Duke Law Livestream - The Positive Second Amendment (720p HD)

CONNER COOK: Good afternoon. Thank you for joining us. We're going to take another minute or so and just let folks get into the meeting room, and then we'll get started. Hi, there. If you're just joining, we're going to take one more minute, and then we will get started. Thank you.

All right, we'll go ahead and get started. Good afternoon, everyone. Thank you for joining us. My name's Conner Cook. I serve as the assistant director of alumni engagement at the law school. We're thrilled to have you join us for this presentation today. This was originally supposed to be a presentation that was going to be in person in Chicago earlier this spring.

Obviously, our plans changed, and we had to adjust a little bit. So we're grateful that Professor Blocher has agreed to do this presentation virtually for all of us. A few housekeeping items before we get started, and then I'll turn over to our alumnus volunteer to do the introduction of our speaker.

We will be recording all video and chat from today's program, and we will plan to share the video after the event. Please make sure to mute your microphone if you're not speaking. If you experience any technical challenges like slow video, sometimes turning off your video can help improve your connection.

If you continue to experience any technical difficulties throughout the program, you can email our office. We'll put our email address in the chat at the bottom of the screen, and somebody from our team will be able to help you. If you're dropped off at any time, please just reconnect and join back in. It's not disruptive to the program. And we will plan to hold all questions until the end of the program.

I'm now going to turn over to Matthew Sloan. Matthew serves as one of our Duke Law Chicago co-chairs. He's class of 2016, and he will introduce our speaker today. Matthew.

MATTHEW SLOAN: Thank you, Conner. And can you hear me all right? Excellent. Welcome, everyone. As Conner mentioned, my name is Matthew Sloan. I am a proud Duke Law alum, class of 2016. I am also one of the co-chairs of the Duke Law Chicago Alumni Board. Welcome, again.

It's great to see so many folks with us here digitally. And based on the roster, to see such a wide diversity and range of class sharers and a mix of law school and non-law school alums. It's great to see. So without further ado, we have a very special guest with us today.

Professor Joseph Blocher is the Lanty L. Smith class of '67, professor of law at the Duke University School of Law where he teaches courses on constitutional law, property law, urban legal history, and relevant to the talk today, The Second Amendment.

He is one of the nation's leading experts on the Second Amendment having participated in major Second Amendment related litigation as a practicing attorney. Having instructed students on it at the law school. Having published multiple legal articles on the subject. And he is now the co-author of a book on the subject, The Positive Second Amendment, Rights, Regulation, and the Future of Heller, which you wrote with fellow Duke Law professor Darrell Miller and is the subject of today's talk.

Also, by way of personal anecdote, I was lucky to have Professor Blocher as my property law professor, his wonderful wife, Marin, who is also a Duke Law professor for remedies, and worked with Professor Blocher to organize my law school journal symposium, for which he was our faculty advisor at our symposium's morning session. I had the honor of being introduced by Professor Blocher. So Professor Blocher, the tables have turned here. So again, please welcome Professor Joseph Blocher, thanks.

JOSEPH BLOCHER: Thank you so much for that really generous introduction, Matthew. It's great to see your face again. It's amazing how fast the years have flown that you were in my class and we were running that symposium back in 2016.

Thanks, again, to you. Thanks, of course, to Conner Cook and everyone else on the team for organizing this event. You're always so wonderful to work with. Thanks to all of you who found time to join today. I'm really looking forward to our conversation.

As Conner and Matthew sort of teed up, I'm going to be speaking today about the past, present, and future of gun rights and regulation in the United States. And I'm going to do it sort of keyed to this theme of the positive Second Amendment, which happens to be the title of a book, which, as Matthew mentioned, I just published with my good friend and colleague Darrell Miller.

And in order to make that discussion as, hopefully, as interesting and engaging as possible, I'm going to use PowerPoint here and share my screen so that you don't have to just look at me for the next 45 minutes. I will save plenty of time for questions at the end. If, for some reason, your question doesn't get answered though, I'm happy to stick on for a few minutes after 1:30. You can also always email me, I enjoy discussing these difficult but, I think, crucial issues about gun rights and regulation.

I want to start just by mentioning something about the title of this talk and the title of the book, The Positive Second Amendment, because it often, I think, throws people a little bit to associate the word "positive" with the Second Amendment. In fact, Darrell and I actually received a letter from a retired Supreme Court Justice questioning our use of the positivity concept here. And so I just want to explain what we mean by it.

Again, I think it's fair to say that most people don't think about the gun debate in positive terms. It is, I think, like some other very difficult but necessary conversations, including the ongoing conversation right now about racial justice and policing, a difficult but necessary conversation. And just to put it in perspective, every year about 100,000 Americans are shot, and about 30,000 Americans die as a result of gunshot wounds.

Now some of those people are shot by others, some are shot by themselves, some are shot on purpose, some are shot accidentally. Some of them are shot during the course of activities that the law protects and even encourages, including armed self-defense or lawful arrests, but other people are shot during the course of activities that the law can and sometimes does punish, including wrongful acts of defensive gun use and unlawful arrests.

Millions of Americans, every year, use guns for hunting and recreation and other activities, which, until recently, were the primary reason for gun ownership. And some number of Americans, although it's very hard to know how many, I'm happy to discuss that, also use guns for self-defense. The divisions that that cost benefit calculation raises map on to deep divisions in the United States between urban and rural, between Republicans and Democrats, between different racial groups, between genders.

And, in the next 45 minutes, I am not going to resolve them. I am not even going to offer prescriptions to resolve all of those divisions. Instead, what I want to do is try to describe an alternative lens through which to look at them. and that is what we describe in the book as the positive vision or the constitutional vision.

And the short version is that we think about the Second Amendment, in the technical sense, as positive law. That it is man-made, it is subject to reason, it can be changed. It's not some kind of natural law handed down that's immutable. But it's also a positive vision in the sense that the Second Amendment, the Constitution, at least so far protects what most Americans say they want, which is recognition of the individual right to keep and bear arms, and also of reasonable gun regulation.

And our hope is that a better facility with that kind of constitutional language might improve the gun debate. Now, we don't for a minute assume that the constitutional debate can be totally separated from the political historical policy and other discussions that are part of the gun debate. As we'll explain today, and I'm have happy to talk about, the constitutional doctrine both borrows and lends from other areas, including history, policy, public health, economics, and so on and so forth. But we do think that constitutional law is something distinct.

We believe in law, and we think that it has its own rules of arguments. What we call a constitutional grammar, constitutional language. The kinds of rules that you all that have been to law school learned from the first day that you were here.

Now those arguments and those arguments styles do overlap with other important arguments and arguments styles, but I think they help focus our energy on what we should be looking for, which are the rules, policies, changes. Whatever it is that might actually be able to make a dent in this horrific rate of gun misuse and violence.

And that means finding the sort of middle of this little Venn diagram. The regulations, which are politically feasible, effective as a matter of policy, and also constitutional. There are some policies that satisfy two of these conditions, but not the third. One example here might be prohibitions on assault weapons.

Assault weapon prohibitions are politically feasible in some parts of the country, including in some states. They've been overwhelmingly upheld by courts, meaning they satisfy the sort of lower two conditions there. But the empirical evidence is not so strong that they actually save a great many lives. Assault weapons are rarely used in gun homicides, at least as compared to handguns.

There are also some policy proposals or laws, which might be very effective as a matter of policy, and which are constitutional at least as far as courts are concerned, but which are rendered politically infeasible sometimes because of misunderstandings about constitutional law. Let me make that concrete with an example. Some of you may remember where you were when you saw this picture and others like it on the morning of December 14, 2012.

On that morning, a young man whose name I won't use but is, I'm sure, familiar to you shot his way through the glass panels next to the locked front door of the Sandy Hook Elementary School in Newtown, Connecticut. And then proceeded to methodically work his way from classroom to classroom murdering 20 small children and six adults with about 150 shots from a Bushmaster semiautomatic rifle.

He then, standing alone, in the middle of a classroom put a handgun to his own head and ended the carnage. Mass shootings like the one that happened at Sandy Hook, sadly, account for a tiny proportion of the number of American gun deaths in any given year, less than 1%. But they do tend to be the flash points for the national political debate.

And even just to rattle off the names, I'm sure will call to mind images like this one in political debates that it spawned. Whether it's Columbine, Aurora, San Bernardino, Orlando, Las Vegas, Virginia Beach, Parkland, the list, sadly, goes on and on. The Sandy Hook massacre set off a another cycle of the great American gun debate, and you don't need me to read the script to you.

The talking points, I'm sure, are familiar. But it also led to something interesting in 2013, which was a concrete proposal in the Senate called the Manchin-Toomey amendment, which would have expanded the federal system of background checks.

In other words, it would have subjected nearly all commercial sales of arms, including those at gun shows and those online to a background check. This was a remarkably popular proposal. Polls at the time indicated that 90% of Americans including 75% of gun owners and 74% of NRA members supported this proposal, which, again, extraordinary figures. Especially given our current divided times, and especially given the issue itself of gun control, which is usually itself so divisive.

But the Manchin-Toomey amendment never made it out of the Senate. The NRA leadership was deeply opposed to it, and their most effective talking point, the one that Gallup polls showed resonated most with people who opposed the amendment, was that expanded background checks would violate the right to arms. Now, the gun debate, of course, is complicated by cultural and regional differences, bipartisanship, by well-funded lobbying groups.

But what the debate over Manchin-Toomey shows, I think, is that it is also complicated by understandings and sometimes misunderstandings about constitutional law and constitutional doctrine.

Some people believe that the right to keep and bear arms encompasses an absolute individual freedom to have and use whatever arms one wants against criminals or even against a government that some people believe has become tyrannical. Some of these people believe that gun regulation, or more ominously gun control, is out of step with American history and is a modern invention.

On the other hand, there are those who believe that the Second Amendment is an anachronism at best, and an outright constitutional evil at worst. They blame the Second Amendment for the relative lack of stringent gun regulation in the United States and argue that it must be repealed and the Supreme Court's decision in District of Columbia versus Heller be overturned. And what I want to try to argue today is that both of these extreme visions are wrong.

And that aside from a few very broad certainties, like the fact that there is an individual right to keep and bear arms and it is subject to regulation, the Second Amendment resists the kinds of simple labels that people try to stick on it. And that the lawyer's tools, some of which we'll walk through today, may actually help unpack what is a complicated, important, and nuanced area of constitutional law. So let's start by looking at the text of the amendment.

These 27 words which have spawned hundreds of articles and books, more than 1,500 cases just in the last 12 years alone, and countless hundreds of millions of ongoing political debates. Until 2008 the central question for Second Amendment law and scholarship was whether these words cover only people and activities and arms related to the organized militia or rather whether they also encompass certain private purposes, like the use of guns in one's home for self-defense.

People who prefer the militia-based view tend to focus on that first clause, the well-regulated militia. Whereas those who prefer the private purposes view, tend to focus on the second clause, the one beginning with the right of the people. Now as a matter of law, federal courts have long upheld the first version, the militia version. And it's actually worth emphasizing here that for more than two centuries there is no federal court case anywhere in the United States striking down a law on Second Amendment grounds.

There are two district court cases that I'm aware of, both of which were overturned on appeal, but that changed in 2008 with the Supreme Court's 5 to 4 decision in District of Columbia versus Heller. That case involved Dick Heller, you can see his picture here, a security guard at the federal judicial center in Washington DC. He carried a gun as part of his official duties, but he also wanted to have a handgun at home for purposes of self-defense. That's something that DC law, at the time and since the 1970s, effectively prohibited.

He argued that this violated his Second Amendment rights, won a divided victory at the DC circuit, and then his case proceeded to the Supreme Court. In an opinion by Justice Scalia, there on the left, a five Justice majority held for the first time that the Second Amendment extends

beyond the organized militias and does protect an individual right to keep and bear at least a handgun at least at home at least for purposes of self-defense.

Those of you lawyers familiar with Justice Scalia's interpretive methodology will not be surprised to hear this was a deeply originalist opinion, meaning that it relied heavily on scholarship and historical materials and, in fact, cited secondary sources, including scholarship, more often than all traditional legal sources, cases, statutes, and constitutional provisions combined. Which I think is relevant for the role of those of us who study Second Amendment, work on Second Amendment as a matter of scholarship. This is an area where the constitutional doctrine and scholarship are deeply intertwined.

This, as I mentioned, was a 5-4 decision. There are actually two dissenting opinions, one of them was authored by Justice Stevens, that's him there on the right. He himself, no thoroughgoing originalist, adopted the originalist methodology for purposes of this dissent, actually looked at some of the same historical materials as Justice Scalia, and came to a very different reading of the Second Amendment.

In Justice Stevens account, joined by three Justices, the Second Amendment was a structural provision put in place to guarantee that the state militias would not be disarmed, and that they could serve as a check against the newly established and somewhat terrifying to the framers federal standing army. And I should note at this point, in interest of full disclosure, that as a very young associate I assisted the District of Columbia briefing in this case that is the briefing for the losing side, and the case was argued by Duke Law's own Walter Dellinger.

The court's endorsement of the individual rights interpretation of the Second Amendment makes Heller a landmark case. And, in fact, it is often now the first case assigned in constitutional law classes, partly for what it says about methodology and constitutional interpretation. But the court didn't tell us or at least didn't tell us clearly how that right can be regulated.

Who gets to exercise this right, where do they get to exercise it, and with what kinds of weapons? Those are unavoidable and important questions. And, in fact, the main thrust of Justice Breyer's dissent, the second dissent in this case, was to criticize the court for not clearly articulating the rules to separate constitutional and unconstitutional gun regulation.

And in the last 12 years, that has been the major task of Second Amendment law. And that's consistent with how all constitutional rights work. All constitutional rights are subject to some kinds of regulation, and one of the main jobs of constitutional law is to create the tests and rules and standards to separate constitutional government actions from unconstitutional government actions.

So, again, this will be familiar to those of you who have constitutional law, but a race conscious student admissions program will be upheld if it is narrowly tailored to a compelling government interest. A restriction on abortion may be upheld if it does not place an undue burden on that right. That's what constitutional doctrine does. It comes up with rules to implement the meaning of constitutional rights.

In Heller, the court did not embrace any of those traditional forms of legal analysis. There's no discussion of the tiers of scrutiny, which are so familiar in other areas of constitutional law. But it did say that gun regulation is not, per se, unconstitutional.

And in this much quoted paragraph, which is on screen right now, you can see that the Court, among other things, endorsed as constitutional prohibition on possession by felons and by the mentally ill and prohibitions on carrying arms into sensitive places such as schools and government buildings. Elsewhere in the opinion, they say that concealed carrying is not covered by the Second Amendment.

And here, further down the same page of the opinion, the Court says that not all weapons are covered by the Second Amendment. And specifically those that are dangerous and unusual, which it equates with those not in common use, are not protected by the Second Amendment. And that's about all the court tells us.

So this paragraph has been the sort of guiding light for most courts in this 1,500 cases in the 12 years since Heller was decided. And I'm happy to talk in detail about specific developments in various areas of Second Amendment law, but let me give just a general overview here and say that one striking fact about Second Amendment litigation has been the very low rate of success. Constitutional rights litigation is always an uphill challenge. Most claims fail.

Second Amendment claims though have failed at a rate of almost 90%, and it's worth talking, maybe we do this in the Q&A, about why they fail. One reason is that many of them involve exactly those categories of gun law that Heller said are constitutional. So hundreds of challenges have been brought by felons, for example, challenging the federal law that prohibits them from having guns. The vast majority of those claims have been failures.

But those exceptions that we talked about, things like felons and the mentally ill and dangerous and unusual weapons and sensitive places, that covers a lot of gun regulation, but not all of it. It doesn't say what to do with, for example, people who commit violent misdemeanors. In some states, domestic violence is not a felony but a misdemeanor. Are those people like felons or are they not? What about people, on the other hand, who commit nonviolent felonies, especially those that are decades old?

Can it really be the case that a person who commits a violent act of domestic abuse has a Second Amendment right where Martha Stewart who's committed a probably not physically dangerous felony can be denied hers? To address those kinds of questions, we need a little bit more guidance, we need a little bit more doctrine. We need a better map.

And I use that map making metaphor consciously. Judges and lawyers and scholars, those of us working on questions evolving the right to keep and bear arms after Heller, are essentially engaged in a map making activity. To use a phrase from Matthew's old property class he may remember, we're trying to figure out really the metes and bounds of this right. What is encompassed by the right to keep and bear arms, and what are the salient features of its terrain?

In fact, that same metaphor of map making came up in an opinion by a judge you lawyers will probably know, J. Harvie Wilkinson on the Fourth Circuit, when he said "the whole matter strikes us as a vast terra incognita that courts should enter only upon necessity and only then by small degree." But that exploration, at least after Heller, can no longer be avoided.

Judges have to answer questions about the Second Amendment that they might have been able to dismiss prior to 2008. And there are lots of specific and complicated questions, which I'm happy to discuss in the Q&A, but in general, I think we can think about them as falling into effectively two categories. One category of questions are those involving what Darrell and I call in the book "coverage." That is the scope of the Second Amendment.

All constitutional rights have limits. There are certain kinds of speech that don't count as speech for purposes of the First Amendment. If you are engaged in libel, child pornography, or securities fraud, what you were doing does not receive any First Amendment coverage whatsoever. You simply don't get on the First Amendment island. And likewise for the Second Amendment.

There are certain arms activities and even people, as we've seen with the felon example, that simply get no Second Amendment protection. Whether that's concealed carrying, dangerous and unusual weapons, and so on, they simply don't get protection at all. They fail at the threshold. If a person asserts a Second Amendment right to carry around a nuclear device, I can guarantee you the courts will not go through the exercise of judging whether the government has a sufficient interest in prohibiting that. They will simply say "nuclear devices are not arms. You are not making a Second Amendment claim."

But if coverage is established, that is if we get out of this first category of questions, we go into another category of questions. Which Professor Miller and I call the protection questions. Even when a constitutional right is in play, it may still be subject to regulation. That's what was going on in the affirmative action example and the abortion example that I raised earlier. Constitutional rights, even when they're invoked, can still be subject to regulation.

And most rights we can think of as having a kind of terrain. They have different levels of sort of high and low protection. So for free speech, for example, political speech is usually put on the top of the mountain, treated with the most protection, whereas something else like commercial speech ends up in the valley with less protection. With regard to the Second Amendment, the court tells us in Heller that self-defense is the core of the Second Amendment right, and that that interest in self-defense is most acute in the home.

So I think self-defense in the home goes on top of the mountain whereas other gun related activities might be protected, like hunting or recreation or even carrying a gun in public, but might receive less protection, might be sort of down in the valley. And those two map metaphors really form that sort of conceptual backbone of Second Amendment law. This slide is just an effort to take the map metaphor and put it into a flowchart in case that's a little easier to follow.

If you are making outlines in class, this is the kind of thing that law students like to see. But again, it breaks down into questions of coverage, which are sort of highlighted there in the red

section, and questions of protection, which are the black text there. So, for example, courts have overwhelmingly held that concealed carrying is not even covered by the Second Amendment, gets no protection whatsoever. That banning it therefore raises no constitutional questions.

Most states, I should note, allow concealed carry, but if they didn't, there wouldn't be a constitutional claim against it. By contrast, most courts that have held or assume that some form of public carry must be allowed, whether open or concealed. And they've gone on to evaluate regulations on public carry according to some level of scrutiny. That's the protection inquiry down there in the right.

And here, the same basic thing. The map, the flowchart. Here, is just a court's statement of the doctrine. This is congealed in something called the two-part test or the two-step test. I prefer to think of it as a framework because it actually has lots of different nuance to it.

And the second step in particular looks different depending on which kind of case you're adjudicating. But this test has been unanimously adopted by the federal courts of appeal. To make that even more concrete, let me show how it plays out in the context of a specific particular case.

On June 5, 2008, Sean Masciandaro and his girlfriend were driving home through Virginia and they got tired. So they pulled off the George Washington Parkway onto a little bit of land called Daingerfield Island, which may be known to those of you who live in northern Virginia or have been to Washington DC. They reclined their seats in their car, and they went to sleep.

They were not alone in the car. Mr. Masciandaro, that's him in the picture, is the owner of a business called Raging Reptiles, which includes his collection of various snakes, reptiles, a blue-tongued skink named Semper Fi. And he takes these things to exhibitions, educational events, and so on, up and down the East Coast. He was also traveling with a fair bit of cash, and a laptop, and protection.

He had, under his seat, a machete style knife and he also had a loaded 9 millimeter semi-automatic handgun locked in a messenger bag in the car. About 10 o'clock the next morning, a National Park Service officer stopped by because it turns out Daingerfield Island is National Park Service land. Noticed that the car was parked illegally and so walked up, and rapped on the window, woke up Mr. Masciandaro.

The officer saw the knife. Mr. Masciandaro told him about the gun, and then the law came into play. Because at the time this happened, in 2008, National Park Service regulations made it illegal to carry a loaded weapon on National Park Service land. The Obama administration actually did away with that restriction, it's no longer forbidden.

But that meant that Mr. Masciandaro was violating the law. He argued that this violated his Second Amendment rights and the case worked its way up to the Fourth Circuit. And here's where the coverage and protection arguments played out. The government argued that Mr. Masciandaro should lose as a matter of coverage on the grounds that the Second Amendment

simply does not extend outside the home or that national park service land is the kind of sensitive place where the Second Amendment does not extend.

But what the court did was assume that, yes, the Second Amendment is in play here. That is, assume the threshold and got to the second part, the protection part. And nonetheless ruled against Mr. Masciandaro on the grounds that the government had a good enough reason to keep people from carrying weapons, loaded weapons that is, on National Park Service land even if we assume that the Second Amendment is in play.

Now that form of argument, assume the Second Amendment and yet rule against the claim, has been quite common in Second Amendment litigation throughout the country in the last 12 years. And in various ways, I can sort of chart and sort of show you how it's developed. But I think maybe what's more interesting is to try to identify the tools, the legal tools, that courts can use and are using to develop those and justify those legal results.

And again, this may be familiar to those of you who've been to law school and you've been through constitutional law. We learn various forms of legal argument, and what forms are legitimate in constitutional law. And I just want to walk through five or six and what they have to say about the Second Amendment.

One, of course, is the text. Most constitutional claims begin with close attention to the text of the documents. But just as in Heller itself, the text of the amendment is not always determinative. So here I've just got an example focused on a seemingly simple phrase, "the people." We've already seen that some people don't count as people for purposes of the Second Amendment, like felons or those with mental illness. They're simply carved out of the Second Amendment.

What about other groups of people? What about, for example, unauthorized immigrants? Courts are split on that question. There you have a quote from a Seventh Circuit case on that question. What about juveniles? People under the age of 18, do they have Second Amendment rights? What about, as I mentioned earlier, people with old, nonviolent felonies, and those with more recent violent misdemeanors? Do they constitute the people who get to make Second Amendment claims?

Now, as courts answer those kinds of questions about the text, they generate another basis of constitutional argument, which is precedent. That is the rules set down by courts in prior cases. And precedent operates in a lot of different dimensions at once. One is vertical.

Vertical precedent is just what higher courts tell lower courts they must do. And for a variety of reasons, we don't have a lot of higher precedent, that is vertical precedent, coming from the Supreme Court. We have Heller. We have a case two years later called McDonald, and that's about it. And I'm happy to talk about that in the Q&A.

There are a few other examples. A case from 1930s called Miller, but the court has generally stayed away from the Second Amendment and has turned down dozens of what are called cert petitions asking them to hear more cases. In December of this year, the court, for the first time, heard oral argument in a Second Amendment case, first time in almost 10 years. And then

dismissed that case as moot. It's a case called NYSRPA, came from New York. I'm happy to talk about that in the Q&A.

Without a lot of vertical precedent, courts are left to develop their own precedent, which binds them going forward. That's horizontal precedent, you can see the line there connecting the Courts of Appeals. That's what the two-part test is, the two-part framework. The Courts of Appeals have developed it. It now binds them.

There are other ways in which precedent can have influence and one of those ways is to think about it as diagonal. And this is really just means persuasive precedent. Precedent that isn't binding, but might nonetheless be useful. And that's why I put state courts on here.

2008 and Heller was the first time that the Second Amendment in the federal constitution was recognized as protecting an individual right to keep and bear arms for private purposes. But state constitutions had been guaranteeing that right in some cases for 200 years or more. And so there is a doctrine out there developed in the state courts, which might have some answers to some of the questions that federal courts are confronting now for the first time.

The state courts have almost unanimously adopted what's called a reasonableness test. So far, at least, federal courts have not been doing much borrowing though from their cousins over in the states. Now, in addition to learning from each other, courts often also take their cues from history. And I think this has been especially prominent in Second Amendment cases partly because Heller itself is styled as an originalist opinion.

That makes history, especially important in the adjudication here, and I have to say unfortunately, I think, there are a few areas of the debate that are more rife with misunderstanding than the history of gun rights and regulation. People on all sides of the debate sometimes treat gun regulation as if it is a new arrival on the scene, a modern invention. And the truth is that gun rights and regulation have coexisted for as long as the Second Amendment has and even before.

If we looked at the pre-history here, we can find examples like the 1328 statute of Northampton which, among other things, forbade people, other than the King's ministers, to ride armed by night nor by day in fairs, markets, nor in the presence of the justices or other ministers nor in no part elsewhere upon pain to forfeit their armor to the King and their bodies to prison at the King's pleasure.

Now I read that language partly because it's like Chaucer era England when this law was passed, but also because the statute of Northampton with a very few alterations, we took out the references to the King, is still the law of the land in many American states, including here in North Carolina. And, in fact, in recent years it has been used to prosecute people or police charge people who've carried guns to protests. The direct descendant of this law still on the books in places like North Carolina. Of course, it is not the only example.

If we looked at other colonial era regulations in especially the urban areas of colonial United States, places like New York, Boston Philadelphia, you'll find information that would really

make the Brady Center blush. They're so incredibly stringent. Prohibitions on the storage of gunpowder, of firing guns within city limits, and these were not limited to those East Coast cities.

In fact, as the country grew, so did gun regulation travel with it. Restrictions on concealed carry have their origins in the south and out west in those famous cow towns of the Old West, those places that were supposedly rife with guns and gun violence, gun regulation was more stringent even than it was in the district before Heller struck those laws down. In places like Tombstone, Arizona and Dodge City, Kansas, you were simply not allowed to carry your gun into city limits.

And, in fact, maybe the most famous shootout in the history of the United States, the shootout at the O.K. Corral was sparked in part by the Earp Brothers efforts to enforce Dodge City's gun regulation, you can see it right there, against members of Ike Clanton's gang.

Now I think the history is fascinating, and it's important, and I'm happy to talk about it more, along with some resources we've developed here at Duke to help us describe it. But I don't think that history can answer every question about guns, and this is true in other areas of constitutional law. History doesn't always give us clear answers, and sometimes courts turn to social practice, to customs, to norms.

This is true in areas of the 1st Amendment, the 4th, the 5th, the 14th, the 8th Amendment's prohibition on cruel and unusual punishment. Sometimes we look to what is common or what is permissible, what is unusual in society today. And the Second Amendment and the Supreme Court's decision in Heller teased up some of those questions.

You remember the earlier slide where the court said that weapons in common use are protected by the Second Amendment as constitutionally guaranteed arms. But that raises very hard questions. What does it mean for a weapon to be common enough to be protected by the Second Amendment?

In the quote here, you see from a Fourth Circuit case called Kolbe versus Hogan, the dissenting Justices point out that the AR-15 style assault weapon-- assault weapon however you want to call it. Semiautomatic rifles. Some people say modern sporting rifle. --is sold more often, every year than the Ford F-150, the most commonly sold vehicle. Is that the proper comparison? If not, what is?

Do we care if they're common for different purposes? Is a common hunting rifle entitled to protection under the Second Amendment if it's not good for self-defense? What if weapons are common for use by the police or the military or criminals, does that count in the sort of population count for purposes of commonality? And then, of course, which weapons are common will depend in part on which weapons have been historically prohibited, which leads to a kind of circular result that the weapons constitutionally protected or the weapons that have not yet been made illegal.

And that focus on social practices, I think, helps demonstrate a sometimes underappreciated point, which is that the right to keep and bear arms does not exist in a vacuum. The Constitution

protects other constitutional rights, and it also protects what's often called The Constitutional Structure. That is the relationship, especially between the federal government and states, but also between states and local governments.

The sort of typical sort of three layers of government that we talk about in law. And that raises difficult questions about which of those levels of government is best suited to make decisions about which kinds of gun regulation. I'm happy to talk about that in the Q&A as well.

Let me also say that, I think, especially in recent years, we've seen various ways in which the Second Amendment as a constitutional right interacts with other constitutional rights, and sometimes can threaten those constitutional rights. So carrying a gun at a protest may be an act of self-defense for the person who's carrying it, but it may also impact other people's ability to safely engage in speech or peaceable assembly. Or for that matter, to pursue the education which is guaranteed under the constitutions of the vast majority of states.

That's not to say that one or the other of those interests always has to prevail, but it is to say that the gun debate is not just about a constitutional right on one side and policy interests on the other side. It is more complicated than that. Increasingly, I think, all sides of the gun debate are asserting constitutional values and interests and even rights, including the right to life.

Now another tool in the lawyer's kit, this will be the last one I talk about, is reasoning by analogy. This is really sort of the engine of the common law. This is what lawyers do day in and day out. And in Second Amendment law, in various ways, reasoning by analogy has become increasingly prevalent. And partly that is because people draw analogies between the Second Amendment and other rights. Trying to, for example, borrow doctrinal machinery from the First Amendment to answer Second Amendment questions.

But it also comes up in historical arguments when judges and justices say things along the lines of, we can identify the scope of the modern Second Amendment by looking for the lineal descendants of either guns or gun regulations that existed at the time of the family. This often goes along with the kind of historical approach I was mentioning before.

Reasoning by analogy is tricky, as lawyers will know, as everybody will know, because it means picking out relevant similarities. And it can be very hard to know what kinds of similarities count as relevant, right? Guns don't have progeny. They don't have offspring. They don't have family trees.

So if you're looking for their lineal descendants, you're presumably trying to draw some kind of analogy, to pick a relevant similarity between, for example, as on this slide a typical revolutionary era musket and a modern day AR-15. What makes these things similar or dissimilar? Is it the magazine capacity, the rate of fire, the muzzle velocity, the range? Is it a cosmetic feature?

I think those are all hard questions, which are yet to be resolved. And, in fact, all of these modalities of argument that I'm describing don't add up to a single legal rule. It is not building to a single legal test that'll govern all Second Amendment cases going forward. That's not how

constitutional rights work. It's not how the First Amendment or any other amendment works. They all have different tests in different kinds of contexts.

What I hope those sort of modalities and forms show is the constitutional grammar, the rules of language that one must use in constructing those rules. There are certain kinds of arguments that are just not relevant, not allowed as a matter of constitutional law. It's perfectly valid to cast your vote based on the feeling "I like guns" or "I don't like guns." But that's not a valid way to shape constitutional doctrine.

A judge can't rely on that as a basis for a decision. A lawyer can't argue that as a basis for a judge to make her or his decision.

The hopefully-- our hope in the book anyway, is that adopting these kinds of rules might add a little bit more discipline to the gun debate, which I think it could sorely, solely use. But there is still something missing, and so I want to open just one more can of difficult questions here. Which is that I think we have yet, and I mean not just we in this discussion but we as scholars, judges, lawyers who work on these questions have yet really to interrogate.

The question of what is the right to keep and bear arms for? What is it really all about? And we ask that kind of question about all kinds of constitutional rights, and the answers have serious consequences for theory and for doctrine. I've used a lot of First Amendment free speech examples, let me use one more.

Over the last century, there has been an ongoing scholarly and judicial debate about what the freedom of speech is there to protect. And there's at least three different answers. One, it's to protect the pursuit of truth in the marketplace of ideas. Another is that it's there to protect democracy and democratic participation. Another is that it's there to protect individual autonomy, and individual identity of speakers.

Now which of those theories you choose points to different directions in terms of what kinds of speech are protected. If the Second Amendment is about the pursuit of truth in the marketplace of ideas, it's a little harder to protect non representational art, for example, which doesn't have necessarily a truth value. Whereas if you believe it's about individual autonomy, then it's much easier to protect art, and maybe harder to protect statements that have truth value, scientific speech, and so on and so forth

I think that the Second Amendment is starting to grapple with those same kinds of questions, all of which can operate under the umbrella of self-defense. And I think the consequences of our conclusions here could be significant for what the Second Amendment does and doesn't allow. So let me just give, as with the First Amendment, three possible answers here.

One, and I think this is the most obvious and the most popular view of the Second Amendment, is that it's about personal safety. And the view here basically is that the contrary to the sort of mock favor view of the states having a monopoly on the legitimate use of force. Actually individuals have an inalienable right to have and use the means of violence, that is guns, to defend themselves.

And the thought here, I think, is actually analogous to that of the marketplace of ideas. The thought is as Brandeis said of speech, the remedy for false or bad speech is more speech. Wayne LaPierre of the NRA says, the only thing that stops the bad guy with a gun is a good guy with a gun. We can recognize there will be bad gun violence, but overall, the good will outweigh the bad and society as a whole will be safer.

That sets itself up, of course, for an empirical evaluation of whether that's actually true. But it's based, I think, the same structural argument here. It's kind of an optimistic notion of what will happen in the sort of marketplace of either ideas or, on the other hand, violence. That's one view.

A second view is that the Second Amendment is not about protecting yourself from burglars or thieves, it's about protecting yourself from a potentially oppressive or tyrannical government. I think this is what people have in mind when they say things like the Second Amendment isn't about hunting ducks it's about hunting politicians. It often finds its way even into court decisions, including one from the Ninth Circuit wherein Judge Kozinski referred to the Second Amendment as a doomsday provision.

And I think people who have this view, which, for obvious reasons that we can talk about, has been prominent in especially the past few weeks and the past few months and even years sensitivity from various different groups in society about the sort of oppression that government or police can inflict on people. This view, I think, has particular currency right now. Whether it can be reduced to doctrine is a much harder question.

And there's one third view here, which is the equivalent of the free speech view, which is that the Second Amendment is not necessarily about any measurable ends, it's about autonomy and identity. Now, some of you may be gun owners. I grew up with a gun in the house. My experience of gun culture has been largely that, for gun owners, owning a gun is a matter of identity.

It is an identitarian thing people would want to do even if they were convinced it did not make them safer. And that, I think, resonates differently than the personal safety or the anti-tyranny view. You have a picture here of a man named Carey McWilliams who got his concealed carry permit in North Dakota in 2001, which is unremarkable in and of itself. There are millions of Americans with concealed carry permits.

The vast majority of them, by the way, never commit any crimes. But it's remarkable here perhaps because Mr. McWilliams is legally blind, which might undermine, one might think, his ability to use guns for self-defense or to fend off a tyrannical government, but doesn't matter much if this is really just about his identity as a gun owner. And I should note here that Mr. McWilliams apparently did satisfy whatever tests North Dakota requires for receiving a permit in the first place.

Now those kinds of theory questions, I think, are significant not just for scholars like me to think through but because they point in different directions in terms of the results that we might expect in Second Amendment cases, and the way we might criticize and think about who has Second Amendment rights. So if Heller's right that self-defense is the core of the Second Amendment,

then why don't felons or the mentally ill get that right? They absolutely have a right to self-defense without guns, they may even have an increased need for it.

If, instead, it's about the prevention of tyranny, then why are dangerous and unusual weapons in sensitive places like government buildings carved out? Because after all, if you wanted to overthrow an oppressive federal government, what kind of gun would you need and where would you want to take it? Probably a dangerous and unusual weapon taking it to a government building. I put up here a picture of then candidate Trump speaking at the NRA leadership forum, a place where the Secret Service forbids guns.

Now, we're running low on time, and I want to leave lots of time for questions. So let me just say something quickly about what I perceive the future of the Supreme Court's decision in Heller to be. I think that Heller is with us to stay. Darrell and I wrote as much before the recent transformations on the Supreme Court.

But I'll just note that one piece of evidence here is that when Merrick Garland was nominated for the Supreme Court and his record on gun rights was challenged, the defense was not to say, yes, he is anti-Heller and will overturn it as some people would argue is a virtue not a vice with regard to some other unpopular cases, whether it's Citizens United or Roe versus Wade. Rather people defended his gun rights bona fides and said that no, no, he won't overturn the Supreme Court's decision in Heller.

About 3/4 of Americans supported the results in Heller, at least the individual rights ruling of it. And, I think, as a matter of doctrine, it's not necessarily going anywhere. Now our primary focus in the conversation today, and in the book, and in the work that Darrell and I do at the Center for Firearms Law has been to try to sharpen the constitutional discussion. And that's a big lift.

You know, we're facing essentially that terra incognita, lots of open, lots of interesting, and lots of difficult questions about the scope of gun rights and about the possible scope of gun regulation. But let me just say for those who are advocates of further gun regulation, and I don't mind saying that that is my position as well. That, so far at least, the Second Amendment has not been the obstacle. That could change, and the Supreme Court seems poised to take another case and may change the rules going forward. Happy to talk about that in Q&A.

But, so far at least, the major obstacles to further gun regulation in the United States have been political. They have not been legal in the sense of things that happen in courts. And hopefully, at least our hope in the book and my hope with this discussion, is that sharpening the constitutional discussion, at least a little bit, can eventually influence the public discourse, give people a way to speak to each other in a common tongue, and to understand one another.

And that's really the mission of the Duke Center for Firearms Law of which I am a co-director with Darrell Miller. I don't mind saying here, taking myself physically and sort of metaphorically out of the picture, that Duke University, I think, has, arguably, the strongest set of scholars working on questions related to firearms law and policy anywhere in the country.

Darrell Miller is fantastic. He's been cited by the Supreme Court. Our center is headed by Jake Charles, a 2013 alum of the law school. He was also a rising star in legal scholarship. Phil Cook, at the Sanford School, is the nation's leading empiricist on gun violence. Kristin Goss at the Sanford School, is one of the leading scholars on the politics of guns, and Jeff Swanson in the psychiatry department, I think, is the leading voice on mental illness in guns and things like red flag laws.

And our hope, our goal anyway is to continue trying to address these kinds of hard questions. So let me stop there and take some of your hard questions. And any that I don't get to, again, I'm happy to stick around after 1:30 and answer more.

CONNER COOK: Thank you so much, Professor Blocher. That was wonderful. We do have a few moments for questions. So if you have a question for Professor Blocher, at the very bottom of your screen, you'll see the Participants button. If you click on that button on the right hand side of your screen, you will find the option to raise your hand. So we'll use that for folks to ask questions. If you have any difficulty, you can also put your questions in the chat.

JOSEPH BLOCHER: While people are gathering their questions, let me say a few words about that Supreme Court case that disappeared. So as I said, in December, the Supreme Court, for the first time, heard oral argument in a Second Amendment case. It had been really since 2010 that it had done that. And it seemed that we were poised for our first substantive decision from the court with a new lineup. Justice Kennedy, of course, having left the Court, Justice Scalia having passed on and been replaced, Justice Stevens having left the Court.

But the regulation that had been challenged, a New York City regulation, was repealed and replaced by a state law by New York in the lead up to the case. And so by the time the Justices heard argument, there really wasn't anything left to decide. And so the court, ultimately, and, I think, correctly dismissed the case as moot.

But the Justices have still pending before them at least 10, maybe 12 cert petitions, that is requests to the court to hear a case, involving a variety of Second Amendment claims. And I think many of us expect that they will take one of those cases as early as this coming Monday. So it could be that if we put off this discussion even for one more week, I'd be commenting on the next case with some more confidence.

Instead, we don't really know what it'll be. But I am happy to speculate about at least what some of the major issues are. But maybe I'll pause just to see if any hands go up or if anybody puts questions in the chat box there.

CONNER COOK: It looks like we have one question from Scott in the chat.

JOSEPH BLOCHER: Yeah, so, Scott's question, in case anybody can't see on the chat here is, "it's an interesting time to have this discussion. Gun sales were up 80% in May as people perceived an increased need for self-defense. Does this impact your thinking?"

So first let me say what Scott points out is absolutely fascinating and important. And actually through the Center for Firearms Law, we've been running a sort a video series of interviews with gun scholars across the spectrum. Some of them very strong gun rights advocates, some of them more skeptical of gun rights, at least two of them trained firearms instructors, and we've asked them, what would you tell these new gun owners so as to be sort of safe with their guns? Because we've also seen a spike in certain kinds of gun violence.

So what Scott says about the spike in gun sales is absolutely true. Gun sales, it turns out, are quite volatile and respond to all kinds of shocks, political and otherwise. During the Obama years, gun sales went through the roof. The gun industry made an enormous amount of money. It's been said to me that President Obama was the best thing that ever happened to the gun industry.

Since President Trump took office, gun sales had fallen off significantly. This was often referred to in industry as the "Trump slump." And the explanation most people gave was that when Obama was in office, gun owners were worried that guns might be confiscated or limited more, and so they were encouraged to go ahead and buy them now. And when President Trump came into office, there was less fear, and so then the gun sales went down. It's always kind of hard to know.

What Scott says about self-defense is really important though. About, I think it was 2013, maybe even more recently, for the first time, self-defense became the primary reason why people buy guns. Historically and really, again, until the last 10 years, the primary reason for gun ownership had been hunting and recreation. And that has now been eclipsed by self-defense.

That's partly because the percentage of Americans who hunt has been decreasing, and the percentage of Americans who are worried about personal safety and think guns will make them safer has continue to go up. So to answer your question, Scott, it impacts my thinking in the sense that it seems to confirm trends that have happened before.

When people are anxious, some number of them will buy guns. And the hope is that they will use them safely. I think that the quarantine increases the risk of some kinds of gun violence, including intimate partner violence, and hopefully lessens the possibility of other kinds of violence, like interpersonal violence in public spaces, since at least in many places, people are limiting those.

I see question here from Regina. "Do policymakers and nonprofits who are concerned with gun violence prevention approach Duke for scholarly advice to advance the ability to argue for prevention?" I and Jake Charles, the executive director, and Darrell Miller are always happy to answer questions from nonprofits and policymakers on all sides of the spectrum.

We are not an advocacy center. We don't take positions in litigation. Darrell Miller and I do in our individual capacity. We filed a brief even in the New York case in support of neither side. But we don't advocate, we don't push for legislation, we don't, as a center, filed briefs. So I'm happy to take questions from anybody, and I will tell you I get questions and comments from all sides of the spectrum. So yes, please. We're always happy to answer what we can.

Question here from Kedrick Meredith. "Not a lawyer here. What would it take to repeal the Second Amendment? Also can you comment on the history of the regulation of the Second Amendment being tied to racism, meaning much of the regulation of guns in the US is historically rooted in limiting gun ownership of African-Americans out of fears that slaves would revolt?"

Two huge and really interesting questions. Of repealing the Second Amendment, I think, is a very, very distant political possibility for the simple reason that the vast majority of Americans support it. That is, they support what they understand it to stand for an "individual" right to keep and bear arms for self-defense.

As I mentioned earlier, when Heller was handed down, which was the summer of 2008, it was in the midst of the Obama McCain campaign. And by the end of the day, both Obama and McCain came out in favor of that core holding of the case. 75% of Americans support the individual rights view. That is a remarkable change.

That was not always the case. Even as late as the '80s and the '90s, you would have conservative stalwarts, like Chief Justice Warren Burger, describing the individual rights view as a fraud. But we don't have polling from then, so I don't really know how much it's changed from then. But I can tell you right now, the majority of Americans very much in favor of the Second Amendment.

An effort to repeal it might result in an enormous backlash, and it's just hard to tell. But to answer your question, it would take a lot more ready the groundwork. There has been some of that, and I think post-Parkland The March for Our Lives movement has certainly made it-- repealing the Second Amendment is not a priority of theirs, but increasing political consciousness about gun violence has been a huge priority as has been registering voters, which has been a major push for MFOL, the March for Our Lives movement.

And that may end up the moving the needle in a sort of a long term way. But that would be a very, very long, I think, road to hoe. And again, so far anyway, the Second Amendment is not the primary obstacle to gun regulation. It's not that gun regulations are being struck down, it's that they're never being passed in the first place. And, again, that's, I think, what happens with that background check example after Sandy Hook.

So the history of regulation of the Second Amendment, I'll say regulation of guns there being tied to racism. Deeply, thoroughly. That's true of any kind of criminal law. It's certainly true of criminal regulations of the use of guns. The people who were allowed to use guns at the time of the framing, and even around the time the 14th Amendment was passed was not a random cross-section of the United States. It was White men of a certain age had Second Amendment rights in the late 1700s.

Guns can be and have been used as tools of liberation as well as tools of oppression. And this is where the intersection with the nationwide conversation about racial justice that we're having right now, I think, has so many important intersections. So regulations have absolutely, and we'll continue, I think, to be, visited most heavily on populations of color. We see with stop-and-frisk in New York, for example.

Anytime any law gets tightened, the burdens are not going to be borne equally across society. But it's also true that support for gun regulation has tended to be highest among populations of color, especially African-Americans, and that gun ownership has been much lower. And, I think, part of the reason for that must be that gun homicide remains the leading cause of death for Black men ages 18 to 35, and the numbers are just staggering. It's in the neighborhood of about 6,000 lives taken every year.

And so the question is what kinds of regulations can stem that literal flood of blood without imposing even more costs on the criminal justice side? And that's where, I think, the policy conversation has to be so much more nuanced and so much more focused than what we sometimes see in the back and forth, where it's either for guns or you're against them. And I kind of hope, at least eventually, that's where we can get.

Great. Set of sort of two questions there. And as I'm wrapping up my answer on that one, I see that we've come to 1:30, which I know means the end of our official time together, and I think means when this official period here is going to stop. But if we were all together, I would be standing up at the podium or at the desk happy to entertain questions afterwards. So I'll pause here.

I know a lot of people have to go at 1:30, but if you do have any more questions, I'm happy to stick around and answer them. If you didn't get a chance to answer your questions, please reach out to me by email. It's always a discussion I'm happy to keep having.

So I'll just pause for a minute while the room clears. Anybody who has to go, and if any other hands go up or any other questions appear in the chat box, I'm happy to answer them. Thank you all who were able to join.

This is also the part of the presentation I'm going to have a sip of water.

[SIGH OF RELIEF]

CONNER COOK: For anyone that would like to stay on, I'm going to go ahead and stop the recording of the video at this time, just so you're aware.