

Duke Law Podcast | Supreme Court overturns bump stock ban #supremecourt #gunrights #secondamendment

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ANDREW WILLINGER: Just a couple of weeks ago, the Supreme Court struck down a ban on bump stocks, devices that enable a semi-automatic rifle to fire rounds much like a machine gun. With a vote of 6 to 3, the Court ruled that the Bureau of Alcohol, Tobacco and Firearms had overstepped its power when it implemented a rule that classified bump stocks as machine guns in 2018. Writing the majority opinion for the Court in *Cargill*, Justice Clarence Thomas said, quote, "We hold that a semi-automatic rifle equipped with a bump stock is not a machine gun because it cannot fire more than one shot by a single function of the trigger."

Summarizing her dissent from the bench, Justice Sonia Sotomayor said, quote, "The majority puts machine guns back into civilian hands." In this episode of *The Duke Law Podcast*, we'll discuss the topic of bump stocks and whether this ruling might offer insights into how the Supreme Court could approach future Second-Amendment and gun cases. I'm your host, Andrew Willinger, the Executive Director of the Duke Center for Firearms Law. And joining me today on the podcast are Duke Law professors, Joseph Blocher and Darrell Miller, both Second-Amendment and constitutional law scholars, as well as the Faculty Co-Directors of the Duke Center for Firearms Law. Joseph and Darrell, thanks for being here today.

JOSEPH BLOCHER: It's great to be here.

DARRELL MILLER: Thank you.

ANDREW WILLINGER: So, Joseph, I thought maybe I could ask you first to start by just giving some brief background about bump stocks and what led the ATF to regulate these devices.

JOSEPH BLOCHER: You know, bump stocks are important precisely because they blur the edges between semi-automatic and automatic weapons. A semi-automatic weapon is one where each time you pull the trigger, a single bullet fires. An automatic weapon is one where you hold down the trigger, and bullets continue to fire. So an automatic weapon-- some people think about when they talk about machine guns, which is really the core issue in this case.

What bump firing is-- here, we get to bump stocks-- is essentially using the recoil of a semi-automatic weapon to help it fire more quickly. So you pull the trigger. The rifle, let's say, produces recoil. That pushes the gun backward.

That releases the trigger so that the gun, if it's a semi-automatic, essentially gets reset for the next shot. And what a bump stock does is essentially allow the gun to slide back so that the trigger resets and forth so that the trigger gets depressed again. The finger bumps into the trigger and pushes it down again, and the gun fires again, and again, and again, and again.

And the reason that these exploded into popular consciousness, I think, is because of the mass shooting in Las Vegas in 2017, where the shooter, using bump stocks, among other things, was able to kill about

60 people and wound 400. Hundreds more were, of course, injured in the ensuing panic. The ATF responded-- and this is 2018, this was during the Trump administration-- by classifying bump stocks as machine guns, which are heavily regulated under federal law. And the way the federal law defines a machine gun is a weapon that can shoot automatically more than one shot without manual reloading-- and here's the key phrase-- "by a single function of the trigger." And when the ATF did that, of course, that led to a ton of litigation.

ANDREW WILLINGER: Right. I'll pick up there and just talk briefly about how these cases evolved and ultimately made it up to the Supreme Court. So as you mentioned, Joseph, right after the ATF's rule, this regulatory ban of bump stocks was challenged in court across the country. And we had a number of different federal circuits that ended up addressing this question.

Initially, they tended to uphold the regulation. These are decisions that were very complex, often fractured among the appeals court judges. But in many cases, in this initial period, the judges said that the language in the statute, which was the 1934 National Firearms Act, was somewhat ambiguous or unclear, and they tended to defer to how the ATF had interpreted that language to include bump stocks.

I think it's fair to say we saw a shift in the last couple of years with at least two circuits, the Fifth and Sixth Circuits, striking down the regulation. Again, these are fractured decisions, different rationales, some judges relying on the rule of lenity, which says that when you have potential criminal penalties, you need to construe the statute in a criminal defendant's favor. And in this case, *Cargill*, the en banc Fifth Circuit, struck down the regulation, and the government petitioned for cert.

So what we got here in *Cargill* was a 6-3 decision that was a pure statutory interpretation decision. So you have six justices in the majority, saying that this statute is clear and unambiguous, and it does not cover bump stocks, that there's no question that bump stocks are outside the scope of the statutory language. And then you have three dissenting justices taking the opposite view and saying that in their opinion, the language is clear and that it does cover bump stocks and that any contrary interpretation would enable the evasion of this civilian machine gun ban.

So I want to turn to you, Darrell, and ask a higher-level question, which is, where do you think this decision falls in current national debates over gun control and Second-Amendment rights? And relatedly, what are the practical consequences in terms of prompting potentially additional legislation at the state or federal level?

DARRELL MILLER: Well, I think one thing that everybody should understand is this is not a Second-Amendment case. The real problem with the way a lot of media picks up a lot of gun cases is that every gun case is denominated as a constitutional case. And the Second Amendment's not anywhere in the reasoning or the law of the opinion. If anything, it's about the atmospherics of gun rights and regulation, which always has a Second-Amendment penumbra over it.

So in terms of the Second Amendment, it doesn't really do anything. We still don't know, for example, whether a bump stock is actually an arm that would qualify under the Second Amendment or not, or whether it's dangerous and unusual, or any of the terminology that's usually used in constitutional adjudication for understanding what actually is protected by the Second Amendment. So it's just a statutory interpretation case.

Pragmatically, what this does is it means that either Congress has to get involved in regulating bump stocks, which is really, really hard to imagine it happening. They very reluctantly, and only after extremely vicious episodes of violence, get involved in the gun regulation business. And if Congress doesn't get

involved, then that means that the states are involved-- states and localities. And that means that you potentially have a patchwork of different regulatory environments for bump stocks, with some states outlawing them or some states protecting them. And then you have all the coordination problems with somebody buying a bump stock in one state and then taking it to another to commit an atrocity that could potentially happen.

JOSEPH BLOCHER: Yeah, and that kind of describes what the landscape looks like now. I mean, just as Darrell says, I mean, Senator Schumer, I think, immediately pushed for a congressional action legislatively to ban bump stocks, which the justices all but invite in their opinions. But it didn't go anywhere, unsurprisingly, for all the reasons that Darrell said.

There are about 20 states that already prohibit bump stocks. There is some with red flag laws. We see maybe more action at the state level than we do at the federal level. So that could continue.

We could still see some prohibitions at the state level. But I think that an important takeaway here is exactly as Darrell says. This is not a Second-Amendment case. And as far as I know, there's no federal court yet that has concluded that bump stocks are covered by the Second Amendment. Andrew, you've written and thought about this. What's your basic takeaway reaction to the decision? I mean, is it really about bump stocks? Is this an administrative state case? How should we be thinking about it?

ANDREW WILLINGER: Yeah, well, to go back really quick to this point about the practical consequences first, you're right, Joseph, that there are a number of states that ban bump stocks. Those laws were in place before this decision came down. It does not impact those laws at all. I was checking this morning. I think it's about 40% of the population, maybe, that live in those states-- so a significant percentage that are still prohibited from owning bump stocks under state law.

And another interesting issue here is actually the potential for local action. So you had some coverage of Philadelphia passing their own ban on bump stocks shortly after the Cargill ruling came down. You usually don't see cities acting to combat to regulate guns in this way because most states have preemption laws that essentially say that only the state government can regulate with regard to firearms. But when you dig into those preemption laws, including the one in Pennsylvania that's enforced there, they tend to only cover guns, ammunition, and maybe component parts of guns, and it's not clear that bump stocks qualify. So this may be an instance where you see even more of a patchwork because you have cities acting as well, even if the state chooses not to ban bump stocks.

DARRELL MILLER: And I'll just add, you could see a phenomenon where you have state Supreme Courts interpreting state constitutional protections to keep and bear arms as impacting either the state or local regulations on bump stocks. There's no necessary reason that they have to interpret their own protections in lockstep with the Second Amendment at all. And so you could see some decisions that would say, well, it's all well and good for the locality to regulate bump stocks, but we find that that is an arm protected by our state constitutional right to keep and bear arms.

ANDREW WILLINGER: And going back to your earlier question, Joseph, about whether this decision is really about bump stocks or whether it's about the ATF, the administrative state, as we are recording this podcast, we received news that the Supreme Court has struck down Chevron deference, has overruled the Chevron case. And so I'm inclined to see this as more about the administrative state. You do get the same division on the Court in these cases as you do in Second-Amendment cases, generally.

But I think the Court is more concerned about the reach of the administrative state than about bump stocks specifically. And especially if you look at the concurrence here by Justice Alito, where he seems to

say-- if you read into it a little bit, he seems to say that he's supportive of efforts to ban bump stocks. He just thinks it needs to be done through legislation, not regulation.

JOSEPH BLOCHER: For what's worth, I agree with that. The way I read this case-- and maybe its influence going forward-- is the window it gives into how the justices think about statutory interpretation and how they think about the administrative state. So to pick up what you just said about Chevron being overruled-- breaking news, literally, as we're recording this-- I mean, the principle of Chevron has said, for decades, that courts should defer to the reasonable agency interpretations of ambiguous statutes. And that's a core, core principle for how administrative law has operated for a long time now. It's arguably what's at issue in Cargill, right?

We have here, lower courts looking at this single function of a trigger language and seeing it differently. I mean, the justices themselves see it differently. Arguably, that makes it ambiguous. And the ATF's interpretation, which is that bump stocks are equivalent to machine guns, is arguably reasonable. Under Chevron, you might think that the agencies should win here.

But the government abandoned the Chevron argument below. And so it's not cited anywhere in any of these opinions. And then, of course, two weeks later, Chevron itself disappears, so maybe it wouldn't have made a difference.

On the statutory interpretation question, which I think will be how this case maybe gets invoked the most often, we just see this really, really, really remarkable-- and Justice Alito's concurrence, I think, captures this well-- difference between consideration of legislative purpose at all and legislative text. And Justice Alito-- again, I'll just point to his opinion here because he says that "The Congress that enacted the machine gun prohibition undoubtedly would have seen no material difference between a machine gun and a bump stock-equipped rifle." So purposefully, Congress would have seen these things the same. And yet, he says, "that's not the law they passed. The single function of a trigger language does not cover bump stock."

So that's text basically over all. Text trumps even a very clear congressional purpose. That feels, to me, like it will be the lasting influence of the case more than-- as Darrell says, it's not really a Second-Amendment case. It's not really a gun rights case.

DARRELL MILLER: So what do you think the significance of this being a split in the Cargill case, same as Bruen? Is there any significance to that? What else really grabbed your attention in the opinion?

ANDREW WILLINGER: Yeah. So one thing that caught my eye and I think is potentially important here is if you think about this, especially together with the Chevron cases, here, you have six justices saying that the statutory language is clear in one direction, and three justices saying the opposite, that it's clear in the other direction. To me, that would maybe suggest that the language is ambiguous.

I think that's maybe a fair takeaway there if the Supreme Court is so divided. But again, maybe this is an early clue that the Court is paring back agency deference as it seemed to do this morning, where you would previously have had a follow-on analysis of whether ATF had reasonably construed the ambiguous statutory language. I think, as the early Circuit Court decision suggested, the answer here is probably yes, but the Court never gets there.

JOSEPH BLOCHER: Yeah, I think that 6-3 divide-- it's not necessarily, in this case, about whether the justices in the majority have a lot of sympathy for bump stocks. I'm not sure. I mean, certainly Justice Alito signals that he doesn't seem to.

I don't think the division that's being picked up there is necessarily about gun rights and regulation so much as it's about the six justices in the majority in Bruen are also the six justices who believe in clear text and read text in the way that they do. It's more methodological division than anything else, and it just happens to line up about the same way. So I don't think it necessarily signals anything about where they are on Second-Amendment issues so much as it's just a methodological division that tracks in both cases.

ANDREW WILLINGER: Great. So I'll direct this final question to you, Darrell, at least in the first instance, which is, do you think that this case represents firearm exceptionalism in some way? So in other words, do you think that the Court here is giving higher scrutiny to agency actions when those actions happen to involve guns? And if so, do you think that is a trend that we could see continue next term in VanDerStok, where the Court has agreed to hear this challenge to ATF's regulation of ghost guns or self-made firearms?

DARRELL MILLER: So I do actually think it is an instance of firearm exceptionalism in this particular way, which is the Court, at least, prior to overruling Chevron, and even in a case like District of Columbia versus Heller, which started us on the Second-Amendment journey, it's always depended on how clear the text is. And the justices' perception of the clarity of the text sometimes seems to be shaded by the ideological valence of the particular issue. So gun rights issues, for example, if you look back at the Heller case, the operative clause is clear. Therefore, you don't need to resort to the militia clause. And I think that same kind of dynamic in the way that the Second Amendment, or at least gun rights or firearm exceptionalism, frames the clarity with which they will demand a particular kind of regulation really comes into view.

JOSEPH BLOCHER: I think the firearms exceptionalism question is just a really interesting one, and we see it in a lot of the court's cases where justices-- when gun rights are at issue, it seems to, I don't know, alter the direction of where you might expect them to go on lots of different kinds of legal questions, right? In the context of Bruen, for example, justices who traditionally have been very hostile to equal protection claims, especially those just based on impact, were all of a sudden very worked up about the racially discriminatory impact of the enforcement of New York's law. In Rahimi, it didn't show up much in the opinions, but in the atmosphere, at least, of the case and of scholars and commenters. Same thing with regard to due process-- people who had not really weighed in a lot about concerns about due process all of a sudden very activated about that. And you could say vice versa on the other sides of those issues. So I do think there's this kind of, I don't know, distorting gravitational effect that seems to happen in some gun rights cases, something that Daryl and I've been thinking and talking about for a while.

I also think the VanDerStok connection is a really interesting one, Andrew. So the VanDerStok case, which the Court will be hearing next term, is about, as you say, the definition of what a firearm is and whether it includes gun parts kits, which are non-assembled firearms that can be put together at home and therefore potentially evade things like background checks. That's a boundary question about what is a gun. Literally, what is a firearm?

And we see that kind of question popping up both in statutory cases like this one and in constitutional cases, like, what is an arm? As Darrell mentioned earlier, it's not 100% clear whether these things count for constitutional purposes as arms. We see the same thing in cases involving high-capacity magazines,

what are often called assault weapons, and so on. So those kind of definitional questions, I think, are going to be before the Court in a variety of different contexts in the years going forward.

ANDREW WILLINGER: Well, these are certainly important and fascinating issues that we'll continue to cover at the Duke Center for Firearms Law. For now, Darrell and Joseph, thanks for sharing your perspectives with us. It's been great speaking with you today.

DARRELL MILLER: Thank you.

JOSEPH BLOCHER: Always a pleasure.

ANDREW WILLINGER: And for our listeners, be sure to check out the Duke Center for Firearms Law online at firearmslaw.duke.edu. Our Second Thoughts blog offers a deep dive into many of the topics we discussed today and other subjects related to the Second Amendment and gun regulation. You can also follow us on X, the site formerly known as Twitter, at [@DukeFirearmsLaw](https://twitter.com/DukeFirearmsLaw). And finally, be sure to follow The Duke Law Podcast wherever you get your podcasts. Until next time, go, Duke.