SECOND AMENDMENT: HISTORY, THEORY, AND PRACTICE

Professor Joseph Blocher
Duke Law School
Spring 2019
Thursdays 8:55-10:45; Room 4044

Ten 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: The door to my office (3174) will always be open from 10:50 to 12:20 on Thursdays, or by appointment. Please feel free to come by with questions or comments. You can also e-mail me any time at blocher@law.duke.edu.

Reading: With some trepidation, I am assigning the book I recently co-authored with Prof. Miller: THE POSITIVE SECOND AMENDMENT: RIGHTS, REGULATION, AND THE FUTURE OF HELLER (2018). The vast 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, I recommend PHILIP J. COOK & KRISTIN A. GOSS, THE GUN DEBATE: WHAT EVERYONE NEEDS TO KNOW (2014). I will not be assigning readings from it, but it provides an excellent overview of many legal and policy issues.

Class: Class will meet Thursdays from 8:55 to 10:45 in room 4044. Attendance and active participation are required and will factor heavily into your final grade. This is a discussion class, and I expect to hear from everyone multiple times each week.
Grading: Grades will be determined by class participation and by your work on six response papers of approximately five pages each. These should be e-mailed to my assistant, Marlyn Dail (marlyn.dail@law.duke.edu) by 5:00 on Wednesday, so that I can review them before class. 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) I will count only the best six towards your final grade. Unless you have received approval from me to write about something else, these papers should be tied to the reading, though you need not limit them to a single week’s assignment.

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 I 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.

-January 1, 2018
SECOND AMENDMENT SEMINAR - READINGS

Week 1: Guns in America

A. Rights and Regulation in US History

• JOSEPH BLOCHER & DARRELL A.H. MILLER, THE POSITIVE SECOND AMENDMENT Chapter 1 (2018)

B. Contemporary Gun Ownership

• Pew Research Center, Perspectives of Gun Owners, Non-Owners: Why Own a Gun? Protection Is Now Top Reason (March 12, 2013)
• Tom Doherty, How to Count the Defensive Use of Guns, Reason.com (March 9, 2015)

C. Gun Deaths and Injuries

• Kaiser Family Foundation, Number of Deaths Due to Injury by Firearms per 1000,000 Population (online resource only; take a few minutes to peruse)
• Law Center to Prevent Gun Violence, Statistics on Gun Deaths and Injuries (accessed Dec. 18, 2018)

D. Basics of Modern Gun Regulation

• CONGRESSIONAL RESEARCH SERVICE, U.S. GUN POLICY: FRAMEWORK AND MAJOR ISSUES (Dec. 3, 2018)
• Online resources to browse:
  o Gun Laws in the US, State by State- Interactive, THE GUARDIAN (Jan. 16, 2013)
  o Feilding Cage, Gun Laws in the US: Seven Things You Need to Know About the Data, THE GUARDIAN (Jan. 16, 2013)
  o GunsToCarry, Gun Laws By State: The Complete Guide – 2018
  o Everytown for Gun Safety, Gun Law Navigator

Week 2: Heller and Constitutional Interpretation

A. The Private Purposes Debate

• BLOCHER & MILLER, Chapter 2

B. District of Columbia v. Heller
• *District of Columbia v. Heller*, 554 U.S. 570, 573-636 (2008); id. at 636-81 (Stevens, J., dissenting)

C. **Heller** and Constitutional Method


D. Incorporation

• BLOCHER & MILLER, 90-98
• *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)

**Week 3: Policy Choices and Constitutional Law**

A. The Empirical Debates

• **NAT'L RESEARCH COUNCIL, FIREARMS AND VIOLENCE** 1-10, 269-75 (2004).

B. Facts and Persuasion


**The Debate Regarding Research Funding**


C. 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)

**Week 4: Post-*Heller* Doctrine**

**A. Building Blocks**

- BLOCHER & MILLER, Chapters 4 & 5

**B. The Two-Part Test**

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

**C. An Overview of Post-*Heller* Litigation**

- LAW CENTER TO PREVENT GUN VIOLENCE, *POST-*HELLER LITIGATION SUMMARY* (Oct. 2018)

**Week 5: 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)

**B. Public Carry Bans**

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

**C. Good Cause Restrictions**

- *Kachalsky v. County of Westchester*, 701 F.3d 81 (2d Cir. 2012)
• Wrenn v. District of Columbia, 864 F.3d 650 (D.C. Cir. 2017)

Week 6: Regulating “Arms”

A. Dangerous and Unusual Weapons and the “Common Use” Test

• United States v. Miller, 307 U.S. 174 (1939)
• Caetano v. Massachusetts, 136 S. Ct. 1027 (2016)

B. Assault Weapons

• Maggie Hartman, What Makes a Gun an Assault Rifle?, N.Y. MAGAZINE (Jan. 30, 2013) (review online; contains videos)
• Kolbe v. Hogan, 849 F.3d 114 (4th Cir. 2017) (en banc)
• Friedman v. City of Highland Park, 784 F.3d 406 (7th Cir. 2015)

Week 7: Classes of “the People” and As-Applied Challenges

A. Past Convictions

• U.S. v. Skoien, 614 F.3d 638 (7th Cir. 2010).
• Binderup v. Attorney General, 836 F.3d 336 (3d Cir. 2016) (en banc)
• Michael Luo, Felons Finding It Easy To Regain Gun Rights, N.Y. TIMES (Nov. 13, 2011)

B. Mental Illness and Suicide

• Ian Ayres & Fredrick E. Vars, Gun (Self) Control, U. PENN. L. REV. 1-7, 42-44 (forthcoming 2018)

C. Red Flag Laws

• EVERYTOWN FOR GUN SAFETY, RED FLAG LAWS: HELPING PREVENT MASS SHOOTINGS (Apr. 24, 2018)
• Excerpted Examples of Red Flag Laws (California, Connecticut, Indiana)
D. Other Classes of Persons (optional)

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

E. 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)

Week 8: Tyranny and the Second Amendment

A. History and Philosophy


B. Law


Week 9: “Sensitive Places”

A. Government Property

- *Bonidy v. United States Postal Service*, 790 F.3d 1121 (10th Cir. 2015)

B. Schools

• Sonja West, *The Real Danger of Guns in Schools*, Slate.com (March 22, 2016)

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

• *GeorgiaCarry.org., Inc. v. Georgia*, 687 F.3d 1244 (11th Cir. 2012)
• Larry Copeland and Doug Richards, *Ga. Governor Signs “Guns Everywhere” Into Law*, USA TODAY (Apr. 23, 2014)
• Joseph Blocher, *The Right Not to Keep or Bear Arms*, 64 STAN. L. REV. 1 (2012)

Week 10: State Law, Federalism, and Local Control

A. State Constitutional Guarantees

• *Britt v. State*, 681 S.E.2d 320 (N.C. 2009)
• Strict Scrutiny Amendments from Alabama, Louisiana, and Missouri
• *State v. Clay*, 481 S.W.3d 531 (Mo. S. Ct. 2016) (en banc)

B. State and Regional Variation

• 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. Federalism Limits on State and Federal Gun Laws

• *Montana Sports Shooting Ass’n v. Holder*, 727 F.3d 975 (9th Cir. 2013)
• *Wilson v. Lynch*, 835 F.3d 1083 (9th Cir. 2016)

Week 11: Interaction with Other Constitutional Rights and Interests
A. Speech

- *Wollschlaeger v. Governor, Fla.*, 848 F.3d 1293 (11th Cir. 2017)

B. The Fourth Amendment

- *United States v. Robinson*, 846 F.3d 694 (4th Cir. 2017) (en banc)

C. Race and Gender

- James Q. Wilson, *Just Take Away Their Guns*, N.Y. TIMES (March 20, 1994)

*Week 12: The Second Amendment and the Gun Debate*

- Blocher & Miller, Chapter 7

*Week 13: What Is the Second Amendment For?*

- Blocher & Miller, Chapter 6