

00:00;19;28 - 00:00;44;29

Stephen Gutowski

All right. Welcome, ladies and gentlemen, to another episode of the Weekly Reload Podcast. I'm your host, Stephen Gutowski. I'm also a CNN contributor and the founder of thereload.com, where you can head over and sign up for our free newsletter today. If you want to keep up to date with what's going on with guns in America from a sober, serious perspective that focuses on reporting and analysis over hot air and opinion, I should come up with a different I always say hot air.

00:00;44;29 - 00:01;10;10

Stephen Gutowski

And then, there is a website called Hot Air that that I actually, we've had the editor on from but either way, you guys get the point. This week we're going to be talking about the latest Supreme Court gun case, not necessarily a Second Amendment case, but a gun case that was handed down this week. And to do that, we have one of the leading Second Amendment scholars in the country back with us.

00:01;10;13 - 00:01;16;11

Stephen Gutowski

David Kopel from Independence Institute, thank you so much for, for joining us to to talk about thank you.

00:01;16;11 - 00:01;17;18

David Kopel

For having me.

00:01;17;20 - 00:01;21;22

Stephen Gutowski

Absolutely. And can you give people a little bit, background about yourself before we get started?

00:01;21;28 - 00:01;45;15

David Kopel

Sure. I work at the Independence Institute, which is in Denver. We're named for the Declaration of Independence and founded on it's eternal truths. And we are the second oldest of the state level thinktanks. And I'm the research director there. Ever since 1992. And one of the things I write on the most is firearms law and policy.

00:01;45;17 - 00:01;56;29

Stephen Gutowski

And you have, of course, written, a lot of, scholarly articles and books and, and in fact, briefs on Second Amendment law, including at the Supreme Court. Right.

00:01;57;02 - 00:02;26;04

David Kopel

That is that is true. I've been white, my work has been cited, in seven different Supreme Court opinions, most recently by Justice Thomas's, opinion in New York State Rifle and Pistol Association versus Berlin. And so if you want to read more, just come to Dave Kopel or Dave Plourde and most of my, legal scholarship in journals and op eds and things like that is available there for free.

00:02;26;07 - 00:02;53;25

Stephen Gutowski

Yeah. And so you have, quite a lot of experience with, the Supreme Court. You're watching closely, you know, what goes on there, and you follow a lot of, mostly the Second Amendment side, but also, really any case that implicates, guns in the United States. And this is one of those cases that's not a Second Amendment case, but certainly implicates, gun ownership gun especially, and even more so, gun dealing and gun making.

00:02;53;27 - 00:03;28;20

Stephen Gutowski

Right. This is, the, Bondi van der stock case that the court handed down, in A72 decision, they upheld the ATF Biden era, ban on so-called ghost gun kits. And, also spoke to sort of unfinished receivers and frames as well. And, you know, maybe not a surprising outcome, right, because oral arguments indicated that the court was pretty skeptical of the arguments against this rule.

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Stephen Gutowski

And, it turned out that was that was the case. They they ruled the ATF regulation was in line, at least in some really just one circumstance, with the Gun Control Act of 1968 and how it defines and regulates, firearms and their component parts. And they determined that was enough to uphold what can you just give us a little bit, your your view of, of summary of what this case, what the holding was.

00:04:02;29 - 00:04:32;18

David Kopel

Okay. The the holding is that the plaintiffs said this the way the court described it, that this rule is facially unconstitutional, as opposed to there are other cases where a plaintiff can say, oh, the the rule or the statute might be constitutional in a lot of situations, but it's not constitutional when it's applied to me. And the court said you weren't doing that, you were making a facial challenge.

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David Kopel

And we adopt this controversial standard that if you're challenging a regulation and the regulation facially and the regulation is might be invalid in lots of application lines, but there are certainly cases, in fact, plenty of them here where the regulation is valid, then you can't win a facial challenge.

00:04:58;07 - 00:05:22;15

Stephen Gutowski

Right. And so they but this I don't know, when I read it, I see a fairly narrow holding here because they really only talk specifically about this one kind of kit. Was which, to be fair, was a very popular, option in this space. But the polymer 80 was the name of this company that existed and sold what we're called by build shoot kits.

00:05:22;15 - 00:05:48;29

Stephen Gutowski

And the court kind of said just on that description alone, they kind of gave away the game of that. These are really the same thing as, as guns themselves, even though you have to go through a process of finishing the frame and then assembling the gun, you know, the you know, they argued that the intent was obviously to sell a weapon which would be regulated, and you'd have to get a license and go through all the steps of that.

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Stephen Gutowski

A traditional gun maker would have to go through in order to sell these things. Of course, polymer 80 has gone out of business since before this, ruling was handed down, but they focused very much on that buy, build, shoot kit. Right. What was that say to you? Do you view that as narrowly, holding like I do or there what's the what's your.

00:06:08;19 - 00:06:45;22

David Kopel

Yes or no? On the one hand, the only application they pointed out of the rule being valid was the polymer 80. But obviously there are there are plenty of other companies that make kits that are pretty close to that. Now, the rule is enormously long and complicated and very difficult to understand. And, it may be that, I think Thomas Moore said to, Henry the Eighth, when Henry the Eighth said, did you understand the Bible?

00:06:45;25 - 00:07:24;09

David Kopel

And he said, Thomas Moore said, no, but maybe the church as a whole, collectively does, I don't know if anyone really understands their full, sprawling, extremely difficult rule. So there certainly the court left wide open as applied challenges by other manufacturers or consumers. When you get further away, you know, what we know from the court is they they analogized it to what they call, you know, the question is, do you have a do you have a frame?

00:07:24;11 - 00:07:48;00

David Kopel

Well, not if it's an unfinished frame. It's not not a completed frame. But the court said, oh, this is a kind of thing called an artifact noun, where you can refer to a yet to be a completed thing as if it were the thing. So if I handed you, the manuscript of my 400 page novel that I haven't finished yet, I still might say, here's my novel.

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David Kopel

And likewise, Ikea, maybe its first appearance in the US Supreme Court is if you've got your Ikea table that you brought home from the store, and it's just laid out on your floor and it's not a full table, you could still tell your friend, oh, look, here's my new table. And they the court says same thing for a frame or receiver, even if it's not all the way to being a frame or receiver, it's it's close enough.

00:08:17;22 - 00:08:38;06

David Kopel

And then on the other hand, the Justice Gorsuch is opinion said, but if you just had a pile of unfinished logs that you intend to make into a table that's not really a table yet, so that those are the two data points we have. If it takes a 21 minutes, like on the polymer 80, that's a frame, a receiver.

00:08:38;08 - 00:09:08;12

David Kopel

On the other hand, somewhere out there there's something that not that's not even even with an intention. And as for in between the half there, there's plenty of room for litigation. And if I were on the, plaintiff's attorney side of this, I would try to get cases that were the furthest out or reach of the ATF regulation, rather than saying, well, okay, 20, 21 minutes, you can regulate, but 45 minutes, you can't.

00:09:08;15 - 00:09:40;15

Stephen Gutowski

Yeah. I mean, that's that was, one of the big controversies of the rule itself. Right? Is this idea of there weren't a lot of limiting principles. Right. What is you know, where the line is between unfinished frame and receiver and, you know, finished regular for the purpose of regulation, at least, frame and receiver, because, I mean, realistically, these days you can take them, pure metal block other the ATF did say in the rule we don't mean like base component parts, like actual metal blocks or.

00:09:40;15 - 00:09:42;22

David Kopel

Yeah, like they call it. Yeah.

00:09:42;24 - 00:10:08;20

Stephen Gutowski

Right. But in reality, like, especially some of the tools that exist, you could take a plank of a block of aluminum and mill it into an AR 15 receiver that functions, within several, you know, eight hours or whatever. Yeah. With some of the mills that exist now. So, you know, the, the, the, Supreme Court does not seem to want to draw that line either.

00:10:08;22 - 00:10:34;28

Stephen Gutowski

But other than but they did continually have these sort of caveats of like, admittedly. Right. You know, there's some line here somewhere. Yeah. We don't we're not going to say what it is because we don't have that. But this was the majority opinion, right? That we don't have to say where it is, because all we have to say is that for this Bible shoot kit or this

polymer 80 frame that's too close to the line, and therefore qualifies under the Gun Control Act.

00;10;34;28 - 00;10;41;29

Stephen Gutowski

And the ATF was right in that regard. So we're not going to toss out the whole of the rule. Right?

00;10;41;29 - 00;11;19;09

David Kopel

That's exactly. And and I think the one thing you can say in favor of that approach is the nine of them know that they're not gun experts. And. Even the ones who, you know may know the most about guns, like Justice Scalia, certainly on the bench at the time and and some of the others who have some firearms experience or maybe a lot, they don't even then they're just consumers, you know, and they don't know the these edge cases on building kits at home and things like that.

00;11;19;11 - 00;11;45;11

David Kopel

So they might well be saying, we don't know enough to try to draw the line on the other side in any precision. And so we're not going to try this time. We'd rather if it ever gets done, that should be done by a court that has the advantage of full briefing and factual development on the particular, longer assembly time, kits.

00;11;45;14 - 00;12;10;01

Stephen Gutowski

And there was some dispute over exactly what the court is holding here between, the dissent from Justice Alito, Samuel Alito, and the concurrence from Justice Sonia Sotomayor. In fact, it was a bit of a prickly exchange. I think you could, refer to it as, but basically Alito saying, you know, we really, the majority really only points to these two examples.

00;12;10;01 - 00;12;47;25

Stephen Gutowski

And so anything that's not those two examples isn't really covered by this ruling. And Sotomayor's she doesn't say anything explicit, but she just says, don't listen to the dissent because that's not, what's binding. Listen to what's in the majority opinion. I, I mean, to me, it feels like the majority opinion here is anything that's relatively close to a Bible shoot kit, which, to be explicit here, was a was a kit that Tom Brady would sell that had all of the, component parts of, of a handgun and then had that unfinished frame, in it.

00;12;47;28 - 00;12;55;13

Stephen Gutowski

And then also, I believe, had the tool sets to finish the frame rate and jigs and, and, you know.

00;12;55;14 - 00;12;59;11

David Kopel

Yeah, not all the you just play your own power drill and. Right.

00;12;59;12 - 00;13;01;11

Stephen Gutowski

But but otherwise it had everything else.

00;13;01;11 - 00;13;01;26

David Kopel

Yeah.

00;13;01;29 - 00;13;28;03

Stephen Gutowski

And they sold this all in one kit. And they claim that it's not covered by federal law because the frame is not finished. Right. And that's really the part that is key under how honestly under how the old ATF rule work. Not so much the

statute necessarily, but the rule itself that the ATF wrote in the 60s. And, and so therefore they didn't have to get a license to sell this.

00;13;28;03 - 00;13;45;25

Stephen Gutowski

They didn't have to serialize it. They didn't have to do background checks on customers. That's what the whole dispute is over. But yeah, you know, Alito kind of saying, well, this is the only thing that guys talked about and, and the frame itself as well. So anything that's not that is not really necessarily covered, by the court's ruling.

00;13;45;25 - 00;13;56;04

Stephen Gutowski

And Sotomayor, I think, was going with the view that it's that's not really true. It's sort of anything that's close to those is covered. How did you read that?

00;13;56;07 - 00;14;34;05

David Kopel

Well, I'm not sure they're really that inconsistent. Despite the, snip obvious level, decent disagreement. Yeah. You know, if a polymer 80 is covered and that's according to the court's record, a guy with no experience by following the instructions on YouTube can get it done in 21 minutes. So. But she's right that if you're close to that, you know, if, some new company came along and it took 33 minutes to get the job done, I think that would be covered by the court's ruling.

00;14;34;07 - 00;14;52;10

David Kopel

And that and Alito saying, sure. But beyond that, we don't really know. And, it's notable that Sotomayor and Alito never had any express disagreement about once saying some type of cat might be covered and the other saying, no, it wouldn't be.

00;14;52;13 - 00;15;17;26

Stephen Gutowski

Right. Right. And I guess, like, we can transition that into the next kind of disagreement that we saw here, which was more over the standard. And that's was, I think, maybe a more specific focus of the two dissents from, Justice Clarence Thomas and Brian. And was the more, more of the meat of, of Samuel Alito's dissent was this idea that the shouldn't have been considered a facial challenge.

00;15;17;26 - 00;15;21;13

Stephen Gutowski

Right. Can you explain what their objection was that.

00;15;21;15 - 00;15;58;00

David Kopel

There's a case that I really don't like, but is valid precedent? From the 1990s, I believe, called Slayer now. And it says when, as we talked about in a constitutional case, you can say the regulation, for example, is facially invalid. Or alternatively, you can say we're not trying to knock out the whole regulation, but we're saying you can't apply it to me, or maybe you can't apply this part of it to me.

00;15;58;00 - 00;16;34;10

David Kopel

And that's an as applied challenge, Salerno says. When you're doing a constitutional case, you know, this law violates the First Amendment freedom of speech, for example. Then to win a facial challenge, you've got to, in the most extreme way to phrase it, show that the law has no valid application or that the, unconstitutional reach of the law far exceeds the constitutional reach of the law.

00;16;34;13 - 00;17;08;27

David Kopel

I don't agree with that standard at all. But anyway, just the the standard that the court applies sometimes, but not always in constitutional cases, as the Thomas and Alito dissents point out, what Justice Gorsuch his opinion does without ever citing or mentioning Salerno, but is essentially to import that standard into a non constitutional case, into a challenge of whether a regulation is valid or not.

00;17;09;00 - 00;17;47;00

David Kopel

The argument against that is that's not what we're supposed to do at all. When you're challenging a regulation here, in this case, you are saying Congress enacted a statute and gave expressly ATF some regulatory authority to interpret and effectuate that statute. Is the rule within the authority that Congress granted, including by the terms of the statute or not?

00;17;47;03 - 00;18;16;03

David Kopel

Is this, you know, if ATF if to get them to another ATF issue, if. Congress had some statute about interstate wine sales and ATF and the use the word wine in the statute, and ATF wrote a regulation about interstate beer sales. It is the power of alcohol, tobacco and firearms and explosives. So it's it's within their general zone.

00;18;16;06 - 00;18;47;12

David Kopel

But the court would say, no, you can't do that because the wine statute doesn't give you a authority over whiskey. So it's not really it's so the question is a different one from what Salerno is asking, because in Salerno, in the constitutional cases, you're presuming that the legislature or regulator had authority to create the law in the first place.

00;18;47;14 - 00;19;38;25

David Kopel

Then you just ask the question as well. That law that they enacted properly within their zone of authority, does it bump into or contradict the US Constitution, which is different from the standard regulatory thing? Which does the agency have the ability? Was the agency ever granted by Congress the authority to enact this in the first place? So to me, it seems like a very inapt, extension of Salerno and you can say is we've been talking about maybe this is a that brought a case on the gun control side, but on administrative law, this is which involves the whole panoply of the bloated Leviathan, out of control, hyper regulatory federal government.

00;19;38;27 - 00;20;21;20

David Kopel

We suffer under, to much detriment of freedom and economic growth and civil liberty, to a point of import that Salerno standard makes challenges across the board much more difficult on on issues that have nothing to do with, with firearms or alcohol or anything else like that. Now, the court, as the, opinion said, the court has occasionally delved into Salerno like language on other administrative law cases in the past, but it's typically been only occasional and never really announced it as a broad, all encompassing rule.

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David Kopel

So this case is an important and in my view, negative step in the development of administrative law. And believe me, in next fall's administrative law classes in law schools, the professors who have very little interest one way or the other in gun control, administrative law are still going to have to probably incorporate this case in their curriculum.

00;20;50;07 - 00;21;19;17

Stephen Gutowski

Right. So you agree with like alito's, you hear that this standard, the Solano standard, almost, makes it a default setting for the court to side with, with regulators, in these types of cases. And he, he to me, that was like his warning, right. And yes, in his dissent and he was although he was more like maybe that's what the law requires, but we should have had this briefed out on that specific point if we're going to rule this way.

00;21;19;17 - 00;21;24;07

Stephen Gutowski

That was kind of his the gist of his main, issue. Yeah.

00;21;24;10 - 00;21;51;03

David Kopel

This is one of the cases where we in court decides the case on something that nobody was arguing about in front of the Supreme Court or in the lower courts. As Alito points out, the Salerno is mentioned once in the attorney general's brief, but it's really kind of a passing mention. The other side didn't talk about it at all.

00;21;51;05 - 00;22;16;07

David Kopel

It never came up at oral argument. So Alito's point was, well, if we're going to, on our own, come up with the idea that Salerno is the ought to control this case, then we ought to have asked the parties for additional briefing on this precedent, which we we, the nine, have now decided is somehow central to this decision.

00;22;16;09 - 00;22;45;16

Stephen Gutowski

Yeah. And and Thomas, he compared this to, you know, just like the, the majority used Ikea furniture and, and, unfinished manuscripts. Yeah. And stuff in there analogies. Thomas used the analogy of, if Congress had written a statute to regulate motorcycles that focused on, you know, the specifics of regulating a motor motorized vehicle with, with two wheels and pedals or.

00;22;45;17 - 00;23;15;01

Stephen Gutowski

Yeah, what have you. And then, a regulator took that underlying statute and then tried to regulate all, motor vehicles, motorized vehicles. He's saying that just because that would still just because there is a scenario specifically motorcycles, that where the regulation would match the statute doesn't mean it should be upheld, because it's going way beyond what's what's actually, authorized by the statute.

00;23;15;01 - 00;23;17;19

Stephen Gutowski

That was his point, on this sort of standard.

00;23;17;26 - 00;23;18;12

David Kopel

Precisely.

00;23;18;15 - 00;23;50;24

Stephen Gutowski

Play here. Okay. And so, yeah, I mean. There was another, dispute that that, on the application of this, this rule where, you know, they talked about and then the majority gets into another analogy with specifically starter guns, right? Where, this was part of the the starter gun is in the statute. Yes.

00;23;50;24 - 00;23;54;07

Stephen Gutowski

It is one of the definitions of, of, what a weapon is.

00;23;54;07 - 00;23;55;00

David Kopel

What a firearm.

00;23;55;03 - 00;24;18;25

Stephen Gutowski

Is. Right. And and a start again, for those who don't know, is, like if you go to a track meet, sometimes they'll have a

gun where they shoot a blank and it's it's designed to shoot blanks. It has a barrel that's blocked, intentionally so that I can't fire live rounds. However, and I assume this just maybe more of an issue back in the 60s when these are more prevalent devices.

00;24;18;25 - 00;24;44;26

Stephen Gutowski

But, you know, that you can drill out the barrel on a starter gun and then fire live ammunition through it, like a right, a regular firearm. And so, you know, the court use that the fact that the Congress put that in their statute as part of their justification for why a build by shoot kit is basically the same concept, as what's being regulated.

00;24;44;28 - 00;25;18;08

Stephen Gutowski

And, because you can it's just like with a starter gun, you can easily, you know, finish the part that is necessary to turn the, the, the item into a functioning firearm. And so, there was some concern about this when they applied that logic to frames and receivers. Right. Which you just the regulated part of the a firearm specifically in regards to actually I have some here for those watching on YouTube, this is a lower receiver of an AR 15.

00;25;18;11 - 00;25;45;26

Stephen Gutowski

Right. And the problem, that Thomas points out and that the majority responds to is that, on an AR 15 lower, that's a semiautomatic version of an AR 15, that you can commonly buy the commonly available, in any gun shop in most states. These are very similar in design to fully automatic versions of the same platform.

00;25;45;28 - 00;26;21;26

Stephen Gutowski

Right. They've missing some holes that you would have to drill out. And, you know, you'd have to modify them a little bit to get to the point where they can accept the fully automatic components, but not they're not all that different. It's the same platform. Right. And so Thomas and the plaintiffs in this case pointed out, well, if you're saying that, you know, this, this minor level of of, if you're setting the low line for what is considered readily convertible and regulated, able, at this point, wouldn't that apply to all AR 15?

00;26;21;28 - 00;26;57;15

Stephen Gutowski

Semi-Automatic lowers are now suddenly readily convertible into fully automatic weapons, which are heavily regulated and legal to possess without registration under the National Firearms Act. And you can't register them anymore after 1986. You know, so you're kind of this there just this issue that it doesn't take a lot of, manipulation to to make an AR 15 semiautomatic lower into a fully automatic lower, which would put anyone who owns a semiautomatic AR 15 under this logic, into potential legal jeopardy.

00;26;57;17 - 00;27;15;13

Stephen Gutowski

And that's millions of of people. Right. And then, you know, the the majority responded by basically just saying the government's never said they want to do that and wouldn't. And then, our opinion doesn't imply that that's possible. What did you make of that? Oh, I thought.

00;27;15;15 - 00;27;53;15

David Kopel

I thought it was the best, part of the opinion in some ways, as a practical matter, the, the, the gun ban lobbies have been were really pushing the Biden administration. Sorry. Excuse me. The gun ban lobbies were really pushing the Biden administration to administratively declare what you just said, that are are so close to the potential to become the potential to become a machine gun, even though they're not machine guns.

00;27;53;18 - 00;28;16;28

David Kopel

That they ought to be considered National Firearms Act, machine guns. And I think that the court was even a little more forceful than saying, well ATF never claimed that because after all ATF never claimed that polymer 80 kits were, were receivers. And when a long time by saying that they weren't then ATF changed its mind.

00:28:17:00 - 00:28:36:00

David Kopel

But I think the court pretty expressly said as for the air AR receivers, no, they're not. I think that's a. It's yet to in a sense. But Supreme Court dicta is quite powerful, especially in recent cases. So I do.

00:28:36:00 - 00:28:36:20

Stephen Gutowski

Think that that.

00:28:36:20 - 00:28:45:19

David Kopel

The door on the, when president Ocasio-Cortez, tries to ban was, administratively,

00:28:45:21 - 00:29:09:00

Stephen Gutowski

I mean, I definitely think that's the the point they're getting across. Here's what here's the what they said. Right. And there's one line in this that I think is perhaps interesting for future cases as well. I want to get your take on it. But, you know, they talk about how plaintiffs suggested this idea. And, you know, the.

00:29:09:03 - 00:29:34:06

Stephen Gutowski

It's, they say the plaintiffs fears are misplaced. The government represents that AR 15 receivers do not qualify as receiver of machine gun, nor the government emphasizes ATF ever suggested otherwise. Much the same can be said of our reasoning today, as we have stressed, a statute's text and contexts are critical to determining whether, and to what extent Congress used an artifact noun to reach unfinished objects.

00:29:34:06 - 00:29:58:17

Stephen Gutowski

And without without doubt, the NFA and the GCA are different statutes passed at different times to address different problems using different language. Our analysis of the GCA that thus does not begin to suggest that the ATF possesses authority to regulate routine receivers as machine guns under the NFA. So, I mean, they're not they're not saying the they're just saying that this analysis doesn't suggest that.

00:29:58:17 - 00:30:39:23

Stephen Gutowski

But I do think practically it means there's no majority to to say this in the future. Yeah. Right. And there's one more line in here, though that I want to get your take on. It says, when they described this, concept again of the risk at play and, they say that results, you know, if you were to say that they are 50 semi-automatic or 15 receivers, are readily convertible to machine guns and therefore covered by the NSA, they say, quote, that result the plaintiffs warn, could lead to many Americans facing new and unforeseen criminal liability for possession of a, quote, machine gun simply because they own a quote, popular and quote

00:30:39:23 - 00:31:09:11

Stephen Gutowski

commonly available rifle. Now there's that section there. When they're talking about popular commonly available rifle, they're talking about the AR 15. Yeah. Now they are quoting that. So they're not they are not necessarily saying that I know. How do you read they quote popular and commonly available. But it was interesting to see that in their in reference to the AR 15, given the, you know, the challenges to bans on air fifteens around the country.

00:31:09:15 - 00:31:14:02

David Kopel

I right. Even though they are quoting someone else's words.

00;31;14;04 - 00;31;14;28

Stephen Gutowski

00;31;15;00 - 00;31;30;13

David Kopel

If we if we're trying to tease out little hints, I think it's a hint that the court recognizes that arms are very common firearms.

00;31;30;15 - 00;31;41;12

Stephen Gutowski

Yeah, they don't dispute the they certainly don't dispute this characterization. They maybe not. They put quotes around it to say that, to show it's not necessarily what they're saying, but they don't dispute that idea.

00;31;41;13 - 00;32;13;07

David Kopel

And once you once you get to that, then that leads you to Heller's statement that the arms protected by the Second Amendment, originally and continuing today, were the types of of arms in common use at the time. So if you want to take a little hint, that's a positive sign on the issue of of arms and semi-automatics in general, but I wouldn't make too much of that.

00;32;13;09 - 00;32;48;08

David Kopel

Sure. By the point you were making about conversions that yes, you can illegally with a number of hours of work, illegally convert an AR lower into a machine gun. That's true for basically every semiautomatic. And and also for lever actions, if you have a skilled machinist with the right tools and the right tools are a lot easier to more affordable these days than, than ever before, you can turn a lever action gun into a machine gun that it's not going to take you three years to do it.

00;32;48;10 - 00;32;56;09

David Kopel

It'll take you a certain number of hours, but you'll get it done. And likewise for every, every semi-auto, as well.

00;32;56;11 - 00;33;06;23

Stephen Gutowski

Yeah. Semi-Auto is even easier. Yes. That's what the Glock switch. Right. It's very simple. Mechanized. But, you know, it doesn't take more than a couple minutes.

00;33;06;23 - 00;33;07;04

David Kopel

To.

00;33;07;07 - 00;33;11;10

Stephen Gutowski

Modify your gun illegally in that way. Oftentimes, unless you have a registered.

00;33;11;16 - 00;33;20;22

David Kopel

Right, which Glock, which is, are separately outlawed by the federal statutes against conversion kits for machine guns. Right.

00:33:20;24 - 00:33:42;28

Stephen Gutowski

Right. But, yeah, going back real quick to that end, the point about popular and commonly available. Yeah, that's the majority saying that, which, we already know that, Alito and Thomas believe are fifteens are are protected by the Second Amendment from the I believe Alito joined. That's the dissent from Thomas, right. In the Illinois case.

00:33:43;00 - 00:33:44;29

David Kopel

I'm not positive I think so.

00:33:45;06 - 00:33:47;21

Stephen Gutowski

I it's just.

00:33:47;23 - 00:33:58;02

David Kopel

Justice Sotomayor in her dissent in the bump stock case, the Cargill case, said that that, are popular in common.

00:33:58;04 - 00:34:01;22

Stephen Gutowski

Yeah, yeah. So I think they're quoting her in that. Yeah.

00:34:01;22 - 00:34:02;15

David Kopel

Yes.

00:34:02;18 - 00:34:23;18

Stephen Gutowski

In that part. So that, interesting interesting that that's in the seven, the the seven which include the three, liberal justice. Yes. They're the ones who, who included the language in there. Again, like you said, you don't want to read too much into it, but, when I read it, that was something that stuck out to me.

00:34:23;21 - 00:34:34;14

Stephen Gutowski

But, yeah. So the next part I want to get to here is just a little bit of the, maybe the political, outside of the court's ruling, but.

00:34:34;16 - 00:35:04;02

David Kopel

I want to just back up on on what, one key thing for the audience, the the case, the plaintiffs say. But you have definitions in the Gun Control Act, which specifically say, or readily convertible. So a firearm, right, is a what would we know a firearm is or something that is readily convertible to become a firearm.

00:35:04;05 - 00:35:04;27

Stephen Gutowski

Like a starter.

00:35:04;29 - 00:35:50;22

David Kopel

Right. Well, I made this specifically name as a starter gun. That's right. In the statute. Similarly the statute says a silencer, you know, properly a suppressor, but they use the incorrect term silencer. A silencer is the full thing. Or it could be a combination of parts from which you can assemble a silencer or something. That's, that's convertible into a silencer, and that this goes on in other places of the federal gun laws and notably the supreme, the Gun Control Act statute just says frame or receiver, and it conspicuously omits that readily convertible language.

00:35:50;25 - 00:36:17;13

David Kopel

And that's a key part of the plaintiffs cases. Yes, some readily convertible things, things that are close to their core object are covered by the Gun Control Act, but not frames. Are receivers because Congress chose not to include that readily convertible language when it mentioned frames or receivers as something that is regulated by the gun control Act.

00:36:17;15 - 00:36:18;20

Stephen Gutowski

Yeah, that was that.

00:36:18;23 - 00:37:08;11

David Kopel

The Thomas and I it's a very powerful argument on a textual basis. But the problem the plaintiffs couldn't couldn't overcome was over half a century of practice that everybody thought was okay. Remember ATF, when it regulates frames or receivers? We had for a long time something that was called the 80% rule, which is ATF. You know, if you have by the Gun Control Act, plainly, if you're a company that manufactures a fully finished frame or receiver, you have to sell that through the gun control act of channels of, you know, selling it to somebody who has a federal firearms license as a retailer.

00:37:08;17 - 00:37:39;17

David Kopel

And he was the manufacturer of that have to have a federal firearms manufacturing license, ATF adopted very soon after the Gun Control Act, a regulation that was commonly called the 80% rule. So if you have start with a blank piece of metal on one on at the beginning, and a fully 0% had a fully finished frame receiver at the other end, 100% ATF said, well, we draw the line at 80%.

00:37:39;20 - 00:37:49;08

David Kopel

So if you sell something that is 75% finished, then that's not a frame receiver and you can just go ahead and sell it without any gun control consequences.

00:37:49;11 - 00:38:05;12

Stephen Gutowski

But if they sort of set it out, like, if you couldn't use the actual receiver as it's set right, you complete a functioning gun, right? Then it without significant machining still to do that. It wasn't a receiver, right? Yeah.

00:38:05;15 - 00:38:07;24

David Kopel

Called it boom. In the gun community.

00:38:07;24 - 00:38:08;20

Stephen Gutowski

Most people call 80.

00:38:08;20 - 00:38:46;21

David Kopel

Percent or percent never Peterson liberal. Right. But so suppose you do you make something that might be called a 95% receiver. Well what about that. The plaintiffs said well we got no quarrel with that with what was essentially the 80% rule. And as the court said. Well that that's basically a fatal concession because either you do what the Fifth Circuit did, which was say a frame or receiver means a completed frame or receiver, end of case, you know, even 98% wouldn't qualify.

00:38;46;24 - 00:39;10;26

David Kopel

But once you say that something less than 100% is already covered by the statute, then that's the end of the game. Really, because then you're just arguing about where to draw the line on what's something less is. And if the plaintiffs aren't going to challenge the old something less, then why is a new something less with a with a different line?

00:39;10;29 - 00:39;14;20

David Kopel

Somehow, outside of ATF's delegated powers?

00:39;14;22 - 00:39;34;10

Stephen Gutowski

Yeah, that was a major point of the majority opinion. And I mean, even the, you know, the ATF initial rule for what a receiver is doesn't actually cover, or frame doesn't actually cover an AR 15. You see a lot of what are called split receivers, right? Right. They are 15 has an upper and lower receiver. Yeah.

00:39;34;10 - 00:39;53;25

Stephen Gutowski

What I'm holding my hand is a lower receiver. And from the beginning of the the initial, attempt to regulate these, they just kind of ignored the fact that this doesn't fit the definition. Right. Because it doesn't include, for instance, the breach of the gun is not in and they are shifting the receiver, even though it's part of the definition that the ATF had.

00:39;53;25 - 00:40;20;22

Stephen Gutowski

Yeah. And so they kind of just for decades this is actually what I honestly, I think this is more so than the ghost gun stuff is what prompted the ATF to want to write a rule like this, because they kept getting, they started having trouble in court trying to prosecute people for just having a lower receiver of an AR 15, when they were prohibited person because the lower receiver, they're 15 doesn't actually fit their, regulation.

00:40;20;24 - 00:40;54;22

Stephen Gutowski

And so that's why the the new rule is much more expansive. And, leads to you having if it has any of the component parts of a receiver, then it could be classified as a receiver and have to be serialized. But so yeah, no, I mean, that's a very good point as far as like what what the one of the major problems with how the this case was litigated and you could tell during oral arguments too, that that was a problem because, yeah, that that was they were asked the plaintiffs lawyers were asked about this and didn't have a solution that the justices seemed to think made sense because they one of the solutions

00:40;54;22 - 00:41;01;10

Stephen Gutowski

they offered up was just going back to the way of things had already been done, which has that underlying problem you mentioned. Right.

00:41;01;10 - 00:41;07;23

David Kopel

And if so, at this point, the plaintiffs. Right. And then the old ways were also illegal. Right. And maybe they and they didn't.

00:41;07;23 - 00:41;35;06

Stephen Gutowski

Really have an alternative either. Yeah. Yeah, that's probably the problem. They just they just were okay to go back to how things were. They didn't present an alternative that fit with their basic argument. Right. But yeah I think that's an important point to to mentioned and all this like how this case was actually litigated. And it's also interesting to me as well that, you know, you mentioned we got into the standard a bit and that really didn't come up very much in the lower

courts.

00:41:35:08 - 00:42:03:17

Stephen Gutowski

And also like in this case, in the Bostock case, it was kind of it was a bit surprising to me how different the Supreme Court approached it from the lower courts, where there was a lot more emphasis on the ATF's flip flopping. Yeah. Over the years in the lower courts, you know, whether or not, you know, obviously the core question was still pretty similar in terms of like, does does what they're doing match with the authority they've been given by federal law?

00:42:03:20 - 00:42:22:16

Stephen Gutowski

But there was a lot more focus on, on, you know, the ATF exceeding its authority of its, you know, changing its views every with kind of the political winds, to be frank. You know, whatever administration happens to be in charge at the moment that they make these rules. But, you know, the.

00:42:22:19 - 00:42:29:28

David Kopel

Difference on those two approaches is the NFA statute in question is much more specific.

00:42:30:00 - 00:42:31:10

Stephen Gutowski

Right? Is in definition.

00:42:31:17 - 00:42:40:07

David Kopel

Of this this case, we were talking about the words frame or receiver. And those are not further defined. You just supposed to know what they are right. In the national.

00:42:40:07 - 00:42:43:05

Stephen Gutowski

File. There's more leeway for the ATF to have the right to define right.

00:42:43:05 - 00:43:17:11

David Kopel

And the National Firearms Act. The statute doesn't just say machine gun. The statute specifically tells you that a machine gun is something that fires more than one projectile with a single function of the trigger, right. And then at that level of specificity, it gets down to the technicalities of what is a single function of the trigger. And and the Supreme Court correctly said, well, a bump stock makes a gun fire basically as fast as a machine is a real machine gun.

00:43:17:13 - 00:43:25:02

David Kopel

But it does, but not through a single function of the trigger. And just instead.

00:43:25:05 - 00:43:25:17

Stephen Gutowski

Yeah, no.

00:43:25:17 - 00:43:47:23

David Kopel

Question. If the Congress that passed the National Firearms Act of 1934 had known about bump stocks that would have included them, but they hadn't been invented, and Congress wrote a statute which just cannot cover this newfangled bump stock invention. Congress could rewrite the statute and maybe should, basically, Alito said.

00:43:48:00 - 00:44:03:07

Stephen Gutowski

Yeah, they did kind of say, yeah, that that does. But I was just been surprised that they've been much more focused on just answering what they think the statute means. Well, more than anything else in any of these cases. And I don't know, maybe that's I mean, that is kind of the role of the court, I guess.

00:44:03;12 - 00:44:40;20

Stephen Gutowski

Yes. Yes. That all that dispute. But, you know, just surprised me. The difference between how they've handled it and how some of these lower courts have handled the same questions. But yeah. And it makes me wonder if that's if they're just going to do that with all of these ATF rule cases. All of that kind of maybe, is a pathway into to the next thing, the last thing I wanted to just go over on in this situation, which is, you know, obviously you had change in administration between when this case was argued and when it's been handed down and the new administration, you know, the president, Donald Trump during

00:44:40;20 - 00:45:04;24

Stephen Gutowski

the campaign had promised to rollback all of these Biden rules. Yeah, maybe not. He didn't name them necessarily, but he just said he would do all of the things that Biden had done to harm, gun owners and manufacturers, from his view, would be undone in the first week. Obviously, the timetable it hasn't happened. There's still reason to think they may undo these things, but in this case, they didn't take any action.

00:45:04;24 - 00:45:23;09

Stephen Gutowski

And it feels like they could have. Right? They could have tried to undo the rule through rulemaking or initiated that process and maybe told the court that that's what they were doing. They've done that in some other cases where they're like, give us some time to reconsider our positions here before you do anything. They didn't do that here.

00:45:23;11 - 00:45:25;27

Stephen Gutowski

But it was an option, right?

00:45:25;29 - 00:46:12;03

David Kopel

Sure. Attorney General Bondi, after being confirmed or for that matter, her predecessor as acting attorney general, could have said, we are going we've we've got this framework receiver rule, which is a it's a final rule published in the Federal Register. But we think maybe we should withdraw it. And we would like to start and go through the proper procedures under the Administrative Procedure Act, which means you would say something like that and then put it out for notice and comment, so the public can write to ATF and make arguments pro or con about why that should be done.

00:46:12;06 - 00:46:19;13

David Kopel

And that that certainly could have been initiated if had if that had been a priority.

00:46:19;15 - 00:46:38;27

Stephen Gutowski

Yeah. And we don't know why they didn't write. They haven't come out and said anything on this, it could just be that like, like you said, maybe not a priority. And they just didn't end up with enough time before the court handed down this decision. Whatever the reason, that's how it turned out. Now we have this ruling.

00:46:38;27 - 00:47:09;05

David Kopel

Well, in terms of time, I. I wouldn't buy that excuse as my, my, friend Steve Halbrook the the greatest Second Amendment lawyer of all time, he and I both write for a lawyers law professor weblog called the The Volokh Conspiracy, which is posted by reason magazine. And Steve writes about once a week on gun cases and, litigation.

00:47:09;07 - 00:47:33;29

David Kopel

And he wrote something a few months ago that the, describing exactly what the attorney general could do without, without even going as far as we talked about, about undoing the rulemaking, is just send a letter to the court saying, in essence, we're not so sure about the legality of this regulation as the prior administration was or or something to that effect.

00:47:34;01 - 00:47:34;29

David Kopel

They could have done it.

00:47:35;02 - 00:47:36;11

Stephen Gutowski

That's what they've done in these other cases.

00:47:36;11 - 00:47:51;14

David Kopel

Yeah, they could have done at least a minimal. Writing a letter to the Supreme Court, is it something like, sending an email to your, your bestie? It's needs to be carefully done, but that sure. That could have been done in two days.

00:47:51;14 - 00:48:12;20

Stephen Gutowski

And it wasn't, and it wasn't. So that's something to know and, and to, to recognize here. But I guess now that we're now that we're past the ruling, the court has upheld this regulation. What can they do now? Can they still go through and try to undo the regulation? Is that going to be or undo this for sure?

00:48:12;22 - 00:48:18;14

Stephen Gutowski

Is it going to be harder because of what the court has ruled here, or was your thought?

00:48:18;16 - 00:48:50;28

David Kopel

No, I don't think it becomes harder because if the the court said ATF had the authority delegated by Congress, implicitly through the text of the statute enacted by Congress to write this rule, at least as it applies to some products, that doesn't take away ATF's judgment to say, oh, well, we did write a valid rule, a legally valid rule, at least for something.

00:48:51;05 - 00:49:14;05

David Kopel

But we're concerned that besides the things that are polymer 80 or were very similar, that this rule goes too far. So we want to withdraw this rule because we don't think it's a good idea as a matter of policy, or we want to rewrite the rule to make it easier to comprehend, for consumers and narrower.

00:49:14;08 - 00:49:26;06

Stephen Gutowski

Yeah. Because that's been one of the, one of the main complaints about this rule is just that it's vague in a lot of areas. And there aren't there aren't hard lines drawn, which is kind of typical of federal agencies. We want to.

00:49:26;07 - 00:50:00;21

David Kopel

Oh yeah, this is it. This very rough sand I used to enforce for the state government, the federal hazardous waste law mean and it's Colorado analogs and the definitions and that of what is what is waste are very complicated. But that is nothing compared to this sprawling rule. And and as the two sets point out, it's very bizarre that the ATF rule says part of our multifactor indefinite.

00:50:00;23 - 00:50:24;04

David Kopel

You can't really know the answer till we decide to prosecute you. Rule is that it matters whether the pre receiver receiver like object is also sold with jigs which which which are just are not receivers. Jake.

00:50:24;05 - 00:50:25;09

Stephen Gutowski

The marketing material to.

00:50:25;10 - 00:50:26;08

David Kopel

WhatsApp.

00:50:26;11 - 00:50:27;14

Stephen Gutowski

And the marketing material.

00:50:27;14 - 00:51:02;05

David Kopel

Is American Mutual right. So and that's really kind of bizarre because even if you're talking about this new linguistic thing called an artifact object, the Ikea table you bought, does that become more or less of a table, depending on whether Ikea includes, the hex wrenches or screwdrivers that you need to assemble the table? Or if you got to go buy them yourself at the hardware store, that that shouldn't seem to matter.

00:51:02;05 - 00:51:12;19

David Kopel

And likewise, whether a pre receiver comes with jigs or not, you can't affect what the object itself is.

00:51:12;21 - 00:51:17;26

Stephen Gutowski

Yeah. And I suppose the court didn't actually rule. They made a point of not ruling on that. Yeah.

00:51:17;27 - 00:51:24;21

David Kopel

That aspect. Yeah. So there's there's there's a lot of challenges out there on an as applied basis.

00:51:24;23 - 00:51:32;13

Stephen Gutowski

Yeah. But so they can still write a rule that would rollback most of this binary rule. But although not the kit part.

00:51:32;13 - 00:51:44;18

David Kopel

Now, you know, they the fact that ATF, per the Supreme Court, had the power to decide to write the rule doesn't mean they have to decide to keep it.

00:51:44;20 - 00:51:53;03

Stephen Gutowski

Okay. Okay. So they could they can still go through and try to undo this rule even even after this. Yes. This ruling, if they want to, I guess that's the other.

00:51:53;05 - 00:51:53;16

David Kopel

The.

00;51;53;20 - 00;52;06;25

Stephen Gutowski

Question. Right? Do they really want to, what about not enforcing? I mean, that's another, potential here. What if they just decide we don't want to put resources into enforcing this, this rule instead of rolling it back.

00;52;06;28 - 00;52;38;11

David Kopel

That that's certainly their choice. And every law enforcement agency has to prioritize cases. So they they can do that. It gets a little sketchier when they say, oh, we're not going to enforce the rule at all. We hate it so much. We're going to treat it as if we'd never written it. That that might be not illegal to do, but it's more pushing the boundaries of proper behavior of an executive branch agency.

00;52;38;14 - 00;52;49;28

David Kopel

But certainly to say it's a lesser priority than people who are doing then the criminal gangs doing it. State gun trafficking is a legitimate choice.

00;52;50;01 - 00;53;09;03

Stephen Gutowski

Yeah, more typical delegation of resources sort of thing. What about civil liability? If this rule stays on the books, they don't undo it. Their civil potential, like, is one of the reasons polymer 80 doesn't exist anymore is that they they kept losing court cases to, like cities and states.

00;53;09;05 - 00;53;34;05

David Kopel

We can conceivably. Yes, you can. Torts are what are called civil wrongs. You know, you leave a, your grocery store and you knowingly leave a bunch of banana peels that got squished on the floor, and you don't clean them up and somebody comes along and slips on them. You were negligent about the safety of your store.

00;53;34;07 - 00;53;59;01

David Kopel

Sometimes a violation of a statute or a regulation can be considered to be negligent behavior in itself. There's more steps in that analysis. But yes, as a starting point, conceivably, yes, you could still have civil liability even if ATF says we're we got better things to do. So don't worry about criminal liability.

00;53;59;03 - 00;54;08;27

Stephen Gutowski

Okay. So even if they decide to prioritize enforcing this rule, if it stays on the books, it could still have an impact on anyone who's trying to sell 80% lowers or what happens.

00;54;08;27 - 00;54;29;00

David Kopel

Well, and particularly the manufacturer of, whatever percent lower or particular manufacturer of a kit that ATF decided not to care about, but it was bought by a prohibited person and then used in a crime. And the victim or the victim's family sues the manufacturer right.

00;54;29;03 - 00;54;38;06

Stephen Gutowski

Okay. All right, well, I think that, is there anything else from this ruling that that, we haven't highlighted already that that you think is important?

00;54;38;08 - 00;54;54;18

David Kopel

I think we got we got enough, you know. Yeah. When what I've taught at preschool, you you you might have three hours of material, but the class has to end after 75 minutes. People have had so much at once.

00:54:54;20 - 00:55:13;17

Stephen Gutowski

That's that's fair. We try not to go on for three hours. Yeah, that's that's certainly the case here as much as possible. Although it's a good conversation, I'll go a little longer than, than normal, but, I, I guess one last thing is maybe, your view on where the court is at with Second Amendment challenges. This, again, was not a Second Amendment challenge.

00:55:13;17 - 00:55:35;27

Stephen Gutowski

It was a gun case. Yeah. And a very prominent one, but it wasn't a Second Amendment case. Now the court is stacking up Second Amendment cases right now. Right. It's it's, relisted. The especially those this the weapons ban out of, Maryland and the magazine ban out of Rhode Island, like nine times now.

00:55:35;27 - 00:55:54;22

Stephen Gutowski

I think. Right. And it's got several other key cases, like Antioch in New York about the broom response law there. You know, it's got a smorgasbord here of of, Second Amendment cases in particular that it could take. And, I don't know, a lot of people are worried that they're not taking them. What what is your view?

00:55:54;24 - 00:56:31;13

David Kopel

Well, it's a legitimate cause for concern, as broadly speaking, because we had Heller in 2008 and then Donald in 2010, both very straightforward cases. Yes. It's an individual right. Includes a handgun and McDonald. And it's enforceable against the states. And then the court went a long time basically from then to Berlin without taking a Second Amendment case and ultimately coming to the, conclusion on the merits in a way that gave a lot of guidance.

00:56:31;14 - 00:57:01;05

David Kopel

They did some other things along the way, but there were they kept denying cert on cases that were plainly cert worthy and involved obvious and flagrant lower court defiance of the Supreme Court's Heller precedent, according to CNN. That was partly well, there was a Justice Kennedy who was the true enigma, and both sides were somewhat afraid of what he might say in a given case.

00:57:01;07 - 00:57:28;24

David Kopel

And then Chief Justice Roberts, who is a an institutionalist and very concerned with conserving the court's political capital and basically behind the scenes on cert grants, told his more ardently pro civil rights colleagues like Justices Thomas and Alito, for example. We don't want a CERT grant in this case, because if you grant cert, you might not like how I'm going to vote on it.

00:57:28;27 - 00:58:02;23

David Kopel

And then at five four, well, you don't want to lose. You can get cert with four, but you only won the case with five. And then that dynamic changes with Justice Barrett. So the Justice Thomas is not our justice. Chief Justice Roberts is no longer the swing vote. So we will we'll have to see what they whether the court's willing to take more constitutional Second Amendment cases or not, then we just don't know if they want to get into that or not.

00:58:02;26 - 00:58:21;20

Stephen Gutowski

And I apologize for extending this a little bit longer, but one thing that interests me as well out of this case, and again, it's not a second movement case. So maybe it's reading too much into it. But, I start to wonder about Thomas's influence

on these questions. After he was the sole dissenter in Rahimi. Right.

00:58:21;20 - 00:58:43;15

Stephen Gutowski

And now he's dissented in this case. Technically, Alito had agreed at least on one point, but didn't join his dissent. You know, this is the guy who wrote ruin, who set the new standard for Second Amendment jurisprudence, but he keeps ending up in these very small majorities in some of these gun cases. Is there anything we should make of that?

00:58:43;18 - 00:59:20;04

David Kopel

No, I think it's just that this is just. Justice Thomas is very straightforward. And he'll tell you what he thinks and says it, and he's not much concerned with following precedents, which he views to be erroneous and contrary to original meaning. He contrasted him. Justice Scalia called himself a fainthearted originalist and basically said, Justice Thomas, you're the one who's not fainthearted.

00:59:20;07 - 01:00:14;04

David Kopel

And so, Justice Scalia, I think the the phrase was like. Thomas is the the bold advance or, and Scalia is more of the incrementalist who will do the mechanics to, to make it happen within the court. I think it's just we we see a line up on the one second amendment and, and gun control issues in general of justice to go from most pro civil rights on this, whether it's in a constitutional law context or administrative procedure to Justice Thomas's Justice Thomas and Alito, and then at the higher end and then you have Gorsuch, Barrett, Kavanaugh, Roberts, in sort of approximately that order in how willing they are to defend what I think is

01:00:14;04 - 01:00:29;27

David Kopel

the correct position. But obviously they don't. And then and then we'll, we'll we'll see about the, the other three who have sometimes joined, you know, joined unanimous, opinions like against the Massachusetts stun gun ban.

01:00:30;02 - 01:00:31;22

Stephen Gutowski

Yeah. Right.

01:00:31;24 - 01:00:52;28

David Kopel

So he's, everything's everything's on a spectrum. Yeah. That's that's whatever he says these days. It's just where he is on the spectrum in the center of the court is not where he is, but he never got on the Supreme Court. So he could be at the center. He got on the Supreme Court so he could say what he thinks is correct.

01:00:53;00 - 01:01:06;16

Stephen Gutowski

Right? Right. Certainly. And that's, you know, hopefully how all these justices are operating. But yeah, it just, you know, it's interesting to look at and think, where is the where's the pivot point on this court now for Second Amendment cases?

01:01:06;16 - 01:01:07;27

David Kopel

Kavanaugh, Barrett.

01:01:07;29 - 01:01:20;03

Stephen Gutowski

You know, Kavanaugh. Barrett. That does seem to be the seems to be the dividing line there or what the guy the people that you really want to try to understand what they're thinking.

01;01;20;05 - 01;01;25;01

David Kopel

Well, and once you get Kavanaugh, Barrett, then Chief Justice Roberts may well come along.

01;01;25;03 - 01;01;42;13

Stephen Gutowski

Right? Right. Yeah. And to be fair to Roberts, I from a from a Second Amendment advocate point of view, other than Rahim, which was an eight one decision. Right. You know, he's been on the, the pro, the pro Second Amendment side of those other cases through.

01;01;42;16 - 01;01;49;14

David Kopel

I wrote an amicus brief saying that the statute under which Rahami was convicted was compliant with the Second Amendment.

01;01;49;16 - 01;01;49;26

Stephen Gutowski

Right.

01;01;50;01 - 01;01;53;19

David Kopel

So I'm I'm sorry, I can't get mad about him agreeing with me.

01;01;53;21 - 01;02;17;11

Stephen Gutowski

Right. So, you know, and these, not every question is, is, going to be a simple answer and. Yeah. And, you know, we will keep following these and it'll be but yeah, I think there's a, there's legitimate worry within the, the Second Amendment, even though it's maybe it's a bit overblown. But there's, you know, why are they waiting?

01;02;17;11 - 01;02;38;14

Stephen Gutowski

What are they waiting for? Where is the court? What's the the where these justices all fall in some of these questions. Right, right. It's just not clear. And it won't be clear until they take it up. And we. That's another thing, Sue saying on this stuff. It's not easy, right? You can't take too much from some of these things, some of the set and trail reading.

01;02;38;14 - 01;02;38;23

Stephen Gutowski

Right.

01;02;38;24 - 01;03;03;18

David Kopel

And that that's why they're there's certainly plenty of journalists and professors who spend an enormous amount of time on on trail reading. But I, I personally try to put my attention into things where I can, for example, write an article that advances knowledge and says something rather than than trying to figure out what somebody else is thinking.

01;03;03;21 - 01;03;16;05

Stephen Gutowski

Yeah, makes sense, especially with the Supreme Court, because you just you just can't know until they hand something down. In this case, you can you can watch oral arguments. And a lot of times it might come out the way you expect from that, but not always. And

01;03;16;08 - 01;03;16;22

David Kopel

That's right.

01;03;16;22 - 01;03;36;00

Stephen Gutowski

Beyond what they say and do. Yeah. I think any signs beyond that are. Yeah, they're it's like astrology. Yes. So all right, well, we appreciate you, joining the show again here to give you your insight, on on this case and the outcome of it. And, if people want to read more from you, where can they do that?

01;03;36;03 - 01;03;46;11

David Kopel

They can go to my website, DaveKopel.org, and they can follow me on Twitter at [DaveKopel](https://twitter.com/DaveKopel).

01;03;46;13 - 01;03;55;00

Stephen Gutowski

All right. Wonderful. Well, that's all we've got for this week. I'm going to hand it off to myself to talk a little bit about our ad swap with the dispatch.