The Gun Dilemma
The Gun Dilemma

How History Is Against Expanded Gun Rights

ROBERT J. SPITZER
To Tess,

The way you changed my life . . .
Contents

Acknowledgments ix

1. The Gun Policy Fork in the Road 1
2. Assault Weapons and Ammunition Magazines 25
3. The Sound of Silencers 52
4. Weapons Brandishing and Display 72
5. Second Amendment Sanctuaries: Coloring Outside the Lines of Federalism 92
6. Conclusion: Navigating the Gun Fork in the Road 116

About the Author 127
Notes 129
Index 177
Acknowledgments

I would like to thank Joseph Blocher, Jacob Charles, Saul Cornell, David Hemenway, Darrell Miller, and the participants in the Duke University Law School Conference on Historical Gun Laws held on June 19, 2020, for their thoughtful and helpful comments and suggestions pertaining to parts of this project. I also thank Jackie Schildkraut, SUNY Oswego.

In addition, I also extend heartfelt thanks to a number of people at my long-time home institution of SUNY Cortland, including Cortland University Police Chief Mark Depaull, Investigator Amanda Wasson and Officer Dave Coakley, History Professor Kevin Sheets, Center for Civic Engagement Director John Suarez, President Erik Bitterbaum, Provost Mark Prus, and Dean Bruce Mattingly. I’ve worked with many outstanding people at Cortland over the years, but none was harder working, smarter, more dedicated, or funnier than the Political Science Department’s administrator, Debby Dintino. Deb, thank you for everything.

I also extend my thanks, and respect, to Solon Town Supervisor Stephen A. Furlin, Truxton Town Councilperson Gun Wehbe, Cortland County legislator and Minority Leader Beau Harbin, Cortland County legislator Ann Homer, Cortland County Clerk Elizabeth Larkin, and Cortland City Police Chief Paul Sandy. And I am again indebted to Oxford University Press social sciences editor David McBride, the nearest modern equivalent to the great Max Perkins of years gone by, to project editor Emily Mackenzie Benitez, and to editorial Project Manager Jubilee James.

For Teresa, to whom I dedicate this book with all the love and humility I can muster (though more the former than the latter), I conclude with the wisdom of Teresa’s Rules: 1. Act faster; 2. Pick up your cues; 3. Don’t look at your feet; 4. Enunciate; 5. Think about what you’re saying; 6. Project; 7. Play to the balcony (keeps face up and out and eyes shine); 8. Early is on time; on time is late.
The Gun Policy Fork in the Road

“When you come to a fork in the road, take it.”

YOGI BERRA

The decade of the twenties would prove to be one of national soul-searching on the issue of guns. The nation had drawn away from the international military entanglements of the previous decade and, in the aftermath of internal national crises, was seeking a return to relative normalcy. Yet guns and gun violence made headlines, especially when large numbers of people were killed with exceptionally destructive firearms. Calls for national and state gun legislation came from many quarters, but gun rights forces argued on behalf of ready gun access for civilians, while groups favoring stricter gun laws conducted studies, issued reports, and tried to transform what appeared to be national consensus on behalf of stronger laws into legislation. These efforts fell short at the national level. The states, however, witnessed a flurry of new gun laws.

The decade in question was the 1920s, not the 2020s. Yet the similarities are many, despite the distance of a century. This suggests a considerable degree of constancy—or paralysis, depending on one’s perspective—in the modern gun policy debate in America. The country elected a presidential candidate in 1920 who embraced a call for national normalcy, Warren G. Harding, not so much different from the country’s turn to Joe Biden in 2020 after four years of the tumultuous and strident presidency of Donald Trump. America had had enough with military conflict in World War I as it entered the 1920s, and similarly supported the end of American military commitments in Afghanistan, Iraq, and elsewhere in the 2020s. The rise of Prohibition-fueled organized crime in the 1920s was punctuated by criminal use of weapons built for war, including the Tommy gun, the Browning Automatic Rifle or BAR (also called the Browning Machine Rifle), and the sawed-off shotgun. In the modern era, much attention has been focused on assault weapons, also designed for
battlefield use but increasingly popular among some gun owners, although also used disproportionately by mass shooters as they have found their way into the civilian gun market. Just as gun silencers came in for special scorn in the 1920s, so too did “bump stocks” in recent years, devices attachable to semi-automatic rifles that allow the operator to fire the weapons in near-fully-automatic fashion. Large capacity ammunition magazines (LCMs), defined as those capable of hold more than ten rounds, have also come under contemporary scrutiny, as they did in the 1920s. (Both silencers and bump stocks were subject to successful regulatory action; LCMs were widely regulated in the 1920s and 1930s; in recent years they have been restricted in some states.)

In the 1920s many good government groups, including the American Bar Association, the National Conference of Commissioners on Uniform State Laws, business groups, and newspaper editorial pages called for gun law reform. Gun groups like the U.S. Revolver Association (USRA) and the still-fledgling National Rifle Association (NRA) opposed some stricter new gun laws but also proposed their own model laws. The USRA drafted a model Uniform Firearms Act, which among other things called for a forty-eight-hour waiting period for purchase of a handgun and gun licensing. In the 1920s, Congress managed to pass only one limited new gun law, the Mailing of Firearms Act of 1927, which prohibited the sale of handguns to private individuals through the U.S. mail. The states, however, enacted a flurry of gun regulations. Most notably, from the 1920s through the early 1930s, more than one-half of the states enacted bills generally termed anti-machine gun laws that barred the sale and possession of fully automatic weapons. During the same period, at least eight states (and perhaps as many as eleven) enacted laws to restrict semi-automatic firearms as well. Also during the same time period, at least sixteen states enacted firearms or ammunition registration laws; another dozen enacted some form of gun permitting. As for the decade of the 2020s, it is not possible to know as of this writing how it will conclude, but early in the decade states continued to enact stricter laws, such as “red flag” laws, also referred to as “extreme risk protection orders.” These measures allow authorities to temporarily remove guns from those considered to pose an imminent and dire threat to themselves or others, and to keep the guns away if the threat is found to be justifiable. On the other hand, more conservative states continued a contrary trend of loosening existing gun laws, a phenomenon that does not find parallel with the 1920s. If the recent past (that is, the late 2010s and early 2020s) is any indication, state gun policy action will continue to be prolific, and will far exceed the scope or frequency of national gun policy change.
The Fork in the Road on Guns

Despite the many parallels between the 1920s and the 2020s, the third decade of the twenty-first century is ushering in something new: a sharp, and perhaps even widening, divergence between a political consensus that supports existing public policy on guns as well as new proposed measures, on the one hand, versus an emergent sharp conservative counter-reaction from ultra-conservatives in some courts, including a majority of the Supreme Court. Prevailing public support for stronger gun laws is one of the most durable and consistent public opinion trends measured since the advent of modern polling in the 1930s. A 1938 Gallup poll reported that seventy-nine percent favored “firearms control.” Since 1975 Gallup has asked whether Americans favor making firearms laws more strict, less strict, or kept the same. From 1975 to 2020, an average of over fifty-eight percent favored more strict laws. An average of thirty-two percent of respondents during this period have favored keeping gun laws the same. Less strict responses ranged from three to thirteen percent. Thus, clear majorities favor stronger laws; overwhelming majorities oppose rolling back existing gun laws. Gallup polling concluded in 2021 that: “The data show strong public support for proposed legislative changes that would do such things as require background checks for all gun purchases, ban high-capacity ammunition magazines, require all privately owned guns to be registered with the police, and require a 30-day waiting period for all gun sales.” It also noted majority support for an assault weapons ban. Other recent polls show overwhelming public support for red flag laws (also called extreme risk protection orders; seventy to seventy-seven percent support in a National Public Radio poll, eighty-six percent support in a Washington Post–ABC poll).

The gap between public support for gun laws and the general failure of the national government to act in line with that consensus is well understood. The new force opposing gun laws this study identifies, however, is not simply resistance to new gun policy proposals (although of course that is part of the movement), but the prospect that existing gun laws will be dismantled by a new generation of very conservative judges and local activists bent on expanding the definition of gun rights.

In the years since the Supreme Court’s historic and controversial gun rights decision of D.C. v. Heller (2008), when it carved out a new, Second Amendment-based individual right of citizens to own handguns for personal self-protection in the home—let’s call it Gun Rights 1.0—the legal system has found a rough equilibrium that balances gun laws with this new gun right.
It has done so as the Supreme Court had consistently refused to weigh in on Second Amendment cases up to the start of the 2020s. Yet the federal judiciary may well now be poised to not only upset, but perhaps throw into gear-grinding reverse, that equilibrium by significantly expanding the definition of gun rights beyond that set out in *Heller*—let’s call it Gun Rights 2.0. The animating force behind this possible judicial reversal is a federal bench populated by large numbers of relatively young, very conservative jurists who maintain in particular an unwavering fealty to a singularly expansive definition of gun rights.

Judicial conservatism is nothing new, nor are evolving legal theories. And it is not only customary but expected that presidential administrations appoint to federal judicial positions jurists who share the ideological leanings of the administration and president making the appointments. But here the liberal–conservative parallelism ends. Since the early 1980s, a concerted legal movement has been constructed and mobilized to change what was seen as a too-liberal legal establishment by cultivating a generation of very conservative legal thinkers and practitioners who possess three key traits: a high degree of extremely conservative ideological coherence, including (although hardly limited to11) an unwavering fealty to a singularly expansive definition of gun rights; allegiance to a constitutional theory generally identified as constitutional Originalism (see subsequent discussion); and with respect to judicial appointments, relative youth.12

This conservative legal movement coalesced in the form of the Federalist Society. The organization first appeared as a chapter at Yale Law School in 1980, and a year later at the University of Chicago Law School. In 1982 it established itself as a nationwide non-profit corporation dedicated to providing a conservative counterweight to what was seen as the prevailing liberalism of the legal profession. The organization’s establishment was fortuitously timed in that it coincided with the election of conservative Republican President Ronald Reagan (1981–1989). Reagan’s counselor to the president and then attorney general, Edwin Meese, urged Justice Department lawyers to join the society. In turn, it brought into government service Federalist Society lawyers/members. As a result, “[b]y 1986, all twelve of the Assistant Attorneys General in the Justice Department were tied to the Federalist Society.”13 Federalist Society membership and values rapidly came to dominate the legal philosophy and personnel connected to Republican administrations, both with respect to Executive branch law-related positions and judicial selection. This continued through the Reagan and George H.W. Bush (1989–1993) presidencies.
This new conservative legal movement’s impact on legal thinking, and especially on the composition of the federal judiciary, picked up momentum and success during the eight years of the second Bush presidency (2001–2009) and flowered fully during the four years of the Trump administration (2017–2021). As a candidate and then as president, Donald Trump essentially threw the judicial selection process entirely to the Federalist Society, proclaiming, “We’re going to have great judges, conservative, all picked by the Federalist Society.”

During George H.W. Bush’s four-year presidency, nine of the forty-two federal appeals court judges he appointed were members of the Federalist Society. For the eight years of the second Bush presidency, a majority of his federal courts of appeal appointees were members, as were his two Supreme Court nominees. In George W. Bush’s first term, more than two-thirds of his appeals court nominees were connected to the Federalist Society. With the direct pipeline from the Federalist Society to the Trump administration, in his four years Trump appointed fifty-four judges to the thirteen federal appeals courts (and three Supreme Court justices). Nearly all of them are Federalist Society affiliated. In total, Trump appointed 234 federal judges.

Even though Trump only served four years, he was able to have a disproportionately large impact on the composition of the federal judiciary, compared to his predecessors. Republican leaders in the U.S. Senate, headed by the exceptionally skillful (his critics would say unscrupulous) majority leader Mitch McConnell (KY), swept aside many of the customary barriers in the Senate that traditionally allowed opposition party members to slow and even stymie the judicial confirmation process. For example, only 28.6 percent of President Barack Obama’s (2009–2017) judicial nominees won confirmation in the last two years of his presidency in the face of a Senate controlled by the opposition party. McConnell, on the other hand, succeeded in achieving his slogan for the Trump presidency to “leave no [judicial] vacancy behind,” meaning that Trump’s administration would be the first in decades to leave no unfilled seats at the end of the administration. During his term Trump appointed thirty percent of all active federal appeals court judicial positions and twenty-seven percent of active district court judges.

It should be noted that the process of sweeping aside Senate procedures that allowed the minority party to delay or even stop court nominations dated to 2013 when then-Senate majority leader Harry Reid (D-NV) eliminated the filibuster for lower federal court nominations in response to Senate minority leader McConnell’s announcement that his party would block through filibuster any Democratic nominations offered to fill three vacancies on the U.S.
Court of Appeals for the District of Columbia Circuit, regardless of their merit, because, McConnell said, “no more judges are needed.” President Obama had nominated three judges to fill the positions. Even though majority leader Reid had historically supported the filibuster, the Republicans’ refusal to allow any Democratic nominations to fill vacancies was the last straw. Even in this moment, it was McConnell’s tactics that precipitated the change.20

Up until the Trump presidency, the Senate witnessed the escalation of the use of the filibuster and other dilatory tactics by opposition party senators. This was a relatively recent phenomenon that led to a swelling chorus of critics, although those criticisms often followed partisan tides. A good argument can be made that presidents, regardless of party, should not encounter roadblocks to judicial nominations of the sort faced by Obama and his immediate predecessors. Given the steps taken by McConnell to sweep aside these impediments, current and future presidential administrations should therefore be able to mimic the Trump–McConnell judicial confirmation success rate when the same political party controls the Senate and the presidency. Indeed, in his first year in office, President Joe Biden was able to successfully appoint more federal judges—forty, including eleven to the appellate courts, out of a total of seventy-three nominees—than any president since Reagan.21

Still, this is mostly in the future. The Trump presidency’s success in filling judicial ranks with young conservative judges does and will have immediate consequences, in particular for the future of gun laws. On the question of judicial appointee age, one study found that in the last forty years, Republican presidents have indeed appointed younger justices to the Supreme Court than have Democrats, and that this factor by itself has helped push the court in a more conservative direction.22 For court of appeals judges, Trump appointees have been younger on average than those of any past president going back to the turn of the twentieth century. And Republican presidents from Reagan through Trump appointed the youngest twenty-five federal appellate judges, forty-five of the youngest fifty, and seventy-six of the youngest one hundred.23

While the Federalist Society sits at the epicenter of the conservative legal movement, it repeatedly declares that: “The Federalist Society takes no positions on particular legal and public policy matters.”24 Yet the legal and policy consequences stemming from the appointment of its adherents are unmistakable. Consider a sweeping study of the ideological leanings of Trump-appointed judges (recalling that virtually all of them are or were promoted
by and through the Federalist Society), based on a comparative examination of 117,000 opinions issued by over 2,400 judges from 1932 to 2020. It concluded that “Trump has appointed judges who exhibit a distinct decision-making pattern that is, on the whole, significantly more conservative than previous presidents . . . . his judges are more to the right than those of any recent Republican president.”25 A different study of 950 en banc federal court decisions (those made by all active members of the respective courts of appeal when they sit together to render decisions for the circuit) spanning fifty-four years through 2020 found “a dramatic and strongly statistically significant spike in both partisan splits and partisan reversals” from 2018 to 2020. No such pattern was observed in any prior period of the study. The authors referred to this “surprising” deviation from the prior relatively non-partisan era as “weaponizing en banc.”26

The point of this analysis is not that Federalist Society–Trump era judges now possess controlling votes on all or even most of the federal circuits; that is certainly not true. And President Joe Biden will appoint more liberal judges during his time in office. But what is true is that there are now multiple receptive avenues for legal challenges to every sort of gun law that will undoubtedly produce some decisions that have already and will surely widen the definition of gun rights and narrow the range of gun regulations. Such decisions will pave the way for new cases to reach the Supreme Court, and where the current Supreme Court is, I argue, primed to redefine and expand gun rights (Gun Rights 2.0) in a way that will make the 2008 Heller decision (Gun Rights 1.0) look like a liberal triumph. Consider the nine justices. Even if this prospect is never realized, it is beyond dispute that the makeup of the federal courts has shifted profoundly to the right.

Among the members of the Supreme Court as of 2021 (years of their birth in parentheses), Samuel Alito (1950), Amy Coney Barrett (1972), Neil Gorsuch (1967), Brett Kavanaugh (1965), John Roberts (1955), and Clarence Thomas (1948) are all Federalist Society affiliated. Lest there be any doubt, during the period of 1937 to 2012, recent Republican appointees to the Supreme Court were far more conservative than earlier Republican appointees, whereas recent Democratic appointees are no more liberal than their Democratic-appointed predecessors. Since 2012, Trump-era appointees, taken together, push the judicial ideological needle even further to the right.27 Gun rights supporters could hardly ask for a more receptive group. Leading them on matters related to the Second Amendment is Justice Thomas.
Thomas’s Steroidal Second Amendment

Among jurists, Clarence Thomas has become a leader of the court’s rightward march on an array of issues. In fact, in 2021 ace journalist Jill Abramson argued that “we may be witnessing the emergence of the Thomas court” as its composition has become ever more conservative.

With respect to the gun issue, Thomas has been a leader on the individualist view of the Second Amendment, codified by the high court in the 2008 *Heller* decision. Yet he has gone beyond that ruling, championing an even more expansive version of that right beyond the parameters of *Heller*. Within the previous decade, Justice Thomas has increasingly chafed at what he has considered the courts’ anemic post-*Heller* view.

Justice Thomas’s Second Amendment jurisprudential views date at least to 1997, in the case of *Printz v. U.S.* Despite the subject matter of the legal challenge giving rise to this case, this was not a case about the Second Amendment. It challenged provisions of the federal Brady Handgun Violence Prevention Act, enacted in 1993, that required local law enforcement officials to conduct background checks of those seeking to buy a handgun. The constitutional question in the case was based on the argument that Congress had overreached in using its power to regulate interstate commerce to enforce this provision. *Printz* followed an earlier case in which the court, for the first time in decades, struck down a federal law as an overreach of the commerce power and a violation of states’ rights under the Tenth Amendment.

The court majority in *Printz* struck down the local law enforcement requirement provision of the act. Thomas voted with the five-member majority, but in his separate concurrence, he wandered off topic, writing:

> This Court has not had recent occasion to consider the nature of the substantive right safeguarded by the Second Amendment. If, however, the Second Amendment is read to confer a *personal* right to “keep and bear arms,” a colorable argument exists that the Federal Government’s regulatory scheme, at least as it pertains to the purely intrastate sale or possession of firearms, runs afoul of that Amendment’s protections.

This was plainly taken for what it was: an invitation to bring to the courts Second Amendment-based challenges to gun laws. That invitation was taken up by a young conservative lawyer, Alan Gura. Indeed, Thomas’s comment “was decisive” in persuading Gura to begin litigation that ultimately resulted in the *Heller* decision. Interestingly, the National Rifle Association and
its lawyers were unpersuaded by Thomas’s invitation and were opposed to Gura’s legal initiative, fearing that it could not prevail, and might even produce an outcome inimical to its gun interests. Gura was not deterred, and his efforts were assisted instead by the libertarian Cato Institute. Only later did the NRA weigh in as a party to the case. In any event, the litigation resulted in the reinterpretation of the Second Amendment in 2008 to create, for the first time in history, a personal or individual right to gun ownership, aside and apart from the Second Amendment’s traditional militia-based understanding.

Two years later, the Supreme Court applied this new interpretation of Second Amendment rights to the states in *McDonald v. Chicago*. Thomas voted as a member of the five-member majority—the same five who composed the *Heller* majority—but unlike in *Heller*, he wrote his own lengthy concurrence, arguing that the incorporation of the Second Amendment (that is, applying it to the states through the Fourteenth Amendment) should be justified based on the largely abandoned justification of the “privileges or immunities” clause rather than the due process clause of the Fourteenth embraced by the other justices writing in the majority. In his lengthy concurrence, Thomas referred to the Second Amendment as “an inalienable right that pre-existed the Constitution’s adoption” that was “essential to the preservation of liberty.” This was the first of several expressions on his part of a broader and more encompassing Second Amendment right than that expressed by his brethren on the court.

In the 2017 case of *Peruta v. California*, the Supreme Court refused to hear an appeal to a lower court ruling upholding California’s concealed carry law that required permit applicants to show “good cause” for the granting of a carry license. A three-judge panel of the U.S. Court of Appeals for the Ninth Circuit struck down the challenged provisions of the law, but a full, en banc panel reversed and upheld the law. Thomas dissented from the Supreme Court’s refusal to hear the appeal, along with Justice Gorsuch. Thomas argued that the court should have taken the case, and in the process expressed displeasure with the California law and the court’s treatment of it. Thomas wrote: “The Court’s decision to deny certiorari in this case reflects a distressing trend: the treatment of the Second Amendment as a disfavored right.” This “disfavored” treatment, by Thomas’s account, is reflected in what he sees as the denigration of the Second Amendment compared to rights found in the other amendments: “The Constitution does not rank certain rights above others, and I do not think this Court should impose such a hierarchy by selectively enforcing its preferred rights.”
The following year, Thomas again dissented from the court’s refusal to hear an appeal to a state gun law upheld by a lower court. In *Silvester v. Becerra,* the federal court of appeals, again from the Ninth Circuit, upheld California’s ten-day waiting period. In a solo dissent, Thomas bemoaned the “lower courts’ general failure to afford the Second Amendment the respect due an enumerated constitutional right.” He continued: “If a lower court treated another right so cavalierly, I have little doubt that this Court would intervene. But as evidenced by our continued inaction in this area, the Second Amendment is a disfavored right in this Court . . . . I do not believe we should be in the business of choosing which constitutional rights are “really worth insisting upon . . . .” In order to demonstrate his belief that the Second Amendment is a mistreated, neglected constitutional right, Thomas engaged in a lengthy comparison with three other rights that, in his mind, hold a far more exalted, privileged position: “The Court would take these cases because abortion, speech, and the Fourth Amendment are three of its favored rights. The right to keep and bear arms is apparently this Court’s constitutional orphan.”

In 2020, Thomas issued yet another dissent from a denial of certiorari in *Rogers v. Grewal.* This time, his dissent was joined by Justice Kavanaugh, in part. This case arose from a challenge to New Jersey’s “justifiable need” standard for granting concealed carry permits (what is generally referred to as a “may issue” gun carry law; nine states plus D.C. have such laws as of this writing). In the dissent, Thomas made no effort to conceal his dismay, saying that by refusing to hear the case, “the Court simply looks the other way.” Thomas proceeds to state his clear view that “the Second Amendment protects a right to public carry.” Most of the rest of his opinion lays out his support for this proposition, including Thomas’s repetition of the theme that the historical denial of guns to Blacks in the post-Civil War South was the linchpin of their oppression. He concludes by bemoaning what he believes to be the court’s “decade-long failure to protect the Second Amendment” (a reference to the court’s refusal to hear new gun law challenges in the aftermath of the *Heller* and *McDonald* decisions). One can almost see the good Justice Thomas’s blood pressure rising across these dissents.

A recent, well-regarded book on Thomas that combines biography with an analysis of his jurisprudence by political scientist Corey Robin argues that Thomas’s constitutional philosophy identifies two constitutions: a “White Constitution” and a “Black Constitution.” The latter Constitution for Blacks in America “features a society that is violent, racist, and regressive, a mix of *Mad Max* and *Do the Right Thing.* The centerpiece of that Constitution is the