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DeLay, Brian

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A MISFIRE ON THE SECOND AMENDMENT

**Rozanne Dunbar-Ortiz, *Loaded: A Disarming History of the Second Amendment*.
San Francisco: City Lights Publishers, 2018. 273 pp. Notes and index. \$16.95.**

Brian DeLay

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There are about 850 million privately held firearms in the world and Americans own nearly half of them. We are ten times more likely to die from gun violence than residents of other high-income countries. Shootings are so common in the United States that they have reduced overall life expectancy within our borders by nearly a full year since 2000. Like most gun statistics, this one is even more shocking when broken down by race. White Americans own guns at markedly higher rates than other groups, yet they have only lost half a year of life on account of firearm assaults. African Americans have lost nearly three and a half years. Other statistical chasms are even wider and crueler. The odds that a black child will be murdered with a gun are double those of Native American children, quadruple those of Hispanic children, and more than ten times those of white and Asian-American children. National firearm legislation could begin to address gun violence, violence that disproportionately afflicts people of color. For more than a generation the Republican congressional caucus, currently 93.6% white, has refused to let such legislation pass. Gun culture and gun violence are complicated topics. But neither can be understood without accounting for white supremacy. In this country, gun politics are also race politics.¹

Readers who want to explore that connection are more likely to turn to journalists, activists, legal thinkers, sociologists, or scholars of public health than to historians. While armed violence is easy enough to find in the historical literature, few people in the profession put guns at the center of their work. Those scholars who do seldom focus on the link between guns and racial inequality. Indeed, historians have lately had as much to say about firearms as tools to resist racial oppression as instruments for imposing it.²

Roxanne Dunbar-Ortiz's learned, strident, and flawed book centers what most histories of guns marginalize. *Loaded: A Disarming History of the Second Amendment* identifies settler colonialism and slavery as the parents of our distinctive national gun culture. Drawing on John Grenier's explication of the "first way of war," Dunbar-Ortiz describes a colonial military tradition that normalized the destruction of villages and food stores, and that justified spectacular violence against indigenous noncombatants. When armed white men killed Native people or terrorized them off their lands, they also crafted and reinforced racialized narratives of savagery vs. civilization. This practical and discursive military tradition and the land hunger that underwrote it only accelerated after the Revolution, propelling white men with guns on a blood-soaked migration across the continent. Relying on the work of historian Sally Hadden, Dunbar-Ortiz tells a parallel story about arms and the white exploitation of black bodies. From the policing mandated by early colonial slave codes to the institution of slave patrols throughout the South in the eighteenth and nineteenth centuries, chattel slavery only worked so long as it was

protected by white men with guns. The legacy of the slave patrol, she tells us, stretches from the Klan through modern-day police violence against black men.

Loaded turns next to guns in popular culture. How, it asks, did Confederate guerrillas morph into heroic western outlaws in twentieth-century pop fiction, music, and movies? Woody Guthrie and Pete Seeger turned Jesse James into Robin Hood; Joan Baez and Johnny Cash crooned the lost cause in “The Night They Drove Old Dixie Down;” John Wayne’s ex-Confederate proved his true grit; and Clint Eastwood redeemed the Outlaw Josie Wales. These and other songs, books, and films extended a process of redemptive transformation begun in the nineteenth century, driven by popular culture and imperial war-making. Dunbar-Ortiz explains that the hunter occupies a different position in American gun culture than the outlaw, but one that has been comparably mythologized. Glorified in tall tales about Daniel Boone, James Fenimore Cooper’s iconic Natty Bumppo, and Teddy Roosevelt’s paeans to hardy men and the thrill of the chase, the hunter has done important cultural work tying guns to white male individualism while obscuring their connections to capitalism, settler colonialism, and militarism.

Mass shootings account for a tiny fraction of firearm deaths in the United States, but over the past generation their aftermaths have become our primary national venue for debating gun policy. Dunbar-Ortiz chronicles these horrific and increasingly frequent events. She moves from the University of Texas tower shooting in 1966 (15 killed, 32 wounded by gunfire) through the mass-murder in Las Vegas in 2017 (59 killed, 422 wounded by gunfire), and asks why we seldom connect mass-shootings at home with our war-making abroad. The author observes that in these same decades the U.S. has dominated the global arms trade and “has perpetrated massive amounts of violence around the world, responsible for killing millions of people and families” (p. 144).

Here and elsewhere readers might feel some ambivalence, as I do, with the book’s preference for correlation over causation. Dunbar-Ortiz is surely right to link our exceptional domestic massacres and gun culture and our exceptional military-industrial complex and imperial war-making. But she has little to say about the harder question of how these phenomena have shaped one another over time. The connection is useful; an explanation would be even more useful. A chapter on white nationalism exemplifies both the appeal and the limitation of this approach. Opening in 2015, with Dylann Roof’s slaughter of nine parishioners at the Emanuel African Methodist Episcopal Church in Charleston, the chapter takes readers on an engaging but circuitous journey back and forth through time. From the Unite the Right rally in Charlottesville we move to the Reagan era, then to 9/11, back to the Contra War, back further to George Wallace’s presidential campaign, forward to Ruby Ridge, the Branch Davidians, and the Oklahoma City bombing, backwards again to the 1970s and the founding of the environmental movement, forward to the growth of white nationalism during the Obama era, back to the 1950s and the John Birch Society, forward to the Black Panther Party, forward again to George Zimmerman’s 2012 murder of Trayvon Martin, and backward a final time to the 1978 publication of the *Turner Diaries*. The chapter concludes by styling Roof a trans-historical exemplar of white America’s timeless violence. “What was everyday reality during the century of frontier wars from the founding of the United States to the 7th Cavalry massacre at Wounded

Knee in 1890, was re-enacted and performed as theater by Roof, but with live ammunition” (p. 171).

Provocative and even absorbing when deployed by a writer as gifted as Dunbar-Ortiz, this mode of history writing does not aim to offer explanation or cause-and-effect so much as to indict through associations, resonances, and continuities. The presentation is impressionistic, the goal is genealogical. America’s contemporary gun culture descends from centuries of white supremacist violence. It is the fruit of our long history of massacre, ethnic cleansing, genocide, slavery, and racial terror.

Insofar as Dunbar-Ortiz does offer explanations and cause-and-effect arguments for our racist national gun culture, they return again and again to the Second Amendment of the U.S. Constitution. Neither side of the contemporary gun debate, the author tells us, “seems to have any idea what the Second Amendment was originally about” (p. 19). Figuring that out “is key to understanding the gun culture of the United States” (p. 23). What, then, was the purpose of the Second Amendment?

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. Over the past thirty years, a rich, interdisciplinary body of scholarship has endeavored to understand the purpose of those words.³ To oversimplify, most of this work has argued either that the Second Amendment enshrines an individual right to keep and bear arms for public or private purposes, or that the amendment merely protects states’ rights to arm militias. Recently, legal historians have disrupted the individual/collective dichotomy by advancing a third, civic interpretation of the Second Amendment. This newer scholarship is more interested in the broad historical context, more willing to integrate social and cultural history with the familiar legal and political sources, more attentive to the range of views white Americans expressed about guns in the eighteenth and nineteenth centuries, and more sensitive to change over time.

Associated most prominently with the historian Saul Cornell, the civic right interpretation situates the Amendment in a few critical contexts from the moment of its adoption. These include a dread of standing armies, particularly among anti-Federalists, both for the coercive threat they posed and because their great cost encouraged the growth of executive power. Most who were preoccupied with this anxiety paired it with a belief that state militias amounted to a viable alternative, provided they be adequately armed, trained, and regulated. Learned debate about arms and state power in the late eighteenth century distinguished between issues comprehended by natural law (like armed rebellion), common law (like armed self-protection), and positive law (like arming the militia). In other words, the framers seem to have crafted the constitutional amendment to address the third of these issues alone, not because the other two were unimportant but because they fell under different domains of law. A minority of policy makers, notably including Thomas Jefferson, argued at the state or national levels that constitutions should explicitly include language protecting an individual right to arms, one separate from any civic obligations. They almost always lost that argument. Finally, the Second Amendment emerged from within a larger debate over the relationship between federal and state power. Anti-Federalists remained deeply anxious that the national government could encroach on

individual states by disarming their militias, and the amendment was written with this anxiety in mind. Therefore, the most historically informed scholarship on the Second Amendment maintains that its purpose was to guarantee “that citizens would be able to keep and bear those arms needed to meet their legal obligation to participate in a well-regulated militia.”⁴

Dunbar-Ortiz disregards these contexts, the scholarship that has recovered them, and the legal and political sources most relevant to the crafting of the Second Amendment. Nonetheless she offers a confident and original argument about its purpose, one, she tells us late in the book, that can “discredit the Second Amendment without rewriting U.S. history” (p. 190). The argument is built on three interlocked claims: that the Amendment conferred an individual right to keep and bear arms; that the militias invoked in the preamble were not the compulsory, state-controlled organizations that other scholars assume them to have been, but rather voluntary and independent armed groups; and that these “militias referred to in the Second Amendment were intended as a means for white people to eliminate Indigenous communities in order to take their land, and for slave patrols to control Black people” (p. 57).

None of these claims are convincing. While the individual right interpretation is now law of the land thanks to the Supreme Court’s decision in *District of Columbia v. Heller*, the historical case for that interpretation was weak in 2008 and is even weaker in light of the past decade of historiography.⁵ Dunbar-Ortiz posits that it would have been redundant for the Bill of Rights to have referred to state-organized militias, because they had already been “authorized” in Article I, Section 8 of the Constitution (pp. 23-24). In fact, state militias appear in the Bill of Rights in part because of how they were invoked in the Constitution. Anxious that Section 8 gave the federal government too much power over state militias, anti-Federalists agitated in the press and in state ratifying conventions for changes. Their activism helped force Federalists to embrace a Bill of Rights with an article protecting gun rights for members of state militias.⁶

As for the third claim, Dunbar-Ortiz provides no evidence that armed whites ever needed the Second Amendment for institutional legitimation of their violence. If the “Second Amendment’s language specifically gave individuals and families the right to form volunteer militias to attack Indians and take their land” (p. 18), one would expect white attackers to have invoked that constitutional right if they landed in court. They would have had ample opportunity to do so in the eighteenth and nineteenth centuries. While the Federal Government intimidated, defrauded, kidnapped, despoiled, displaced, and killed Native peoples across the continent, it also frequently sought to bring charges against whites who murdered, raped, and terrorized Indigenous peoples without state sanction. Dunbar-Ortiz offers no examples of such individuals mounting legal defenses with the Second Amendment. To my knowledge there are none. White murderers, rapists, and terrorists simply relied on federalism and jurisdictional ambiguity, on sympathetic local and state officials, or, as a last resort, on juries, almost none of which ever convicted white men for hurting Native people. Slave patrols likewise generated considerable conflict and litigation between whites, but we read nothing here about the Second Amendment intruding into those cases. Nor do *Loaded’s* twentieth- and twenty-first-century outlaws, mass murderers, and white supremacists use the Second Amendment to argue for the constitutionality of their actions. If legitimating the racist violence of armed whites really was the amendment’s hidden purpose, it has been hidden so well that even its beneficiaries have overlooked it.

Given Dunbar-Ortiz's emphasis on the deep continuities of white supremacist violence in U.S. history and her insistence that they are institutionally anchored in the Second Amendment, it is perhaps unsurprising that the book is pessimistic, even dismissive about the prospects of reducing gun violence, reforming gun law, or moderating the influence of the gun lobby in our politics. Misunderstanding the true purpose of the Second Amendment, *Loaded* tells us, gun-control advocates "delude themselves, failing to comprehend the history embedded in contemporary U.S. culture and social relations" (p. 127). The deep continuities of white supremacist violence are undeniable. But the prospects of reform are neither as futile nor as bleak as the book leads readers to believe.

For instance, noting that there are now roughly as many traffic fatalities in the U.S. as firearm deaths, notwithstanding the many rules and regulations governing the use of automobiles, Dunbar-Ortiz writes that "the high rate of traffic fatalities begs the question of how effective gun regulations would be" (p. 20). In fact, the comparison to automobile regulation makes the case for firearm regulation as well as or better than anything else. Automobile fatalities per mile driven dropped by 75% between 1970-2015, thanks to investments in safety research and government regulation.⁷ *Loaded* likewise dismisses the Clinton-era assault weapons ban as "largely ineffectual and unenforceable" (p. 21). The law was too easily evaded. Still, social scientists have found that the frequency of mass shootings and their average casualty counts dropped markedly once the law and its ban on high-capacity magazines went into place, and then soared once the Republican-controlled Congress allowed the law to lapse in 2004. Moreover, the effects of our gun laws are felt beyond our borders. The expiration of the law resulted in a statistically significant increase in firearms homicides across northern Mexico.⁸ An assault weapons ban wouldn't affect most of the daily gun violence that claims so many lives in this country, but there is broad consensus among public health scholars that other kinds of laws could.⁹

When Dunbar-Ortiz tells us that the problem is not the NRA or law or a poverty of regulations, when she insists "that it is necessary to look elsewhere for what causes firearms proliferation and gun deaths; it is necessary to seek the historical roots" (p. 20), she presents us with a false choice between politics and history. We need both.

While Dunbar-Ortiz does not offer a compelling reinterpretation of the Second Amendment, her broader argument is compelling: we cannot understand this country's historic relationship to guns or its contemporary gun culture without confronting its long history of settler colonialism, slavery, and white supremacy. In this country, gun politics are also race politics. The public needs historians to help them understand why. From start to finish Dunbar-Ortiz's book hums with justified anger about what most Americans do not know, and often do not want to know about their past. Too few scholars study the role firearms have played in American history, and, among those who do, too few meaningfully confront the enduring centrality of racial violence. *Loaded* should help change that.

Brian DeLay is associate professor of history at the University of California, Berkeley, and author of *War of a Thousand Deserts: Indian Raids and the U.S.-Mexican War* (2008).

¹ Numbers of guns: A recent study by the Small Arms Survey estimates that there were 1,013,000,000 firearms in the world in 2017. 857 million were in civilian hands (legally and otherwise), 393.3 million of them in the United States. See Aaron Karp, “Estimating Global Civilian-Held Firearms Numbers,” Small Arms Survey Briefing Paper, June 2018, <http://www.smallarmssurvey.org/fileadmin/docs/T-Briefing-Papers/SAS-BP-Civilian-Firearms-Numbers.pdf>. International death rates: Erin Grinshteyn and David Hemenway, “Violent Death Rates: The US Compared with Other High-Income OECD Countries, 2010,” *The American Journal of Medicine* 129:3 (March 1, 2016): 266–73. For race and ownership, see Kim Parker et al, “America’s Complex Relationship with Guns: An In-Depth Look at the Attitudes and Experiences of U.S. Adults,” Pew Research Report, June 22, 2017, <http://www.pewsocialtrends.org/2017/06/22/americas-complex-relationship-with-guns/>; Bindu Kalesan et al, “Cross-Sectional Study of Loss of Life Expectancy at Different Ages Related to Firearm Deaths among Black and White Americans,” *BMJ Evidence-Based Medicine* 24:2 (April 1, 2019): 55–58. Data on childhood firearm homicide rates is from 2012–2014. See Katherine A., Fowler et al, “Childhood Firearm Injuries in the United States,” *Pediatrics* 140:1 (July 1, 2017).

² See Lance E. Hill, *The Deacons for Defense: Armed Resistance and the Civil Rights Movement* (2004); Akinyele Omowale Umoja, *We Will Shoot Back: Armed Resistance in the Mississippi Freedom Movement* (2013); Charles E. Cobb, Jr., *This Nonviolent Stuff’ll Get You Killed: How Guns Made the Civil Rights Movement Possible* (2014); Nicholas Johnson, *Negroes and the Gun: The Black Tradition of Arms* (2014). These works all take inspiration from Robert F. Williams, *Negroes with Guns* (1962).

³ The surge in scholarly interest began with a landmark article by Sanford Levinson, “The Embarrassing Second Amendment,” *The Yale Law Journal* 99:3 (1989): 637–59.

⁴ Saul Cornell, *A Well-Regulated Militia: The Founding Fathers and the Origins of Gun Control in America* (2006), 2. See also H. Richard Uviller and William G. Merkel, *The Militia and the Right to Arms, Or, How the Second Amendment Fell Silent* (2002); and the important new book by Patrick J. Charles, *Armed in America: A History of Gun Rights from Colonial Militias to Concealed Carry* (2018).

⁵ For critiques from historians, see for example David Thomas Konig, “Why the Second Amendment Has a Preamble: Original Public Meaning and the Political Culture of Written Constitutions in Revolutionary America,” and Cornell, “Heller, New Originalism, and Law Office History: Meet the New Boss,” both in *UCLA Law Review* 56 (2008): 1295–1342, 1095–1126; Paul Finkelman, “It Really Was about a Well Regulated Militia,” *Syracuse Law Review* 59 (2008): 267–82; Patrick J. Charles, “The Second Amendment in Historiographical Crisis: Why the Supreme Court Must Reevaluate ‘Standard Model’ Moving Forward,” *Fordham Urban Law Journal* 39:5 (2012): 1727–1866.

⁶ Cornell, *Well-Regulated Militia*, 18–25; Charles, *Armed in America*, 93–97.

⁷ For automobile fatalities, see Jennifer Tucker and Matthew Miller, “What the Clean Air Act Can Teach Us about Reducing Gun Violence,” *Boston Globe*, Oct. 6, 2015.

⁸ For the domestic consequences of the assault weapons ban, see Mark Gius, “The Impact of State and Federal Assault Weapons Bans on Public Mass Shootings,” *Applied Economics Letters* 22:4 (March 4, 2015): 281–84; Louis Klarevas, *Rampage Nation: Securing America from Mass Shootings* (Prometheus Books, 2016); Charles DiMaggio et al, “Changes in US Mass Shooting Deaths Associated with the 1994–2004 Federal Assault Weapons Ban: Analysis of Open-Source Data,” *The Journal of Trauma and Acute Care Surgery* 86:1 (January 2019): 11–19. For Mexico, see Arindrajit Dube et al, “Cross-Border Spillover: U.S. Gun Laws and Violence in Mexico,” *American Political Science Review* 107:3 (August 2013): 397–417; and Luke E. Chicoine, “Homicides in Mexico and the Expiration of the U.S. Federal Assault Weapons Ban: A Difference-in-Discontinuities Approach,” *Journal of Economic Geography* 17:4 (July 1, 2017): 825–56.

⁹ See for example Julian Santaella-Tenorio et al, “What Do We Know About the Association Between Firearm Legislation and Firearm-Related Injuries?” *Epidemiologic Reviews* 38:1 (January 1, 2016): 140–57. Convincingly proving or disproving the efficacy of individual gun laws is enormously difficult, a problem greatly compounded by federal limitations on relevant research. See the Rand Corporation’s report “Gun Policy in America,” <https://www.rand.org/research/gun-policy.html>