Book Reviews

The Supreme Court’s New Battlefield


Reviewed by Josh Blackman*

I. Introduction

In 2008, one of the three libertarian lawyers who fought District of Columbia v. Heller1 all the way to the Supreme Court victoriously proclaimed, “The Second Amendment [i]s [b]ack, [b]aby[!]”2 But where was it for the first two centuries of our Republic? Adam Winkler’s Gunfight tells the story of the battle over the right to bear arms in America.3

The flow of Gunfight, which reads more like a page-turning novel than an academic work, can best be described as a finely designed tapestry—several intricately woven threads cross and intersect throughout the chapters to form a rich, full discourse of the story of gun rights and gun control in America. The first thread tells the captivating story of District of Columbia v. Heller, the landmark case where the Supreme Court recognized an individual right to keep and bear arms.4 This history, recreated through personal interviews with all of the key actors, is developed in each chapter in small transitional bites, providing a gripping narrative of the progress of the case from inception to decision.

The second thread introduces the genesis of the modern-day gun control movement, pejoratively labeled by Winkler as the “gun grabbers,” who aspire for complete civilian disarmament.5 The third thread explores the evolution of the so-called “gun nuts,” who instinctively oppose any limitation

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* Assistant Professor, South Texas College of Law. President, The Harlan Institute. For purposes of full disclosure, I note that I served as a research assistant to Alan Gura, Clark Neily, and Bob Levy on District of Columbia v. Heller, 554 U.S. 570 (2008), and remain colleagues or co-authors with these three, as well as many of the other important actors on both sides of the litigation of Heller, as well as McDonald v. City of Chicago, 130 S. Ct. 3020 (2010). I dedicate this Review to Frederick Douglass.

5. WINKLER, supra note 3, at 15–43.
on the right to keep and bear arms, no matter how reasonable or sensible.\footnote{Id. at 45–92.} The extreme gun grabbers and gun nuts have declared the Second Amendment as the Supreme Court’s new battlefield: a sharp culture war divided along firmly entrenched ideological fronts, with no choice of a middle ground. But as Winkler’s balanced, important, and timely work shows, this has not always been the case in America.

The fourth thread—and really the vein that circulates Winkler’s thesis throughout the work—is the relationship between gun rights and gun control in the American tradition. This balance has ebbed and flowed along with numerous social movements in our nation’s history: from Revolution,\footnote{Id. at 95–122.} to Reconstruction,\footnote{Id. at 123–48.} to the Frontier,\footnote{Id. at 149–79.} to Prohibition,\footnote{Id. at 181–224.} to the Civil Rights Era,\footnote{Id. at 231–47.} to the present.\footnote{Id. at 247–62.} Protection of the right to keep and bear arms, or the infringement thereof, has been closely linked with issues of race and equality—socially disfavored or insular groups have often been the first to be disarmed.

Though a fifth thread that threatens to unravel the entire tapestry is loose—what is the relevance of this history to the development of modern Second Amendment jurisprudence?—the Supreme Court, and not Winkler, is to blame for this shortfall. \textit{Heller} has set forth an uneasy temporal relationship between the original understanding of the Second Amendment—that is, how the right would have been understood at the time of its ratification in 1791—and the role that the two centuries of cultural and legal development that Winkler chronicles should play in the constitutionality of gun control laws. Winkler does not fully connect this history with the future, short of making the lamentable, though largely anachronistic, argument that “[a]s the history of the right to bear arms and gun control shows, there is a middle ground in which gun rights and laws providing for public safety from gun violence can coexist.”\footnote{Id. at 295–96.}

Winkler’s magisterial work is by far the fairest and most well-balanced book I have read about gun control in America. Winkler, better than any scholar today, can peel back the veneer of the heated rhetoric and drill to the core of what this issue is about—keeping society safe and minimizing harm from guns, while at the same time protecting the right of people to defend themselves.\footnote{I have also written about the Supreme Court’s balancing of the social costs of many of our rights, including the right to keep and bear arms. \textit{See} Josh Blackman, \textit{The Constitutionality of}}
Gunfight will bring some much-needed clarity to the fog of the Supreme Court’s new battlefield.

II. “A well regulated Militia, being necessary to the security of a free State . . . .”

From the beginning of our Republic, the right to keep and bear arms has played an important role in our American tradition. Ratified in 1791, the Second Amendment provides, “A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.” These twenty-seven words, and the two clauses of the Amendment, engender more controversy than perhaps any other constitutional provision today. So what does the Second Amendment mean? Or perhaps a better question is: What did it mean in 1791?

The conventional understanding of the Second Amendment focused on the first clause, and found that the Amendment was “merely about protecting state militias from being disarmed by the federal government.” This view posits that the states feared that the federal government, which possessed the power to control the state militias under Article I, Section Eight, would disarm the state militias, leaving the states helpless against a tyrannical central government. The Second Amendment guaranteed the right of members of the state militia to remain armed against such a threat. In United States v. Miller, the Supreme Court—though it did not explicitly adopt this rationale—held consistently with this view and it became constitutional dogma.

In the 1970s, a different theory of the Second Amendment emerged based on an alternative reading on early American history. This alternative model was introduced in a groundbreaking Michigan Law Review article authored by Don Kates. Kates—a “Kennedy liberal” civil rights lawyer who carried an M1 carbine rifle while protecting a civil rights activist in North Carolina in 1963—posited that the Framers of the Constitution were not solely concerned with the federal government disarming state militias, but rather sought to protect an individual “right of the people” to keep and bear

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15. U.S. CONST. amend. II.
16. WINKLER, supra note 3, at 95.
17. Id. at 24.
19. See id. at 178 (holding that absent evidence of a “reasonable relationship to the preservation or efficiency of a well regulated militia,” the Second Amendment did not protect the plaintiffs’ right to possess an unregistered firearm); WINKLER, supra note 3, at 24–25 (explaining that in the decades following the decision, lower courts interpreted Miller as an endorsement of the militia theory, and the Supreme Court “never objected”).
20. WINKLER, supra note 3, at 105–06.
arms.\textsuperscript{21} To address the direct reference to the militia in the first clause, Kates relied on the writings of George Mason, the author of the Virginia Declaration of Rights—largely viewed as a progenitor of the Constitution’s Bill of Rights.\textsuperscript{22} Mason wrote, “Who are the militia? They consist now of the whole people.”\textsuperscript{23} In essence, the Second Amendment protected the right of all people. Further, the Framers “also used the words ‘bear arms’ in nonmilitary contexts.”\textsuperscript{24}

At first, Kates’s theory was met with widespread opposition. Chief Justice Burger famously said in an interview in 1991 that the theory of the individual right to keep and bear arms was “one of the greatest pieces of fraud—\textit{I repeat the word ‘fraud’—}on the American public by special interest groups that I have ever seen in my lifetime.”\textsuperscript{25} After nearly two decades of ridicule from the bench and the ivory tower, Kates’s argument was vindicated in a \textit{Yale Law Journal} article by Sanford Levinson titled “The Embarrassing Second Amendment,” which maintained that the “darling[s] of the professoriate\textsuperscript{26} and the “elite bar [were] so opposed to the idea of private gun ownership that [they] simply ignored the Second Amendment and Kates’s powerful argument.”\textsuperscript{27} Contemporaneously with Levinson’s article came a profusion of scholarship advancing the individual view of the Second Amendment.\textsuperscript{28} Ultimately, the Supreme Court adopted—in large part—the individual model of the Second Amendment in \textit{District of Columbia v. Heller}.

III. Telling the Story of \textit{District of Columbia v. Heller}

The plot of \textit{District of Columbia v. Heller} is the stuff of Hollywood magic and of Supreme Court lore. Throughout the book, Winkler expertly intersperses the chronology of the case, using it to cinematically segue into and out of the history of gun rights in America in several scenes. The Second Amendment’s constitutional shootout began with an unlikely, ragtag bunch of three libertarian lawyers: Clark Neily, Bob Levy, and Alan Gura. Neily—a veteran civil rights litigator at the Institute for Justice—inspired by a recent Fifth Circuit case finding that the Second Amendment protects an

\begin{itemize}
  \item \textsuperscript{21} Id. at 109–10 (discussing Don B. Kates, Jr., \textit{Handgun Prohibition and the Original Meaning of the Second Amendment}, 82 Mich. L. Rev. 204, 213–18 (1983)).
  \item \textsuperscript{22} Id.
  \item \textsuperscript{23} Id. at 109.
  \item \textsuperscript{24} Id. at 110.
  \item \textsuperscript{25} Id. at 25.
  \item \textsuperscript{26} Transcript of Oral Argument at 7, McDonald v. City of Chicago, 130 S. Ct. 3020 (2010) (No. 08-1521).
  \item \textsuperscript{27} WINKLER, supra note 3, at 111 (discussing Sanford Levinson, \textit{The Embarrassing Second Amendment}, 99 Yale L.J. 637, 642 (1989)).
  \item \textsuperscript{28} Id. at 111–12.
\end{itemize}
individual right to keep and bear arms, decided over drinks that he wanted to bring a test case to the Supreme Court. Bob Levy—a self-made millionaire and committed libertarian—agreed to bankroll Neily’s case. With this agreement, the story began.

Second, the lawyers located their ideal target, setting their sights on shooting down the District of Columbia’s complete ban on private ownership of handguns. This statute, the most draconian in the nation, had the added benefit of being enforced directly by the federal government, and not the states—thus, there would be no need to worry about incorporation.

Third, the lawyers had to cast their case with six sympathetic plaintiffs. Shelly Parker, the lead plaintiff, had been harassed by drug dealers in her home near Capitol Hill, and wanted a gun for self-defense. Tom Palmer, an openly gay man, was able to turn away a violent group of homophobes because he was carrying—albeit illegally—a pistol. The eponymous, and most famous plaintiff was Dick Heller, a security guard who was able to carry a pistol at work when guarding the lives of federal judges, but not at his home across the street from a violent abandoned housing project. Because Neily was unable to take the lead in litigating this case due to the Institute for Justice’s focus on economic-liberty and property-rights cases, the duo needed to find an attorney to fight this battle; enter Alan Gura. Gura accepted the case for little money, with the promise that he would be able to argue the case all the way to the Supreme Court. The cast was set, and litigation commenced. The lawyers suffered an unsurprising loss at the District Court for the District of Columbia, though this was only the first step on the road to the Supreme Court.

Fourth, in a classic David-versus-Goliath struggle at the D.C. Circuit Court of Appeals, the libertarian litigators were forced to confront an unlikely foe. No, not the Brady Campaign, or some other gun grabber, but rather the National Rifle Association! The NRA was leery of anyone bringing a case to the Supreme Court for fear that a loss would be worse than maintaining the status quo. None of the Justices, with the exception of Justice Thomas, had ever opined on the Second Amendment. The NRA

29. United States v. Emerson, 270 F.3d 203, 260 (5th Cir. 2001); WINKLER, supra note 3, at 47–49.
30. WINKLER, supra note 3, at 47.
31. Id. at 53–54.
32. Id. at 50–51.
33. Id. at 60.
34. Id. at 21.
35. Id. at 42.
36. Id. at 52, 54.
37. Id. at 55–56.
38. Id. at 62–63.
39. Id. at 7.
was afraid of this uncertainty. Further, “[t]he NRA’s most effective fundraising strategy was to threaten gun owners that the government was coming to get their guns.”41 A victory at the Court could make those threats less frightening and lucrative. The NRA sought to “wrest control over the D.C. gun lawsuit”42 by trying to consolidate the trio’s case with an NRA case that was doomed to fail for lack of standing in the district court.43 However, this effort failed.

Fifth, following the trio’s victory in the D.C. Circuit,44 the NRA moved its strategy from the courts to Congress by lobbying for the District of Columbia Personal Protection Act, a bill that would have repealed the District of Columbia’s gun ban and mooted the suit.45 Yet, that bill stalled following the shootings at Virginia Tech.46 Against the advice of many in the gun control community, the District of Columbia decided to appeal the case to the Supreme Court to set the final stage for the shootout at One First Street.

Sixth, Winkler regales the reader with the high drama of the argument at the Supreme Court, the climax of the story. Walter Dellinger was retained to argue the case for the District of Columbia.47 He quickly realized his primary argument—that the history of the Second Amendment supported only a collective right—would not appeal to five Justices, and switched to his fallback position that the Court should defer to the D.C. city council’s judgment and uphold the law.48 Justice Kennedy, the decisive swing vote, “tipped his hand”: the Second Amendment protects a “general right to bear arms . . . without reference to the militia either way.”49

With this wave, the tides had turned. Evoking the imagery of the classic film Rocky—a movie Adam Winkler’s father Irwin co-produced in 197650—Winkler described Gura’s ebullient post-argument reaction to his now near-certain victory: “Gura lifted both arms straight up in the air with fists clenched . . . [T]he young, inexperienced lawyer was Rocky Balboa, standing triumphant at the top of the steps.”51 The stuff of Hollywood magic, indeed.

41. WINKLER, supra note 3, at 7.
42. Id. at 88.
45. WINKLER, supra note 3, at 61–62.
46. Id. at 129.
47. Id. at 151.
48. Id. at 175.
49. Id. at 157.
51. WINKLER, supra note 3, at 178.
After Dellinger finished his argument, Solicitor General Paul Clement, arguing on behalf of the United States, approached the lectern. Gura, like many opposed to D.C.’s laws, was initially excited that President Bush’s Solicitor General sought to intervene in the case; that is, until Clement briefed the unpopular—though not unpredictable—position that the Second Amendment protects an individual right to keep and bear arms, though the case should be remanded, and the law should be reconsidered under a form of deferential intermediate scrutiny. During arguments, Clement largely adhered to the position taken in his briefs.

In the final scene, it was Gura’s turn to take center stage. Gura had never argued in the Supreme Court, let alone in one of the biggest constitutional law cases of the Roberts Court. He immediately targeted Clement’s position—so quickly that Justice Scalia coaxed him to “[t]alk a little slower.” With that, Gura settled into his argument and rebutted Clement’s intermediate position, articulating that if the Second Amendment does protect an individual right to keep and bear arms, a complete ban on the most popular method of self-defense could not be constitutional. Despite some tough questioning from the liberal Justices, “[w]hen Chief Justice John Roberts announced that Gura’s time was up, the libertarian lawyer returned to his seat knowing that he had won on the big question of whether or not the Second Amendment guaranteed an individual right to have guns for personal self-defense.” After Dellinger supplied a few minutes of rebuttal, Chief Justice Roberts cut him off. “Thank you, Mr. Dellinger. The case is submitted.”

The dénouement of this drama descended on decision day: June 26, 2008. In a landmark 5–4 opinion, the Supreme Court held that the Second Amendment protects an individual “right of law-abiding, responsible citizens to use arms in defense of hearth and home.” The opinion was grounded in Justice Scalia’s signature jurisprudence, originalism, and focused on how the Second Amendment and the right to keep and bear arms were understood at the time of its ratification in 1791. According to Clark Neily of the victorious libertarian troika, “Justice Scalia’s majority decision is everything
a Second Amendment supporter could realistically have hoped for.”

Though *Heller* serves as the beginning of a new Second Amendment jurisprudence, our nation has a long history of gun control and gun rights coexisting without the Court’s intervention.

IV. “Gun Grabbers” and “Gun Nuts”

In every conflict, there are adversaries; in *Gunfight* they are the “gun grabbers” and the “gun nuts.”

Winkler ascribes membership of the former to the Brady Center to Prevent Gun Violence, and of the latter to the National Rifle Association; the former aim to ban the private possession of all handguns, while the latter instinctively oppose any law that limits the right to keep and bear arms. While these labels are intentionally pejorative—and rather overinclusive, as many members in both of these groups are more mainstream than fringe—Winkler deftly sketches how both of these movements are largely products of the last four decades. Each has moved towards extreme positions, much to the detriment of the middle ground in the gun rights and gun control debate.

A. The Gun Lobby

When the National Rifle Association was founded in 1871, “it wasn’t to lobby against gun control,” but rather primarily focused on promoting “target-shooting competitions.” As late as the 1920s and 1930s, leaders of the NRA wrote and even lobbied for handgun control legislation such as the Uniform Firearms Act. This proposed model legislation required people to obtain a license in order to carry a concealed weapon; such a license could only be issued “to a ‘suitable person’ with a ‘proper reason for carrying’ a firearm.” Gun dealers were required to be licensed by the state and to maintain records of all sales. A waiting period prior to sales was imposed. Finally, sales were prohibited “to those convicted of crimes of violence, drug addicts, drunkards, and minors.”

Winkler reminds us that “[t]he NRA wasn’t a blind supporter of any and all gun control, but the leaders of the organization were willing to compromise with lawmakers to enhance public safety.” Further, the NRA had not yet adopted the Second Amendment as its battle cry. In fact, any mention of the “Second Amendment was glaringly absent” from the *American Rifleman*,

61. Neily, supra note 2, at 147.
62. WINKLER, supra note 3, at 15, 45.
63. Id. at 35.
64. Id. at 63–64.
65. Id. at 208 (citing Charles V. Imlay, *The Uniform Firearms Act*, 12 A.B.A. J. 767 (1926)).
66. Id. at 209.
67. Id.
68. Id. at 64–65.
the NRA’s primary publication until the 1960s.69 As late as 1975, the NRA Fact Book on Firearms Control noted that the Second Amendment was “of limited practical utility” as a means to challenge any gun laws.70

However, the NRA was hardly in favor of all gun laws. As early as 1911, the president of the NRA wrote that laws that “seem to make it impossible for a criminal to get a pistol” also “make it very difficult for an honest man and a good citizen to obtain them . . . [and] have the effect of arming the bad man and disarming the good one to the injury of the community.”71 Even in the 1930s, the NRA opposed more draconian gun control laws, such as the Sullivan Act, arguing that they limited “the ability of a law-abiding citizen to defend himself in his own home.”72

The mission and future of the NRA changed in November 1976. Two competing factions within the organization—one that sought to focus on target shooting and hunting, and the other that wanted to take a strong position against encroaching gun control legislation—clashed on what became known as the “Weekend Massacre.”73 The former faction ousted the hard-liners from leadership positions, though this victory was pyrrhic and short-lived.74 Through guerilla parliamentary tactics coordinated with walkie-talkies at the NRA’s annual meeting on May 21, 1977, the extremists assumed power and removed from leadership those moderates who desired that the NRA focus on hunting and target shooting.75

“[N]ow committed to a more rigid approach to gun control, [the NRA] became one of the most powerful forces in American politics.”76 Under this new leadership, the NRA’s Institute for Legislative Action—its main lobbying arm—received increased funding and moved to the forefront of the organization’s mission.77 Today, under the leadership of NRA Executive Vice President Wayne LaPierre, Winkler asserts that the NRA views “every gun law . . . [as] a certain step down the slippery slope to . . . ‘eliminate private firearm ownership completely and forever.’”78 The Second Amendment is the NRA’s battle cry with only the second clause of the text—“the right of the people to keep and bear Arms, shall not be infringed”—

69. Id. at 65.
70. Id.
72. WINKLER, supra note 3, at 211.
73. Id. at 66–67.
74. Id.
75. Id. at 67.
76. Id.
77. See id. at 66–67 (explaining that the new leadership “moved to revise the bylaws to . . . increase funding of the [Institute for Legislative Affairs]” and reversed the old leadership’s policy of underfunding and restricting the powers of the Institute for Legislative Affairs).
78. Id. at 68.
emblazoned on the wall at their headquarters. 79 Enemy number one of the gun nuts are the gun grabbers.

B. The Anti-gun Lobby

In a somewhat ironic twist of fate, the genesis of the modern-day gun control movement began with the D.C. handgun ban—the very law that met its demise in Heller four decades later. Following a wave of gun violence and murders, one of the first major laws the District of Columbia enacted after Congress established home rule for the federal enclave was the 1976 ban on the possession and sale of handguns in the city. 80 It is only fitting that this ban was the very law the libertarian lawyers targeted in District of Columbia v. Heller.

Eliminating violence was only a secondary goal of this movement—the primary goal was the elimination of private ownership of firearms. Winkler observes that supporters of the D.C. handgun ban knew it “was not going to reduce crime or diminish gun violence” but “believed that such a symbolic law could send a message that it was time to get rid of the guns once and for all.” 81 Marion Barry, a supporter of the ban [and future mayor of the District of Columbia], made a frank acknowledgment. ‘What we are doing today will not take one gun out of the hands of one criminal.’ 82 Nelson “Pete” Shields III, a founder of Handgun Control, Inc.—the progenitor of the Brady Center to Prevent Gun Violence—openly advocated for the elimination of all handguns: “We’re going to have to take this one step at a time. . . . Our ultimate goal—total control of all guns—is going to take time.’ The ‘final problem,’ he insisted, ‘is to make the possession of all handguns and all handgun ammunition’ for ordinary civilians ‘totally illegal.’” 83 John Hechinger, a sponsor of the D.C. handgun ban and a board member of Handgun Control, Inc., put it simply: “We have to do away with the guns.” 84

The modern-day extreme gun control movement gained steam on March 30, 1981, when John Hinckley’s .22 caliber bullets struck President Ronald Reagan and his press secretary, James Brady. 85 Tragically, Brady was left permanently paralyzed. 86 Handgun Control, Inc. was later renamed the Brady Center to Prevent Gun Violence after James Brady. 87 The Brady Center brought numerous lawsuits in the 1990s alleging that guns were

79. Id. (emphasis omitted).
80. Id. at 16–17.
81. Id. at 31.
82. Id. at 18.
83. Id. at 35 (omission in original).
84. Id. at 15–16, 19.
85. Id. at 69.
86. Id.
87. Id.
“defective,” and it sought to hold the manufacturers liable for the injuries that resulted from the firearms. The goal of these suits was not to show the guns were defective—a gun’s lethality is a feature, not a flaw—but to “make the sale of guns to civilians so costly that no business would want to do it.”

The group’s signature proposal was the Brady Handgun Violence Prevention Act, commonly known as the Brady Bill, “which would require a gun purchaser to wait several days before receiving a purchased gun.” The Brady Bill was met with strong opposition from the NRA, which warned that imposing waiting periods would lead us “on the inevitable path to complete disarmament of civilians.” Enacted in 1993 over strong NRA opposition, this bill received support from across the ideological spectrum, including by Presidents Reagan, Nixon, and Ford. The bill imposed a five-day waiting period for handgun purchases, and—adopting an NRA proposal—required state officials to conduct instant computerized background checks through the National Instant Criminal Background Check System (NICS). Ironically, the NRA challenged this requirement in Printz v. United States, where the Supreme Court held that state officials could not be forced to conduct background checks—this was a violation of the Tenth Amendment’s anti-commandeering principle rather than a violation of the Second Amendment.

Despite NRA protestations that the Brady Bill wouldn’t work—as criminals do not buy firearms from legal sources—“more than 1.5 million illegal gun purchases were rejected because of background checks in the decade or so after the law was enacted.” Without “grabbing,” the Brady Center, through its signature legislation, has prevented criminals from easily obtaining firearms. However, Winkler reminds us that the ultimate aim of “disarmament is an unrealistic goal.” The fact that “[g]uns are permanent in America” is “perhaps the most important” fact that the “D.C. gun ban supporters failed to grasp.”

V. Guns and American History

Taking a step back from the present-day culture war over guns, Winkler deftly tracks the ebb and flow between gun rights and gun control as a reflex
to five pivotal eras in our Republic: Revolution, Reconstruction, the Frontier, Prohibition, and the Civil Rights Era. These historical epochs provide a rich backdrop to explore how both gun rights and gun control reacted to racism, xenophobia, and lawlessness in America. In many respects, where we are today is a product of where we were. “What’s past is prologue.”

For the gun nuts, the fear of disarmament—as witnessed during the Revolutionary Era, Reconstruction, and the Civil Rights Era—animates concerns about a slippery slope toward the government taking away guns from unpopular groups. For the gun grabbers, the fear of widespread carnage—as witnessed during the (allegedly) Wild West and Prohibition—animates concerns about the dangers of insufficient gun control laws. Recreating these past skirmishes provides clarity from the fog of war on the Supreme Court’s new battlefield.

A. Guns of Our Fathers

Even if the Second Amendment protects an individual right—and it is not clear that Winkler accepts this argument, as his brief in Heller only assumes this point arguendo—Gunfight shows that the Founding-era generation imposed laws restricting the use of firearms “that few modern-day gun rights advocates would ever accept.” Many states imposed “safe storage” laws that required flammable gunpowder to be stored on the top floor of buildings. Boston even passed a law effectively banning the possession of any combustible gunpowder—and thereby loaded firearm—indoors. All “free men between the ages of eighteen and forty-five [were mandated] to outfit themselves with a musket, rifle, or other firearm suitable for military service” and muster at “public gatherings held several times a year.” At the musters, these guns were inspected and accounted for through the “rolls—an early version of gun registration.” In short, “[t]he right to bear arms in the colonial era was not a libertarian license to do whatever a person wanted with a gun,” as “when public safety demanded that gun owners do something, the government was recognized to have the authority to make them do it.” The Founding-era generation “might not have termed it ‘gun control,’ but the founders understood that gun rights had to be balanced with public safety needs.”


101. WINKLER, supra note 3, at 114.

102. Id. at 116–17.

103. Id. at 117.

104. Id. at 113.

105. Id.

106. Id. at 115.

107. Id. at 114.
It is worth noting that none of the laws Winkler cites had the goal of reducing violence from individual ownership of firearms. Placing limitations on combustible gunpowder to reduce the risk of fire in the powder kegs that were colonial towns seems entirely divorced from the goals of the modern-day gun control movement. Guns today are safer and less likely to lead to a town burning down. In any event, Winkler’s historical arguments are fatal to the absolutists who contend that no limitation on the right to keep and bear arms can be countenanced by our Constitution as implemented by the Founding-era generation.

B. Reconstruction, Guns, and Civil Rights

_Gunfight_ tells the story of how the right to keep and bear arms played an integral role in the period before and after the ratification of the Fourteenth Amendment. Some of the earliest, most oppressive gun control laws emerged in the South and were aimed at “restricting gun ownership for blacks.”108 Prior to the Civil War, many of the leading abolitionists, including Lysander Spooner, recognized the importance of arming blacks, and they “argued that blacks had a natural right to use guns to defend themselves from southern outrages” and “that slavery must end, even if it meant taking up arms to stop it.”109 Following the Civil War, the situation worsened as white resentment grew toward the freedmen who were no longer under their control. As a result, the Ku Klux Klan formed and spread throughout the South. Winkler retells, in graphic, gory detail, the tragic stories of the Klansmen’s carnage—often aided by state authorities and local militias—as they would ride through the night, breaking down the doors of freedmen who had guns, taking their arms, and then lynching them.110

The Radical Republicans in Congress, recognizing the criticality of ensuring that freedmen were armed in order to resist the KKK, passed two important pieces of legislation to protect this right. First, the Freedmen’s Bureau Act of July 1866 “declared that the freedmen were entitled to the ‘full and equal benefit of all laws and proceedings concerning personal liberty, [personal] security, and the acquisition, enjoyment, and disposition of estate, real and personal, including the constitutional right to bear arms.’”111 Later that year, “Congress passed the nation’s first Civil Rights Act, which defined the freedmen as citizens of the United States and made it a federal offense to deprive them of their rights on the basis of race.”112 Senator James Nye stated, “‘As citizens of the United States,’ the freedmen ‘have an equal right

108. _Id._ at 132.
109. _Id._ at 138.
110. _See, e.g., id._ at 134–35, 137–39, 142–44 (describing how the Ku Klux Klan broke into freedman Jim Williams’s house, demanded his arms, and lynched him in March 1871).
111. _Id._ at 140 (emphasis added) (quoting Act of July 16, 1866, ch. 200, § 14, 14 Stat. 173, 176).
112. _Id._
to protection, and to keep and bear arms for self-defense.”

President Johnson vetoed both laws—part of the impetus for his impeachment—but the support in Congress was so strong that both vetoes were overridden.

Realizing that the Bill of Rights was not enforceable against the states and recognizing the fleeting and ephemeral nature of statutes—which could be repealed by a future Congress more sympathetic to the cause of the South—the Radical Republicans in Congress aimed to entrench the fundamental rights of American citizenship—including the right to keep and bear arms—with a constitutional amendment. Leading the charge on what would become the Fourteenth Amendment was Ohio Representative John Bingham. Bingham aimed to correct what he “saw as the Constitution’s greatest mistake”—“[f]rom now on, the states couldn’t trespass on the fundamental rights of individuals listed in the Bill of Rights.” These fundamental rights, known as “privileges or immunities,” were protected by the Fourteenth Amendment: “No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States.”

What constituted a privilege or immunity was, and remains, a question open to debate, though many of the ratifiers of the Amendment concurred that the right to keep and bear arms was such a right. Bingham argued that the “privileges and immunities of citizens of the United States” were “chiefly defined in the first eight amendments to the Constitution.” Senator Jacob Howard, the chief sponsor of the Amendment in the Senate, stated that privileges and immunities included “the personal rights guaranteed and secured by the first eight Amendments of the Constitution; such as the freedom of speech and of the press,” “the right to be exempt from unreasonable searches and seizures,” and “the right to keep and bear arms.”

113. Id.

114. Id.

115. See Barron ex rel. Tiernan v. Mayor of Baltimore, 32 U.S. (7 Pet.) 243, 249–51 (1833) (holding that the Fifth Amendment is “not applicable to the legislation of the states”).

116. WINKLER, supra note 3, at 140–42.

117. Id. at 141.

118. Id.

119. U.S. CONST. amend. XIV, § 1 (emphasis added).

120. See, e.g., McDonald v. City of Chicago, 130 S. Ct. 3020, 3083–84 (2010) (Thomas, J., concurring) (finding that the right to keep and bear arms is a privilege under the Privileges or Immunities Clause). For further reading on the Privileges or Immunities Clause as it relates to the right to keep and bear arms, see Alan Gura, Ilya Shapiro & Josh Blackman, The Tell-Tale Privileges or Immunities Clause, 2009–2010 CATO SUP. CT. REV. 163 (2010). For a detailed account of McDonald v. City of Chicago, see generally Josh Blackman & Ilya Shapiro, Keeping Pandora’s Box Sealed: Privileges or Immunities, the Constitution in 2020, and Properly Extending the Right to Keep and Bear Arms to the States, 8 GEO. J.L. & PUB. POL’Y 1, 17 (2010).

121. WINKLER, supra note 3, at 141.

122. Id. at 142.
While the right to keep and bear arms in 1791 was closely tied—though not exclusively limited—to protecting state militias from federal tyranny, the right in 1868 was “defined . . . primarily in terms of individual self-defense” of freedmen from the KKK and the oppressive Black Codes. Though, the Privileges or Immunities Clause’s service as a bulwark of this fundamental right was short-lived following what became known as the Colfax Massacre.

Opposing a local election in Grant Parish, Louisiana, in 1873 that “was marked by widespread fraud and intimidation of black voters,” a group of armed black men “occupied the courthouse and dug a large trench around the building.” On Easter Sunday, over “300 whites armed with rifles arrived and ordered the blacks to turn over their guns and evacuate the courthouse.” When they refused, “a battle ensued.” The white men brought out a cannon, raided the building, and set it afire, resulting in the death of 150 blacks.

A federal prosecution was brought against the white men for violation of “the freedmen’s civil rights, including their ‘right to keep and bear arms for a lawful purpose.’” Bill Cruikshank, one of the defendants, was convicted of conspiracy and appealed to the Supreme Court, arguing that the federal government lacked the power to prosecute him.

In United States v. Cruikshank, the Supreme Court invalidated the conviction. In tension with what Bingham and others had said about the Fourteenth Amendment, the Court held that the Second Amendment only applied to Congress. Effectively affirming Barron v. Baltimore, the Court reasoned that the Fourteenth Amendment did not change the relationship between the states and the Bill of Rights. Because Congress did not infringe on the rights of the blacks—Cruikshank did (though he was aided and abetted by state officials)—there could be no prosecution. This opinion had a devastating effect on the power of the federal government to enforce civil rights and placed in peril the ability of freedmen to arm themselves for self-defense. As one historian noted, “Cruikshank paralyzed the federal government’s attempt to protect black citizens by punishing violators of their Civil Rights and, in effect, shaped the

123. Id.
124. Id. at 143–44.
125. Id. at 144.
126. Id.
127. Id.
128. Id.
129. Id.
130. 92 U.S. 542 (1876).
131. Id. at 553; WINKLER, supra note 3, at 144–45.
133. Cruikshank, 92 U.S. at 552–55; WINKLER, supra note 3, at 144.
135. WINKLER, supra note 3, at 145.
Constitution to the advantage of the Ku Klux Klan.”\textsuperscript{136} The specter of guns, race, and racism would return to haunt American culture a century later during the civil rights movement.

C. The Mild, Not-So-Wild West

The Old West was more mild than wild. The legendary shootout with Wyatt Earp and Doc Holliday at the O.K. Corral in Tombstone, Arizona—dubbed the “wickedest place in the West”\textsuperscript{137}—was perhaps the exception, rather than the rule. “Like many myths, however, the lessons often taken from the Shootout at the O.K. Corral are profoundly misleading.”\textsuperscript{138} Life on the frontier was certainly dangerous, but the risk of being gunned down on Fremont Street is more legend than fact. In notorious Dodge City, Kansas, for example, between 1877 and 1886 there were only fifteen murders—in most years, there were one or zero homicides.\textsuperscript{139} “It turns out there really wasn’t much need to get out of Dodge,”\textsuperscript{140} In Tombstone’s most violent year, 1881, only five people were killed.\textsuperscript{141} In Deadwood, South Dakota’s most violent year, only four people were killed.\textsuperscript{142} Our “popular mythology of gun-toting cowboys having a shootout over a poker game gone awry [is] more a product of marketing than anything else.”\textsuperscript{143}

Contrary to Justice Kennedy’s statement at oral arguments in \textit{District of Columbia v. Heller}, the right to keep and bear arms during this period did not reflect the “concern of the remote settler to defend himself and his family against hostile Indian tribes and outlaws, wolves and bears and grizzlies and things like that.”\textsuperscript{144} Citing the research of Robert Dykstra, Winkler shows that people on the frontier certainly had guns, but the towns in which they lived imposed strict limitations on those guns.\textsuperscript{145} In many towns, carrying firearms was banned—a photograph from Dodge City in 1879 showed a sign notifying everyone that “The Carrying of Firearms [is] Strictly Prohibited.”\textsuperscript{146} When visitors arrived in a frontier town, they were required to temporarily turn over their guns to the sheriff until their departure—much like one would hand over a jacket to a coat check in exchange for a token. “On Main Street at high noon, holsters carried no guns.”\textsuperscript{147} However,

\textsuperscript{136} Id. (quoting Leonard W. Levy, United States v. Cruikshank, \textit{in 2 ENCYCLOPEDIA OF THE AMERICAN CONSTITUTION} 527 (Leonard W. Levy et al. eds., 1986)).
\textsuperscript{137} Id. at 157.
\textsuperscript{138} Id. at 160.
\textsuperscript{139} Id. at 163.
\textsuperscript{140} Id.
\textsuperscript{141} Id.
\textsuperscript{142} Id.
\textsuperscript{143} Id. at 164.
\textsuperscript{144} Id. at 157.
\textsuperscript{145} Id. at 165 (citing ROBERT DYKSTRA, CATTLE TOWNS 112–22 (1968)).
\textsuperscript{146} Id. (emphasis omitted).
\textsuperscript{147} Id. at 166.
Winkler adduces no proof of how prevalent these laws were, and whether they were enforced effectively, if at all. The shootout at the O.K. Corral—even if it is an outlier—serves as proof that the gun control laws out west were not particularly effective. Rather than citing to gun laws, more compelling proof would be citations to convictions for violations of these laws.

D. Gunners and Bootleggers

Perhaps more than any other provision in the Constitution, the Eighteenth Amendment—banning the sale of alcohol—transformed the dynamic between state and federal enforcement of criminal laws. Prior to the 1930s, the enforcement of criminal laws was generally the province of the states.\footnote{Id. at 187–88.} However, the interstate nature of bootlegging offered challenges to this traditional model. Armed with automatic machine guns such as the infamous “Tommy gun,” bootleggers wreaked havoc on big cities, causing untold bloodshed and suffering as they lubricated the streets with intoxicating liquors.\footnote{Id. at 191–92.} The “most famous machine-gun incident of all time” occurred on Valentine’s Day in 1929 when Al Capone’s gang viciously gunned down members of a rival gang.\footnote{Id. at 191 (quoting JOHN ELLIS, SOCIAL HISTORY OF THE MACHINE GUN 154 (1975) (internal quotation marks omitted)).} “In ten seconds, Capone’s men fired over seventy rounds and two shotgun blasts.”\footnote{Id. at 192.} The bootleggers bought off the local police departments, so no one was ever prosecuted for the crime. Even those police departments that were not on the take lacked the firepower or jurisdiction to keep up with the well-armed mobsters, whose criminal enterprises stretched across state lines.\footnote{Id. at 193.}

“These types of criminals were a national problem, and it was going to require the national government to combat them.”\footnote{Id. at 196.} As part of his New Deal, President Roosevelt found that the rash wave of crime was no longer only a local issue—it was a national one: “The consequences of lax law enforcement and crime-breeding conditions in one part of the country may be felt in cities and villages and farms all across the continent.”\footnote{Id. at 198.} Homer Cummings, Roosevelt’s Attorney General, proclaimed, “We are engaged in a war . . . with the organized forces of crime.”\footnote{Id. at 199.} In response, Cummings added two hundred “G-men” agents to the nascent Bureau of Investigation and armed them, some with submachine guns, to fight the new breed of interstate criminals like John Dillinger and Bonnie and Clyde.\footnote{Id. at 200.}
Against the backdrop of nationwide crime sprees and corrupt police forces, federal gun control legislation soon followed. The National Firearms Act of 1934 imposed a tax of $200 ($2,000 in 2010 dollars) on the sale of machine guns and short-barreled shotguns, and required owners of such weapons to register them and submit fingerprints to the federal government.\textsuperscript{157} Granted, no one expected mobsters to pay the tax, register the firearms, and submit fingerprints—that was the point.\textsuperscript{158} Now, anyone caught with an unregistered machine gun could be prosecuted in a federal court and sentenced to a federal prison. No need for witnesses to testify against the mob. No need to rely on corrupt local police departments. “The government wouldn’t have to prove that the person had killed anyone, only that he hadn’t paid his taxes or properly registered his weapon.”\textsuperscript{159} Similarly, Al Capone was sent to Alcatraz not for his ruthless murders—but for his failure to pay income tax.\textsuperscript{160}

In \textit{United States v. Miller}\textsuperscript{161}, the Supreme Court upheld the constitutionality of the enforcement of the 1934 Act.\textsuperscript{162} As interpreted by the Ninth Circuit, \textit{Miller} stands for the principle that “the right to keep and bear arms is meant solely to protect the right of the states to keep and maintain armed militia . . . guarantee[ing] a collective rather than an individual right.”\textsuperscript{163} \textit{Miller} stood as the Court’s only pronouncement on laws affecting the Second Amendment until \textit{Heller}. The subsequent 1938 Federal Firearms Act barred felons from receiving firearms, and required gun dealers to be licensed and to keep records.\textsuperscript{164} These laws set the stage for future federalization of gun control policy.

\textbf{E. The Armed Civil Rights Era}

During the civil rights era, opponents—both inside and outside the government—used unlawful violent force to suppress the movement. In response, many of the advocates of the era, unconfident in relying on the state to protect them, turned to guns as a means of self-defense. After his house was bombed, Martin Luther King Jr. “applied for a permit to carry a concealed firearm” in Montgomery, Alabama; the discretionary permit was denied by the local police chief.\textsuperscript{165} Subsequently, King’s home became an “arsenal” as “armed supporters took turns guarding” the house.\textsuperscript{166}

\begin{flushleft}
157. Id. at 203.
158. Id.
159. Id.
160. Id. at 203–04.
162. Id. at 183.
163. Hickman v. Block, 81 F.3d 98, 101–02 (9th Cir. 1996) (internal quotation marks omitted).
164. WINKLER, supra note 3, at 204.
165. Id. at 235.
166. Id.
\end{flushleft}
In the more militant wings of the civil rights movement, “[g]uns became part of the official uniform of the Black Panthers,” as the group openly carried assault rifles throughout California in a show of force.167 Unsurprisingly, many, including Governor Ronald Reagan, were concerned by the Black Panthers, who exploited a loophole in the law that permitted them to openly carry rifles, even in the California state capitol.168 As Winkler notes, “If it hadn’t been for the Black Panthers, a militant group of Marxist black nationalists committed to ‘Black Power,’ there might never have been a modern gun rights movement.”169

The assassinations and the militant Black Panthers, set against the backdrop of the Warren Court’s criminal procedural revolution, set the stage for a sea change in firearm policy, nudging the nation to get tough on crime.170 “On July 28, 1967, less than three months after the Panthers’ visit to Sacramento,” Governor Reagan signed into law one of the strictest gun control laws—the Mulford Act—which banned the carrying of loaded firearms.171 Later that year, there were “eight major riots and thirty-three other serious incidents of civil unrest,” many of which were filled with gunfire and bloodshed.172 The desire for gun control was heightened after the assassinations of Robert Kennedy and Martin Luther King Jr. within two months of each other; “[t]he political will to enact gun control shifted literally overnight.”173

The day after Kennedy’s assassination, Congress passed the landmark legislation of that movement: the Omnibus Crime Control and Safe Streets Act.174 A few months later, its companion, the Gun Control Act of 1968—the first major piece of gun control legislation since the 1930s—was enacted.175 Together, the acts banned the interstate shipping of firearms to anyone who was not a federally licensed dealer or collector; banned the sale of firearms to “prohibited persons,” including “felons, the mentally ill, substance abusers, and minors”; and expanded the registration regime enacted by the Federal Firearms Act of 1938.176

The leadership of the NRA in 1968 initially supported the Gun Control Act. However, this support led to the ultimate schism of thought “that would

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167. Id.
168. Id. at 245.
169. Id. at 231.
170. Id. at 222.
171. Id. at 245.
172. Id. at 249–50.
174. WINKLER, supra note 3, at 251.
175. Id.
176. Id.
split the gun group wide open over the next decade." The “gun hard-liners” worried that the “NRA leadership [was] focused too much on the sporting uses of guns and not enough on personal self-defense and the Second Amendment.” Buoyed by the “rising crime rates, easy access to drugs, and the breakdown of the inner city, the [hard-liners argued that the] NRA should be fighting to secure Americans the ability to defend themselves against criminals.” In short, the NRA “needed to spend less time and energy on paper targets and ducks and more time blasting away at gun control legislation.” By the mid-1970s, leadership in the NRA started to call for the repeal of the Gun Control Act. Woodson D. Scott, the new president of the NRA, called the Act a “legislative monstrosity saddled upon the people in a period of emotionalism.” Opposition to the Act led the NRA to set up their leviathan lobbying arm, the Institute for Legislative Action, which in large part brings us to the present-day culture war between the nuts and the grabbers.

VI. Back to the Future of the Second Amendment

_Heller_ set forth an uneasy temporal relationship between the original understanding of the Second Amendment—that is, how the right would have been understood at the time of its ratification in 1791—and the role that over two centuries of change should play in considering gun control laws. The role that these histories play remains an important question in gun cases going forward. The story that _Gunfight_ tells to a large extent answers this question, though it falls short of solidifying the link between the once and future Second Amendment.

A. Guidepost Originalism

To what end should we consider the history of the Second Amendment? _Heller_ and _Gunfight_ seem to consider three separate approaches. (Of course, these three approaches do not represent the entirety of originalist thought.) First, history can be used to show the original public understanding—or what has been deemed the “semantic content” of the Second Amendment.

177. _Id._ at 254.
178. _Id._
179. _Id._
180. _Id._
181. _Id._ at 256.
182. _Id._
183. See _id._ (“Congressman John Dingell fatefully advised the NRA to set up a full-time professional lobbying arm to fight off regulation and roll back the laws of the 1960s.”).
Generally speaking, how would the term “the right to keep and bear arms” have been understood in 1791?185

Second, the history of early gun laws can be used as evidence of what the Framers of the Second Amendment were comfortable with. That is, examples of the founding generation placing limitations on the right to keep and bear arms suggest that this is how the Second Amendment was meant to operate. Or, opposition to such laws indicates that those laws were not compatible with the Second Amendment. In other words, if it was good enough for James Madison, it is good enough for us! I call this approach “retrospective originalism.”

This method must be distinguished from the original-expected-application blend of originalism, which looks to how the Framers would expect the Constitution to be applied to modern issues186—such as how the Fourth Amendment would apply to a device that can measure heat signatures inside a home.187 Retrospective originalism, in contrast, uses the practices of the Founding Era as evidence of how the provisions were intended to operate back then. For example, Winkler cites to many of the laws passed in the Colonial Era aimed at promoting gun safety as evidence that the Framers were comfortable with strict gun control laws.188 These ordinances—many of which were cited in Justice Breyer’s dissent in Heller189—are illustrations that “gun possession . . . balanced with gun safety laws was [an idea] that the founders endorsed.

Third, historical practices of limitations on the right to keep and bear arms are not relied on so much to show how the founding generation viewed the Second Amendment, but rather to establish certain enduring practices. Indeed, this history need not be limited to 1791, but rather stretches throughout the American tradition. Justice Scalia’s opinion in Heller, to the disapproval of Justice Stevens, looked to the post-enactment history of the Second Amendment following its ratification, in the antebellum period, and


186. See, e.g., Jack M. Balkin, Original Meaning and Constitutional Redemption, 24 CONST. COMMENT. 427, 432–36 (2007) (arguing that while living constitutionalists generally object to the limiting influence of the “original expected application” of constitutional provisions, they normally do not oppose applying constitutional provisions according to their “original meanings”).

187. See Kyllo v. United States, 533 U.S. 27, 34 (2001) (concluding that a thermal-imaging device aimed at a home from a public street constituted a “search” and violated the “degree of privacy against government that existed when the Fourth Amendment was adopted”); cf. United States v. Jones, 132 S. Ct. 945, 958 (2012) (Alito, J., concurring in judgment) (“But it is almost impossible to think of late-18th-century situations that are analogous to what took place in this case.”).

188. See supra subpart V(A).


190. WINKLER, supra note 3, at 117.
following the Civil War. Or, to put it in the lexicon of the Washington v. Glucksberg substantive due process framework, the Constitution protects “those fundamental rights and liberties which are, objectively, ‘deeply rooted in this Nation’s history and tradition’ . . . [and where there is] a ‘careful description’ of the asserted fundamental liberty interest.”

Through this approach, the Court looks to our “Nation’s history, legal traditions, and practices [to] provide the crucial ‘guideposts for responsible decisionmaking.’” In short, we’ve been doing it so long that it must be right.

I call this approach guidepost originalism. Gunfight demonstrates that our nation has a long tradition of regulating—and even banning—the use of firearms, from colonial days to the not-so-Wild West to the laws of the early twentieth century. The courts have looked to this history for guideposts for how the right has, and should, develop—despite the fact that the Second Amendment was effectively a dead letter during the period in which these laws emerged—even if this history was in tension with the original understanding of the Second Amendment.

In sum, semantic originalism looks to what people said or thought, retrospective originalism looks to what people did, and guidepost originalism looks to what people have done and are still doing. All three inquiries are historical in nature, but the focus and aim of each method varies significantly. Gunfight is a tour de force for guidepost originalism. By understanding the nature of a Second Amendment that is “deeply rooted in this Nation’s history and tradition” through looking at the “history, legal traditions, and practices” evidenced over two centuries of balancing gun rights and gun controls—many of which constitute longstanding prohibitions—we can obtain guideposts on how to proceed. Yet, articulating why each approach should inform modern-day constitutional doctrine remains somewhat underexplored.

191. Heller, 554 U.S. at 605 (2008) (“As we will show, virtually all interpreters of the Second Amendment in the century after its enactment interpreted the Amendment as we do.”).
193. Id. at 720–21 (emphasis added) (citations omitted).
194. Id. at 721 (citation omitted).
[A] regulation that is “longstanding,” which necessarily means it has long been accepted by the public, is not likely to burden a constitutional right; concomitantly the activities covered by a longstanding regulation are presumptively not protected from regulation by the Second Amendment. A plaintiff may rebut this presumption by showing the regulation does have more than a de minimis effect upon his right. A requirement of newer vintage is not, however, presumed to be valid.

Id.
B. What’s Past Is Prologue

Paradoxically, perhaps, in laying the groundwork for our future Second Amendment, the originalist Supreme Court turned to the past. Even while stating that the Court looked to the meaning of the right in 1791, Scalia’s opinion in many respects “reflected a thoroughly modern understanding of gun rights.”196 In essence, Scalia’s originalism—based on eighteenth-century political philosophy—was grounded in twentieth-century practicalities, and it only purported to elide everything in between.

The ban on machine guns, for example, was justified because they are not “in common use”—the reason why machine guns were not “in common use” was because the federal government had banned them since 1930.197 Similarly, Scalia upheld certain “longstanding prohibitions”198—many of which were longstanding due to the Court’s failure to recognize that the Second Amendment had any teeth for two centuries. “The scope of the Second Amendment’s protections was not, in other words, defined by the original meaning of the Constitution . . . [but was] made within the confines of contemporary government regulation.”199 Perhaps the fact that these “longstanding prohibitions” are so “deeply rooted in this Nation’s history and tradition”200 informs their constitutionality. The Court’s controversial pragmatic dicta—which I have assailed as unoriginalist201—sounds in guidepost originalism.

This temporal disconnect of the Second Amendment, which Winkler wittily refers to as “Heller’s Catch-22,”202 remains the most enduring question going forward. Some lower courts considering Second Amendment challenges have looked to the history of the right.203 Other courts have

196. WINKLER, supra note 3, at 287; see also Nelson Lund, The Second Amendment, Heller, and Originalist Jurisprudence, 56 UCLA L. REV. 1343, 1355 (2009) (noting that instead of a historical analysis, Scalia’s conclusion in Heller focused on the arms that modern Americans prefer to keep for self-defense and the reasons that these preferences are sensible).
199. WINKLER, supra note 3, at 288.
201. See Blackman, supra note 14, at 956 (“[T]he most significant portions of Heller for the lower courts are based on the same pragmatic—and not originalist—consideration of asserted social costs that may stem from gun ownership.”)
203. See, e.g., Ezell v. City of Chicago, 651 F.3d 684, 702 & n.11 (7th Cir. 2011) (“[T]his wider historical lens is required if we are to follow the Court’s lead in resolving questions about the scope of the Second Amendment by consulting its original public meaning as both a starting point and an important constraint on the analysis.”); id. at 702–03 (“Accordingly, if the government can establish that a challenged firearms law regulates activity falling outside the scope of the Second Amendment right as it was understood at the relevant historical moment—1791 or 1868—then the analysis can stop there; the regulated activity is categorically unprotected, and the law is not subject to further Second Amendment review.”); United States v. Masciandaro, 638 F.3d 458, 470 (4th Cir. 2011) (“[H]istorical meaning enjoys a privileged interpretative role in the Second Amendment context . . . .”).
remarked that the history only provides limited, if any, use in fleshing out the contours of firearm jurisprudence. Winkler fails to fully connect this past with the future, short of making the largely anachronistic argument that “[a]s the history of the right to bear arms and gun control shows, there is a middle ground in which gun rights and laws providing for public safety from gun violence can coexist.” However, the Supreme Court, and not Winkler, is at fault for this shortfall.

_Gunfight_ effectively and powerfully reminisces and pines for an earlier time of compromise and sensibleness—a veritable two-century-long golden era of gun control perhaps—where opponents and proponents of gun rights were able to work together in relative harmony in the legislative process to achieve common ends. Yet, it is not enough to simply say that things used to be better in the past—a time where the Second Amendment was effectively a dead letter, I might add—because for better or worse, we are in the midst of the culture war that Winkler so ably describes. For this reason, I am concerned that without solidifying the link between our shared traditions and today’s developing Second Amendment landscape—to the extent that is even possible—these sensible and respectable arguments may not lead to a ceasefire in our constitutional _Gunfight_ on the Supreme Court’s new battlefield.

Conclusion

_Gunfight_ was not written to make you an expert on the history of the Second Amendment or its evolving jurisprudence. It won’t. _Gunfight_ will not provide you with ammunition as to why all gun control laws are either unconstitutional or absolutely necessary. If you hold such an unwavering dogma, read elsewhere. Rather, by looking to the intervening two centuries between the ratification of the Second Amendment and _Heller_—where “the right to own a firearm has lived side by side with gun control”—_Gunfight_ finds a “middle ground in which gun rights and laws providing for public safety from gun violence can coexist.” There is no “need to choose between two absolutes—between unfettered gun rights on the one hand and

204. See, e.g., United States v. Skoien, 614 F.3d 638, 640 (7th Cir. 2010) (en banc) (“[The historical passages quoted] tell us that statutory prohibitions on the possession of weapons by some persons are proper—and, importantly for current purposes, that the _legislative role did not end in 1791_. That _some_ categorical limits are proper is part of the original meaning, leaving to the people’s elected representatives the filling in of details.” (first emphasis added)).

205. Nordyke v. King, 664 F.3d 776, 786, 788 (9th Cir. 2011) (holding that heightened scrutiny of a firearm-regulating law is triggered only when the law substantially burdens the right to keep and to bear arms under the Second Amendment and concluding that the ban on gun shows did not substantially burden that right). The Ninth Circuit in _Nordyke v. King_ did not even attempt to cite any historical sources to support its holding that a ban of gun shows on public property does not violate the Second Amendment.

206. WINKLER, supra note 3, at 295–96.

207. Id.
unfettered gun control on the other.\textsuperscript{208} For this, advocates and zealots on both sides of the gun debate owe Winkler a debt, as he brings some much-needed sanity, reasonableness, and moderation to the Supreme Court’s new battlefield.

\textsuperscript{208} \textit{Id.} at 296.