

## 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](mailto: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

*February 13, 2019*

*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)
- RAND Corporation, *The Challenge of Defining and Measuring Defensive Gun Use* (accessed Dec. 18, 2018)
- 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)
- Kegler SR, Dahlberg LL, Mercy JA. *Firearm Homicides and Suicides in Major Metropolitan Areas — United States, 2012–2013 and 2015–2016*, 67 MMWR 1233–1237 (2018)
- 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)
- Philip K. Cook, Jens Ludwig & Adam M. Samaha, *Gun Control After Heller: Threats and Sideshows from a Social Welfare Perspective*, 56 UCLA L. REV. 1041, 1050-57 (2009)
- Online resources to browse:
  - [Gun Laws in the US, State by State- Interactive](#), THE GUARDIAN (Jan. 16, 2013)
  - Feilding Cage, [Gun Laws in the US: Seven Things You Need to Know About the Data](#), THE GUARDIAN (Jan. 16, 2013)
  - [GunsToCarry, Gun Laws By State: The Complete Guide – 2018](#)
  - [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**

- J. Harvie Wilkinson, *Of Guns, Abortion, and the Unravelling Rule of Law*, 95 VA. L. REV. 253, 253-57, 266-75 (2009)
- Nelson Lund & David Kopel, *Unraveling Judicial Restraint: Guns, Abortion, and the Faux Conservatism of J. Harvie Wilkinson, III*, 25 J. L. & POL. 1 (2009)
- Reva Siegel, *Dead or Alive: Originalism as Popular Constitutionalism in Heller*, 122 HARV. L. REV. 191, 191-95, 236-45 (2008)

### **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).
- Philip K. Cook, Jens Ludwig, Adam M. Samaha, *Gun Control After Heller: Threats and Sideshows from a Social Welfare Perspective*, 56 UCLA L. REV. 1041, 1041-44, 1073-93 (2009)

### **B. Facts and Persuasion**

- Dan M. Kahan & Donald Braman, *More Statistics, Less Persuasion: A Cultural Theory of Gun-Risk Perceptions*, 151 U. PA. L. REV. 1291 (2003)
- Philip J. Cook & Jens Ludwig, *Fact-Free Gun Policy?*, 151 U. PA. L. REV. 1329 (2003)

#### The Debate Regarding Research Funding

- Mayors Against Illegal Guns, *Access Denied: How the Gun Lobby is Depriving Police, Policy Makers, and the Public of the Data we Need to Prevent Gun Violence* (Jan. 2013)
- NRA-ILA, *The "Tiahrt Amendment" on Firearms Traces: Protecting Gun Owners' Privacy and Law Enforcement Safety* (Jan. 15, 2013)

### **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
- 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, 1443-75 (2009)

##### **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)
- George A. Mocsary, *A Close Reading of an Excellent Distant Reading of Heller in the Courts*, 68 DUKE L.J. ONLINE 41 (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)
- John R. Lott, Jr. & David B. Mustard, *Crime, Deterrence, and Right-to-Carry Concealed Handguns*, 26 J. LEGAL STUD. 1-31 (1997) ([skim](#))
- John J. Donahue et al., *Right-to-Carry Laws and Violent Crime: A Comprehensive Assessment Using Panel Data and a State-Level Synthetic Controls Analysis*, NBER Working Paper No. 23510, 1-14 (June 2017)
- JENNIFER CARLSON, *CITIZEN-PROTECTORS: THE EVERYDAY POLITICS OF GUNS IN AN AGE OF DECLINE* 58-84 (2015)

##### **B. Public Carry Bans**

- *Moore v. Madigan*, 702 F.3d 933 (7th Cir. 2012)
- Michael C. Dorf, *Does Heller Protect a Right to Carry Guns Outside the Home?*, 59 SYRACUSE L. REV. 225 (2008)
- Darrell A.H. Miller, *Guns as Smut: In Defense of the Home-Bound Second Amendment*, 109 COLUM. L. REV. 1278, 1282 (2009)

##### **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)
- 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, 1475-91 (2009)
- *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)
- James B. Jacobs, *Why Ban “Assault Weapons”?*, 37 CARDOZO L. REV. 681 (2015)
- *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)
- *Friedman v. City of Highland Park*, 136 S.Ct. 447, 447-50 (2015) (Thomas, J., dissenting from denial of cert)
  - *Optional*: Joseph Blocher & Darrell A. H. Miller, *Lethality, Public Carry, and Adequate Alternatives*, 53 HARV. J. ON LEG. 279 (2016).

## **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**

- Jeffrey W. Swanson et al., *Mental Illness and Reduction of Gun Violence and Suicide: Bringing Epidemiological Research to Policy*, 25 ANNALS OF EPIDEMIOLOGY 366 (2015) ([skim](#))
- 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)
- Glenn Kessler, *The Stale Claim That 40 Percent of Gun Sales Lack Background Checks*, WASH. POST (Jan. 21, 2013)

### **Week 8: Tyranny and the Second Amendment**

#### **A. History and Philosophy**

- DAVID C. WILLIAMS, *THE MYTHIC MEANINGS OF THE SECOND AMENDMENT: TAMING POLITICAL VIOLENCE IN A CONSTITUTIONAL REPUBLIC* 261-80 (2003)
- DAVID B. KOPEL, *THE MORALITY OF SELF-DEFENSE AND MILITARY ACTION: THE JUDEO-CHRISTIAN TRADITION* 92-119, 308-41 (2017)
- Michael Steven Green, *Why Protect Private Arms Possession?*, 84 NOTRE DAME L. REV. 131, 172-85 (2008)
- Charles L. Dunlap, Jr., *Revolt of the Masses: Armed Civilians and the Insurrectionary Theory of the Second Amendment*, 62 TENN. L. REV. 643 (1995)

#### **B. Law**

- JOHNSON, KOPEL, MOCSARY & O'SHEA, *FIREARMS LAW AND THE SECOND AMENDMENT: REGULATION, RIGHTS, AND POLICY* 1256-63 (2d ed 2018)
- Darrell A.H. Miller, *Retail Rebellion and the Second Amendment*, 86 IND. L.J. 939, 939-68, 977 (2011)
- Tom Ginsburg, Daniel Lansberg-Rodriguez, & Mila Versteeg, *When to Overthrow Your Government: The Right to Resist in the World's Constitutions*, 60 UCLA L. REV. 1184, 1184-1217 (2013) (skim)

### **Week 9: "Sensitive Places"**

#### **A. Government Property**

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

#### **B. Schools**

- Antonia Okafor, *Why I Bring My Gun to School*, NYTimes.com (July 24, 2017)

- Sonja West, *The Real Danger of Guns in Schools*, Slate.com (March 22, 2016)
- David B. Kopel, *Pretend “Gun-Free School Zones”: A Deadly Legal Fiction*, 42 CONN. L. REV. 515 (2009)

### **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**

- Adam Winkler, *The Reasonable Right to Bear Arms*, 17 STAN. L. & POL’Y REV. 597 (2006)
- *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**

- Eric M. Ruben & Saul Cornell, *Firearm Regionalism and Public Carry: Placing Southern Antebellum Case Law in Context*, 125 YALE L.J. F. 121 (2015)
- 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*
- Ashley Powers, *The Renegade Sheriffs*, THE NEW YORKER (Apr. 30, 2018)

### **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)
- *United States v. Lopez*, 514 U.S. 549 (1995)
- *Printz v. United States*, 521 U.S. 898 (1997)

## **Week 11: Interaction with Other Constitutional Rights and Interests**



### **A. Speech**

- Geoffrey R. Stone, *The Lessons of Charlottesville: Speech and Guns*, Huffingtonpost.com (Aug. 21, 2017)
- *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, 49-61 (2012)
- Timothy Zick, *Arming Public Protests*, IOWA L. REV (forthcoming 2019)

### **B. The Fourth Amendment**

- *Floyd v. City of New York*, 959 F. Supp. 2d 540, 556-63 (S.D.N.Y. 2013) (Introduction and Executive Summary)
- *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)
- ADAM WINKLER, GUN FIGHT: THE BATTLE OVER THE RIGHT TO BEAR ARMS IN AMERICA, 130-45, 230-58 (2011)
- NICOLAS JOHNSON, NEGROES AND THE GUN 297-318 (2014)
- Kristin Goss & Jennifer Carlson, *Gendering the Second Amendment*, 80 LAW & CONTEMP. PROBS 103 (2017)

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

- BLOCHER & MILLER, Chapter 7
- B. Bruce-Biggs, *The Great American Gun War*, 45 PUBLIC INTEREST 37 (1976)
- ROBERT J. SPITZER, THE POLITICS OF GUN CONTROL, 91-136 (2015)
- KRISTIN A. GOSS, DISARMED: THE MISSING MOVEMENT FOR GUN CONTROL IN AMERICA (2006)
- HARRY L. WILSON, GUN POLITICS IN AMERICA 704-23 (2016)
- Mike Spies, *The N.R.A. Lobbyist Behind Florida's Pro-Gun Policies*, THE NEW YORKER (Mar. 5, 2018)

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

- BLOCHER & MILLER, Chapter 6