INTRODUCTION:

A NEW EMPIRICAL AND CULTURAL LOOK AT THE SECOND AMENDMENT

ROBERT WEISBERG

In 1989, Sanford Levinson issued perhaps the pivotal, and perhaps most-cited, modern paper on guns and the Constitution. Levinson admonished us that the Second Amendment was as much a part of the Bill of Rights as the amendments that were the main subjects of the Warren Court revolution in civil liberties and of modern legal scholarship’s rethinking of judicial review. This article made it impossible for us to demean the Second Amendment as unworthy of our academic attention simply because its subject matter seemed to have so little to do with progressive notions of civil rights because of its (for most academics) unattractive cultural associations and (for other academics) its worrisome questionable empirical assumptions.

Both the legal and empirical aspects of the Second Amendment and gun control soon thereafter led to voluminous writing. On the legal side, logically there was necessarily some discussion of the scope of some presumed right or the level of judicial scrutiny attached to it. But most of the energy focused on the great binary substantive question—the choice between the collective and individual rights readings of the amendment. The vexing semi-independent clause at the start of the (in)famous text of the amendment caused interpreters to treat the issue as all or nothing. This was true even though a purely individual rights model would at best roughly equate the Second Amendment with provisions no one ever doubted were “individual”—most obviously the,

* Edwin E. Huddleson, Jr. Professor of Law, Stanford University; Director, Stanford Criminal Justice Center.

2. E.g., Mathew S. Nosanchuk, The Embarrassing Interpretation of the Second Amendment, 29 N. Ky. L. Rev. 705, 779 (discussing how various “tiers” of review or levels of scrutiny could affect individual rights reading of the Second Amendment).
3. “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.”
fourth, fifth, and sixth—which were clearly subjected to all sorts of limitations even by the Warren Court itself and surely by the Courts that followed.4

The rise of the legal debate paralleled—though any possible causal relation between the two is uncertain causation—the empirical argument. Roughly put, some empiricists argued and purported to prove that widespread individual private gun ownership reduced crime by deterring would-be burglars and robbers and rapists with the fear that they would be shot by their intended victims.5 The abstract logic of this was perfectly sound. Victims are by definition at the scene of the crime when it occurs; police rarely can be. But even at this abstract level, there were doubters who invoked the question of costs and benefits: Some argued that that the deterrent (or actual incapacitating) benefits were outweighed by at least two sets of costs.

One cost was that an armed victim might provoke a weapons battle more likely to kill her than her attacker (a question with parallels to the issue of resistance in rape situations).6 The other cost was that in a more diffuse way the level of private gun ownership that would be necessary to achieve any deterrent effect on criminals would increase the incidence of accidental shootings or what I will roughly call the “semi-accidental” shootings done by angry impulsive people who would have cooled off before violence had a gun not been just coincidentally available.7 And then there was the counter-counter argument that most of these semi-accidental killings, even if they might look to the law as at worst manslaughters, were far more deliberate and purposive than the legal terminology might suggest, and that most such semi-accidental killers were malevolent and determined enough to find guns to kill anyway.8

But beneath this abstract discussion, the real empirical action was in econometric studies focused on the relationship between private gun ownership and violent crime rates. The criminologist Gary Kleck9 produced impressive

4. E.g., Terry v. Ohio, 392 U.S. 1 (1968) (Fourth Amendment permits stop-and-frisk of suspects on less than probable cause; opinion by Chief Justice Warren); Harris v. New York 401 U.S. 222 (1971) (Miranda rules do not apply to inculpatory statements introduced to impeach testifying defendant); United States v. Ash, 413 U.S. 300 (1973) (even after formal charges are filed, Sixth Amendment right of counsel does not apply to police use of photographic arrays).
7. E.g., JOSH SUGARMANN & KRISTEN RAND, CEASE FIRE: A COMPREHENSIVE STRATEGY TO REDUCE FIREARMS VIOLENCE 4 (1994) (most gun killing “stems from arguments that turn deadly because of ready access to a firearm”); Josh Sugarmann, The NRA Is Right—But We Still Need to Ban Handguns, WASH. MONTHLY, June 1987, at 11 (handgun violence not largely attributable to “predatory strangers” is “usually the result of people being angry, drunk, careless, or depressed—who just happen to have a handgun around”).
research suggesting that private guns really did reduce violent crime. John Lott then did follow-up research, specifically on the introduction of new expanded statutory rights to carry concealed weapons, and claimed to find similar results.\(^{10}\) Kleck’s research certainly encountered some rebuttal, but Lott’s work was especially strongly condemned as empirically unsound, most notably by John Donohue and Ian Ayres.\(^{11}\)

In this symposium, Saul Cornell, Adam Winkler, and David Hemenway offer sharp new interventions into these continuing debates, Cornell and Winkler on the legal side and Hemenway on the empirical.

Cornell is, with Jack Rakove\(^{12}\), one of the two leading interpreters of the second Amendment who have boldly addressed its meaning, not by choosing sides between the individual and collective models, but rather by reframing the question out of its binary form.\(^{13}\) And in this essay,\(^{14}\) Cornell continues his work in this vein in two key ways. First, he shows that from the start of American government, state restrictions on gun ownership were common, and a rare decision rejecting a gun restriction law under the state’s own constitution was quickly denounced by officials in Kentucky as wildly unsound.\(^{15}\) More specifically, Cornell shows that there is a venerable differentiation to be respected between “bearing arms” and “carrying guns.” The former means the kind of arms and the kind of wielding of them that enabled participation in armies, formal militias, or (back to this later) not-so-official roles as resisters of invasion, rebellion, or epidemics of crime. The latter is individual gun ownership that serves none of those purposes and involves non-military weapons that are all too useful in random criminal violence or feud-settling.

So Cornell usefully complicates any Golden Age notions by showing that not too many decades after the Founding, even in places where guns are thought to be revered, there was nothing inherently suspect about gun control laws and nothing absolute and pure about perceived rights to own guns. But more importantly, his distinction between bearing arms and carrying guns is

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13. Saul Cornell, Commonplace or Anachronism: The Standard Model, The Second Amendment, and the Problem of History in Contemporary Constitutional Theory 221 (1999) (although Pennsylvania was relatively pro-gun state in eighteenth century, Pennsylvanians were divided as to necessity of general right to bear arms, even among anti-Federalists, and gun-rights laws were very restrictive).
orthogonal to the individual vs. collective binary framing of the question. Precisely because there was a continuum of official and unofficial or formally organized and informally organized ways in which righteous citizens could be expected to help resist invasion or rebellion, the right to bear arms is just as “individual” as it is collective, even while it is normally subject to serious restrictions.

Winkler usefully undermines the primary predicate of the constitutional debate in a different way.\(^\text{16}\) Even if the individual rights argument could win at some level of generality, the legal consequences of such a victory are far from what the debate has generally assumed. Specifically, serious constitutional scrutiny of gun control laws leads to affirmance of the constitutionality of these laws. Winkler probably believes it does so “lead” on logical doctrinal grounds. Indeed, proponents of strong judicial review of even an individual right could suggest that the best analogies are the criminal procedure amendments, which do not invoke the vocabulary of tiers of scrutiny as does equal protection or perhaps free speech. But Winkler’s main thesis is one of straightforward legal empirics—constitutional scrutiny, at least under state constitutions, in fact leads to such affirmance, as demonstrated by the powerful synthesis he has done of the lots and lots of courts that have already performed judicial review of gun control laws without relying on the collective rights model. Overwhelmingly, judicial behavior suggests that whatever abstract model of review one chooses, our system seems inherently prone to upholding most such laws as, to put in bluntly, reasonable.

On the empirical side, David Hemenway in one sense does a conventional reframing of the harm argument about costs and benefits.\(^\text{17}\) A public health expert, he follows the tack of insisting that the gun violence problem in America be treated as a public health problem, not a legal rights or even a criminal justice problem. That itself may not be novel, and by itself it might lead to no more than rhetorical reorientation of the cost-benefit question, not an answer; or, at best, it could be a reframing that spurs empiricists to look more thoughtfully for empirical data. But the originality of his contribution lies not so much in this reframing but in its specific focus on one set of data that emerges from the public health approach: large numbers of children get killed by guns, and more of them per capita get killed by guns in states that have laxer gun control rules.

This is where the unique nature of Hemenway’s argument lies. First, the empirical debate about the social efficacy of right to carry laws focuses on the mathematically observable (in theory) relationship between gun ownership and violent crime rates. But many, if not most, child deaths from guns are from true

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Hemenway would suggest, child deaths are an undeniable social cost that cannot be rationalized by the equations of the defensive gun use debate. To put it differently, the counter-counter argument about semi-accidental gun deaths, which says that many impulsive killings are not very accidental at all and hence not so preventable by gun restrictions, cannot address the accidental killings of children. Thus, Hemenway’s report puts greater pressure on the pro-gun ownership side of the debate to argue one of the following: (a) Even the independent deadweight social cost of accidental killings of children is outweighed by the social benefits—including the protection of children that results from widespread gun ownership; and/or (b) Relatively noninvasive and constitutionally uncontroversial legal restrictions on gun use—or perhaps voluntary preventive measures and education could reduce these child deaths. We will see if any of these responses is forthcoming.

But gun scholarship has moved beyond the legal and the empirical to the cultural. Indeed, the legal and the empirical dimensions require reference to the cultural because they are to some degree cultural themselves. Even originalist or textual construction of the Amendment requires some understanding of the way guns and law operate in American social understanding. And even empiricists must acknowledge that costs and benefits sometimes depend on the interpretable meaning of the categories into which data fall.

The cultural dimension of the gun debate is dazzlingly captured by a deceptively subordinate passage in Carole Emberton’s essay on the gun debates and Reconstruction.18 White Democrats and indeed Klansmen who resisted Reconstruction fancied themselves members of an authentic militia; they used the forms and protocols of the colonial militias as they organized themselves in armed resistance to and sabotage of state governments established by Reconstruction. And yet one of the things they were fighting was the threatening power of the Black militias, formed of freed slaves after the War, and deployed by state governments to enforce new Republican authority. How is it that these violently opposed forces both thought they constituted something pure like a militia? This is more than a matter of two opposing forces using similar military forms, structures, or techniques. Rather, it is a remarkable example of the two most violently opposed forces in late Nineteenth-Century America both drawing on the moral, legal, and political capital of a self-conception of both individual and collective identities that lies at the center of the gun debate.

To situate this issue first back on the legal side: As the legal debate over the Second Amendment has matured, the binary nature of it has, as I have said, broken down in the face of research like Cornell’s. That is, modern scholarship on the militia shows that this cultural and political and legal concept

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(phenomenon? form of social organization?—the vocabulary problem is itself a striking feature of this research) that supposedly embodies represents the collective side of the debate is in fact an amazingly malleable thing. Yes, it represents a certain type of (episodically) official governmental, military, or police force. Yes, it sometimes is a not so official but somewhat legal and legitimate form of social organization that can help protect the social order without necessarily impinging on official authority. Yet, it sometimes justifies the stereotype of the vengeful vigilante groups that do indeed subvert official authority. But also, it represents an individual self conception of the virtual kind of citizen-model, a mixture of participation on populist sentiment, a figure of modeling appropriately public-minded behavior, and embodiment of disinterested civilized values.

Three of the papers in this symposium make rich new contributions to elaborating this central new theme in the gun control and Second Amendment debates. William Merkel’s paper is itself a superb review and synthesis of the recent scholarship on precisely this theme—a perfect guide to the way that the Second Amendment, of all things, has been the spur to some of the most innovative cultural anthropology of law anywhere in the legal academy. Merkel shows how Second Amendment studies have become a whole new department of American Studies—a combination of history, folklore, and mythology, and yet nevertheless an interpretive enterprise very much relevant to doctrinal understanding of the meaning of the Fourteenth Amendment and the interrelation of the Bill of Rights and Privileges and Immunities Clause.

As already noted, Carole Emberton’s article addresses the conflicting roles of the Black Militias in its various forms (including in a sense, the direct participation of Blacks in the Metropolitan Police Force in New Orleans), and the racist groups that were appalled by the new armed power of Blacks and for that and other reasons tried to overthrow the new Republican state governments. As Emberton shows in this striking new research, the battle was not just over who would run the state and whether Blacks would have power or even rights—it was a battle for the cultural capital of the populist citizen identity associated with the militia form. And as a corollary, each side felt that its right to play that role was embodied in the Second Amendment, and each thought the denial of guns to the other side was a right limitation within the Second Amendment.

Finally, to return to cultural anthropology of law, no better example could be found than Joan Burbick’s innovative study of the almost indescribable

phenomenon of the modern gun show. 21 Others have helpfully explained the operations of these gun shows in connection to the strange immunity they enjoy under federal gun control law.22 But no one before has so exploited the wonderful interpretive possibilities of that description. The gun show is the perfect plastic, multiple venue/vehicle for every possible aspect of the militia phenomenon and the concept of the virtuous citizen as bearer of arms. The show, as Burbick illustrates, has everything to be found in American society. It is a great commodification of the symbolism of the Second Amendment. The American tradition of gun advertisements as simultaneously political statements about gun populism are fully realized in these sales bazaars of guns themselves and decorative paraphernalia along with them. The show is also like medieval costume far where homage is paid to old values—or, as Burbick nicely notes—the equivalent of a Civil War reenactment society honoring the soldier-citizen heroes of the past for their sacrifices. It is also, of course, a political rally and a place where the free speech content of Second Amendment principles find material form.

This collection is both a tour of how Second Amendment scholarship looks in its young maturity, and a collection of the most innovative new insights that scholarship has produced.

22. JAMES B. JACOBS, GUN SHOWS AND GUN CONTROLS, IN GUNS, CRIME, AND PUNISHMENT IN AMERICA 299 (Bernard E. Harcourrt ed. 2003).