular Constitutionalism? The Overlooked Narrative of Armed Black Self-Defense*, 20 U. Pa. J. Const. L. 1237, 1252 (2018)
- 5. Feb. 14** **Gender and the Second Amendment**
- *Voisine v. United States*, 136 S. Ct. 2272 (2016)
 - Jennifer Carlson & Kristin A. Goss, *Gendering the Second Amendment*, Law & Contemp. Probs., 2017
 - Carolyn B. Ramsey, *Firearms in the Family*, 78 Ohio St. L.J. 1257, 1260 (2017)
- 6. Feb. 21** **Guns Rights Expansionism**
- *State v. Peraza*, No. SC17-1978, 2018 WL 6539359 (Fla. Dec. 13, 2018)
 - Joseph Blocher & Darrell A.H. Miller, *Letbality, Public Carry, and Adequate Alternatives*, 53 Harv. J. on Legis. 279 (2016)
 - C.D. Christensen, *The "True Man" and His Gun: On the Masculine Mystique of Second Amendment Jurisprudence*, 23 Wm. & Mary J. Women & L. 477, 510 (2017)
- 7. Feb. 28** **The Social Science of Guns**
- Jamal Greene, *Guns, Originalism, and Cultural Cognition*, 13 U. Pa. J. Const. L. 511(2010)
 - Dan M. Kahan & Donald Braman, *More Statistics, Less Persuasion: A Cultural Theory of Gun-Risk Perceptions*, 151 U. Pa. L. Rev. 1291, 1292 (2003)
 - Elizabeth Kolbert, [Why Facts Don't Change Our Minds](#), New Yorker (Feb. 27, 2017)

- Garry Wills, [Our Moloch](#), New York Review of Books (Dec. 15, 2012)

8. March 7

Technology and Immunity

- *Daniel v. Armslist, LLC*, 2018 382 Wis. 2d 241, review granted
- Steve Pokin, [Proponents of 'smart guns' say NRA is the main obstacle](#), USA Today (Aug. 3, 2014)
- Andy Greenberg, [A Landmark Legal Shift Opens Pandora's Box for DIY Guns, Wired](#) (July 10, 2018)
- Kyle Armstrong, *Nigh-Impenetrable: Firearm Manufacturer Liability Under the Protection of Lawful Commerce in Arms Act in A Post-Heller World*, 28 Geo. Mason U. Civ. Rts. L.J. 173, 181 (2018)

March 14

NO CLASS (Spring Break)

9. March 21

Finding a Way Forward

- Blocher and Miller, 148-196
- John Paul Stevens, "The Second Amendment (Gun Control)," from SIX AMENDMENTS: HOW AND WHY WE SHOULD CHANGE THE CONSTITUTION (2014), 125-133
- James E. Fleming & Linda C. McClain, *Ordered Gun Liberty: Rights with Responsibilities and Regulation*, 94 B.U. L. Rev. 849 (2014)

***OP-ED DUE BY 5PM MONDAY, MARCH 25**

10. March 28

Rights v Rights I

- *Glass v. Paxton*, 900 F.3d 233, 237 (5th Cir. 2018)
- *Wollschlaeger v. Governor, Fla.*, 848 F.3d 1293 (11th Cir. 2017)
- Gregory P. Magarian, *Speaking Truth to Firepower: How the First Amendment Destabilizes the Second*, 91 Tex. L. Rev. 49 (2012)
- Katlyn E. DeBoer, *Clash of the First and Second Amendments: Proposed Regulation of Armed Protests*, 45 Hastings Const. L.Q. 333 (2018)
- Dahlia Lithwick and Mark Joseph Stern, [The Guns Won](#), Slate (Aug. 14, 2017)

11. April 4

Discussion of Op-Eds

12. April 11

Second Amendment Fundamentalism

- Mary Anne Franks, "The Cult of the Gun," from THE CULT OF THE CONSTITUTION (2019)

13. April 18

Reflections

***JUDICIAL OPINION DUE BY 5PM THURSDAY, APRIL 25**