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New Approaches to Old Questions in Gun Scholarship

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NEW APPROACHES TO OLD QUESTIONS IN GUN SCHOLARSHIP

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PHILIP J. COOK & KRISTIN A. GOSS, THE GUN DEBATE: WHAT EVERYONE NEEDS TO KNOW (2014). Pp. 296. Hardcover $ 74.00.

THE SECOND AMENDMENT ON TRIAL: CRITICAL ESSAYS ON *DISTRICT OF COLUMBIA V. HELLER* (Saul Cornell & Nathan Kozuskanich, eds., 2013). Pp. 456. Hardcover $ 80.00.

NICHOLAS JOHNSON, NEGROES AND THE GUN: THE BLACK TRADITION OF ARMS (2014). Pp. 379. Hardcover $ 19.95.

AKINYELE OMOWALE UMOJA, WE WILL SHOOT BACK: ARMED RESISTANCE IN THE MISSISSIPPI FREEDOM MOVEMENT (2013). Pp. 351. Paperback $ 23.00.

CRAIG WHITNEY, LIVING WITH GUNS: A LIBERAL'S CASE FOR THE SECOND AMENDMENT (2012). Pp. 304. Hardcover $ 28.99.

Perhaps no area of constitutional law has been so shaped by scholarship in recent years as the Second Amendment. The story of that influence has been ably told elsewhere, and the details and characters deserve individual recognition, but for the purposes of this review essay the short version will have to do: Over the past few decades, a committed group of scholars, lawyers, and activists worked tirelessly to articulate, justify, and popularize the view that the Second Amendment protects an "individual" right to keep and bear arms disconnected from militia service.[1] That view found popular support,[2] but had little direct Supreme Court precedent behind it. Then, in *District of Columbia v. Heller*[3] and *McDonald v. City of Chicago*,[4] the Court endorsed the "individual" right view, and—

* Professor, Duke Law School. Many thanks to Darrell Miller for thoughtful criticism, and to Alyssa Rutsch for excellent research assistance.

1. *See* ADAM WINKLER, GUNFIGHT: THE BATTLE OVER THE RIGHT TO BEAR ARMS IN AMERICA 95–97 (2011); Reva B. Siegel, *Dead or Alive: Originalism as Popular Constitutionalism in* Heller, 122 HARV. L. REV. 191, 239 (2008).

2. *See* Jeffrey M. Jones, *Public Believes Americans Have Right to Own Guns*, GALLUP (Mar. 27, 2008), http://www.gallup.com/poll/105721/Public-Believes-Americans-Right-OwnGuns.aspx (showing that seventy-three percent of Americans believe that the Second Amendment guarantees the right to own guns outside of militia membership).

3. District of Columbia v. Heller, 554 U.S. 570 (2008).

4. McDonald v. City of Chicago, 130 S. Ct. 3020, 3050 (2010) (incorporating the Second Amendment against the states).

despite the Justices' occasional public jabs at the irrelevance of academic work[5]—did so based largely on scholarship. In *Heller*, the Court cited more scholarly and journalistic works, and cited those works more often, than legislative history and case law combined.[6] *McDonald* had a higher proportion of citations to case law, in part, because it was an incorporation case and therefore had well-established doctrine to draw from, but scholarly and journalistic works still made up nearly half of the sources and citations.[7] Whatever one thinks of guns, the Second Amendment, or the Court's originalist methodology, this is inspiring stuff for scholars who dream of "having an impact" on law.

But *Heller* and *McDonald* provoked as many questions as they answered. For most people, the important question is not whether the Second Amendment protects an individual right in some conceptual sense, but what kinds of gun regulation it permits. The Court gave its blessing to many kinds of gun control,[8] but did so using a methodology that lower courts have struggled to reverse-engineer. To the frustration of some scholars and advocates, the Court has declined dozens of invitations to revisit or clarify its holdings.[9]

The resulting void invites and practically demands more scholarship. This review will focus on three areas that appear particularly fruitful. First, *Heller* undeniably encourages (some say requires)[10] careful study of history. Scholarship about the historical use and regulation of guns therefore remains exceedingly important. Two new additions to the literature—Nicholas Johnson's *Negroes and the Gun: The Black Tradition of Arms*[11] and Akinyele Omowale Umoja's *We Will Shoot Back: Armed Resistance in the Mississippi Freedom Movement*[12]—focus on the relatively underexplored historical issue of gun ownership and use by black Americans, especially in response to racist violence.

Second, and despite *Heller*'s focus on history, many courts and scholars have argued that gun policy and Second Amendment doctrine are inevitably, and properly, attentive to

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5. *See* Jonathan H. Adler, *Chief Justice Roberts and Current Legal Scholarship*, THE VOLOKH CONSPIRACY (July 23, 2011, 11:07 AM), http://www.volokh.com/2011/07/23/chief-justice-roberts-and-current-legal-scholarship/; *Law Prof. Ifill Challenges Chief Justice Roberts' Take on Academic Scholarship*, AM. CONST. SOC'Y L. & POL'Y (July 5, 2011), http://www.acslaw.org/acsblog/law-prof-ifill-challenges-chief-justice-roberts'--take-on-academic-scholarship (discussing Chief Justice Roberts' comments about legal scholarship being disconnected).

6. Treatises, books, collections, law review articles, online articles, and newspaper articles account for ninety-four of the 175 sources cited by the majority. Dictionaries account for another six. The remainder includes all federal and state cases, all state and federal statutes, state constitutions, and legislative history. Those ninety-four sources make up 136 of the 270 citations in the opinion (150 if one counts dictionaries). I am grateful to Alyssa Rutsch, Duke Law Class of 2015, for reviewing the citations in *Heller* and *McDonald*.

7. Treatises, books, collections, law review articles, online articles, and newspaper articles account for thirty-seven of the seventy-six sources cited by the *McDonald* majority, and fifty-four of the 119 citations.

8. *Heller*, 554 U.S. at 626-27 (affirming the constitutionality of "longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places . . . [and] laws imposing conditions and qualifications on the commercial sale of arms.").

9. *See, e.g.*, Damon Root, *Supreme Court Refuses to Hear Major Second Amendment Case*, REASON (May 5, 2014, 9:52 AM), http://reason.com/blog/2014/05/05/supreme-court-refuses-to-hear-major-seco ("The U.S. Supreme Court has not heard a single Second Amendment case since issuing its landmark gun rights rulings in *District of Columbia v. Heller* (2008) and *McDonald v. Chicago* (2010). . . . It now appears the Supreme Court is content to let the lower courts keep rubberstamping away.").

10. *See* Peruta v. Cnty. of San Diego, 742 F.3d 1144, 1167 (9th Cir. 2014) (criticizing the district court for failing to do a full historical analysis).

11. NICHOLAS JOHNSON, NEGROES AND THE GUN: THE BLACK TRADITION OF ARMS (2014).

12. AKINYELE OMOWALE UMOJA, WE WILL SHOOT BACK: ARMED RESISTANCE IN THE MISSISSIPPI FREEDOM MOVEMENT (2013).

contemporary costs and benefits.[13] In the hope that such facts and empirics might still have some influence over policy or doctrine,[14] these scholars have focused primarily on measuring attitudes, costs, and benefits regarding gun ownership. Philip J. Cook and Kristin A. Goss's *The Gun Debate: What Everyone Needs to Know*[15] does that and more, providing a comprehensive account of the law, history, use, and misuse of guns.

A third area of scholarship seeks to find—or perhaps create—a functional public or scholarly discourse regarding guns. Many veterans of the gun "debate" seem skeptical that this is possible: the strong pull of cultural and identity politics[16] and the apparent strength of interest groups who have no incentive to compromise or end the debate mean that room for engagement is hard to find. Two new books that try to create and fill that space are Saul Cornell and Nathan Kozuskanich's *The Second Amendment on Trial: Critical Essays on* District of Columbia v. Heller[17] and Craig Whitney's *Living with Guns: A Liberal's Case for the Second Amendment*.[18] In different ways, each book tries to facilitate engagement between gun rights supporters and gun control advocates.

These distinctions are artificial, of course, and all five books address each topic. More generally, the books suggest some hope for progress in an area where scholarly engagement has often been hard to come by. At times, as in the political debate about guns, "[t]here appears to be no bridge between the two sides."[19] Allegations of bad faith or results-oriented research are not unknown,[20] and some gun scholarship has indeed been discredited or disgraced.[21] Some scholars have all but given up on the possibility of

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13. *See* Allen Rostron, *Justice Breyer's Triumph in the Third Battle over the Second Amendment*, 80 GEO. WASH. L. REV. 703, 706-07 (2012) (explaining that "lower courts' decisions strongly reflect the pragmatic spirit" of Justice Breyer's dissenting opinion in *Heller*); *see also* Joseph Blocher, *Categoricalism and Balancing in First and Second Amendment Analysis*, 84 N.Y.U. L. REV. 375, 375 (2009) (predicting that balancing tests will "almost inevitably" become a part of Second Amendment doctrine, notwithstanding *Heller*'s purported categoricalism).

14. *Compare* Donald Braman et al., *Modeling Facts, Culture, and Cognition in the Gun Debate*, 18 SOC. JUST. RES. 283, 285 (2005) ("[C]ulture is prior to facts in resolving the gun debate.") *with* Philip J. Cook & Jens Ludwig, *Fact-Free Gun Policy?*, 151 U. PA. L. REV. 1329, 1329-30 (2003) ("[F]actual information has helped steer popular opinion . . . in the area of guns. And, equally important, empirical research may affect public policy directly, independent of its influence on public opinion, by informing the decisions of courts, bureaucrats, and other actors in the policymaking process.").

15. PHILIP J. COOK & KRISTIN A. GOSS, THE GUN DEBATE: WHAT EVERYONE NEEDS TO KNOW (2014).

16. Zell Miller, *The Democratic Party's Southern Problem*, N.Y. TIMES, June 4, 2001, at A17 ("Gun control . . . is about values. What you are for says a lot about who you are and who you aren't."); David Brooks & Gail Collins, *What We Talk About When We Talk About Guns*, N.Y. TIMES OPINIONATOR (July 25, 2012, 1:22PM), http://opinionator.blogs.nytimes.com/2012/07/25/what-we-talk-about-when-we-talk-about-guns/?php=true_&_type=blogs&_r=0 ("David [Brooks]: 'The gun control debate is no longer about guns. It's a culture war between urbanites and rural people.'").

17. THE SECOND AMENDMENT ON TRIAL: CRITICAL ESSAYS ON *DISTRICT OF COLUMBIA V. HELLER* (Saul Cornell & Nathan Kozuskanich eds., 2013).

18. CRAIG WHITNEY, LIVING WITH GUNS: A LIBERAL'S CASE FOR THE SECOND AMENDMENT (2012).

19. Erwin Chemerinsky, *Putting the Gun Control Debate in Social Perspective*, 73 FORDHAM L. REV. 477, 481 (2004).

20. *See* STEVEN D. LEVITT & STEPHEN J. DUBNER, FREAKONOMICS: A ROGUE ECONOMIST EXPLORES THE HIDDEN SIDE OF EVERYTHING 133-34 (2005) (recounting "the troubling allegation that [John] Lott actually invented some of the survey data that support his more-guns/less-crime theory." and reporting that "[w]hen other scholars have tried to replicate his results, they found that right-to-carry laws simply don't bring down crime."); *cf.* Lott v. Levitt, 556 F.3d 564, 566-70 (7th Cir. 2009) (upholding dismissal of a defamation claim brought by John Lott against Steven Levitt on the basis of this passage).

21. *See generally* James Lindgren, *Fall from Grace:* Arming America *and the Bellesiles Scandal*, 111 YALE L.J. 2195 (2002) (reviewing Michael Bellesiles's *Arming America: The Origins of a National Gun Culture* (2000), a favored reference of gun control supporters, and identifying numerous errors and apparent falsifications in the book's historical analysis).

reasoned persuasion in the political struggle over guns, concluding that "competing cultural visions . . . drive the gun control debate."[22] One hopes that the scholarly debate, at least, leaves room for something more.

I. HISTORY

The Supreme Court's two major gun decisions are good news for scholars of gun–related history. They both (*Heller* in particular) claim to rely heavily on historical analysis, and have been simultaneously celebrated as paragons of originalism[23] and denigrated as flawed law office history.[24] Whatever their virtues or vices, the Court's opinions both rely on existing gun scholarship and generate a need for more of it. For example, the Court provided no citations to support its suggestion that various forms of gun control—including bans on possession by felons—are constitutional, suggesting that "there will be time enough to expound upon the historical justifications for the exceptions we have mentioned if and when those exceptions come before us."[25] Lawyers, judges, and historians have dutifully tried to fill in the footnotes, but it seems that some of the Court's historical assumptions are simply unfounded.[26]

Whether or not it is directly motivated by the Supreme Court's historicist opinions in *Heller* and *McDonald*, scholarship addressing the history of gun use and regulation has become increasingly important to our understanding of the Second Amendment. Akinyele Omowale Umoja's *We Will Shoot Back* is a welcome addition to this literature. In it, Umoja tells the story of black[27] Americans in Mississippi who, during the Civil Rights Movement, turned to armed self-defense as a means of protection against racist violence and oppression.[28] Umoja persuasively argues that "armed resistance was critical to the efficacy of the southern freedom struggle and the dismantling of segregation and Black disenfranchisement."[29] That armed resistance was largely individualized and ad hoc throughout the 1950s and early 1960s, but became more organized in the mid-1960s with

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22. *See* Donald Braman & Dan M. Kahan, *Overcoming the Fear of Guns, the Fear of Gun Control, and the Fear of Cultural Politics: Constructing a Better Gun Debate*, 55 EMORY L.J. 569, 571 (2006); *see also* WINKLER, *supra* note 1, at 14 ("The debate over guns is usually portrayed as a cultural battle between urban and rural, with the latter seeing guns as part of their cultural heritage of hunting."); Brannon P. Denning, *In Defense of a "Thin" Second Amendment: Culture, the Constitution, and the Gun Control Debate*, 1 ALB. GOV'T L. REV. 419, 420 (2008) ("The gun control debate is at bottom a cultural debate.").

23. *See e.g.* Randy E. Barnett, *News Flash: The Constitution Means What It Says*, WALL ST. J., June 27, 2008, at A13 ("Justice Scalia's opinion is the finest example of what is now called 'original public meaning' jurisprudence ever adopted by the Supreme Court.").

24. McDonald v. City of Chicago, 130 S. Ct. 3020, 3021 (2010) (Breyer, J., dissenting) ("Since *Heller*, historians, scholars, and judges have continued to express the view that the Court's historical account was flawed.").

25. District of Columbia v. Heller, 554 U.S. 570, 635 (2008).

26. United States v. McCane, 573 F.3d 1037, 1047-49 (10th Cir. 2009) (Tymkovich, J., concurring) (questioning whether felon-in-possession rules are "longstanding"); Carlton F.W. Larson, *Four Exceptions in Search of a Theory:* District of Columbia v. Heller *and Judicial Ipse Dixit*, 60 HASTINGS L.J. 1371, 1374-76 (2009). *See also* Rostron, *supra* note 13, at 731-32 ("Although Justice Scalia's opinion in *Heller* characterized disarming felons as a longstanding tradition, federal law did not disqualify any felons from possessing firearms until 1938 and did not disqualify nonviolent felons until 1961.").

27. Umoja capitalizes "Black" throughout his book. UMOJA, *supra* note 12. Johnson considers doing so but does not. JOHNSON, *supra* note 11, at 11. I follow Johnson, and the general law review practice, in not capitalizing the word.

28. *See* UMOJA, *supra* note 12.

29. *Id.* at 2.

the emergence of "paramilitary groups" in some areas.[30] And, even as late as the 1970s, groups like the United League relied on armed resistance to fight back against racist violence perpetuated by the Klan.[31]

One of the many virtues of Umoja's account is that it not only weaves together anecdotes and stories of individuals, but also shows how institutional players in the Civil Rights Movement—the NAACP, Congress of Racial Equality (CORE), and Student Nonviolent Coordinating Committee (SNCC), for example—were forced to confront the issue of armed self-defense.[32] The standard version of the story emphasizes the Movement's commitment to nonviolence, and Umoja does not minimize or denigrate that commitment. He argues, however, that armed resistance and self-defense must be recognized as a crucial part of the history as well.[33] In many cases, the division was between the national-level organizations, which publicly maintained their commitment to nonviolence, and the individual Mississippi residents who hosted and protected the organizers.[34] The result is a history that moves seamlessly between the individual and the Movement (or perhaps movements, since Umoja emphasizes that armed self-defense was heavily debated in the Civil Rights Movement but widely accepted in the Black Power Movement).[35]

Indeed, Umoja illustrates the degree to which movement leaders struggled to maintain a public message of nonviolence despite their own private preference, in some cases, for armed resistance. Describing the position of Medgar Evers,[36] Umoja puts the point clearly: "Although Evers realized that the image of armed Blacks was not 'good public relations,' he possessed weapons as a matter of survival."[37] (Nicholas Johnson, too, notes how many movement leaders "embraced private self-defense and political nonviolence without any sense of contradiction.")[38]

Since this review is being written by a law professor and published in a law review, it is worth noting that law itself is rarely on stage in Umoja's story. This is not to say that law is unimportant, only that it is notable primarily for its conspicuous absence—as when a federal district court judge refused to reinstate two black police officers who had been fired because they refused to wear patches of the Confederate battle flag on their uniforms[39]—or uneven enforcement—as when sheriffs, the FBI, and state police raided a house and arrested ten black activists on trumped-up charges of stealing a car.[40] Vile and violent racism, both private and state-sponsored, provides all the villainy the book needs.

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30. *Id.*; *see also id.* at 130-47 (describing the Deacons of Defense); *id.* 186-91 (describing the Provisional Government of the Republic of New Africa).

31. *Id.* at 211-53.

32. *See, e.g.*, *id.* at 50-82 (describing initial interaction between these groups' professed commitment to nonviolence and the tradition of armed self-defense in the Mississippi communities where they worked); *id.* at 86-89 (describing SNCC's internal debate).

33. *Id.* at 2.

34. *Id.* at 83-120.

35. *Id.* at 7.

36. *Id.* at 39-47 (describing how Medgar Evers' position with the NAACP "constrained his public posture on armed resistance," despite his private support for armed self-defense and resistance).

37. *Id.* at 49.

38. JOHNSON, *supra* note 11, at 13.

39. UMOJA, *supra* note 12, at 174-75.

40. *Id.* at 196.

And the men and women who fight back are heroes enough for many books: E.W. Steptoe,[41] Vernon Dahmer,[42] Hartman Turnbow,[43] and the "legendary" C.O. Chinn.[44]

Nicholas Johnson's *Negroes and the Gun*—the title is a callback to Robert F. Williams *Negroes with Guns*[45]—tells the stories of these and other courageous men and women, with the explicit goal of recognizing them as heroes and valorizing a "tradition" of gun use and ownership by black Americans. Johnson is explicit about his desire to find "a Leonidas,"[46] and he compares the armed self-defenders in his book to "gallant young cavalrymen charging artillery placements with sabers."[47] He argues that gun use and ownership constituted a tradition embraced by "the very best people in the community,"[48] and his language makes clear that he celebrates this "rich vein of grit and steel."[49] He comes to praise the tradition, not to bury it.

Johnson begins his story earlier than Umoja, in the horror of slavery and the dark days following Reconstruction, when the old regime was doing everything possible to perpetuate itself. Like Umoja, Johnson relates stories of racist violence perpetrated by whites who were often aided and abetted by the state itself. These stories are shocking even when they are all too familiar, and Johnson tells them well. And whatever one's feelings on gun rights and gun control, or even on violence and nonviolence, the sheer courage of the men and women who fought back all but valorizes itself.

In addition to covering more historical ground than Umoja, Johnson has a different emphasis. Much more than Umoja, Johnson attempts to identify lessons for contemporary debates on gun control and gun rights. It is important, therefore, to have a clear sense of exactly what "tradition" he has identified. Johnson seems to define it broadly as "a long tradition of black men and women who thought it just and natural to answer aggression with corresponding force,"[50] and even as a "self-defense impulse."[51] Thus defined, one can imagine how the tradition would be relevant to contemporary discussions of guns.

But it is also possible to understand the evidence, and to define the tradition, based on historical context. Nearly all of Johnson's stories involve black Americans defending themselves against organized, endemic, and sometimes state-perpetuated violence by white racists. One might very well celebrate this tradition of resistance while questioning its relevance for debates about how to stop what Johnson calls "the tragic plague of violent

41. *Id.* at 59-63.

42. *Id.* at 65-66.

43. *Id.* at 73-76.

44. *Id.* at 77-81.

45. ROBERT F. WILLIAMS, NEGROES WITH GUNS (1962) (arguing against uncritical acceptance of pacifism in the civil rights movement); *see also* TIMOTHY TYSON, RADIO FREE DIXIE: ROBERT F. WILLIAMS AND THE ROOTS OF BLACK POWER 289 (2001) (discussing Williams's *Negroes with Guns*).

46. JOHNSON, *supra* note 11, at 14-15.

47. *Id.* at 15.

48. *Id.* at 13. *See also id.* at 105 (describing how "Ida B. Wells. . . . a four-and-a-half-foot tall colored schoolteacher" stated that "'[t]he Winchester rifle deserves a place of honor in every Black home.'"); *id.* at 108 (emphasizing that educated and respected men such as "W.E.B. Du Bois . . . [and] his classmates . . . were habitually armed whenever they ventured into the city."); *id.* at 177 (noting that in the early twentieth century, many armed blacks were "[l]ocal veterans . . . active in defending the community . . . ."); *id.* at 305-06 (referring to gun owners as "good people").

49. *Id.* at 17.

50. *Id.*

51. *Id.* at 36, 117, 124, 125, 244.

young black men with guns and the toll that this violence takes on many black communities."[52] The tragedy of that plague is difficult to overstate. Homicide is now the leading cause of death for black men ages fifteen to thirty-four.[53] Most of those homicides are committed with guns,[54] and most of them are committed by other young black men.[55] Should this plague of distinctly urban[56] violence be answered in the same way as state-sponsored oppression by the Klan in the late 1800s?

Just as the reader might question the relevance of what Johnson is arguing for, one might also ask exactly what he is arguing against. In the book and in other scholarly work,[57] Johnson defines his target as the "modern orthodoxy."[58] This, he says, advocates "supply-control" policies—policies seeking to limit or even ban guns—based on the assumption that "no gun equals no gun crime."[59] Johnson traces the roots of this orthodoxy to "a particular strand of civil-rights advocacy and political strategy that prevailed over" black radical groups that "invoke[d] self-defense as a justification for overt political violence."[60]

If this is the orthodoxy, it is a phantom threat to gun rights—a politically powerless minority that failed to get its way even before *Heller* made prohibitionism unconstitutional. No more than a quarter of Americans support banning guns,[61] and even the leading gun control proponents pledge support for the Second Amendment and publicly advocate gun restrictions that have little in common with broad bans.[62]

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52. *Id.* at 14.

53. *Leading Causes of Death by Age Group, Black Males—United States 2010*, CTRS. FOR DISEASE CONTROL AND PREVENTION, http://www.cdc.gov/men/lcod/2010/LCODBlackmales2010.pdf (last visited Oct. 9, 2014); *see also* JOHNSON, *supra* note 11, at 302 ("[H]omicide remains the leading cause of death among black males between fifteen and twenty four years of age.") (quoting WILLIAM OLIVER, *The Structural-Cultural Perspective: A Theory of Black Male Violence*, *in* VIOLENT CRIME: ASSESSING RACE AND ETHNIC DIFFERENCES 282-83 (Darnell F. Hawkins ed., 2003)).

54. Charles H. Hennekens et al. *Mortality from Homicide among Young Black Men: A New American Tragedy*, AM. J. MED. (Jan. 17, 2013), *available at* http://www.amjmed.com/article/S0002-9343(12)00638-9/fulltext.

55. *See* JOHNSON, *supra* note 11, at 301, 308; ALEXIA COOPER & ERICA SMITH, HOMICIDE TRENDS IN THE UNITED STATES, 1980-2008 13 (2011), *available at* www.bjs.gov/index.cfm?ty=pbdetail&iid=2221 (prepared for the U.S. Department of Justice) (stating that from 1980 to 2008, "93% of black victims were killed by blacks.").

56. A 2006-2007 study from the Centers for Disease Control and Prevention found that "[t]he 62 center cities of America's 50 largest metro areas account for 15 percent of the population but 39 percent of gun-related murders . . . ." Richard Florida, *A Growing Divide in Urban Gun Violence*, ATLANTIC CITIES (Jan. 10, 2013), http://www.theatlanticcities.com/neighborhoods/2013/01/growing-divide-urban-gun-violence/4328. Johnson says that his book is "motivated by a rural sensibility," and most of its action takes place in rural areas. JOHNSON, *supra* note 11, at 14. I share Johnson's belief that this sensibility is important, and I have argued for stronger gun rights in rural areas. Joseph Blocher, *Firearm Localism*, 123 YALE L.J. 82, 85 (2013). But of what relevance is that "sensibility" to cities (generally the only places in the country with stringent gun control) racked by gun violence? *Id.* at 87-88 (arguing that, whether it is grounded in historical practice or contemporary cost-benefit analysis, Second Amendment doctrine should give more leeway to gun control in urban areas).

57. *See, e.g.*, Nicholas J. Johnson, *Firearms Policy and the Black Community: An Assessment of the Modern Orthodoxy*, 45 CONN. L. REV. 1491, 1495 (2013).

58. JOHNSON, *supra* note 11, at 14, 286.

59. *Id.* at 297.

60. *Id.* at 286.

61. Lydia Saad, *Americans Want Stricter Gun Laws, Still Oppose Bans*, GALLUP (Dec. 27, 2012), http://www.gallup.com/poll/159569/americans-stricter-gun-laws-oppose-bans.aspx (finding that only twenty-four percent of Americans favor banning the possession of handguns).

62. *See, e.g.*, *Background Checks Safe*, EVERYTOWN FOR GUN SAFETY, http://everytown.org/learn/ (last visited Nov. 29, 2014) (stating that "Support for the Second Amendment goes hand-in-hand with keeping guns

Washington, DC and Chicago (the two cities whose laws were struck down in *Heller* and *McDonald*) were the only major metropolitan areas that banned handguns in recent decades, and not even they banned guns altogether. Whatever this is, it is not an "orthodoxy."

Mischaracterizing the orthodoxy not only misses an opportunity to engage with actual mainstream gun proposals, it also needlessly exaggerates the threat to gun owners. When discussing gun control, Johnson sometimes refers to gun "bans"[63] as if gun prohibition were a serious threat despite being unpopular, politically impossible, and unconstitutional.[64] Perhaps contemporary leaders of the gun control community secretly harbor that ambition, or once did,[65] but one would be hard-pressed to find it in their public statements and the proposals they have put forward: universal background checks, for example, or laws against high-capacity magazines. The threat of complete disarmament, and the suggestion that someone might actually be pursuing it, is an incredibly powerful tool for fundraising,[66] but it does not do much to advance the scholarly debate.

To be sure, there is still broad support for reasonable gun laws—support that nevertheless seems to flounder against more entrenched and motivated opposition. The Senate's failure to approve universal background checks, despite support from ninety percent of Americans and even seventy-four percent of NRA members, is extraordinary but not unrepresentative.[67] And gun control is indeed popular among racial minorities—more so than among white Americans.[68] But this does not mean that supporters of gun control regard black supporters of gun rights as "dupes or fools."[69] One hopes, at least, that it is still possible for partisans of both sides to impute good faith to those with whom

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away from criminals and other dangerous people."); *Brady Center, Victims' Families, Law Enforcement Urge Federal Appeals Court To Review and Reverse Ruling Invalidating Illinois Restrictions on Carrying Guns in Public*, *Brady Campaign to Prevent Gun Violence*, BRADY CAMPAIGN TO PREVENT GUN VIOLENCE (Jan. 9, 2013), http://www.bradycampaign.org/brady-center-victims%E2%80%99-families-law-enforcement-urge-federal-appeals-court-to-review-and-reverse (containing statement from Brady Center Legal Action Project Director Jonathan Lowy that he supports "reasonable public safety laws [that] do not infringe on the Second Amendment rights of law-abiding citizens"); *see also* Molly Ball, *How the Gun-Control Movement Got Smart*, THE ATLANTIC (Feb. 7, 2013, 7:00 AM), http://www.theatlantic.com/politics/archive/2013/02/how-the-gun-control-movement-got-smart/272934/ (stating that, unlike gun-control advocates of 15 years ago, today's gun-control proponents do not seek to "confiscate law-abiding Americans' legally acquired firearms and instigate federal-government monitoring of all gun owners").

63. *See, e.g.*, JOHNSON, *supra* note 11, at 286, 297, 302, 304.

64. Johnson has been criticized elsewhere for imputing prohibitionism to those who merely favor some degree of gun control. Michael de Leeuw, *Let Us Talk Past Each Other for a While: A Brief Response to Professor Johnson*, 45 CONN. L. REV. 1637, 1642 (2013) (objecting to Johnson's characterization of the author as supporting constitutionality of "gun prohibition").

65. One recent column imputing prohibitionism to gun control supporters builds its case using a quote from 1976. David T. Hardy, *Why Gun Owners Are Right to Fight Against Gun Control*, REASON (July 18, 2013), http://reason.com/archives/2013/07/18/why-second-amendment-supporters-are-righ.

66. OSHA GRAY DAVIDSON, UNDER FIRE: THE NRA AND THE BATTLE FOR GUN CONTROL 149-50 (1993).

67. Polls indicated that before the Senate vote, more than ninety percent of Americans favored universal background checks, including seventy-four percent of NRA members. Scott Clement, *90 percent of Americans want expanded background checks on guns. Why isn't this a political slam dunk?*, WASH. POST FIX (Apr. 3, 2013, 11:10 AM), http://www.washingtonpost.com/blogs/the-fix/wp/2013/04/03/90-percent-of-americans-want-expanded-background-checks-on-guns-why-isnt-this-a-political-slam-dunk; Scott Clement, *Obama: Overwhelming majorities support background checks*, WASH. POST POLITICS (Feb. 12, 2013), http://www.washingtonpost.com/blogs/post-politics/wp/2013/02/12/obama-overwhelming-majorities-support-background-checks/.

68. COOK & GOSS, *supra* note 15, at 180.

69. JOHNSON, *supra* note 11, at 14.

they disagree.

II. POLICY

Fact-based policy questions lie alongside history at the center of the gun debate. One might want to know, for example, whether and why gun use and gun control save lives. And yet, as with the historical record, such basic facts remain hotly contested. Reputable scholars disagree about whether defensive gun-uses average 2.5 million per year or just 80 thousand[70] or whether concealed carrying reduces crime or increases it.[71] Even basic information about the prevalence of guns can be hard to find.[72] Perhaps more fundamentally, some scholars have given up on the ability of facts to persuade.

Phil Cook and Kristin Goss[73] have not lost faith. Their book, *The Gun Debate: What Everyone Needs to Know*, reflects a belief that knowing things about guns may help resolve, or at least advance, the gun debate. The very structure of the book suggests a persuasive dialogue—section headers are phrased as discrete questions ("How often are guns used in self-defense?"; "Does the US have more crime than other countries?"; "What are the key gun control laws?"),[74] and each receives a short, clear answer.

The substance of these answers is drawn from a wide range of scholarly research—some of it performed by the authors—which is summarized in ways that even a casual reader can appreciate and understand. The book therefore functions like a well-organized literature review. And where scholarship points in different directions—in the well-known disagreement between John Lott and others (including John Donohue and Ian Ayres)[75] regarding the deterrent effect of concealed carry laws, for example—Cook and Goss report both sides, though they do not shy away from explaining which they believe to be stronger.[76]

Where the research does not provide clear answers, however, Cook and Goss do not claim to have them. Frequently, they pose a question and note that the answer is "unclear,"[77] "depends on whom you ask,"[78] or is "yes, no, and maybe."[79] Some of these

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70. *Compare* MICHAEL R. RAND, U.S. DEP'T OF JUSTICE, NCJ-147003, GUNS AND CRIME: HANDGUN VICTIMIZATION, FIREARM SELF-DEFENSE, AND FIREARM THEFT (1994) (finding about 80,000 defensive gun uses per year, based on figures from the National Crime Victimization Survey), *with* Gary Kleck & Marc Gertz, *Armed Resistance to Crime: The Prevalence and Nature of Self-Defense with a Gun*, 86 J. CRIM. L. & CRIMINOLOGY 150, 184 tbl.2 (1995) (finding average of 2.5 million defensive gun uses per year, based on phone survey designed by authors).

71. *Compare* JOHN R. LOTT, JR., MORE GUNS, LESS CRIME: UNDERSTANDING CRIME AND GUN-CONTROL LAWS 75 (1998) (describing that concealed-handgun laws, allowing citizens to carry guns, result in an "ensuing decline in crime"), *with* Ian Ayres & John J. Donohue III, *Shooting Down the "More Guns, Less Crime" Hypothesis*, 55 STAN. L. REV. 1193, 1202 (2003) (finding "stronger evidence for the conclusion that these [concealed-handgun] laws increase crime . . . .").

72. *See* Editorial, *What We Don't Know Is Killing Us*, N.Y. TIMES, Jan. 27, 2013, at SR10 ("[W]e need more data to formulate, analyze, and evaluate [gun] policy . . . .").

73. Both Cook and Goss teach at the Sanford School of Public Policy at Duke University; I teach at Duke Law School.

74. COOK & GOSS, *supra* note 15, at vi, viii.

75. *See* JOHNSON, *supra* note 11 and sources cited therein.

76. COOK & GOSS, *supra* note 15, at 27 ("[Lott's] results are too good to be true . . . [and] not 'robust'—seemingly minor changes in the data or application of the statistical methods produce different results.").

77. *Id.* at 58.

78. *Id.* at 27.

79. *Id.* at 165.

questions may simply be unanswerable—such as "[does] the media contribute to gun violence in America?"[80]—but others, perhaps inspired by this volume, will be taken up by other scholars.

III. CREATING DIALOGUE

One of the most notable characteristics of the American gun debate is how little resemblance it bears to a discussion. As noted above, many of its participants—at least the agenda-setting, vocal ones—seem uninterested in finding common ground and unable even to appreciate that the other side's beliefs are genuinely held.[81]

This is not to say, however, that scholars and commentators have given up on finding or creating dialogue. *The Second Amendment On Trial*, a volume of articles, essays, and legal briefs edited by Saul Cornell and Nathan Kozuskanich,[82] is exemplary in this regard. Though both Cornell and Kozuskanich have ably defended their own views of the Second Amendment[83]—Cornell's view of the "civic" nature of the right has been particularly influential[84]—the volume reflects diverse and sometimes antagonistic viewpoints. In that sense, it can be read alongside Craig Whitney's book (discussed in more detail below) as an effort to clarify areas of agreement and disagreement regarding history and law. For example, the book opens by pairing two amicus briefs filed in *Heller* by historians: the first, filed by the Cato Institute and historian Joyce Lee Malcolm, argues for the "individual right" interpretation;[85] the second, filed by Jack Rakove, Cornell, David Konig, and others, argues that the Framers did not intend to constitutionalize a private right to keep firearms.[86]

The Second Amendment On Trial is an excellent resource for anyone seeking to understand or teach *Heller*, precisely because the book provides *ex ante* and *ex post* perspectives on the case. Some essays—such as the historians' briefs described above—reflect the major intellectual debates prior to the Court's decision, and on which the Justices drew. Other essays—such as those by Judge Harvie Wilkinson[87] and Professor Cass Sunstein[88]—analyze and critique the interpretive moves in the Court's decision. And still others—including contributions from Kozuskanich[89] and Kevin Sweeney[90]—suggest new questions for historians to answer.

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80. *Id.* at 66.

81. *See* Braman & Kahan, *supra* note 22, at 569 (describing the "pathologies that afflict the American gun debate"); B. Bruce-Biggs, *The Great American Gun War*, THE PUB. INT. 37, 38 (1976) ("In addition to the usual political charges of self-interest and stupidity, participants in the gun-control struggle have resorted to implications or downright accusations of mental illness, moral turpitude, and sedition.").

82. CORNELL & KOZUSKANICH, *supra* note 17.

83. *See, e.g.*, SAUL CORNELL, A WELL-REGULATED MILITIA: THE FOUNDING FATHERS AND THE ORIGINS OF GUN CONTROL IN AMERICA (2008); Nathan Kozuskanich, *Originalism, History, and the Second Amendment: What Did Bearing Arms Really Mean to the Founders?*, 10 U. PA. J. CONST. L. 413 (2008).

84. *See, e.g.*, McDonald v. City of Chicago, 130 S. Ct. 3020, 3132 (2010) (Breyer, J., dissenting) (citing Cornell's work for the proposition that "the primary Revolutionary era limitation on a State's police power to regulate guns appears to be only that regulations were 'aimed at a legitimate public purpose' and 'consistent with reason.'"); District of Columbia v. Heller, 554 U.S. 570, 684-85 (2008) (Breyer, J., dissenting) (similar).

85. Cornell & Kozuskanich, *supra* note 17, at 31-52.

86. *Id.* at 53-77.

87. *Id.* at 189-254.

88. *Id.* at 255-86.

89. *Id.* at 289-309.

90. *Id.* at 310-82.

Craig Whitney's *Living With Guns: A Liberal's Case for the Second Amendment* makes a similar contribution.[91] Like recent works by law professors—Adam Winkler's *Gunfight*[92] and Mark Tushnet's *Out of Range*[93]—Whitney's book reproduces, in readable form, many of the historical materials covered in Cornell and Kozuskanich's volume. Although he is a journalist by trade, Whitney has clearly immersed himself in the historical scholarship, and he explains it well.

The book represents Whitney's personal effort to come to grips with guns and the Second Amendment, and it is useful and interesting in part because his position is largely representative of the median American view. Most Americans believe that the Second Amendment protects an "individual" right,[94] and also support many forms of gun control.[95] Whitney similarly believes that the Second Amendment protects the ownership and use of firearms for lawful purposes, but he bemoans the fact that "[n]otably absent in the current stalemated debate about the Second Amendment is any sense of obligation, of civic duty, connected with the right to bear arms today—yet surely there is such a duty, to exercise the right responsibly and not recklessly."[96]

This position, however, is not reflected in actual gun control law. Whitney is right that "[t]hose on the left can't continue to hold out hope for a gun-free American that won't ever come to be."[97] But even the minority of liberals who hold this hope seem to have recognized, as Whitney does, that prohibition is off the table. By contrast, prohibition *of gun control* remains a central plank in the agenda of many gun rights supporters.[98] Indeed, Whitney closes his book by suggesting various seemingly-reasonable forms of gun control such as "requiring states to report . . . people found to be drug abusers, psychiatrically disturbed, or otherwise disqualified as gun purchasers under federal law" and "[r]equir[ing] everyone who owns firearms to report firearms losses, or thefts, to local law-enforcement authorities within forty-eight hours."[99] As he notes, these solutions are similar to those proposed by President Obama.[100] And the NRA's reaction to those proposals should give pause to anyone who hopes for compromise.[101]

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91. WHITNEY, *supra* note 18.

92. WINKLER, *supra* note 1.

93. MARK TUSHNET, OUT OF RANGE: WHY THE CONSTITUTION CAN'T END THE BATTLE OVER GUNS (2007).

94. *See* Jeffrey M. Jones, *Public Believes Americans Have Right to Own Guns*, GALLUP (Mar. 27, 2008), http://www.gallup.com/poll/105721/Public-Believes-Americans-Right-OwnGuns.aspx (showing that seventy-three percent of Americans believe that the Second Amendment guarantees the right to own guns outside of militia membership).

95. Saad, *supra* note 61 ("Gallup finds 58% of Americans in favor of strengthening the laws covering the sale of firearms.").

96. WHITNEY, *supra* note 18, at xii.

97. *Id.* at xvii.

98. Larry Bell, *The Slippery Slope of Gun Control: Time to Stand on Firm Ground*, FORBES (Jan. 15, 2013, 8:00 AM), http://www.forbes.com/sites/larrybell/2013/01/15/the-slippery-slope-of-gun-control-time-to-stand-on-firm-ground/ ("Beware that while 'reasonable compromises' proffered by gun control proponents may sound disarmingly well-intentioned, many of these are certain to establish precedents for private gun ownership restrictions which are literally disarming."); Hardy, *supra* note 65 ("Any 'reasonable compromise' would simply be a first step in a long campaign to make firearm ownership as difficult, expensive, and legally risky as possible.").

99. WHITNEY, *supra* note 18, at 216, 235.

100. *Id.* at xvii.

101. Chris Cox, Executive Director NRA-ILA, *Ask Obama's Experts*, YOUTUBE: NRA CHANNEL (Feb. 12, 2013), *available at* https://www.youtube.com/watch?v=jHmxY7zE5uc (stating that President Obama's proposal

Although what lies between its covers is both readable and substantively enlightening, the title of Whitney's book—*Living With Guns: A Liberal's Case for the Second Amendment*—reflects, rather than resolves, an important element of the dysfunctional gun debate, which is its tendency to equate guns and the Second Amendment. To say that one is "for" the Second Amendment does not convey much more information than saying that one is "for" the First Amendment. The dissenters in *Heller*, after all, believed in the Second Amendment; they simply thought (along with many other judges and scholars) that it was limited to militia service.[102] Even after *Heller*, advocates of reasonable gun control have struggled to make clear that they are not "against" the Amendment. Rather, they believe that it preserves ample room for reasonable gun control.[103]

The larger problem, at least from the admittedly parochial perspective of a constitutional law scholar, is the continuing slippage between political and doctrinal arguments in the gun debate. To be sure, constitutional scholarship has, particularly in the past few decades, blurred the line between law and politics. But it does no favors to political engagement when, for example, a store that bars guns on its premises, or even simply chooses to sell "smart guns," is denounced as violating the Second Amendment.[104] Over-reliance on invocations of the Second Amendment often disable engagement rather than facilitating it.[105]

Whitney concludes that "[s]cholarship about gun rights in this country is as politically fraught and ensnared in the culture wars as the subject itself."[106] The books reviewed here give some cause for hope.

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will lead to "government confiscation of legal firearms owned by honest citizens"); Bob Owens, *Yes, an Obama DOJ memo says ban will not work without gun registration, confiscation*, BEARING ARMS (Nov. 18, 2013), http://bearingarms.com/yes-an-obama-doj-memo-says-ban-will-not-work-without-registration/ ("[N]ow we can confirm that . . . fears [of gun registration and confiscation] were well founded.").

102. District of Columbia v. Heller, 554 U.S. 570, 637 (2008) (Stevens, J., dissenting).

103. *See supra* notes 60-61 and accompanying text.

104. *See, e.g.*, Louise Red Corn, *NRA to Boycott Companies*, TULSA WORLD, Aug. 2, 2005, at A9 (quoting NRA chief executive Wayne LaPierre as saying, "We're going to make ConocoPhillips the example of what happens when a corporation takes away your Second Amendment rights"); Michael S. Rosenwald, *Store Backs Away From Smart Guns Following Outcry from 2nd Amendment Activists*, WASH. POST (Mar. 6, 2014), http://www.washingtonpost.com/local/california-smart-gun-store-prompts-furious-backlash/2014/03/06/43432058-a544-11e3-a5fa-55f0c77bf39c_story.html.

105. *See generally*, Joseph Blocher, *Gun Rights Talk*, 94 BOSTON U. L. REV. 813 (2014), *available at* http://www.bu.edu/bulawreview/files/2014/08/BLOCHERDYSFUNCTION.pdf.

106. *See* WHITNEY, *supra* note 18, at 35.