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ABSTRACT

*Contemporary Second Amendment law, which originated with the famous Heller decision (2008) and reached a new peak with Bruen (2022), relies on an implicit political theory. This article uncovers and critiques that theory. I argue that the Supreme Court's Second Amendment jurisprudence positions interpersonal self-defense, and more generally individual response to crime, at the heart of the meaning of American citizenship. The paradigmatic citizen for whom state institutions should be designed is a self-defender, because, per the Court's interpretive methodology, this is what the American people want. This line of cases thus attempts one of the most challenging feats of modern political philosophy: squaring popular sovereignty with natural rights, and particularly the right to use violence in self-defense. Curiously, however, the philosopher who first and most influentially established how self-defense and popular sovereignty bear on each other, Thomas Hobbes, is absent from Second Amendment analyses. The article explains why this absence is unfortunate and then rectifies it.*

*Ruling that self-defense is a necessary component of the good state puts the Second Amendment in Hobbesian terrain. However, while Hellerian Second Amendment law might appear to vindicate Hobbes's protoliberal bases for justice, with the necessary adjustments for a constitutional democracy, Hobbes does very different things with the same ingredients. Hobbes would recognize the conclusions that the Supreme Court reaches as exactly those that we ought to overcome. The Second*

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*Amendment's self-defense is hierarchical and moralistic: it is a just infliction of violence and an individual right to designate fellow citizens as criminals. Hobbes's self-defense is egalitarian and materialistic: it is a matter of self-preservation. Hence, for Hobbes, self-defense is neither a moral nor a social achievement. It will always have a place in public life, but that does not make the presence of self-defense a desirable one. Self-defense is base, as we are when we are left alone; we contract to no longer be left alone. Rather than come naturally and be discarded if they don't, Hobbes thought that peace and sociability require work.*

*The article focuses on four critiques of the Supreme Court's Second Amendment that Hobbes helps to flesh out. First, Hobbes conceptualized self-defense as directed toward safety, whereas the Supreme Court adopts the Lockean view, which links self-defense to autonomy and hence allows private appeals to morality to cut through political associations and assert themselves by force. Second, Hobbes held an egalitarian understanding of political subjectivity, and ascribed corresponding representation and protection responsibilities to state institutions. The Heller-Bruen line of cases, in contrast, favors a patriarchal order of hierarchy and self-sufficiency. Third, Hobbes viewed self-defense as natural but unfortunate, a right that we have but that should not dictate our everyday lives. The phenomenon of mass shootings epitomizes the dangerous repercussions of a contrasting cultural script, according to which the ultimate American citizen is a self-defender. Fourth, Hobbes linked self-defense and popular sovereignty to cultivate a flourishing public life, but the Hellerian Court translates this relationship into constitutional fetishism. For the Second Amendment Supreme Court, self-defense serves not to bring about a social contract but to break one up.*

## I. INTRODUCTION

The Supreme Court's 2022 decision on the Second Amendment, *New York State Rifle & Pistol Association v. Bruen*, cements and expands the centrality of self-defense to American public life, which was first posited in the seminal 2008 decision of *District of Columbia v. Heller*. The fundamental contribution *Bruen* makes to Second Amendment law is twofold. Substantively, the *Bruen* Court ruled that the constitutional right to keep and bear arms for self-defense purposes extends beyond the home and into the public space.[1] Methodologically, *Bruen* established a traditionalist test for scrutinizing gun regulation laws.[2] Under this test, a regulation infringing on the right is constitutional if and only if it is historically established. The Court rejected any additional step of means-ends analysis whereby the logical relationship between the right and the regulation is assessed, whether in terms of rationality, proportionality, or another measure.[3]

While traditionalism is distinct from originalism, the method the Court has famously used to interpret the Second Amendment since *Heller*, both are justified by appeal to the notion of popular sovereignty. The people have chosen to protect a particular right, enshrined in the constitutional

1. N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2134 (2022).

2. *Id.* at 2127.

3. The outcome in this case was striking down as unconstitutional New York's "may issue" gun licensing regime (as opposed to "shall issue" regimes), which gave officials discretion to issue public carry gun licenses pursuant to applicants' demonstration of a "proper cause" to get such a license.

text they have adopted, and they have chosen to put only particular limitations on it, as gleaned from their subsequent practices. For the traditionalist *Bruen* Court, like the originalist *Heller* Court as well as the major Second Amendment decision in between, *McDonald v. Chicago*, the fate a judicial holding must avoid is to be "judge-empowering."[4] And yet in each of these three cases the Court struck down democratically made statutes. The Second Amendment Court seeks an elevated sense of "the American people." The text and the history teach it that self-defense plays a constitutive role in this elevation and must continue to do so wherever American people interact with each other.

Implicit in any political ideology is an image of the person for whom it applies and the values guiding their engagement with their fellows. In Kwame Anthony Appiah's formulation, "the norms of public life are defended as making for a good life for people with that moral psychology . . . [e.g.,] Hobbes's fearful rational egoist, Smith's more sympathetic but also self-interested economic man, Bentham's utility consumer . . . all of them are understood as ideal types, not precise descriptions."[5] This is the political unit of analysis, a normative construction of natural personhood—or "founding myth of self"[6]—for whom public institutions are designed. Who fills this role for the political theory guiding the United States, if one exists? I doubt they are to be found in Appiah's list, which goes on to mention "Tocqueville's man of honor, Rawls's self-respecting person with her moral powers, sense of justice, and conception of the good, Nussbaum and Sen's men and women with their capabilities."[7] From a jurisprudential perspective we may offer the reasonable person or the Holmesian bad man.[8] Other possible alternatives are the homo economicus,[9] the rugged individual of the frontier,[10] perhaps simply the white-straight-Christian-man. The *Heller* line of cases brings to the fore a

4. District of Columbia v. Heller, 554 U.S. 570, 128 S. Ct. 2783, 2821 (2008); *Bruen*, 142 S. Ct. at 2129 (2022); McDonald v. City of Chicago, 130 S. Ct. 3020, 3079 (2010) (Scalia, J., concurring) (originalism is "less subjective because it depends upon a body of evidence susceptible of reasoned analysis rather than a variety of vague ethico-political First Principles whose combined conclusion can be found to point in any direction the judges favor").

5. KWAME ANTHONY APPIAH, AS IF: IDEALIZATION AND IDEALS 154 (2017).

6. James R. Martel, *The Radical Promise of Thomas Hobbes: The Road Not Taken in Liberal Theory*, 4 THEORY & EVENT, no. 2, 2000.

7. APPIAH, *supra* note 5, at 154.

8. Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 61 (1897).

9. *See* WENDY BROWN, UNDOING THE DEMOS: NEOLIBERALISM'S STEALTH REVOLUTION 31–35 (2015).

10. *See* RICHARD SLOTKIN, GUNFIGHTER NATION: THE MYTH OF THE FRONTIER IN TWENTIETH-CENTURY AMERICA (1992).

new contender, who borrows some elements from each of these alternatives: the self-defender.

The self-defender reaches deeper than Second Amendment law and gun culture. This cultural frame of identity manifests ubiquitously, resonating like few others in our time. Across demographic and ideological divides, Americans invoke self-defense when they strive to articulate their rightful place in the public square: in reality[11] and in fiction;[12] from the far right[13] to the far left;[14] from Christians[15] to Buddhists;[16] from tough-on-crime advocates to abolitionists;[17] among urban, white, rural, Black,[18] and indigenous communities;[19] men and

11. *See, e.g.*, THOMAS GABOR, CONFRONTING GUN VIOLENCE IN AMERICA chs. 9–10 (2016) (providing data on gun violence related to self-defense); Mugambi Jouet, *Guns, Identity, and Nationhood*, 5 PALGRAVE COMM. (published online Nov. 5, 2019), https://www.nature.com/articles/s41599-019-0349-z#citeas (linking recent data on gun violence in the U.S. to its national identity).

12. *See, e.g.*, JOKER (Todd Phillips dir., 2019) (film in which an act of self-defense empowers the protagonist to form a personal identity and then inspire a collective one, igniting a class war); T. C. BOYLE, THE HARDER THEY COME (2015) (novel depicting self-defense as encapsulating all of the ills of American hyperindividualism, violence, and xenophobia).

13. *See, e.g.*, James Pogue, *The Government Is Botching Another Bundy Trial*, OUTSIDE (Dec. 18, 2017), https://www.outsideonline.com/2269531/why-government-keeps-losing-bundy-cases (the Bundy family, who engaged in an armed confrontation with the government due to their refusal to pay fees for their use of federal land, "brought armed protesters to the ranch in self-defense, because they were surrounded by what they feared was a hostile force of government 'snipers'").

14. *See, e.g.*, JEFFREY SHANTZ, ORGANIZING ANARCHY: ANARCHISM IN ACTION ch. 11 (2020) (discussing anarchist self-defense); Angela Mitropoulos, *Pro Anti*, NEW INQUIRY (Aug. 20, 2017), https://thenewinquiry.com/pro-anti/ ("Antifa is indeed a set of self-defense tactics").

15. *Symposium: Gun Violence, Gun Rights . . . and God*, SYNDICATE (Oct. 2, 2020), https://syndicate.network/symposia/philosophy/god-and-guns-in-america.

16. LAMA ROD OWENS, LOVE AND RAGE: THE PATH OF LIBERATION THROUGH ANGER 42 (2020).

17. Mariame Kaba, *Black Women Punished for Self-Defense Must Be Freed from Their Cages*, *in* WE DO THIS 'TIL WE FREE US: ABOLITIONIST ORGANIZING AND TRANSFORMATIVE JUSTICE 49 (2021).

18. *See, e.g.*, JENNIFER CARLSON, CITIZEN-PROTECTORS: THE EVERYDAY POLITICS OF GUNS IN AN AGE OF DECLINE (2015) (an ethnographic study exploring the meanings attached to guns among various communities in Michigan).

19. *See, e.g.*, John Laidler, *Saying No to the Dakota Pipeline*, HARV. GAZETTE (Mar. 27, 2017), https://news.harvard.edu/gazette/story/2017/03/foes-of-dakota-access-pipeline-explain-issues-cite-lessons-learned/ ("Self-defense sometimes means putting your body between settlers and their money . . . [water protectors are] reminding us of that"); Ann E. Tweedy, *"Hostile Indian Tribes . . . Outlaws, Wolves, . . . Bears . . . Grizzlies and Things like That?" How the Second Amendment and Supreme Court Precedent Target Tribal Self-Defense*, 13 U. PA. J. CONST. L. 687 (2011).

women;[20] LGBT persons;[21] people with mental illness;[22] state officials;[23] between spouses;[24] within the United States, abroad,[25] or as a benchmark for acceptance into society when moving from there to here.[26] Self-defense resonates in abstracted spaces too, like cyberspace,[27] or the relationship between branches of government.[28] The COVID-19 pandemic provided yet new opportunities for Americans to use self-defense as a justification for violence.[29] These instances illustrate that self-defense is about the identity of the defender as much as it is about the acts of the aggressor; individuals and collectives use self-defense to assert who they are. The law reflects, legitimates, and expands this phenomenon.

20. *See, e.g.*, Laura Beth Nielsen, *Good Moms with Guns: Individual and Relational Rights in the Home, Family, and Society*, *in* GUNS IN LAW 164 (Austin Sarat et al. eds., 2019).

21. For instance, a queer progun organization, "pink pistols," submitted an amicus brief in favor of petitioners in *Bruen*. Brief for The DC Project Foundation, Operation Blazing Sword—Pink Pistols, and Jews for the Preservation of Firearms Ownership as Amici Curiae Supporting Petitioners, N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111 (2022) (No. 20-843), *available at* https://www.supremecourt.gov/DocketPDF/20/20-843/184308/20210719173754323_41068%20pdf%20Nightingale.pdf.

22. *See, e.g.*, Susan McMahon, *Gun Laws and Mental Illness: Ridding the Statutes of Stigma*, 5 U. PA. J.L. & PUB. AFF. 1 (2020) (arguing that mentally ill persons should not be excluded from gun possession because such exclusion reinforces harmful stigmas against them).

23. See, e.g., Michael Sierra-Arévalo, *American Policing and the Danger Imperative*, 55 L. & SOC'Y REV. 70 (2021); Cynthia Lee, *Reforming the Law on Police Use of Deadly Force: De-Escalation, Preseizure Conduct, and Imperfect Self-Defense*, 2018 U. ILL. L. REV. 629.

24. *See, e.g.*, Carolyn B. Ramsey, *Firearms in the Family*, 78 OHIO ST. L.J. 1257 (2017); C. D. Christensen, *The "True Man" and His Gun: On the Masculine Mystique of Second Amendment Jurisprudence*, 23 WM. & MARY J. WOMEN & L. 477 (2017); Jeannie Suk, *The True Woman: Scenes from the Law of Self-Defense*, 31 HARV. J.L. & GENDER 237 (2008).

25. *See, e.g.*, Teo Armus, *A Californian Economist Loves Neoliberalism. When Chileans Started Protesting It, He Opened Fire on Them*, WASH. POST (Nov. 11, 2019), https://www.washingtonpost.com/nation/2019/11/11/john-cobin-chile-shooting-protesters-video (the man, who drove his car into a crowd of protesters before opening fire, explained the encounter thus: "It was very dangerous, very scary time for me. Thankfully, I had my gun to be able to defend myself").

26. *See, e.g.*, Faiza W. Sayed, *Terrorism and the Inherent Right to Self-Defense in Immigration Law*, 109 CAL. L. REV. 615 (2021) (arguing that asylum should be granted to those who current U.S. immigration policies designate as terrorists but were really self-defenders in their countries of origin); Pratheepan Gulasekaram, *"The People" of the Second Amendment: Citizenship and the Right to Bear Arms*, 85 N.Y.U. L. REV. 1521 (2010) (arguing that Second Amendment rights should be granted to noncitizens).

27. *See, e.g.*, Lennon Y.C. Chang et al., *Citizen Co-Production of Cyber Security: Self-Help, Vigilantes, and Cybercrime*, 12 REG. & GOVERNANCE 101 (2018); BENJAMIN WITTES & GABRIELLA BLUM, THE FUTURE OF VIOLENCE: ROBOTS AND GERMS, HACKERS AND DRONES ch. 3 (2015).

28. S. Cagle Juhan & Greg Rustico, *Jurisdiction and Judicial Self-Defense*, 165 U. PA. L. REV. ONLINE 123 (2017).

29. *See, e.g.*, Mihir Zaveri, *McDonald's Employee Is Shot after Store Is Partly Closed for Virus*, N.Y. TIMES (May 7, 2020), https://www.nytimes.com/2020/05/07/us/oklahoma-mcdonalds-shooting-coronavirus.html (the shooter's mother explained that her daughter "had tried to place an order and that she was defending herself against employees who attacked her").

The *Heller-Bruen* line of cases (Hellerian, for short) culminates the establishment of self-defense as a tool for arranging American public life: articulating who the American is as a public actor.[30] This logic pervades diverse legal regimes and frames of social epistemology, as I further elaborate elsewhere.[31] But Second Amendment law, being constitutional law, carries the heaviest normative weight and compels the Court to inch toward providing a political theory that explains self-defense as a principle of governance. The Court's treatment of the Second Amendment thus invites an investigation into the political function of self-defense, independent of its moral justification. It invites a further development of a strand in self-defense scholarship that understands this doctrine as a site of public law.[32] That is, as a mechanism for distribution and regulation of power, rather than a doctrine governed by interpersonal morality. What this strand has yet to articulate is that the relationship is reciprocal: self-defense might be a constitutive element of institutional design and not just an expression thereof.

In both its substantive and its methodological holdings, *Bruen* drives *Heller* to its logical conclusions. *Bruen* continues in the Hellerian path of striving to reconcile a "pre-existing" individual right to self-defense with a jurisprudential stance that predicates legal validity on the will of the people, however expressed. This line of cases thus attempts one of the most challenging feats of modern political philosophy: squaring popular sovereignty with natural rights, and particularly the right to use violence in self-defense.

30. Lower courts have constructed more varied narratives and complex doctrines around Second Amendment questions. Time and again, however, the Supreme Court imposes and reaffirms its own vision. Thus, in *Bruen*, the Court rejected the two-prong test that all federal courts of appeals have unanimously adopted (first, identify infringement on a second amendment right; second, scrutinize the infringement according to the established levels of scrutiny) in favor of a single-step traditionalist test. For this reason, this article employs close readings of Supreme Court Second Amendment case law rather than a broader cross-jurisdictional analysis.

31. Rafi Reznik, *Taking a Break from Self-Defense*, 32 S. CAL. INTERDISC. L.J. 19 (2022).

32. Varied arguments in this spirit include Addie C. Rolnick, *Defending White Space*, 40 CARDOZO L. REV. 1639 (2019); Darrell A.H. Miller, *Self-Defense, Defense of Others, and the State*, 80 L. & CONTEMP. PROBS. 85 (2017); Malcolm Thorburn, *Justifications, Powers, and Authority*, 117 YALE L.J. 1070 (2008); Suk, *supra* note 24; Janine Young Kim, *The Rhetoric of Self-Defense*, 13 BERKELEY J. CRIM. L. 261 (2008); Dan M. Kahan & Donald Braman, *The Self-Defensive Cognition of Self-Defense*, 45 AM. CRIM. L. REV. 1 (2008); George P. Fletcher, *Political Theory and Criminal Law*, 25 CRIM. JUST. ETHICS 18 (2006); V. F. Nourse, *Reconceptualizing Criminal Law Defenses*, 151 U. PA. L. REV. 1691 (2003); Claire Oakes Finkelstein, *On the Obligation of the State to Extend a Right of Self-Defense to its Citizens*, 147 U. PA. L. REV. 1361 (1999) [hereinafter Finkelstein 1999]; Benjamin C. Zipursky, *Self-Defense, Domination, and the Social Contract*, 57 U. PITT. L. REV. 679 (1996).

The interplay between substantive criminal law (the legal location of self-defense) and political theory (the basis for ideas about popular sovereignty) is a neglected perspective in Second Amendment literature, which has focused instead on questions of constitutional doctrine and legal history. In modern political theory, the central framework used to ground the legitimacy of popular sovereignty is the idea of a social contract. The link between self-defense and the social contract has a formidable philosophical pedigree, to which Second Amendment jurisprudence makes a serious, if regrettable contribution. This article uncovers and critiques this contribution. It therefore conjures up the philosopher who first and most influentially established how self-defense and the social contract bear on each other: Thomas Hobbes.

Hobbes receives less attention from legal scholars in comparison to other thinkers who stand at the center of the Western philosophical canon.[33] Notwithstanding, jurists have been increasingly turning to Hobbes in recent years to make sense of various intersections of criminal law, public life, and political authority.[34] This Hobbesian revival finds in his thought a potent source for critical reflection on—more than a resolution of—our perennial insistence that authority and liberty can both be satisfied at the same time.

The Second Amendment is perhaps the richest jurisprudential site in which Hobbes may offer a fruitful framework through which to decipher, evaluate, and critique legal and political meanings. Curiously though, it has been absent from neo-Hobbesian conversations.[35] In parallel, Hobbes

33. Alice Ristroph, *Respect and Resistance in Punishment Theory*, 97 CAL. L. REV. 601, 605 (2009) [hereinafter Ristroph, *Respect*]; ROBIN L. WEST, RE-IMAGINING JUSTICE: PROGRESSIVE INTERPRETATIONS OF FORMAL EQUALITY, RIGHTS, AND THE RULE OF LAW 35 (2003).

34. *See* Raff Donelson, *The Inherent Problem with Mass Incarceration*, 75 OKLA. L. REV. 51 (2022) (mass incarceration); Teresa M. Bejan, *Hobbes Against Hate Speech*, BRIT. J. HIST. PHIL. (forthcoming, published online Feb. 3, 2022), https://doi.org/10.1080/09608788.2022.2027340 (hate speech); Rocio Lorca, *Punishing the Poor and the Limits of Legality*, 18 L. CULTURE & HUMAN. 424 (2022) (punishment); SEAN FLEMING, LEVIATHAN ON A LEASH: A THEORY OF STATE RESPONSIBILITY (2020) (collective and organizational responsibility); Luke William Hunt, *Hobbesian Causation and Personal Identity in the History of Criminology*, 31 INTELL. HIST. REV. 247 (2021) (criminogenics); Henrique Carvalho, *Liberty and Insecurity in the Criminal Law: Lessons from Thomas Hobbes*, 11 CRIM. L. & PHIL. 249 (2017) (coercion in criminal justice); Ristroph, *Respect*, *supra* note 33 (procedural safeguards); Raff Donelson, *Blacks, Cops, and the State of Nature*, 15 OHIO ST. J. CRIM. L. 183 (2017) (policing); PETER RAMSAY, THE INSECURITY STATE: VULNERABLE AUTONOMY AND THE RIGHT TO SECURITY IN THE CRIMINAL LAW 215–19 (2012) (preventive orders); Robin L. West, *Law's Nobility*, 17 YALE J.L. & FEMINISM 385, 400–07 (2005) (feminist endorsement of state coercion); Claire O. Finkelstein, *Self-Defense as a Rational Excuse*, 57 U. PITT. L. REV. 621 (1996) [hereinafter Finkelstein 1996] (self-defense).

35. One exception is Alice Ristroph, *The Second Amendment in a Carceral State*, 116 NW. U. L. REV. 203, 230–35 (2021) (This article tracks some of Ristroph's interventions though it was largely written before hers was published).

has not been taken seriously in Second Amendment conversations, where the common assumption is that "the best place to start is with Locke."[36] Sure enough, Hobbes has been namedropped in Second Amendment literature,[37] but no systemic appreciation of his theory has been offered in this context. Worse yet, most of the existing sporadic invocations of Hobbes erroneously assume that his philosophy supports the Hellerian reading of the Second Amendment.[38] This article fills this vacuum, corrects these mistakes, and suggests that Hobbes's philosophy is a unique source for criticizing contemporary interpretation of the Second Amendment, precisely because they share key premises and aspirations—yet ultimately come to opposing conclusions.

I begin, in Part II, by positioning *Bruen*'s contributions within the jurisprudential narrative of Second Amendment law, focusing on how *Bruen* brings to fruition the Hellerian understanding of the place of self-defense in public life. Part III turns to Hobbes, explaining how his theory situates self-defense in public life, with regard to the state of nature, the social contract, and the commonwealth. I then explain, in Part IV, why readers of Second Amendment decisions should care about Hobbes. The article's main contributions are in Part V, which offers a Hobbesian critique of Hellerian Second Amendment law. I focus on four salient issues. First, Hobbes's materialist conception of self-defense, as opposed to the Hellerian centering of autonomy, which allows private appeals to morality to cut through political associations and assert themselves by force. Second, Hobbes's egalitarian understanding of political subjectivity and the representation and protection responsibilities he accordingly ascribes to state institutions; the Heller line of cases instead favors a patriarchal order of hierarchy and self-sufficiency. Third, the dangerous repercussions of a cultural script that views the American as a self-defender, epitomized by the phenomenon of mass shootings, and Hobbes's contrasting view of self-defense as natural but unfortunate, which should not dictate our everyday lives. Fourth, the link between self-defense and

36. Steven J. Heyman, *Natural Rights and the Second Amendment*, 76 CHI.-KENT L. REV. 237, 241 (2000).

37. *See, e.g.*, Boaz Sangero, Heller*'s Self-Defense*, 13 NEW CRIM. L. REV. 449, 455 (2010); David E. Murley, *Private Enforcement of the Social Contract:* DeShaney *and the Second Amendment Right to Own Firearms*, 36 DUQUESNE L. REV. 15, 41 (1997).

38. *See* Michael Steven Green, *Why Protect Private Arms Possession? Nine Theories of the Second Amendment*, 84 NOTRE DAME L. REV. 131, 151 (2008) (noting that "a number of Second Amendment advocates have appealed to such passages in Hobbes as support," and casting doubt on their reasoning; *see also* text accompanying *infra* note 231).

popular sovereignty, which for Heller translates into constitutional fetishism but for Hobbes aims to cultivate a flourishing public life.

## II. *BRUEN* ON SELF-DEFENSE IN PUBLIC LIFE

In this Part, I do not yet delve into all relevant aspects of the Supreme Court's understanding of self-defense in Second Amendment decisions. Here, I focus specifically on *Bruen*'s two aforementioned contributions: expanding the right to the means of self-defense from the home to the public space and predicating the constitutionality of a law infringing on that right on being "consistent with this Nation's historical tradition of firearms regulation."[39] The seeds for both of these holdings already existed in previous decisions on the Second Amendment and surrounding regimes. *Bruen* cultivates them, sharpening the place that self-defense occupies in the Court's understanding of the American social compact.

*Bruen* put to sleep efforts to constrain post-*Heller* Second Amendment doctrine by appealing to self-defense laws as a "stable basis for the home/public distinction."[40] At home, Darrell Miller argued, "the man was Leviathan," but outside of it, "the social compact confers to the government a monopoly on legitimate violence . . . a gun is a token that the social compact is out of joint."[41] Miller meant this as a warning, but it was a legal reality already thanks to *Heller*, and *Bruen* makes sure we are left without a doubt.

*Heller*'s ostensible focus on the home was already misleading in light of the prevailing stand-your-ground doctrine at its background. The common law Castle Doctrine sets the home as the one exception to the duty to retreat in self-defense. In other places, you must try to avoid violence by going somewhere else before you may meet a threat with force. Most U.S. jurisdictions, however, have opted for stand-your-ground rules over retreat rules, not only in the home but in public spaces as well. Wherever one has a right to be, one has a right to respond to threat with force without making an effort to prevent violent confrontation. This shift started with nineteenth century case law and became famous with twenty-first century legislative acts.[42]

39. *Bruen*, 142 S. Ct. at 2126.

40. Eric Ruben, *An Unstable Core: Self-Defense and the Second Amendment*, 108 CAL. L. REV. 63, 78 (2020).

41. Darrell A.H. Miller, *Guns as Smut: Defending the Home-Bound Second Amendment*, 109 COLUM. L. REV. 1278, 1306–08 (2009) [hereinafter Miller, *Guns as Smut*].

42. *See* Cynthia V. Ward, *"Stand Your Ground" and Self-Defense*, 42 AM. J. CRIM. L. 89, 94 (2015).

Despite historical and philological proximities between arms and armor,[43] a gun is not a shield. The Castle Doctrine justifies aggressive action only after the defensive measure—the walls of the home—has failed.[44] Read in tandem with stand-your-ground rules, *Heller* normalized aggression and facilitated its taking over the defensive as default. Not only is the agent standing their ground provided with the most effective means of lethality, but the carrying of guns feeds the notion that danger awaits, and hence legitimates proactive, preemptive defense against it. *Bruen* only renders this explicit, ruling that Second Amendment rights apply in public because they are needed wherever there is risk of confrontation.[45] The Court's view of the public as a space where danger awaits tracks the views of majorities of Americans of all ideological and geographical stripes. Americans almost always think that crime is on the rise,[46] and fear of crime has motivated voting with unparalleled potency since the 1960s,[47] but also long before that.[48] In the American mind, to be out is to be vulnerable: "fear of crime . . . has been written into our common sense and the routines of our everyday life."[49] Under this light, the self-defender as a paradigm

43. *Bruen*, 142 S. Ct. at 2140.

44. The underlying conception of defensiveness here is still patriarchal. For domestic violence victims, the walls of the home do not shield from violence but enable it. *See* Susan P. Liebell, *Sensitive Places?: How Gender Unmasks the Myth of Originalism in* District of Columbia v. Heller, 53 POLITY 207 (2021); Ramsey, *supra* note 24; Christensen, *supra* note 24; Suk, *supra* note 24.

45. Already in 2020, the Court denied certiorari in a challenge to a licensing regime similar to the one the Court struck down in *Bruen*. In dissent, Justice Thomas, joined by Justice Kavanagh, opined that "[c]onfrontations, of course, often occur outside the home. Thus, the right to carry arms for self-defense inherently includes the right to carry in public." Rogers v. Grewal, 140 S. Ct. 1865, 1868 (2020) (denial of certiorari) (Thomas, J., dissenting) (internal citations omitted); *see also* Ruben, *supra* note 40, at 79–80.

46. Since 1972, Gallup polls have included the following question: "Is there more crime in your area than there was a year ago, or less?" In the vast majority of polls, "more" is the most popular answer, often by a large margin. GALLUP, CRIME, https://news.gallup.com/poll/1603/crime.aspx (last visited Aug. 8, 2022).

47. JONATHAN SIMON, GOVERNING THROUGH CRIME: HOW THE WAR ON CRIME TRANSFORMED AMERICAN DEMOCRACY AND CREATED A CULTURE OF FEAR ch. 3 (2007). Recent examples in left-leaning jurisdictions include the recall of Attorney General Boudin in San Francisco, due to concerns that crime was on the rise, and the election of Mayor Adams in New York City, who ran on a tough-on-crime platform, both occurred in 2022.

48. Richard Maxwell Brown, *Historical Patterns of American Violence*, *in* VIOLENCE IN AMERICA: HISTORICAL & COMPARATIVE PATTERNS 19, 29 (Hugh Davis Graham & Ted Robert Gurr eds., 1979) ("The threatening presence of the criminal and the disorderly in American life has incurred the violent riposte of the forces of law and order, ranging from the police and associated legal bodies to lynch mobs, vigilantes, and related extralegal groups").

49. DAVID GARLAND, THE CULTURE OF CONTROL: CRIME AND SOCIAL ORDER IN CONTEMPORARY SOCIETY 163 (2001).

of political subjectivity is just the flip-side of a stronger candidate not mentioned earlier—the victim.[50]

The Supreme Court holds fear of crime in one hand and in the other it holds a portrait of America as home of the brave. It juggles them by conflating the home and the body: if the home is a relatively safe haven, then we need to take it with us wherever we go. The feminist insight that the personal is the political is thus turned on its head. Feminists have long claimed that it is a mistake to think of the home as a private sphere from which the state is absent, because power relations in the home reproduce power relations outside of it, and so we need to think of the home as a political space. The *Bruen* Court, building on stand-your-ground doctrine,[51] agrees that the private/public distinction is bunk. But it moves in the opposite direction. Instead of inviting politics (typically in the form of a welfare state) into the home, it erodes the public sphere by treating every place as if it is a private home, part of the realm of the individual sovereign as head of household.

In this environment, personal use of guns must be dissociated from blame and associated instead with responsibility. Writing for the Court, Justice Thomas takes pains throughout his opinion in *Bruen* to establish these links. Thus, the Court acknowledges a common law history of regulating public carry of firearms for public safety purposes. However, it insists that the fear that such carriage would "terrify the people" was not inherent in the presence or visibility of weapons but rather necessitated mens rea: an intent to cause terror and breach the peace. Per *Bruen*, the dangers that guns present to the public are independent of sociopolitical conditions and hinge exclusively on a "wicked purpose" of the weapons' bearer.[52] Whether you live in the Stuarts' England or in Trump's United States, so long as responsible individuals are the ones with guns, you are safe. Criminals invade and violate other people's homes and bodies, but law-abiding citizens protect them.

As with the home/public distinction, *Bruen*'s linkage between firearms and blameworthiness follows existing case law. One precursor is the 1994 case *Staples v. U.S*, which dealt with regulatory offenses in the context of firearm registration. *Staples* held that owning a semiautomatic assault rifle is not the type of conduct that ought to signal to its doer any

50. SIMON, *supra* note 47, at 75 ("Crime victims are in a real sense the representative subjects of our time"); ALYSON COLE, THE CULT OF TRUE VICTIMHOOD (2007) (discussing the forms of social and political capital generated by claims to victimhood).

51. *See* Suk, *supra* note 24, at 259–64.

52. *Bruen*, 142 S. Ct. at 2142–45.

positive obligation to ascertain its registry requirements.[53] Again writing for the Court, Justice Thomas noted that "[g]uns in general are not 'deleterious devices . . .' that put their owners on notice that they stand 'in responsible relation to a public danger' . . . that an item is 'dangerous,' in some general sense, does not necessarily suggest . . . that it is not also entirely innocent."[54] The opinion marks the social cognitive baseline for what counts as abnormally dangerous. In doing so, *Staples* foreran Second Amendment decisions, picking a side on this front of the culture wars: "forcefully, even gleefully, Justice Thomas argues from the standpoint of the American gun culture," as David Luban writes, adding that the opinion establishes the "normality, or even normativity" of gun ownership.[55] Per the *Staples* Court, immersion in the gun culture blocks any awareness that guns are anything but "licit and blameless."[56] The mens rea requirement of the offense, failure to duly register the weapon, is not met—the offender is excused—unless the government proactively makes it known.[57]

*Bruen* imputes the same social cognition of contemporary American gun culture centuries back and oceans away. Here its methodological contribution comes into play. For alongside the empirical question of how social epistemology shapes our understandings of reality, the texts we read, and the data we analyze,[58] there is also the normative question of whether the law ought to express and rationalize our culture uncritically.[59] The *Bruen* Court's merger of originalism and traditionalism answers in the affirmative.

53. Staples v. U.S., 511 U.S. 600 (1994); *see* David Luban, *The Publicity of Law and the Regulatory State*, 10 J. POL. PHIL. 296, 304 n.21 (2002).

54. *Staples*, 511 U.S. at 610–13 (internal citations omitted).

55. Luban, *supra* note 53, at 306.

56. *Staples*, 511 U.S. at 613.

57. Luban, *supra* note 53, at 308 (arguing that *Staples* establishes a cultural defense, which is usually considered an excuse defense, unlike self-defense which is usually considered a justification defense).

58. For instance, what we find analogous to what. *Bruen* discusses many historical gun regulations that, if found to be sufficiently analogous to the one under review, might render it historically rooted; but no individual nor aggregate set of regulatory regimes is satisfactory. *See Bruen*, 142 S. Ct. at 2149 (Breyer, J., dissenting); Peter Salib & Guha Krishnamurthi, *Gun Rights (Still) Aren't Trumps*, DUKE CTR. FIREARMS L., SECOND THOUGHTS BLOG (July 21, 2022), https://firearmslaw.duke.edu/2022/07/gun-rights-still-arent-trumps (arguing that *Bruen*'s "highly fact-specific approach to analogizing simply cannot work"). Already in *Staples*, Justice Stevens complained in his dissent that the Court "reaches the rather surprising conclusion that guns are more analogous to food stamps than to hand grenades." *Staples*, 511 U.S. at 631 (Stevens, J., dissenting).

59. I put to one side here the possibility that the majority Justices in *Bruen* act in bad faith.

*Heller* is well-known as a triumph of public meaning originalism.[60] Writing for the Court, Justice Scalia conducted an empirical foray into fixed semantic meanings, to discern the binding meaning of the text as it was originally understood. The Court focused on the "operative" clause ("the right of the people to keep and bear arms, shall not be infringed") that follows the "prefatory" one ("A well regulated militia, being necessary to the security of a free state"). It concluded that the "people" whose rights are protected are individuals, "all members of the political community,"[61] and that the purpose for which they can use firearms is protection against threats to their personal safety "in case of confrontation," not limited to the militia context.[62] Per *Heller*, the Second Amendment protects a prepolitical right to "self-preservation" that the Constitution did not create but merely codified.[63]

That the Second Amendment protects a "pre-existing" right can be understood either logically or chronologically. Second Amendment decisions emphasize both at the same time. Logically, self-defense is highlighted as a natural right that predates "all government."[64] Chronologically, the right to have guns is "rooted in the traditions and conscience of our people as to be ranked as fundamental."[65] In this latter sense, "pre-existing" is not timeless but contingent. It means that the right was codified by the English prior to the United States gaining independence, and underwent a series of transitive relations, finally landing in the American Constitution.[66] Up until that last codification, the scope of the right was subject to dynamic, evolutionary updating via judicial interpretation at common law. But this process loses democratic legitimacy once ratification takes place and formally details the necessary procedure for amending the Constitution.[67]

60. Sanford Levinson, *Why Didn't the Supreme Court Take My Advice in the* Heller *Case? Some Speculative Responses to an Egocentric Question*, 60 HASTINGS L.J. 1491, 1501 (2009); Reva Siegel, *Dead or Alive: Originalism as Popular Constitutionalism in* Heller, 122 HARV. L. REV. 191, 191 n.5 and accompanying text (2008).

61. *Heller*, 128 S. Ct. at 2790.

62. *Id.* at 2797.

63. *Id.* at 2793, 2797, 2808, 2810, 2817.

64. *Id.* at 2809; *McDonald*, 130 S. Ct. at 3079 (Thomas, J., concurring) (arguing that the entire Bill of Rights is prepolitical; a strange proposition, since these rights have little meaning outside of person-government relationships).

65. *McDonald*, 130 S. Ct. at 3032 (quoting Snyder v. Massachusetts, 291 U.S. 97, 105 (1934)); *see also id.* at 3050, 3055–56 (Scalia, J., concurring) (emphasizing that the Court's interpretive theory is grounded in American tradition).

66. *See Bruen*, 142 S. Ct. at 2127.

67. *Id.* at 2136 ("the common law, of course, developed over time"); *Rogers*, 140 S. Ct. at 1869–71 (Thomas, J., dissenting) (making same point). Justice Scalia was overtly suspicious of the

There is thus an inherent tension between the idea of a natural right and originalist methodology as the Second Amendment's Supreme Court applies it.[68] While scholars have offered various justifications for originalism, such as virtue ethics,[69] natural rights,[70] linguistics,[71] and positivism,[72] the Court's justification is political: originalism is correct because it solves the countermajoritarian difficulty and vindicates the democratically legitimate choices that express the will of the people.[73] Hence, it looks not to natural moral truths but to the moment of consent to semantic meanings. If self-defense is protected for being a natural right, its validity must be independent of our choices; if, on the other hand, it is protected for its contingent role in our scheme of government, a theory of natural morality may explain the right's inclusion but plays no part in its validity. Traditionalism salvages the Court from this paradox by inserting an element of historical determinism: original meaning is elucidated by ensuing traditions, which, in turn, ensure that the best possible order emerges from our choices.[74]

This perspective might make some sense of the prudential caveats included in *Heller*, contra both its natural right and its originalist aspirations, which would frame the ensuing litigation battles. Stressing that the right is not unlimited, the Court excluded from the scope of the right certain categories of people, e.g., "felons and the mentally ill"; certain "sensitive places," such as schools and government buildings; and certain types of guns: "dangerous and unusual" as opposed to those

legitimacy of common law adjudication in a constitutional regime. *See* Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, *in* A MATTER OF INTERPRETATION 3 (Amy Gutman ed., 1997); *but cf.* Bernadette Meyler, *Towards a Common Law Originalism*, 59 STAN. L. REV. 551 (2006) (critiquing originalists' understanding of common law adjudication and discussing different approaches to continuity and change of the common law).

68. *See* Miller, *Guns as Smut*, *supra* note 41, at 1322–23 (arguing that *Heller* collapses natural law and affirmative acts of government as the sources for the Second Amendment right).

69. *See* LEE J. STRANG, ORIGINALISM'S PROMISE: A NATURAL LAW ACCOUNT OF THE AMERICAN CONSTITUTION (2019).

70. *See* RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION (2004).

71. *See* Lawrence B. Solum, *The Fixation Thesis: The Role of Historical Fact in Original Meaning*, 91 NOTRE DAME L. REV. 1 (2015).

72. *See* William Baude, *Is Originalism Our Law?*, 115 COLUM. L. REV. 2349 (2015).

73. *See* KEITH E. WHITTINGTON, CONSTITUTIONAL INTERPRETATION: TEXTUAL MEANING, ORIGINAL INTENT, AND JUDICIAL REVIEW ch. 5 (1999). On the gaps and tensions between judicial and academic originalisms, see Lawrence B. Solum, *Originalism versus Living Constitutionalism: The Conceptual Structure of the Great Debate*, 113 NW. U. L. REV. 1243 (2019).

74. *See* Randy Barnett, *The Intersection of Natural Rights and Positive Constitutional Law*, 25 CONN. L. REV. 853 (1993); James Q. Whitman, *Why Did the Revolutionary Lawyers Confuse Custom and Reason?*, 58 U. CHI. L. REV. 1321 (1991).

"chosen by American society."[75] The latter ostensibly precludes the former, reminiscent of Justice Scalia's interpretation of the Eighth Amendment—if a punishment has been commonly used it cannot be cruel *and* unusual[76]—though a major difference is that the state establishes which punishments are "usual," but the market establishes which weapons are.[77] *Bruen* urges "unqualified deference" to the traditions that yield gun popularity as expressed by choosing products, not representatives.[78]

These exclusions were justified in *Heller* for being "longstanding."[79] *Bruen* inquires whether there is such a longstanding tradition as regards New York's requirement that applicants for public carry gun licenses demonstrate a proper cause before being issued one. The history it surveys stretches from the fourteenth to the twenty-first centuries, yet the Court claims allegiance to the originalist methodology: meaning is fixed in time and expressed in text, and earlier and later sources only help to understand it.[80] If this is the case, however, it cannot matter whether a particular regulation is longstanding or not. *Bruen* takes *Heller*'s hint and diverges from originalism in scrutinizing a regulation based on whether it is a "well-established," "longstanding," "enduring American tradition."[81] This test belies any claim that meaning is fixed to a specific point in time, but it is consistent with originalism in establishing a constitutionality test that, taken on its merits, is concerned exclusively with the *is* and denies the

75. *Heller*, 128 S. Ct. at 2817.

76. Harmelin v. Michigan, 501 U.S. 957, 111 S. Ct. 2680, 2701 (1991) ("Severe, mandatory penalties may be cruel, but they are not unusual in the constitutional sense, having been employed in various forms throughout our Nation's history").

77. Cody J. Jacobs, *End the Popularity Contest: A Proposal for Second Amendment "Type of Weapon" Analysis*, 83 TENN. L. REV. 231, 265–75 (2015) (explaining how commercial firearm brands can manipulate consumer choice, e.g., by manufacturing particular guns and marketing them more aggressively than others). The relationship between state and market is never dichotomous. Gun popularity is also affected by local statutes and litigation strategies that may limit or expand availability and influence consumer choice of weaponry. *See* Jacob D. Charles, *Securing Gun Rights by Statutes: The Right to Keep and Bear Arms Outside the Constitution*, 120 MICH. L. REV. 581, 634 (2022).

78. *Bruen*, 142 S. Ct. at 2131. *Bruen* thus positions itself as judicially conservative (deferential), economically conservative (market-oriented), and socially conservative (respecting tradition).

79. *Heller*, 128 S. Ct. at 2816. Some commentators claim that originalism "goes out the window at this point." Levinson, *supra* note 60, at 1502. Others justify the passage as a matter of construction rather than interpretation, retaining originalist integrity. Lawrence B. Solum, District of Columbia v. Heller *and Originalism*, 103 NW. U. L. REV. 923, 972–73 (2009).

80. *Bruen*, 142 S. Ct. at 2137 ("to the extent later history contradicts what the text says, the text controls"). Justice Barrett adds in her concurrence that "the Court does not conclusively determine the manner and circumstances in which post-ratification practice may bear on the original meaning of the Constitution." *Id.* at 2162.

81. *Id.* at 2133, 2139, 2154 (respectively).

relevance of the *ought*. As the Court finds that Americans have always been allowed to take guns with them everywhere they go, no logical or context-sensitive assessment of New York's licensing regime can cabin that right.[82]

The Court's interpretive attitude submits that no matter the social cost or the normatively troubling content of being who we are—that's what we defend, whoever that might be. Since individual self-defense is a central component of who the American is, Second Amendment law invites scrutiny not only from constitutional law theory but from criminal law theory too. From this angle, the Court is in line with recent calls to view the criminal law as reflective but not constitutive of culture. A contemporary proponent of this approach is Joshua Kleinfeld, who draws on the counter-enlightenment historical school of jurisprudence to claim that the criminal law ought to "valorize the ethical life extant in a culture."[83] This romanticist school of thought assumes a homogenous, coherent national culture that expresses itself in the customs and practices of its people. The stuff of law is, therefore, not authoritative texts that are a product of choice, but a dynamic process of collective daily life.[84] Kleinfeld's corresponding vision of the criminal law assumes a collective ethical life that is both cohesive and worth preserving. If this is the case, the criminal law's function is to sustain—rather than explain, critique, or transform—society's way of life and ethical language, to express the ethos of the American polity.[85] Punishing and thereby condemning deviations from the existing ethical project fortifies it and its members, thereby setting the cultivation of solidarity as the criminal law's central goal.[86]

82. The Court's chosen methodology forces it to resort to gross overstatements, such that despite its discussions of many and widespread analogous prohibitions it must deny doubt rather than resolve it, and conclude that "there is little evidence of an early American practice of regulating public carry by the general public," *id.* at 37, there is a "consensus" that public carry prohibition was "beyond the constitutional pale in antebellum America," *id.* at 46, and there is "no doubt" about the public understanding of the Second Amendment, *id.* at 11. It is hard to see how any reader familiar with the huge volume of dissents, amici briefs, and historical scholarship challenging the majority's conclusions, could agree that there is "no doubt," even if one agrees with the Court about the final result. For a thorough critique of *Bruen*'s historical methodology, see Michael L. Smith, *Historical Tradition: A Vague, Overconfident, and Malleable Approach to Constitutional Law*, 88 BROOK. L. REV. (forthcoming 2023), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4187143.

83. Joshua Kleinfeld, *Reconstructivism: The Place of Criminal Law in Ethical Life*, 129 HARV. L. REV. 1485, 1549 (2016).

84. *See* Menachem Mautner, *Three Approaches to Law and Culture*, 96 CORNELL L. REV. 839, 845–47 (2011).

85. PHILIP BOBBIT, CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION 93–95 (1982).

86. Kleinfeld, *supra* note 83, at 1492.

Hellerian Second Amendment law, moving from punishment to self-defense, exposes a basic tension in this scheme: what if solidarity is fundamentally at odds with the ethical language at play in the United States, which rather valorizes atomism, self-sufficiency, or patriarchy? If self-interested individualism best characterizes the masses' wants and wonts,[87] then a challenge arises to Kleinfeld's assertion that "the problem in American criminal law today is not how Americans live; it is the way our criminal law lacks respect for how we live."[88] We might not like what we find at the bottom of contemporary American ethical life, or there might be no single coherent social articulation of it, let alone a prelegal articulation.[89]

If there is not one but many recognitional communities,[90] it is incumbent on the interpreter of the culture to make a normative choice about which discourse to promote—that is, to construe law as constituting, not just reflecting culture. The *Heller* and *Bruen* Courts are aware of this, and hence only walk so far with Kleinfeld and the historical school. On the one hand, the Court understands law as a product of choice, cemented by formal procedures: the meaning of a legal edict is a settled fact fixed to the time of its democratic promulgation. This runs directly against the historical school's contention that law, like language, is organic and dynamic and evolves on the streets rather than in any particular deciding forum. On the other hand, the Court also makes room for a spontaneously emerging legal order,[91] when adjudicating the legality of gun regulations such as licensing regimes and types of guns. Thus, *Bruen* acknowledges some weapons are offensive just by virtue of their carriage, but which ones are is contingent: the category of guns deemed socially acceptable ever

87. Jeffrie G. Murphy, *Marxism and Retribution*, 2 PHIL. & PUB. AFF. 217, 239 (1973) (arguing that the conditions for applying a social contract-based retributive system of punishment do not exist in our hypercapitalist society, which enshrines greed and selfishness while unfairly distributing opportunities to achieve them: "There is something perverse in applying principles that presuppose a sense of community in a society which is structured to destroy genuine community").

88. Kleinfeld, *supra* note 83, at 1550.

89. Mautner, *supra* note 84, at 852 ("law, by its participation in the constitution of culture, also participates in the creation of the mind categories through which individuals perceive the social relations in which they take part—i.e., their status vis-à-vis other individuals, what others are entitled to do to them, what they are entitled to do to others, and the self-perceived identities of individuals and groups"); Austin Sarat & Thomas R. Kearns, *The Cultural Lives of Law*, *in* LAW IN THE DOMAINS OF CULTURE 1, 10 (Austin Sarat & Thomas R. Kearns eds., 1998) (making same point).

90. Matthew D. Adler, *Popular Constitutionalism and the Rule of Recognition: Whose Practices Ground U.S. Law?*, 100 NW. U. L. REV. 719, 747 (2006).

91. I use the Hayekian term of spontaneous order—*see generally* FRIEDRICH A. HAYEK, LAW, LEGISLATION AND LIBERTY (1973)—because this "spontaneity" is a delegation of law-making to market forces. *Supra* notes 75–78 and accompanying text.

grows.[92] Here the Court allocates the prerogative of designing legal arrangements to particular subcultures, which use legal institutions instrumentally to exert control over others. The dominant group triumphs in a particular social conflict by imposing their own social cognition as representative of the entire populace, and by predicating legality on a discernment of existing tradition, which enhances their hegemonic normative power.[93]

Clearly, the historical context of Second-Amendment litigations is no less informative than that of the constitutional provision itself. In the decades preceding *Heller*, political conservatives flagged firearm possession as a core element of traditional American identity coming under attack[94] and, in parallel with fear of crime taking over American politics, began justifying the right by appeal to personal self-defense.[95] Originalism rose in the same period, valorized by the same portion of the population. The conservative-libertarian backlash to the civil rights movement, legal liberalism, and the Great Society pushed gun ownership to the fore of the "culture wars" and the Second Amendment to the fore of legal debate.[96] Tracking older historical patterns, growing social diversity and shrinking gaps between classes—which are keenly felt not at home but in public—lead the socially strong to deem themselves physically

92. *Bruen*, 142 S. Ct. at 2132 (2022) ("even though the Second Amendment's definition of 'arms' is fixed according to its historical understanding, that general definition covers modern instruments that facilitate armed self-defense"); *id*. at 2143 (even if handguns were considered dangerous and unusual in the 1600s, they are not considered thus today); Caetano v. Massachusetts, 136 S. Ct. 1027, 1027–28 (2016) (Per Curiam) (ruling that "stun guns" are protected by the Second Amendment, clarifying that the standard for "dangerous and unusual" weapons is not constrained by whether a weapon was in existence at the time of the Founding). Theoretically, this process might work in the other direction as well. *See* Jacob D. Charles, *Defeasible Second Amendment Rights: Conceptualizing Gun Laws that Dispossess Prohibited Persons*, 83 L. & CONTEMP. PROBS. 53, 59 (2020) ("some arms that would have been 'out' several decades ago may be 'in' now. The reverse could also be true").

93. Mautner, *supra* note 84, at 850; Paul W. Kahn, *Freedom, Autonomy, and the Cultural Study of Law*, 13 YALE J.L. & HUMAN. 141, 149–50 (2001).

94. Often quoted in this context is the actor and activist who served as president of the NRA, Charlton Heston. *See* Siegel, *supra* note 60, at 231–36; Jamal Greene, *Guns, Originalism, and Cultural Cognition*, 13 U. PA. J. CONST. L. 511, 525–26 (2010); Green, *supra* note 38, at 159.

95. David Yamane, Sebastian L. Ivory & Paul Yamane, *The Rise of Self-Defense in Gun Advertising: The American Rifleman, 1918-2017*, *in* GUN STUDIES: INTERDISCIPLINARY APPROACHES TO POLITICS, POLICY, AND PRACTICE 9, 17–22 (Jennifer Carlson, Kristin A. Goss & Harel Shapira eds., 2018).

96. Siegel, *supra* note 60. Advocates for gun regulation now similarly read into this issue myriad values and interests beyond bodily integrity, including speech, religion, and assembly. *See* Reva B. Siegel & Joseph Blocher, *Why Regulate Guns?*, 48 J.L. MED. & ETHICS 11 (2020).

weak and therefore to take special interest in self-defense.[97] This cultural process yielded *Heller* and progressed naturally into *Bruen*'s traditionalist methodology and public carry normalization: "the Second Amendment has *become* an individual right-protecting provision that the Supreme Court must respect as such."[98]

Hellerian Second Amendment doctrine, which reached a new peak with *Bruen*, may be historically contingent and empirically driven, but that does not diminish the amount or vigor of normative offerings it invites us to unpack. This article argues that the philosophy of Thomas Hobbes is especially useful for this task.

## III. HOBBES ON SELF-DEFENSE IN PUBLIC LIFE

The Second Amendment Supreme Court shares with Hobbes the basic idea that self-defense is "a necessary feature of a legitimate political order."[99] To unpack this relationship in Hobbes, let us follow the Hobbesian subject "chronologically": from the state of nature, through the covenant and into a civil order. The general ideas surrounding this trajectory, introduced into modern philosophy by Hobbes and subsequently modified by many others, from Locke to Rawls and beyond,[100] are both well-known and subject to centuries of interpretation. Our focus will therefore be narrow, placed on the role of self-defense in the three stages of the scheme: the state of nature, the social contract, and the commonwealth.

### *A. Alas, Self-Defense*

In the Hobbesian state of nature, where no political authority exists and no positive law governs, it is morally permissible for persons to do whatever they deem conducive to their self-preservation. More specifically, they are legitimate in their efforts to protect their safety and

97. EMELYNE GODFREY, MASCULINITY, CRIME AND SELF-DEFENCE IN VICTORIAN LITERATURE 3–4 (2011) (describing the growing fascination with self-defense among upper classes in Victorian England with the rise of the metropolitan city).

98. Greene, *supra* note 94, at 523.

99. Claire Finkelstein, *A Puzzle about Hobbes on Self-Defense*, 82 PAC. PHIL. Q. 332, 332 (2001) [hereinafter Finkelstein 2001]; *see also* Finkelstein 1999, *supra* note 32.

100. *See* KATRINA FORRESTER, IN THE SHADOW OF JUSTICE: POSTWAR LIBERALISM AND THE REMAKING OF POLITICAL PHILOSOPHY (2019) (describing how Rawls almost single-handedly transformed the vocabulary of late twentieth century political philosophy, owing, inter alia, to his revitalization of contractualism).

security by whichever means available,[101] since the worst impediment to the fulfillment of their interests—death—is always looming.[102] Absent a sovereign, self-preservation cannot assume any robust substantive content, because all are constantly under physical threat and in a state of war.[103] This is also a state of equality, since all are equal in their ability to cause pain and death to others and in their fear of being the victims of such actions, brought about with the help of force or wits.

While equal vulnerability is the first *law* of nature,[104] self-defense is the first *right* of nature[105]: "every man may preserve his own life and limbs, with all the power he hath."[106] To ward off threats and attacks, persons judge what steps are necessary subjectively, without presuming neutrality and impartiality, i.e., without presuming to adhere to universally applicable moral imperatives. This judgment rather hinges on where the self stands vis-à-vis the other, one's own perception of real and potential power relations.[107] In light of this radical equality between persons who enjoy absolute freedom to act,[108] the natural right to self-preservation encompasses not only defensive actions but ones of an unequivocally aggressive nature as well—preemptive, invasive, acquisitive, offensive.[109] Rights to use others for one's benefit, with oneself as the sole, and legitimate, judge of their necessity.[110] As opposed to natural laws, which are logical principles that entail a prescription of an ought, natural rights merely indicate what people can freely and blamelessly choose to do, without implying any obligation to act on anyone else's part.[111] Hobbesian rights are not Hohfeldian claim-rights: they incur no correlative duties to

101. THOMAS HOBBES, LEVIATHAN 190 (C. B. Macpherson ed., 1985) (1651) [hereinafter LEVIATHAN]; *see, e.g.*, ELEANOR CURRAN, RECLAIMING THE RIGHTS OF THE HOBBESIAN SUBJECT 103 (2007); RICHARD TUCK, HOBBES 58–59 (1989).

102. QUENTIN SKINNER, HOBBES AND REPUBLICAN LIBERTY 93 (2008); TUCK, *supra* note 101, at 59; *see also infra* note 169 and accompanying text (on the centrality of fear for life).

103. CURRAN, *supra* note 101, at 105.

104. LEVIATHAN, *supra* note 101, at 189–90.

105. RICHARD TUCK, NATURAL RIGHTS THEORIES 120 (1979).

106. Thomas Hobbes, *The Elements of Law*, *in* THREE-TEXT EDITION OF THOMAS HOBBES'S POLITICAL THEORY 136 (Deborah Baumgold ed., 2017); *see* TUCK, *supra* note 101, at 60.

107. Jeremy Waldron, *Self-Defense: Agent-Neutral and Agent-Relative Accounts*, 88 CAL. L. REV. 711 (2000).

108. Murray Forsyth, *Hobbes' Contractarianism: A Comparative Analysis*, *in* THE SOCIAL CONTRACT FROM HOBBES TO RAWLS 35, 37–38 (David Boucher & Paul Kelly eds., 1994).

109. CURRAN, *supra* note 101, at 156–57; Ristroph, *Respect*, *supra* note 33, at 607; Susanne Sreedhar, *Defending the Hobbesian Right of Self-Defense*, 36 POL. THEORY 781, 799 (2008).

110. CURRAN, *supra* note 101; Ristroph, *Respect*, *supra* note 33.

111. LEVIATHAN, *supra* note 101, at 189; TUCK, *supra* note 101, at 62–63; CURRAN, *supra* note 101, at 106.

ensure they are respected.[112] As opposed to prevailing conceptions today—that having a right means others must not interfere with the acts the right entitles its holder to perform—multiple Hobbesian agents may have an equal right to the very same thing at the very same time.

Hobbes famously defined people's lives in the state of nature as "nasty, brutish, and short"; slightly less famous but no less telling are the preceding two adjectives: "solitary, poore."[113] Absolute freedom of the kind we enjoy as natural beings is thus not exactly something we "enjoy."[114] It is awful. We want to leave it behind, become social, and end war and lawlessness along with the violence and misery they entail. We want and we can create a better reality for ourselves than what nature has in store. Sociability, in Hobbes's sharp break with the Aristotelian tradition, does not come naturally: we have to work to make it happen.[115] Once we enter civilization, our being "among but not with others" would be ameliorated (though not eradicated).[116] In Hobbes's language, this requires doing with rights an act that to modern ears sounds a lot like what we might do with guns: lay them down. Indeed, the second law of nature, per Hobbes, is that one "be willing, when others are so too, as farre-forth, as for Peace, and defence of himselfe he shall think it necessary, to lay down this right to all things."[117] Natural rights thus belong in nature, not in civilization. Instances in which we will need to invoke our natural rights within civil society do occur, but each of them is a cause for worry.

People's first priority is preserving life and limb, and hence the choice between stable peace and chaotic war ought to be clear.[118] Hobbes's is a philosophy of peace and security, but how can they be achieved? The second law of nature presents a prisoner's dilemma—no one has incentive to be the first to lay down their rights, even if all recognize that giving up their equally valid claim to the use of force would enhance their prospects.[119] Here the social contract enters the picture. As we will

112. Waldron, *supra* note 107, at 718 (Hobbesian rights are Hohfeldian privileges); *see also* Ristroph, *Respect*, *supra* note 33, at 617 (Hohfeld aside, Hobbesian rights entail no correlative duties); Sreedhar, *supra* note 109, at 797 (same); *but cf.* CURRAN, *supra* note 101, at 75–78, 154 (Hohfeldian analysis cannot capture Hobbes's conception of rights, and renouncing does incur a duty).

113. LEVIATHAN, *supra* note 101, at 186.

114. Philip Pettit, *Freedom in Hobbes's Ontology and Semantics: A Comment on Quentin Skinner*, 73 J. HIST. IDEAS 111, 119 (2012). See further discussion of Hobbes's conception of freedom at *infra* notes 204–209 and accompanying text.

115. SKINNER, *supra* note 102, at 94–97.

116. CONAL CONDREN, THOMAS HOBBES 37 (2000); *see also id.* at 42.

117. LEVIATHAN, *supra* note 101, at 190.

118. TUCK, *supra* note 101, at 62.

119. Ristroph, *Respect*, *supra* note 33, at 608.

presently see, it takes shape via the third law of nature: one ought to keep one's word.[120]

### *B. The Political Magic of Consent*

Against this backdrop of equal vulnerability and equal desire to live peacefully, the sovereign emerges, equipped with the means to hold at bay the tendency of conflicting wills to produce violence. The social contract is the mechanism that establishes sovereignty, but it also provides it with legitimacy, such that in order for political authority to be justified it must be contingent on consent. Although there are ancient and medieval precedents to the idea that consent legitimizes government,[121] it was Hobbes who articulated the idea that the source of justice is contract. That is, that all entitlements and obligations of individuals are a product of agreements they freely consented to.[122]

To reconcile free will with coercive political action, Hobbes develops a theory of representation. An action can be truly attributed to a person even if performed by another, provided the former duly authorized the latter.[123] As Quentin Skinner explains, the covenant undertaken by individuals consists of a twofold move: a unification of the multitude of conflicting wills, and an establishment of a political authority to act on behalf on the unified will.[124] The first establishes the fictitious entity of the state, and the second commissions a sovereign to represent it.[125] The process of consensual transfer of rights renders the laws issued by the sovereign a product of individuals' own will and therefore just.

The kind of representation the sovereign embodies is akin to a litigator in court or an actor on stage: the civil is an artificially constructed realm, a fiction, in which a collectivity can become a united entity and confer the

120. LEVIATHAN, *supra* note 101, at 201; *see also id.* at 195 ("a Promise is equivalent to a Covenant; and therefore obligatory").

121. *See, e.g.*, David Johnston, *A History of Consent in Western Thought*, *in* THE ETHICS OF CONSENT: THEORY AND PRACTICE 25, 26 (Franklin G. Miller & Alan Wertheimer eds., 2010).

122. *Id.* at 45; SKINNER, *supra* note 102, at 87.

123. Quentin Skinner, *Hobbes and the Purely Artificial Person of the State*, 7 J. POL. PHIL. 1, 7 (1999).

124. *Id.* at 25–26.

125. *Id.*; *see also* FLEMING, *supra* note 34, at 47–51 (summarizing the scholarly debate over the nature of the state); RICHARD TUCK, THE SLEEPING SOVEREIGN: THE INVENTION OF MODERN DEMOCRACY 107–09 (2016) (stressing that the separation between state and sovereign was not as pronounced in earlier writings of Hobbes, primarily *De Cive*. But *Leviathan* is both the later text and the conceptual culmination of Hobbes's thinking. SKINNER, *supra* note 102, at ch. 5; CONDREN, *supra* note 116, at 43).

power to speak in its name to another.[126] In lieu of a plurality of conflicting wills, a unified will governs.[127] It belongs not to a natural person but to the contingent political artifact of the commonwealth, which is in turn represented by the government, a man or an assembly.[128] Yet the authorizers must be the natural persons who are capable, unlike the state, of bearing responsibility for their actions, whoever performs them, and who own or dominate the artificial creation.[129] Hence, the validity of the sovereign's actions hinges on the authorization of each and every subject, such that their status of equality is retained but transformed.[130] For they still *own* the sovereign's words and deeds as *their own*. Hobbes understands consent to denote an act of subjection as well as subjectification; it is assuming a civil personality by submission to another's control yet without relinquishing individuality.[131]

The natural multitude becomes a civil unity through the single representer, authorized by the social contract.[132] It is in the best interest of all persons to covenant and transfer their rights and powers to the sovereign, authorizing him to perform the actions they are the authors of—in their place, but with his discretion. Otherwise, war would ensue. Thus, self-interest translates fear into peace; the alienation is willful, done for the purpose of ensuring security and contentment.[133] The sole purpose of consent is to yield benefit, and the latter legitimates the former, rendering agreement under threat voluntary (Hobbes rejected the idea that duress interferes with consent).[134]

The dangerous volatility of free human interaction is the ground upon which the political order grows.[135] Sovereignty is a political solution to the

126. FLEMING, *supra* note 34, at 47–48; Skinner, *supra* note 123, at 6, 12, 18; Forsyth, *supra* note 108, at 41; Marco Piasentier & Davide Tarizzo, *'The Government of a Multitude:' Hobbes on Political Subjectification*, *in* THE ROUTLEDGE HANDBOOK OF BIOPOLITICS 36, 41 (Sergei Prozorov & Simona Rentea eds., 2017).

127. Forsyth, *supra* note 108, at 41.

128. In describing Hobbes's theory, to use pronouns other than male to describe political actors would be anachronistic.

129. Skinner, *supra* note 123, at 13–17.

130. *Id.* at 22–23; Liisi Keedus, *Liberalism and the Question of "The Proud": Hannah Arendt and Leo Strauss as Readers of Hobbes*, 73 J. HIST. IDEAS 319, 330 (2012).

131. Piasentier & Tarizzo, *supra* note 126, at 37–43; Alice Ristroph, *Hobbes on "Diffidence" and the Criminal Law*, *in* FOUNDATIONAL TEXTS IN MODERN CRIMINAL LAW 23, 25–26 (Markus D. Dubber ed., 2014) [hereinafter Ristroph, *Diffidence*].

132. Skinner, *supra* note 123, at 19; TUCK, *supra* note 101, at 67.

133. Skinner, *supra* note 123, at 23.

134. Finkelstein 2001, *supra* note 99, at 336–40; SKINNER, *supra* note 102, at 200; CONDREN, *supra* note 116, at 117.

135. Ristroph, *Respect*, *supra* note 33, at 607; Forsyth, *supra* note 108, at 41.

problem of moral relativism in the state of nature, where every person is her self-preserving actions' own judge.[136] Renouncing the right to self-governance by authoring a political authority and establishing a commonwealth, persons unconditionally and irrevocably delegate their decision-making powers.[137] Authorization cannot be rescinded, because that would be contradictory: the sovereign's actions, on behalf of the state, are the people's own.[138] "This is more than Consent," says Hobbes, "it is a reall Unitie . . . This is the Generation of that great LEVIATHAN, or rather of that *Mortall God*, to which wee owe under the *Immortall God*, our peace and defence."[139]

Although Hobbes concedes that his scheme of political representation does not bar a democratic assembly from assuming the role of sovereign, he maintains that sovereignty is undividable and must be able to compel obedience.[140] Yet it does not follow that the sovereign bears no obligations toward the citizenry. True, the sovereign does not provide us with the safety we desire "in return" for our surrendering to him our liberties. The sovereign is not a party to the covenant and hence does not share the mutual obligations that subjects undertake by covenanting.[141] The source of his duties is not contractual, nor does it emanate from the subjects' rights, since these are not claim-rights that entail correlative duties but only liberties to act. Rather, it is the office he holds.[142] As representer of all subjects, and absent any organic unity with the state, the sovereign is just a holder of an office with duties attached—to procure the safety of the people and, under some interpretations, their contentment as well beyond mere survival.[143] In civil society, all take upon themselves a role, and the

136. TUCK, *supra* note 101, at 64.

137. *Id.* at 64–65; Ristroph, *Respect*, *supra* note 33, at 609.

138. Skinner, *supra* note 123, at 27.

139. LEVIATHAN, *supra* note 101, at 227 (parenthesis removed).

140. *Id.* at 367–72; CONDREN, *supra* note 116, at 52, 73; Piasentier & Tarizzo, *supra* note 126, at 38; RICHARD E. FLATHMAN, THOMAS HOBBES: SKEPTICISM, INDIVIDUALITY, AND CHASTENED POLITICS 158 (new ed. 2002); Gary L. McDowell, *Private Conscience & Public Order: Hobbes &* The Federalist, 25 POLITY 421, 425 (1993).

141. Ristroph, *Respect*, *supra* note 33, at 609–10; Sreedhar, *supra* note 109, at 797; CONDREN, *supra* note 116, at 43.

142. CURRAN, *supra* note 101, at 105, 157, 174; SKINNER, *supra* note 102, at 119; Thomas Hobbes, *De Cive*, *in* THREE-TEXT EDITION, *supra* note 106, at 338–64 [hereinafter Hobbes, *De Cive*]. In addition to his office, another source of the sovereign's duties is natural law and an obligation to the immortal god, but Hobbes offers little guidance as to the content of these duties. CURRAN, *supra* note 101, at 112; CONDREN, *supra* note 116, at 45.

143. Skinner, *supra* note 123, at 20–21; Sreedhar, *supra* note 109, at 802 n.22; CURRAN, *supra* note 101, at 113.

sovereign's is a weighty one, which tyranny would abuse.[144] Hobbesian absolutism does not entail arbitrariness, selfishness, or capriciousness. Rather, he can be read to distill the idea that legitimate authority over individuals is a high achievement. For his theory demands true and equal representation of all, along with every responsibility that this representation incurs. So high an achievement, that it invites us to contemplate political life as an ongoing and worthwhile yet doomed struggle to attain it.

Persons prefer by nature the lesser evil over the greater one.[145] Therefore, to enter a covenant that does not guarantee adequate protection and contentment is not only unwise but irrational.[146] By the same token, a state that fails to provide these benefits is unworthy of its name; it is not a commonwealth anymore. In light of the nature of his relationship with the subjects, the sovereign's own desire for self-preservation entails doing his job well and taking care of the citizenry, for nonprudential reasons.[147] To do otherwise would be a breach of the trust that is duly invested in him and conceptually animates his deeds[148]: people cannot authorize their own destruction.[149] Consequently—and seemingly contradicting the irrevocability of consent, as will be addressed in the next section—in the event that the sovereign fails to uphold his responsibilities, the subjects are freed from theirs. "The Obligations of Subjects to the Soveraign, is understood to last as long, and no longer, than the power lasteth, by which he is able to protect them . . . The end of Obedience is Protection."[150]

Underlying this striking argument of the people's right to rebel is the inalienability of self-defense—the one thing that resists consent's control. As we turn to look at it more closely, we can take note that although the sovereign is the source of civil law and rule of law equals rule by will, it is a public rather than a private will.[151] Consent works to confer discretion to a public entity and the output is the subjects' welfare, including the

144. CONDREN, *supra* note 116, at 45.

145. LEVIATHAN, *supra* note 101, at 199.

146. Finkelstein 2001, *supra* note 99, at 338; *infra* note 157 and accompanying text.

147. For instance, the commands the sovereign issues must not be arbitrary. *See* Ristroph, *Respect*, *supra* note 33, at 611.

148. TUCK, *supra* note 101, at 70; *see also* Sreedhar, *supra* note 109, at 792–95 (arguing that trust is a central component in all Hobbesian covenants).

149. CONDREN, *supra* note 116, at 45.

150. LEVIATHAN, *supra* note 101, at 272; *see* CURRAN, *supra* note 101, at 113–15.

151. Michael P. Zuckert, *Hobbes, Locke, and the Problem of the Rule of Law*, *in* 36 NOMOS: THE RULE OF LAW 63, 67 (Ian Shapiro ed., 1994); CONDREN, *supra* note 116, at 72.

provision of public, equitable recourse instead of private charity.[152] In general, public force is not the problem for Hobbes but the solution. The problem is private violence, which inevitably results from unrestrained private will.[153] The other side of the coin is that since the sovereign is external to the acts by which people come together and constitute their reality and collective identity, a nonhierarchical social sphere is thereby established as well. Here Hobbes trusts us, per James Martel, with "the responsibility to create ourselves as we see fit."[154]

### *C. Nevertheless, Self-Defense*

The basis for entering the covenant is consent, albeit conceptualized as consistent with coercion and valid though motivated by fear.[155] The one thing, however, that persons do not, indeed cannot consent to, is the alienation of self-defense. It is a vestige of the state of nature that we are unable to shake off, for logical as well as psychological reasons.[156] Conceptually, it is impossible for a person to renounce self-defense because it is diametrically opposed to the purpose of the original covenant—to yield benefit, for which a *sine qua non* is the preservation of one's life. Hobbes's attribution of common sense to persons leads him to deny the possibility of self-contradiction—covenanting for safety cannot sit with forfeiting safety. As Jeremy Waldron explains, "An individual's obligations depend, for Hobbes, not so much on the exact words of his submission but 'from the Intention . . . which . . . is to be understood by the End [thereof].'" If a covenant is self-contradicting, "no intention or purpose can be imputed to it."[157] Psychologically, defending oneself from

152. Hence, the sovereign taxes, adjudicates with equity and decides on the distribution of material resources, for the purpose of providing each subject with fair access to the necessities of life. TUCK, *supra* note 101, at 71.

153. West, *supra* note 34, at 401.

154. Martel, *supra* note 6; *see also* Lucien Jaume, *Hobbes and the Philosophical Sources of Liberalism*, *in* THE CAMBRIDGE COMPANION TO HOBBES'S *LEVIATHAN* 199, 204 (Patricia Springborg ed., 2007).

155. JEAN BETHKE ELSHTAIN, SOVEREIGNTY: GOD, STATE, AND SELF 105 (2008); CONDREN, *supra* note 116, at 34 ("Hobbes was decidedly unusual in arguing that free will and determinism are compatible"), 117; Pettit, *supra* note 114; Johnston, *supra* note 121, at 46.

156. Sreedhar, *supra* note 109, at 785–88, 800 n.11 (discussing Waldron *supra* note 107; Finkelstein 2001, *supra* note 99).

157. Waldron, *supra* note 107, at 720 (quoting LEVIATHAN, *supra* note 101, at 268); *see also* Finkelstein 2001, *supra* note 99, at 336.

immediate harm would prevent the greater evil, a potentially fatal one, and people cannot be expected to resist the urge to survive.[158]

Self-defense does not discriminate between a threat posed by a private or a public agent. As a result, potential for resistance stands, as one commentator put it, "at the heart of the infrastructures of the state."[159] This presents a puzzle. Rational reasons and passionate motivations both prevent us from trusting each other to keep our words absent an enforcing authority, in spite of our best interests.[160] Since justice consists of upholding agreements, Hobbesian subjects are bound to the obligations arising from their own covenants, and no more. In a state of nature, covenants are impossible because they are unenforceable, and therefore might makes right.[161] In a civil order, however, our pacts and covenants bring about a body politic, whose laws are consequently just.[162] Once we unite our wills through the social contract and erect a legitimate sovereign who now represents us, obeying his command *is* justice, because it is consensual as well as beneficial. Ergo, subjects cannot legitimately disobey.[163] At the same time, self-defense is inalienable, such that when anyone including the sovereign tries to cause me harm, I am justified in resisting and protecting the very vital interests underlying this contractarian justice.[164] Ergo, subjects are at liberty to disobey.[165] How can both propositions be true, and unconditional coercion sit squarely with legitimate resistance?

Some critics hold that the tension between the omnipotence of the Hobbesian sovereign, and the inalienable right to self-defense of the Hobbesian subject—is a fatal flaw in his theory.[166] Others attempt at reconciliation or find the paradox helpful precisely because it is

158. Waldron, *supra* note 107, at 722–23; Finkelstein 2001, *supra* note 99, at 341–42; Sreedhar, *supra* note 109, at 787–88.

159. Jaume, *supra* note 154, at 212.

160. *Id.* at 202–03; JEAN HAMPTON, HOBBES AND THE SOCIAL CONTRACT TRADITION 58–68 (1986).

161. SKINNER, *supra* note 102, at 99.

162. *Id.* at 126.

163. Sreedhar, *supra* note 109, at 784; ELSHTAIN, *supra* note 155, at 107; SKINNER, *supra* note 102, at 87; CURRAN, *supra* note 101, at 111.

164. This includes resisting the public agents who come to hurt the subject, even if for justified public order purposes, and hence resisting, inter alia, punishment and self-incrimination. LEVIATHAN, *supra* note 101, at 269; *see* Waldron, *supra* note 107, at 717; Ristroph, *Respect*, *supra* note 33, at 622–30.

165. LEVIATHAN, *supra* note 101, at 269.

166. Glenn Burgess, *On Hobbesian Resistance Theory*, 42 POL. STUD. 62 (1994); HAMPTON, *supra* note 160, at 197–207.

unsolvable.[167] The details of these attempts are beyond the scope of this article, but all commentators agree that self-defense—in some shape or form—is the one thing that consent to the social contract cannot override. Self-defense is prior to the state, an individual right that limits the state's power,[168] and yet it is this very right that catalyzes government. For it is the very same interest—"nothing else but the security of a mans person, in his life"—that grounds both persons' natural rights and the decision to alienate them to the sovereign upon entering the covenant.[169]

The purpose of the commonwealth is to elevate us from the perils of the state of nature in which self-defense roams.[170] We ought not need self-defense inside the civil order. If the occasion arises, something has gone wrong. But if the occasion does arise, and our life and limb are under threat, then we are in an ad-hoc state of nature vis-à-vis the aggressive entity, be it a fellow citizen or the sovereign himself.[171] In the event that the sovereign is justified in harming a subject, e.g., punishing them for committing an offense, self-defense might be exhausted by the right to kick and scream on the way to the gallows. (In such a case, where no wrong is done to the subject, what has gone wrong is just the offensive action of the individual.) The right to kick and scream is inalienable because the possibility of power inferiority never disappears; it is not due to an objective standard of morality that puts justice on the subject's side. Recall that we do alienate the broader bundle of rights to self-preservation that extends beyond immediate protection of life and limb. Instead of being our own judges and executors of right and wrong, this is now the sovereign's burden.[172]

This question of discretion boils down to the question of means: we relinquish the right to choose "the aptest means" for our self-

167. *Compare* Carvalho, *supra* note 34; Susanne Sreedhar, *In Harm's Way: Hobbes on the Duty to Fight for One's Country*, *in* HOBBES TODAY: INSIGHTS FOR THE 21ST CENTURY 209 (S. A. Lloyd ed., 2013); Ristroph, *Respect*, *supra* note 33, at 618–22; CURRAN, *supra* note 101, at 162–75; Finkelstein 2001, *supra* note 99.

168. Finkelstein 1996, *supra* note 34, at 636–38.

169. LEVIATHAN, *supra* note 101, at 192; *see also id.* at 223. Fear for life is not the only motivation Hobbes ascribes to human behavior, but it is the most dominant one. Ristroph, *Diffidence*, *supra* note 131, at 30 ("Readers of Hobbes may disagree about the extent to which humans are competitive or glory-seeking, but it's clear that our ordinary lives are shaped by the suspicion that others may harm us").

170. *Supra* note 109 and accompanying text.

171. Ristroph, *Respect*, *supra* note 33, at 614 ("the state of nature is the always-possible situation in which political authority is absent").

172. *See* TUCK, *supra* note 101, at 69 ("there is simply no point in transferring my right of private judgment to the sovereign, [if] I may as well go back to looking after myself in all instances"); *see also* Ristroph, *Respect*, *supra* note 33, at 608; Forsyth, *supra* note 108, at 44.

preservation,[173] as opposed to the state of nature where we have a natural right to all available means.[174] Bare power is transformed into legitimate authority.[175] The sovereign has no rule over people's bodies, but he has a monopoly on the means of justified use of force. For Hobbes, the end justifies the means, and the primary attainment of human beings is safety.[176]

## IV. WHY HOBBES? WHY NOW?

The Founding Fathers probably read little of Hobbes, and what they did read they did not like.[177] To illustrate, Thomas Jefferson "lament[ed]" that some political theorists "adopt the principles of Hobbes, or humiliation to human nature; that the sense of justice and injustice is not derived from our natural organization, but founded on convention only."[178] Hobbes is thus not to be expected among the intellectual sources of foundational American political texts. For his part, Hobbes rejected the theory of checks and balances, since sovereignty is undividable, and did not view constitutions as equivalent to a social contract.[179] However, it would be a grave mistake to infer that Hobbes is irrelevant to American constitutional thought, then or now, for at least four reasons.

First, the Founders engaged with Hobbes vicariously. For although the kind of polity they envisioned and designed drew little inspiration from Hobbes, he "was known, openly corrected, and quietly adopted by authors who developed the versions of liberalism that more directly influenced the Founders."[180] Through the mediation of figures like Locke and Blackstone, Hobbesian echoes abound in texts like The Federalist and the Constitution. For example, Federalist 10's aversion to faction is a republican reiteration of Hobbes's fear that individuals impose their own conceptions of justice over others. Moreover, both agendas find the

173. LEVIATHAN, *supra* note 101, at 189; *see* Ristroph, *Respect*, *supra* note 33, at 608; Skinner, *supra* note 123, at 23.

174. Jaume, *supra* note 154, at 200.

175. CONDREN, *supra* note 116, at 44.

176. Johnston, *supra* note 121, at 47.

177. JAMES R. STONER, JR., COMMON LAW AND LIBERAL THEORY: COKE, HOBBES, AND THE ORIGINS OF AMERICAN CONSTITUTIONALISM 4, 71 (1992).

178. THOMAS JEFFERSON, Letter to Francis W. Gilmer (June 7, 1816), *in* POLITICAL WRITINGS 142, 143 (Joyce Appleby & Terence Ball eds., 1999); *see also* Letter to John Adams (Oct. 14, 1816), *id.* at 231, 296.

179. Ristroph, *Respect*, *supra* note 33, at 605; Pettit, *supra* note 114, at 118, ELSHTAIN, *supra* note 155, at 108; SKINNER, *supra* note 102, at 105; Zuckert, *supra* note 151, at 66, 68.

180. STONER, *supra* note 177, at 4.

solution in stable written law animated by the will of the people and formalized via representative political institutions.[181] These covert vestiges can be causal as well as conceptual. Conceptually, some of the procedural rights in the Bill of Rights, such as the Fifth Amendment right against self-incrimination, might be best understood as Hobbesian rights to resist. Recognizing the sovereign's justification to punish and, at the same time, defendants' right to self-preservation by whatever means, is challenging to any moral theory. But it sits comfortably with Hobbes's conception of rights as agent-relative liberties, grounded in power imbalances rather than objective morality.[182]

Second, some of Hobbes's polemical ideas might be relevant for us today for the very same reasons that the Founders expressly rejected them, regardless of whether they echo covertly. Namely, that Hobbes was a materialist heretic, who "introduced the concept of power into political discourse."[183] Thinking about self-defense law in these terms is profoundly provocative for modern jurisprudence. Since Locke, philosophers of self-defense have focused mainly on its *moral* dimensions. Such inquiries draw ethical conclusions from facts about the parties' wills, intentions, and self-consciousness, such as whether the aggressor is culpable or not. For Hobbes, in contrast, self-defense is a matter of *political* philosophy, intimately tied to the justification and character of the good state. Normative assessment, therefore, depends upon institutional settings; questions of representation, authority, and discretion are prior to questions of guilt and innocence.[184] The structures of power in a Hobbesian commonwealth are far simpler than those of contemporary American reality, where social capital is complexly dispersed along lines such as race and gender, which Hobbes gave little thought to.[185] But these dimensions of power diffusion must be reckoned with if we want to understand how self-defense operates in the U.S. today; looking at it through the lens of moral justification will not suffice, indeed it will show a distorted picture.

Third, turning specifically to the Second Amendment, *Heller* traces its origins to seventeenth century England. According to the Court's narrative, the Second Amendment builds on the "libertarian political

181. McDowell, *supra* note 140; *see also* THOMAS R. POPE, SOCIAL CONTRACT THEORY IN AMERICAN JURISPRUDENCE: TOO MUCH LIBERTY AND TOO MUCH AUTHORITY 24–39 (2013).

182. Ristroph, *Respect*, *supra* note 33, at 629; Alice Ristroph, *Regulation or Resistance? A Counter-Narrative of Constitutional Criminal Procedure*, 95 B.U. L. REV. 1555 (2015).

183. STONER, *supra* note 177*,* at 71.

184. Finkelstein 2001, *supra* note 99, at 332.

185. For Hobbes on gender relations, see THREE-TEXT EDITION, *supra* note 106, at ch. 19 (comparing *The Element of Law*, chs. 22–23; *De Cive*, chs. 8–9, 11; *Leviathan*, chs. 19–21).

principles" established in the Glorious Revolution of 1688 and subsequent installment of the English Bill of Rights in 1689.[186] Among its guarantees was the right of protestants to "have Arms for their Defence suitable to their Conditions and as allowed by Law."[187] To describe seventeenth century political orientations as "libertarian" is dubious as well as anachronistic (for one, the right was granted on the basis of group status), but this text was indeed a certain precursor to the American Constitution.[188] Although *Bruen* goes further back in time than *Heller*, it too characterizes the late seventeenth century as "particularly instructive."[189] Hobbes died in 1679 and did not live to see the Glorious Revolution, but his writings as well belong to the tumultuous aftermath of the English Civil War. He pioneered an abstracted, quasi-scientific methodology in political philosophy, but Hobbes was still, of course, a product of his time. Witnessing first-hand the atrocities of war led Hobbes to view authority as the solution to private violence: "the right of *the private Sword*, which is worse than any form of subjection whatsoever."[190] Yet Second Amendment decisions and their analyses ignore the philosopher who single-handedly molded modern political theory under the influence of the very same events that instigated the historical snowball whose culmination, according to the Court, is the Second Amendment. This philosopher, it turns out, drew from these events conclusions opposite to those of the Court.

Fourth, Hobbes and the Second Amendment Court share not only historical but theoretical proximity as well: the questions that preoccupy the Justices are among those that Hobbes gave serious thought to. Where Hobbes heavily theorizes, however, *Heller* and the following decisions are undertheorized. Hobbes is uniquely positioned for the task of helping us understand where and why the Court goes wrong. He shows how one may

186. *Heller*, 128 S. Ct. at 2788, 2798–99.

187. Bill of Rights, 1688 Ch. 2, 1 Will. and Mar. Sess. 2 [received royal assent Dec. 16, 1689], *available at* http://www.legislation.gov.uk/aep/WillandMarSess2/1/2/data.pdf.

188. *See, e.g.*, WHITTINGTON, *supra* note 73, at 125 ("The promise of the American constitutional experiment was not that it realized the possibility of the social contract, making historical what had previously been regarded as merely hypothetical. Britain's own Glorious Revolution belied the claim of American exceptionalism in this regard"); ROBERT A. FERGUSON, LAW AND LETTERS IN AMERICAN CULTURE 14 (1984) (the 1689 Bill of Rights preempted the U.S. Constitution as an attempt to codify "an ancient constitution, which through immemorial common law, guaranteed the rights of Enlightenment in perpetuity").

189. *Bruen*, 142 S. Ct. at 2140.

190. THOMAS HOBBES, DE CIVE: THE LATIN VERSION 152 (vol. 2, Howard Warrender ed., 1983), quoted and translated in SKINNER, *supra* note 102, at 106.

accept many of *Heller* and *Bruen*'s basic premises and yet end up in a very different place, especially regarding the role of self-defense in public life.

In particular, contemporary Second Amendment jurisprudence has followed a Hobbesian path in the sense that it has opted for the "liberal" as opposed to the "republican" interpretation of the provision.

Scholarly interpretations of the Second Amendment diverge along two axes: who has the right and for what purpose. The first oscillates between individuals and collectives and the second between private and public purposes. Three major families of readings have been offered: a collective-public one, that the Second Amendment protects a right of the states against the federal government to operate local militias against overreaching federal powers; an individual-private one, that it protects a right of individuals against other individuals who threaten their personal safety; and an individual-public one, that it protects a right of individuals against the government. The latter is an individual yet nonindividualistic right—or, more accurately, an individual civic duty to protect the citizenry, an incorporated body, against tyranny.[191]

| | **Individual** | **Collective** |
|---|---|---|
| **Private** | *Heller* | – |
| **Public** | Civic republican readings | States' right |

While all variants can be captured by the general idea of self-defense,[192] only the individual-private one stems from the doctrine as it appears in penal codes today. The interpretations concerned with public interests view guns as safeguards of the political freedom of collectives, providing a right and a duty to participate in a decentralized power structure.[193] Contra *Heller*, these interpretations generally read the second part of the provision ("the right of the people to keep and bear Arms, shall

191. *See, e.g.*, William G. Merkel, *A Cultural Turn: Reflections on Recent Historical and Legal Writing on the Second Amendment*, 17 STAN. L. & POL'Y REV. 671, 676 (2006); James H. Henretta, *Collective Responsibilities, Private Arms, and State Regulation: Toward the Original Understanding*, 73 FORDHAM L. REV. 529 (2004); Sanford Levinson, *The Embarrassing Second Amendment*, 99 YALE L.J. 637 (1989).

192. *See* Darrell A.H. Miller, *Institutions and the Second Amendment*, 66 DUKE L.J. 69, 79 (2016) [hereinafter Miller, *Institutions*]; Miller, *Guns as Smut*, *supra* note 41, at 1316 n.235; Don B. Kates, Jr., *The Second Amendment and the Ideology of Self-Protection*, 9 CONST. COMMENT. 87, 89 (1992).

193. Notwithstanding self-defense as it appears in penal codes today can be understood as an *implicit* mechanism for decentralizing public power. *See supra* note 32 and accompanying text.

not be infringed") through the lens of the first part ("A well regulated militia, being necessary to the security of a free State").[194] The militia, under civic republican readings, comprises all citizens who can *potentially* take arms and are therefore full citizens.[195] Thereby the practice of gun use becomes a means for fostering a political community that eschews self-interest for the cultivation of a shared vision of the good: "the ultimate 'checking value' in a republican polity is the ability of an armed populace, presumptively motivated by a shared commitment to the common good, to resist governmental tyranny."[196]

*Heller* took the individual-private route and ruled that the Second Amendment protects a personal right to use guns for self-interested purposes. That is not to say that the rhetoric of political freedom does not appear in Second Amendment decisions; it does, though decreasingly so. According to *Heller*, founding generation Americans appreciated the need to distribute means of violence in order to prevent tyranny and recognized a link between firearms and political freedom. However, "most" of them "undoubtedly thought [the right] even more important" for the protection of their personal interests.[197] Since this is how it was understood at the Founding, per *Heller*, the Second Amendment gives individuals a right to protect "against both public and private violence."[198] Whoever threatens it, this is violence against the person, not the polity. It is justified or excused so long as the applicable penal code says it is. Under *Heller*, political freedom might be a happy side effect of the wide distribution of arms, but it is not the doctrine.[199]

*Bruen* barely bothers with nodding toward republican rhetoric.[200] It assumes that persons have always encountered confrontations and needed "self-defense weapons"[201] to emerge triumphant and proceeds to ask what weapons of yesteryear are analogous to the ones popular today for these

194. David C. Williams, *Death to Tyrants:* District of Columbia v. Heller *and the Uses of Guns*, 69 OHIO ST. L.J. 641, 646 (2008).

195. Levinson, *supra* note 191, at 647.

196. *Id.* at 648.

197. *Heller*, 128 S. Ct. at 2801.

198. *Id.* at 2799.

199. Whatever their legal purpose, once at hand, guns often provide people with a sense of freedom that might be understood as political in some way. However, the Second Amendment as applied does not give individuals a right erga omnes, even if by originalists standards it should. As Darrell Miller puts it, even after *Heller*, one does not have the right "to kill a cop." Darrell A.H. Miller, *Retail Rebellion and the Second Amendment*, 86 IND. L.J. 939 (2011).

200. The political freedom element of *McDonald* is discussed *infra* at text accompanying notes 260–267.

201. *Bruen*, 142 S. Ct. at 2139.

purposes. In fact, self-defense has never been as timelessly and simplistically absolute as *Bruen* imagines it. Well into modern times, homicide was only justified in England for public purposes, as an extension of the King's authority, not for protection or promotion of self-interest.[202] But *Bruen* discounts the political contexts of the historical firearms laws it analyzes. It does not consider that political circumstances might be logically prior to questions about self-protection or indeed to the moral presumptions of substantive criminal law generally.

The protection of bodies, not the body politic, controls the Second Amendment right and dictates its justifiability and doctrinal contours.[203] We don't have Second Amendment rights to tanks and nuclear codes because although they pose tyrannical risks, they do not play a part in criminal encounters. So far so good for Hobbes. Hobbesian subjects pursue their self-interest as individuals and authorize sovereignty to the extent that it protects their material well-being, not for the purpose of providing a comprehensive scheme of the good life. In fact, Hobbes laboriously developed his conception of freedom exactly for the purpose of refuting republican thinkers who wished to think about liberty in collective terms of democratic self-rule.[204]

Our bodily existence is the cornerstone of Hobbes's philosophy, as the only absolute truth we receive from God.[205] We are embodied and therefore vulnerable, and these facts, rather than our being reasoned or social creatures by nature, animate our political life.[206] They also facilitate the reconciliation of personal freedom and absolute sovereignty. Hobbes frames the question of freedom in causal, physical terms: freedom is the absence of external impediments to motion.[207] Hobbes was concerned with actualities rather than potentialities. Accordingly, he believed that individual freedom is only infringed upon when action is blocked as a matter of fact and the agent is unable to perform the option chosen,

202. *See* Reznik, *supra* note 31, at 65 and the sources cited therein.

203. Ruben, *supra* note 40; Sangero, *supra* note 37; Green, *supra* note 38. *But cf.* JOSEPH BLOCHER & DARRELL A.H. MILLER, THE POSITIVE SECOND AMENDMENT: RIGHTS, REGULATION, AND THE FUTURE OF *HELLER* 151–54 (2018) ("self-defense is too vague, ambiguous, and contested a concept to fill the void" created by the lack of any robust theoretical foundation for the Second Amendment after *Heller*).

204. SKINNER, *supra* note 102, at 140–49.

205. Martel, *supra* note 6.

206. Ristroph, *Diffidence*, *supra* note 131, at 27.

207. LEVIATHAN, *supra* note 101, at 261; *see* SKINNER, *supra* note 102, at 127; Piasentier & Tarizzo, *supra* note 126, at 41; CONDREN, *supra* note 116, at 34.

including when she already alienated the prerogative to choose.[208] Today, we would all probably resist the notions that coercion can be easily squared with consent and that submission out of fear of death is voluntary. But this is tinkering at the margins. Hobbes shifted the question of freedom from absence of dependence (potential) to absence of impediments (actual), and ultimately won the day. For he initiated what would become the standard liberal conception of negative liberty—the idea that one must point at an intruder or an obstacle to claim that freedom is lacking and removing them is sufficient to reclaim it.[209]

The republican conception of freedom requires active participation in political decision-making. In the birthplaces of republican democracy, Rome and Athens, arms were connected with citizenship because army service was—not for defense against threats to personal safety posed by fellow citizens (with or without uniform).[210] The classical renaissance similarly linked the armed citizen to civic virtue and republican freedom, as an intently dedicated organ of a political body.[211] *Heller* might be defended for construing citizens as members of an unorganized militia, thus sustaining (or resurrecting) this institution.[212] The Court does not understand its own ruling in this way,[213] and rightly so, for it transforms a communal-political responsibility into an individual right. Insofar as the idea of militia is retained—and putting aside the question of whether that makes the situation any less terrifying[214]—it is stripped of any collective rationales. The Second Amendment does not give us guns for the purpose of participation in politics. On the contrary, thanks to our guns, among other things, we are free to not participate—an oxymoron from a republican perspective but no problem at all for Hobbes.

That politics is disengaged from freedom and exhausted by consent poses the peril of reducing political commonality to nothing more than

208. SKINNER, *supra* note 102, at 154–55; *see also* CONDREN, *supra* note 116, at 51; ELSHTAIN, *supra* note 155, at 107 ("reason is reduced by Hobbes to the reckoning of consequences"); Pettit, *supra* note 114, at 114 ("any act that issues from the will—that is, from the process in which conflicting passions resolve themselves in decision—counts as voluntary").

209. SKINNER, *supra* note 102, Conclusion.

210. Joshua Kleinfeld, *Two Cultures of Punishment*, 68 STAN. L. REV. 933, 967 (2016).

211. *See, e.g.*, ELSHTAIN, *supra* note 155, at 104.

212. *See* Jonathan Obert & Elias Schultz, *Right Wing Militias, Guns, and the Technics of State Power*, 16 L. CULTURE & HUMAN. 236 (2020); Miller, *Institutions*, *supra* note 192, at 96.

213. *Bruen*, 142 S. Ct. at 2127; *id.* at 2157 (Alito, J., concurring) ("the key point that we decided [in *Heller*] was that 'the people,' not just members of the 'militia,' have the right to use a firearm to defend themselves").

214. David C. Williams, *Civic Republicanism and the Citizen Militia: The Terrifying Second Amendment*, 101 YALE L.J. 551 (1991).

self-interest.[215] Some have suggested that here lies the problem with Hobbes: the polity's function is to facilitate maximization of self-interest rather than concerted action and public good. Thus, Hannah Arendt stipulates that making fear of pain a constitutive political principle eliminates the political realm because it fundamentally individualizes our social experience. Death is "the most antipolitical experience there is"; instead of establishing bonds between persons, Hobbes put at the center of his philosophy the idea that our ability to appear before others and converse with them will one day go away.[216] The end of security is provided by the monopoly of the state on violent means, and the individual, cut out from participation in public affairs and discussion of public values, loses any meaningful connection with her fellows save formal consent.[217]

The methodological emphasis on popular consent of Second Amendment originalism traces the right to self-defense to the very moment of establishing a polity. The Court attempts to shape this right in accordance with the conditions put forth by the citizenry when they consented to their government, on the one hand, while holding on to their natural right to defend themselves, on the other hand. Like Hobbes, the assumption is that "our ordinary lives are shaped by the suspicion that others may harm us."[218] Hellerian Second Amendment law might therefore appear to vindicate Hobbes's protoliberal bases for justice—individualism, consent, negative liberty—with the necessary adjustments for a constitutional democracy. Yet Hobbes does very different things with the same ingredients. Hobbes would recognize the conclusions that the Supreme Court reaches as exactly those that we should work to overcome. Even if we ultimately do not wish to live in a Hobbesian universe, his

215. Hannah Arendt, *Civil Disobedience*, *in* CRISES OF THE REPUBLIC 49, 84 (1972) [hereinafter Arendt, *Civil Disobedience*]; Hannah Arendt, *Freedom and Politics*, 14 CHI. REV. 28, 31 (1960) [hereinafter Arendt, *Freedom and Politics*]; Johnston, *supra* note 121, at 46; Benjamin R. Barber, *Liberal Democracy and the Costs of Consent*, *in* LIBERALISM AND THE MORAL LIFE 54 (Nancy L. Rosenblum ed., 1989).

216. Hannah Arendt, *On Violence*, *in* CRISES OF THE REPUBLIC, *supra* note 215, at 103, 164; Arendt, *Freedom and Politics*, *supra* note 215, at 31. *See* Keedus, *supra* note 130, at 329.

217. Barber, *supra* note 215, at 56. *But cf.* Martel, *supra* note 6 (Hobbes "does in fact mandate an idea of will that only works in a truly social manner—not as a monolithic general will, but as the interaction of various separate wills. In other words, he offers exactly what Arendt is looking for"). As the sovereign is not party to the covenant, Arendt is wrong to describe the Hobbesian contract as "vertical" as opposed to "horizontal," i.e., consisting of agreements between individuals and the political authority rather than amongst citizens themselves. Arendt, *Civil Disobedience*, *supra* note 215, at 86.

218. Ristroph, *Diffidence*, *supra* note 131, at 30.

reasons should be of use to us when we think about the Second Amendment.

## V. HOBBES V. *HELLER*

Reading an individual right to guns into the Bill of Rights and then anchoring its expansion in an American tradition of preparedness for confrontation, Second Amendment decisions position interpersonal self-defense, and individual response to crime more generally, at the heart of the meaning of American citizenship. Despite the Supreme Court's attempt to claim on its side "many legal systems from ancient times to the present day,"[219] Second Amendment law is an American idiosyncrasy. The vast majority of countries in the world have included self-defense provisions in their penal codes,[220] but only fifteen have done so in their constitutions,[221] out of which eleven are classified by the United Nations as "small island developing States."[222] Regarding a constitutional right to firearms, the United States, including the constitutions of forty-four of its fifty States,[223] is joined only by a handful of other nations, where such rights are either not enforced or much narrower.[224]

That self-defense is a component of the good state, rather than good behavior, puts the Second Amendment in Hobbesian terrain. However, if we want to understand self-defense as a public institution, the Court takes us a step forward and then a step backward. Forward, because placing self-defense in an environment of public law—the Constitution—signals a recognition of its relevance to political questions about the distribution of legitimate violence through structures of authority and institutional design.[225] Backward, because from *Heller* through *Bruen*, the Supreme Court's interpretation of the Second Amendment detaches self-defense

219. *McDonald*, 130 S. Ct. at 3036.

220. John Mikhail, *Is the Prohibition of Homicide Universal? Evidence from Comparative Criminal Law*, 75 BROOK. L. REV. 497, 508 (2009) (finding that 93%, 38 out of the 41 jurisdictions surveyed, have codified self-defense provisions in their criminal laws).

221. NICHOLAS J. JOHNSON, DAVID B. KOPEL, GEORGE A. MOCSARY, E. GREGORY WALLACE & DONALD KILMER, FIREARMS LAW AND THE SECOND AMENDMENT: REGULATION, RIGHTS, AND POLICY 1626–27 (3d. ed. 2022), http://firearmsregulation.com/www/FRRP3d_Ch19.pdf.

222. UNITED NATIONS, WORLD ECONOMIC SITUATION AND PROSPECTS 170 (2020), https://www.un.org/development/desa/dpad/wp-content/uploads/sites/45/WESP2020_FullReport.pdf.

223. Eugene Volokh, *State Constitutional Rights to Keep and Bear Arms*, 11 TEX. REV. L. & POL. 191, 205 (2006) (adding that twenty-two State constitutions expressly mention self-defense as one of the reasons for protecting a right to arms).

224. JOHNSON ET AL., *supra* note 221, at 1625–26.

225. Miller, *Guns as Smut*, *supra* note 41, at 106.

from representative institutions and from political discourse. Self-defense law is treated as logically prior to but historically derivative of the law of weapons. The Court thus doubly decontextualizes self-defense, envisioning it as a brooding omnipresence in the sky whose normative meanings are independent of our public values.

The Court has opted for what might be termed *political moralism* in lieu of political morality.[226] It disengages the American citizen—the self-defender—from civic and social life, creating an atomistic political climate in the service of enshrining the justifiability of self-defense. This antisociability is paradoxically grounded in the ultimate moment of concerted action, the moment of consenting to a political covenant. Like highways and railroads, social contracts can bring people together, but they can also cause division and segregation. The basic difference between Hobbes and contemporary Second Amendment law is that in Hobbes, self-defense serves to bring about a social contract, whereas in *Heller* and following decisions, self-defense serves to break one up.

The Second Amendment Court seeks the "most natural reading"[227] of political texts, believing it will be aligned with natural rights and with naturally emerging traditions, and it arrives at a state of nature. Hobbes denies that nature dictates normativity. He thought bad things come out of tracking what we take our nature to be when we design the artificial sphere of the public. The kind of freedom nature bestows and the social relations it facilitates are precisely what we should work together to overcome; the social contract aims to relieve us of atomism, not perpetuate it.[228] Rather than come naturally and discarded if they don't, peace and sociability require work. They are achievable despite, not thanks to, self-interest. Accordingly, authority is a high achievement, but self-defense is not. It will always have a place in public life, due to necessity, and may salvage our individuality without which authority cannot be legitimate. But that does not mean the presence of self-defense is a desirable one. Self-defense is base, as we are when we are left alone. We contract to no longer be left alone.

226. By moralism as opposed to morality I mean the exaggeration of how important a particular moral principle is, elevating it out of contestation and debate and precluding any considerations based in practical reasoning or sensitivity to context from muddying its waters. *See* JOHN KEKES, THE NATURE OF PHILOSOPHICAL PROBLEMS: THEIR CAUSES AND IMPLICATIONS 101–18 (2014).

227. *Heller*, 128 S. Ct. at 2792.

228. *See* MARY MIDGELY, THE SOLITARY SELF: DARWIN AND THE SELFISH GENE 5 (2010) (stressing that neo-Darwinism does not follow a Hobbesian logic as it leads to violence rather than peace).

That is the gist. The following four sections break down and flesh out why Hobbes offers a most urgent critique of the role that the Supreme Court's Second Amendment jurisprudence accords to self-defense in American public life. To start, we will ask what self-defense is for; we will then consider who is the self-defensive citizen; next, the pernicious potential of the Hellerian trajectory of civic belonging through self-defense will be highlighted; and finally, some doubts will be raised as to how the Hellerian Court understands the connection between self-defense and popular sovereignty.

### *A. Hobbes v. Locke*

Today, the Second Amendment protects the right to self-defense. A Hobbesian critique begins by asking what self-defense is for. I argue that Hobbes's answer to this basic question differs radically from the one implicit in Supreme Court Second Amendment decisions: Hobbes answers safety, *Heller* answers autonomy. The latter is not as idiosyncratic as it may sound. The contrast with Hobbes is pertinent since Second Amendment law is but a grotesque manifestation of a well-established conception of self-defense, rooted in Locke. This conception is moralistic as opposed to the materialistic Hobbes.

Recall that in the Hobbesian state of nature, subjects legitimately decide on the means necessary for their security—but it does not follow that invoking such rights tracks morality. Justice in a state of nature is whatever the strong or cunning say it is, a matter of power imbalances to which we are all perpetually vulnerable. For this reason, no conceptual difficulty arises once a politically legitimate authority takes over. Within a civil order, Hobbes's understanding of self-defense is akin to our doctrinal construct of excuse, not justification.[229] It is immaterial to ask whether the act was "the right thing to do" or not, so long as you sensed you had to do it to preserve your bodily freedom. That self-defense is retained as a natural right does not mean it establishes a direct line from persons to morality that cuts through political institutions. As a rule, there are no justifications for violence for anyone but the sovereign. His legitimacy to use violence is strictly political, i.e., arises from the consent of the governed, so that justice becomes what we agree it is, through our representative institutions. It is excusable for persons to protect their bodies at all costs not as a portable home laden with meaning nor as a vehicle for expressing autonomy, just as the physical constitution of our

229. Waldron, *supra* note 107, at 726.

selves. Neither in the state of nature nor in civil society does exercising self-defense make us happy; it is never a source of joy, a sense of self-worth, or of building community. We may strive for these things, but it would be in spite of self-defense, not through it.

The Supreme Court does not understand self-defense in this way. Analyzing the possible normative justifications for a judicial recognition of an individual right to arms, Michael Green rejects all but one: retention of a Lockean "executive" natural right.[230] Green acknowledges that Hobbes, who is concerned with safety, cannot justify *Heller*.[231] With Locke, however, self-defense protects autonomy interests.[232] Between a Lockean state of nature and a Lockean political order, there is no fundamental change in what justice entails, only in its enforcement. The substance of justice is a prepolitical given, but we want it secured. The same substantive natural rights follow us when we enter civil society; they simply get better protection thanks to our alienation of "executive" natural rights, of judging for ourselves. If Hobbes's approach is agent-relative—the legitimacy of actions depends on the agent's position (for instance, the punished is allowed to resist hard treatment but their neighbor is not allowed to assist them[233])—Locke believes the justification of a defensive act is independent of where one stands in a given interaction. The moral truth of the matter is fixed.[234] Bias causes private enforcement to overreach and impinge on others' natural rights; yet Locke believed that executive rights are intrinsically valuable. They enable us to vindicate and express our autonomy as morally independent beings. Hence, Green suggests we might desire to retain something of them:

> What is good about our executive right is not that it will increase the chance that natural rights are respected, but rather that it allows us to use our own moral judgment to take a chance—even a bad chance—at vindicating natural rights . . . the use of arms even in *unjustified* self-defense has value.[235]

230. Green, *supra* note 38, at 188.

231. *Id.* at 150–52.

232. *Id.* at 157–61; BLOCHER & MILLER, *supra* note 203, at 160; GEORGE P. FLETCHER, A CRIME OF SELF-DEFENSE: BERNHARD GOETZ AND THE LAW ON TRIAL 32–33 (1988); *but cf.* Waldron, *supra* note 107, at 737 (arguing that for Locke, too, safety is prior to autonomy).

233. Ristroph, *Respect*, *supra* note 33, at 618–20. *See also* Waldron, *supra* note 107, at 729–33.

234. Waldron, *supra* note 107, at 733–34.

235. Green, *supra* note 38, at 157–58. *But cf.* Heyman, *supra* note 36, at 241–46 ("Lockean theory holds that when individuals establish a society, they give up the right to use force against others in return for the protection they receive from the community"); Susan Liebell, *Retreat from the Rule of Law: Locke and the Perils of Stand Your Ground*, 82 J. POL. 955 (2020) (similarly trying to salvage Locke from complicity in insidious developments in American self-defense law).

Green nails *Heller*'s idea of self-defense. It is a right against the state, but not due to its failure to provide every person with the law's protection.[236] Rather, the Second Amendment is a right against the state to stay away and let me protect myself. So, if for Hobbes exercising self-defense means that something has gone wrong, for *Heller* it means that all is going well. The Lockean-Hellerian subject wants to be able to say what neither the Hobbesian nor the republican subjects can say: "I am right and the state is wrong; my interpretation of what natural justice demands is just as valid, and I deserve the power to assert it on my own, regardless of institutional set up." In some contexts, like instances of civil disobedience, such arguments may have great appeal. But when individuals use the bodies of their fellows as means for and the grounds upon which their view of natural justice is erected, we might think again. Hobbes thought private conscience is antagonistic to tranquility and peace and therefore antagonistic to social order.[237] In Locke's contrasting view, as Keith Whittington explains, "God speaks to each individual personally . . . Every person can recognize His law, and all are responsible for their interpretation of it at the final judgment."[238] Guns enable individuals to assert and enforce this kind of moral authority. They are "symbolic embodiments of Lockean autonomy and individualism," representing such values as independence, self-esteem, and vigilance.[239]

Favorable interpretations of Locke insist that he joins Hobbes in rejecting the view that self-defense builds on a dichotomy between villains and victims, which finds the solution to violence in the form of "arming the righteous and establishing the reign of virtue."[240] Nonetheless, Locke, unlike Hobbes, does provide a theoretical foundation for the intelligibility of this categorization of persons. They may not be innate qualities, but persons can still assume the status of either villainous or virtuous by their own autonomous actions. A Lockean state of nature is more like an adjudication of all against all than a war of all against all. Namely, it's not that sovereignty does not exist, but rather it is dispersed. Every individual

236. George P. Fletcher, *Domination in the Theory of Justification and Excuse*, 57 U. PITT. L. REV. 553, 570–71 (1996); Sanford H. Kadish, *Respect for Life and Regard for Rights in the Criminal Law*, 64 CAL. L. REV. 871, 884 (1976).

237. *See* McDowell, *supra* note 140, at 426.

238. WHITTINGTON, *supra* note 73, at 118.

239. Green, *supra* note 38, at 158 n.96, 166.

240. David Gauthier, *Self-Defense and the Requirement of Imminence: Comments on George Fletcher's* Domination in the Theory of Justification and Excuse, 57 U. PITT. L. REV. 615, 620 (1996).

is an atom of governance with a potential claim to justified violence.[241] Hence, vigilantism for Hobbes is nothing but "vain-glory," but for Locke it may very well be justice. Hobbes lists individual entitlement to privately judge the moral virtue of actions among "the *Diseases* of a Commonwealth, that proceed from the poyson of seditious doctrines."[242] Private violence—no matter the moral presumptions that guide it—is the primary evil that government ought to eradicate; and it inevitably flows from private will unrestrained by political authority. The main problem in a Lockean state of nature, to be resolved by the erection of a civil order, is not *violence* but *injustice*. Per Locke, each of us is entitled to determine what justice objectively demands, by private appeal to a prefixed natural moral order, and then, arguably, to act accordingly.

The upshot of this entitlement is an establishment of moral hierarchy based on the principle of desert. So, whereas for Hobbes we have a right to kick and scream on the way to the gallows, since the establishment of moral hierarchy through violence is conceptually rejected,[243] for Locke criminality is loss of status. Here is Locke: "a Criminal, who having renounced Reason, the common Rule and Measure, God hath given to Mankind, hath by the unjust Violence and Slaughter he hath committed upon one, declared War against all Mankind, and therefore may be destroyed as a *Lyon* or a *Tyger*."[244] Self-defense is a private case of punishment, i.e., just violence inflicted on one who has performed or threatened unjust violence, thereby forfeiting their rights and rendering themselves liable.[245] This is an autonomous renouncing, not by consent but by fault. Those who do it are akin to "savage beasts," and thus the

241. MICHEL FOUCAULT, THE BIRTH OF BIOPOLITICS: LECTURES AT THE COLLEGE DE FRANCE, 1978–1979 91 (Michel Senellart ed., Graham Burchell trans., 2004) (arguing that in Hobbes we find "the last of the theories of the state," whereas "Locke does not produce a theory of the state; he produces a theory of government"). *See* Timothy W. Luke, *Gunplay and Governmentality: Sovereignty, Subjectivity, and Shootings in the United States*, *in* GUN VIOLENCE AND PUBLIC LIFE 1 (Ben Agger & Timothy W. Luke eds., 1999) (applying Foucault's theory of governmentality to American gun culture).

242. LEVIATHAN, *supra* note 101, at 365.

243. *See* Forsyth, *supra* note 108, at 44 ("There was, for Hobbes, no firm, divinely established, status of security and property in the state of nature, such that a conflict there always took the form of a clash between objective 'wrong' and objective 'right', between the 'good' and the 'wicked', between the 'criminal' and the 'punisher'. Rather there was a constant interplay of rightful claims and rightful counter-claims, a constant clash of right").

244. JOHN LOCKE, SECOND TREATISE OF GOVERNMENT 8 (Mark Goldie ed., 2016) (1689).

245. *Id.* at 10–11, 13; *see* WHITLEY R. P. KAUFMAN, JUSTIFIED KILLING: THE PARADOX OF SELF-DEFENSE 52 (2009).

moral hierarchy gets a naturalist anchor while also being highly susceptible to complementary social hierarchies, primarily racial.[246]

If a violent action of an individual toward another is justified by their self-asserted privilege to assign blame for violating natural rights and act on it,[247] why not after the fact too? Defensive acts are forward-looking by definition, but the Lockean executive natural right allows one to judge others and punish them for breaching natural law.[248] The Lockean vigilance encapsulated in the gun reduces self-defense to private punishment. Indeed, Green defends the retention of the executive right to perform moral judgment and to refuse submission to governmental authority, by highlighting the salience of vigilante figures in American culture.[249] The Second Amendment is uniquely valuable because guns "allow us to defend our vision of our rights."[250] As constitutional law, it belongs in the group of basic entitlements we ought to be free to enjoy without state intervention. Hence, it is not necessarily the case that "*Heller* may be doctrinally inconsistent by placing lawful self-defense at the core of the right, but neglecting the nonlethal orientation baked into that core," as Eric Ruben argues.[251] If autonomy rather than safety drives self-defense under the Second Amendment, then nonlethality is not what this body of law aims at its core to promote. Rather, it regulates the legality of lethality so as to leave room for people to choose for themselves when, where, why, and against whom to use forceful protection measures against threats. Ruben thus asks the Court to use a markedly different conception of self-defense in applying *Heller* than the one animating the decision itself.

In sum, Hellerian Second Amendment law follows Locke in viewing self-defense as a *moral triumph*, because by exercising it the individual eradicates the wrong and reinstalls the right, restores a just order, and puts every person in his place. For Hobbes, the last thing we want is to let the right to self-defense, and correspondingly the fear of its exercise by

246. CHARLES W. MILLS, THE RACIAL CONTRACT 86 (1997) (though Mills argues that Hobbes is just as responsible for the racist undertones of social contract theory as Locke); *see also* Sherally Munshi, *Dispossession: An American Property Law Tradition*, 110 GEO. L.J. 1021, 1062 (2022) (explaining how Locke's theory legitimates slavery).

247. With the caveat that the agent must "face the consequences if she is wrong." Green, *supra* note 38, at 187. More accurately though, the question is not whether she is *wrong* but whether she is *unreasonable*. Through the reasonableness standard, distribution of decision-making powers remains controlling. Thorburn, *supra* note 32.

248. Finkelstein 2001, *supra* note 99, at 333.

249. Green, *supra* note 38, at 160–62.

250. *Id.* at 165.

251. Ruben, *supra* note 40, at 68.

another, rule our lives. Self-defense is therefore neither a moral issue nor a cause for celebration. It is instead a *political problem*.

### *B. Hobbes v. The Patriarchy*

The Supreme Court's answers to central questions of Second Amendment doctrine are informed by its conception of self-defense in combination with its conception of civic personhood. The previous section argued that the nature of the former is autonomy. This section argues that the nature of the latter is patriarchy. This reveals the reach and the impact of the Lockean conception of self-defense as a private case of just infliction of violence. Since government gets its legitimacy from the people, Locke believed that if government has a right to punish it must be derived from individual's natural right as earthly executors of a "prepolitical authority to punish wrongdoers possessed by God and by fathers."[252] Hierarchy is baked into the conceptual scheme. Hobbes's citizen, by contrast, in not a head of household but rather an equal member of a public.

The idea of householdership is deeply rooted in American criminal law. Markus Dubber argues that this notion captures the apolitical view held by penal code drafters, from the Founding through Reconstruction and onwards.[253] According to Dubber, the revolutionary republican scheme of government was confined to public law institutions, from which criminal justice was excluded. Here, the monarchical structure was kept, in the form of a rule of police governed by an economic logic of management, rather than a rule of law governed by a republican logic of self-rule. In the latter, the relationship between ruler and ruled is one of equal participation in a shared civic space; in the former, it is a manager and his subordinates. For this reason, Dubber contends, constitutional criminal law safeguards the rights of persons before but not after conviction.[254] The Bill of Rights is silent about the convicted because their status in the political community is malleable, in accordance with their designation as faulty human resources. Even if performed by the state, the

252. A. John Simmons, *Locke and the Right to Punish*, 20 PHIL. & PUB. AFF. 311, 315 (1991); *see also* Forsyth, *supra* note 108, at 37 (describing the paradigmatic Lockean subject, as opposed to the Hobbesian one, as a head of household).

253. Markus D. Dubber, *Foundations of State Punishment in Modern Liberal Democracies: Toward a Genealogy of American Criminal Law*, *in* PHILOSOPHICAL FOUNDATIONS OF CRIMINAL LAW 83, 92–98 (R. A. Duff & Stuart P. Green eds., 2011).

254. The Eighth Amendment is no exception, per Dubber, because it forbids excessive punishment as bad management of human resources rather than as an infringement on the status of equal citizenship. *Id.* at 101.

regulation of private violence remains a matter of patriarchal management, as "a king's macro household."[255]

Second Amendment law translates this framework into the micro level. Today, there is a growing body of scholarship on republican design of the criminal law, but the focus is on criminalization, policing, and punishment, not on private defenses.[256] *Heller* could have helped to close this gap, but it is antirepublican: it promotes a patriarchal order centered around the defender of home, in lieu of a public sphere centered around an equal participant in the polity. The Hellerian vision of subjectivity is opposite both to political association (republicanism) and to subjection to authority (Hobbes). *Heller*'s citizen is not a child, as a macro household may insinuate, but he is an island, or rather a patriarch of his own island. Perhaps most accurately: the citizen as a car.[257] The chances that an American has participated in building his car have gotten slimmer, but the gun allows one to feel that they have firm control over the steering wheel.[258] "As the decline of manufacturing and a rise in the female labor force has disrupted men's privileged position as sole providers for their households," Jennifer Carlson found in her ethnographic study on Michigan gun owners, "guns provide an alternative means of claiming masculine duty, authority, and dignity in the household."[259]

The trajectory of Second Amendment decisions after *Heller* expands and diversifies the image of the home-protector. For example, Justice Alito's concurrence in *Bruen* cites instances of gays and women resorting to their guns for protection against assaults.[260] But this is most pronounced with regard to race. Taking a close look at Reconstruction in *McDonald* (which ruled that the Second Amendment applies to the States via the Fourteenth Amendment), Justice Thomas's concurring opinion narrates how former slaves were able to become patriarchs of their own, thanks to

255. Markus D. Dubber, *"An Extraordinarily Beautiful Document": Jefferson's Bill for Proportioning Crimes and Punishments and the Challenge of Republican Punishment*, *in* MODERN HISTORIES OF CRIME AND PUNISHMENT 115, 120 (Markus D. Dubber & Lindsay Farmer eds., 2007).

256. *See, e.g.*, Ekow N. Yankah, *Pretext and Justification: Republicanism, Policing, and Race*, 40 CARDOZO L. REV. 1543 (2019); R. A. Duff & S. E. Marshall, *Civic Punishment*, *in* DEMOCRATIC THEORY AND MASS INCARCERATION 33 (Albert W. Dzur et al. eds., 2016) (contrasting a republican vision and a Hobbesian one as opposites); JOHN BRAITHWAITE & PHILIP PETTIT, NOT JUST DESERTS: A REPUBLICAN THEORY OF CRIMINAL JUSTICE (1990).

257. Sarah A. Seo, *The New Public*, 125 YALE L.J. 1616 (2016) (explaining how the car has come to encapsulate shifting understandings of key ideas like home, policing, freedom, and privacy, through its central place in Fourth Amendment law since the middle of the twentieth century).

258. The illusions of control and of usefulness are *real* benefits that guns provide, though they are not *material* as the harms caused by guns are.

259. CARLSON, *supra* note 18, at 97.

260. *Bruen*, 142 S. Ct. at 2159 (Alito, J., concurring).

their guns. Barred from gun-holding before emancipation by law and by force, the extension of this right to Black Americans was necessary for their liberty, security, and property-holding.[261] Racially discriminatory gun laws did not end with Reconstruction,[262] but this racist history is not taken to indicate the Second Amendment's true purpose. Justice Thomas's opinion synthesizes originalism and Black Power.[263] The narrative is one of constitutionally mandated emancipation, realized by armed struggles against violent white supremacy from Reconstruction through Jim Crow to "Black Guns Matter."[264]

Most importantly for Justice Thomas, doctrinally and historically, the right to guns is "a privilege of American citizenship."[265] His originalist insistence on incorporation through the Fourteenth Amendment's Privileges and Immunities rather than Due Process Clause is anchored in the latter facilitating "a liberal [civil] 'rights revolution' that has undermined traditional authority and generated a culture of permissiveness and passivity . . . destroying the Black patriarch whom Black women, children, and communities need for protection and instruction," in Corey Robin's analysis.[266] Robin portrays Thomas's "black man of arms" as a benevolent patriarch; he is "no libertarian," yet he still wants the government to leave him alone: "[t]hat man is an outcast from white government and racist society; he is a refugee from politics."[267]

261. *McDonald*, 130 S. Ct. at 3082–88 (Thomas, J., concurring); *see also id.* at 3040 (Alito, J.); *Rogers*, 140 S. Ct. at 1873–74 (Thomas, J., dissenting).

262. Adam Winkler, *Racist Gun Laws and the Second Amendment*, 135 HARV. L. REV. F. 537 (2022); CAROL ANDERSON, THE SECOND: RACE AND GUNS IN A FATALLY UNEQUAL AMERICA (2021); Gulasekaram, *supra* note 26, at 1542–43, 1557–61.

263. *McDonald*, 130 S. Ct. at 3063 ("the objective of this inquiry is to discern what 'ordinary citizens' at the time of ratification would have understood the Privileges or Immunities Clause to mean").

264. *See also* Katherine J. King, Comment, Heller *as Popular Constitutionalism? The Overlooked Narrative of Armed Black Self-Defense*, 20 U. PA. J. CONST. L. 1237 (2018); NICHOLAS JOHNSON, NEGROES AND THE GUN: THE BLACK TRADITION OF ARMS (2014); Robert J. Cottrol & Raymond T. Diamond, *The Second Amendment: Toward an Afro-Americanist Reconstruction*, 80 GEO. L.J. 309 (1991). "Black Guns Matter" is an organization that submits amici briefs in Second Amendment cases, arguing that any gun regulation is racist. *See, e.g.*, Brief for Black Guns Matter, A Girl & A Gun Women's Shooting League, and Armed Equality as Amici Curiae Supporting Petitioners, N. Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111 (2022) (No. 20-843), *available at* https://www.supremecourt.gov/DocketPDF/20/20-843/184443/20210720184235122_Amici_Brief_of_Black_Guns_Matter_No._20-843.pdf.

265. *McDonald*, 130 S. Ct. at 3059 (Thomas, J., concurring).

266. Corey Robin, *The Self-Fulfilling Prophecies of Clarence Thomas*, NEW YORKER (July 9, 2022), https://www.newyorker.com/news/daily-comment/the-self-fulfilling-prophecies-of-clarence-thomas.

267. COREY ROBIN, THE ENIGMA OF CLARENCE THOMAS 184–85 (2019).

If protection of self and others stems from heading a household, particularly vis-à-vis a hopelessly hostile political hegemony, it is not just a right but a duty. So it is for Locke, because we hold our lives as trustees of God and therefore are under an obligation to preserve them. When we offend, we "trespass against the whole Species,"[268] renounce reason and forfeit the law's protection. A criminal of whatever caliber is "dangerous to Mankind,"[269] Locke submits, and hence natural law not only allows but requires to "*kill a Thief*, who has not in the least hurt him, nor declared any Design upon his Life . . . [because there is] no reason to suppose, that he, who would *take away my Liberty* would not, when he had me in his Power, take away every thing else."[270] The duty to self-defend thus consists of a self-righteous power to assign an immutable status of criminality based on judgment of faulty conduct. This is the root of the status of "law-abiding," which Second Amendment law hinges on.

*Bruen* struck down "may issue" gun licensing regimes, because they grant "open-ended discretion to licensing officials," requiring "ordinary, law-abiding citizens" to show a special reason apart from the universal need for self-defense.[271] In contrast, "shall issue" regimes are constitutional thanks to their employment of "objective licensing requirements," as Justice Kavanaugh stresses in his concurrence.[272] Objectively, however, most gun owners will never need to use a weapon for self-defense, and many of those who will—those in spaces of abundant physical threats, like jails, prisons, and gangs, where a natural right to self-defense would be most acutely protected—are barred from gun possession due to felony convictions, presence in sensitive places, or both.[273] The question is not whether the requirements are objective but whose subjectivity counts. Second Amendment law mandates that the power to use discretion and judge the need for self-defense be in the hands of individuals rather than officials. Yet only a subset thereof. "Law-abiding" is a status assigned by state officials with their discretion, which "shall issue" regimes do allow.

The macro patriarch and the micro patriarch join hands to select who is admitted into the household. They merge three issues: the meaning of citizenship, the commitment of crime, and the right to self-defense. Under

268. LOCKE, *supra* note 244, at 6.
269. *Id.*
270. *Id.* at 11.
271. *Bruen*, 142 S. Ct. at 2161 (Kavanaugh, J., concurring).
272. *Id.*
273. *See* Ruben, *supra* note 40, at 75; Miller, *Institutions*, *supra* note 192, at 80–81.

Hobbes's view, these issues have no bearing on one another: blame does not alter, and self-defense does not depend on, one's citizenship status. First, because citizenship is not virtue-dependent; all subjects are entitled to equal representation. Second, because criminality does not indicate your true and deserved moral worth—it is a predicate of the use of authority.[274] Third, conversely, because self-defense is antagonistic to and valid in spite of authority, it is not a privilege for certain social classes. Under Hellerian Second Amendment law, there is an essentialist binary between the citizenry and the felonry, and the discretionary privileges of self-defense are reserved for members of the former group.[275] Both classes are described in Second Amendment decisions as categories of people rather than of deeds, e.g., "persons of quality" and "the responsible" versus "disorderly person, vagrant, or disturber of the peace" and "the allegedly reckless."[276] Once persons are labeled as members of the latter group, the stringent mens rea requirements that *Bruen* insists on no longer apply.[277] This is consistent with "the entire structure" of federal gun crimes, which "revolves around aiming to secure, protect, and defend the rights of law-abiding citizens to keep and bear guns while visiting extreme punishment on the bad apples."[278]

Second Amendment law enlists the republican roots of the United States to justify the exclusion of felons from exercising their individual rights, due to their ostensible lack of civic virtue.[279] It ignores the fact that the felonry is a very broad, loose, and racialized category,[280] particularly

274. *See* CONDREN, *supra* note 116, at 49.

275. *See* Alice Ristroph, *Farewell to the Felonry*, 53 HARV. C.R-C.L. L. REV. 563 (2018) (exploring the historical underpinnings and contemporary implications of this binary); Siegel, *supra* note 60, at 207–15 (situating this binary in the context of *Heller*); Kleinfeld, *supra* note 210, at 965–69 (analyzing collateral consequences of conviction as stripping rights connected to citizenship). Challenges to laws prohibiting persons convicted of felonies or serious misdemeanors from possessing firearms have failed, although a few courts have entertained the possibility that a person who has been convicted of serious crime may, in exceptional circumstances, lift the burden and prove that they now belong in the category of "law abiding, responsible citizens." Charles, *supra* note 92, at 61; Eric Ruben & Joseph Blocher, *From Theory to Doctrine: An Empirical Analysis of the Right to Keep and Bear Arms after* Heller, 67 DUKE L.J. 1433, 1481, 1499 n.256 (2018).

276. *Bruen*, 142 S. Ct. at 2142, 2149, 2152 (respectively).

277. *Supra* text accompanying notes 52–57.

278. Jacob D. Charles & Brandon L. Garrett, *The Trajectory of Federal Gun Crimes*, 170 U. PA. L. REV. 637, 688 (2021). Hence, for example, prosecutors prioritize street-level offenders over "holding manufacturers, distributors, and dealers to account." *Id.* at 689.

279. Don B. Kates & Clayton E. Cramer, *Second Amendment Limitations and Criminological Considerations*, 60 HASTINGS L.J. 1339, 1359–60 (2009); Miller, *Institutions*, *supra* note 192, at 97.

280. This would still be true if we substitute "criminal" or "felonious" with "violent." *See* DAVID ALAN SKLANSKY, A PATTERN OF VIOLENCE: HOW THE LAW CLASSIFIES CRIMES AND WHAT IT MEANS FOR JUSTICE (2021); Alice Ristroph, *Criminal Law in the Shadow of Violence*, 62 ALA. L.

in our prosecutorial reality, which reduces vice to actuarial prediction of dangerousness. Worse yet, it emblemizes a punitive culture that views criminality as inherent to certain people's characters, a matter of deserved status. This is deeply illiberal, but it also belies republicanism, which would forbid the crime-based disenfranchisement practices that Second Amendment law relies on. A republican understanding of the criminal law, as Ekow Yankah stresses, will be "more sensitive to the way punishment itself can do damage to civic bonds."[281]

The Hellerian right to keep the state away is best understood under Hobbes's conception of "state": not officials representing the sovereign but political commonality itself. Hobbes was certainly no republican, but he shares with republicanism the notion of *the public* as the guiding light for political affairs. This notion translates to equal and equitable institutional representation in lieu of conflicting private wills. Second Amendment law takes the public out of the republic. It utilizes self-defense not to fortify but to undermine the social contract. First, by erecting boundaries between diverse social groups that impede the possibility of a flourishing public life built around joint social projects.[282] Second, by creating a "right to exit" civil society and resort to self-help, stripping the state of its role as protector and delegating sovereignty to the individual.[283] The state envisioned does not further a common good and it is not even a night-watchman state, for it does not even purport to keep us safe. In fact, it positions itself precisely in opposition to this function, under the assumption that every increase in welfare functions, including the protection of life and limb, is a step toward tyranny.

REV. 571 (2011) (discussing the problematic, often irrelevant, arbitrary, or racist criteria for classifying certain offenses as violent).

281. Ekow N. Yankah, *Republican Responsibility in Criminal Law*, 9 CRIM. L. & PHIL. 457, 466 (2015). *But cf.* Robert Weisberg, *Values, Violence, and the Second Amendment: American Character, Constitutionalism, and Crime*, 39 HOUSTON L. REV. 1, 6 (2002) ("any effort by liberals to give content to the Civic Republican notion of virtue risks implicating political values that liberals would hardly find virtuous"). Modern republican theory consists of two general branches—one is inspired by Athens and ideas about civic virtue, the other inspired by Rome and ideas about freedom as nondomination—though I do not dwell on this distinction.

282. *See, e.g.*, with regard to Second Amendment law's contribution to economic inequality, Bertrall L. Ross II, *Inequality, Anti-Republicanism, and Our Unique Second Amendment*, 135 HARV. L. REV. F. 491 (2022); Williams, *supra* note 194, at 642 ("*Heller* offers a Second Amendment cleaned up so that it can safely be brought into the homes of affluent Washington suburbanites who would never dream of resistance [against tyranny]—they have too much sunk into the system—but who might own a gun to protect themselves from the private dangers that, they believe, stalk around their doors at night"). We might understand Hobbes as the city to Heller's suburb and to republicanism's small town.

283. ROBIN L. WEST, CIVIL RIGHTS: RETHINKING THEIR NATURAL FOUNDATION ch. 5 (2019).

The same history Justice Thomas narrates in *McDonald* is also one of state impotence and inadequacy, if not malignancy, relieving itself of responsibility for its subjects' welfare and privatizing core functions such as the protection of their physical safety.[284] But this is not taken to be a problem. In *Bruen* as well as previous decisions, the Court stresses the necessity of individual guns due to state inability or lack of will to protect: "individuals . . . must defend themselves because the State will not."[285] Majority Justices cite anecdotal and statistical evidence for why your desire to be in control of your own safety is justified.[286] It is a given that the state will abandon you, particularly if you are socially weak, and the Court does not believe you are owed any recourse besides empowerment.

There is an element of self-fulfilling prophecy in the notion that you need a gun to protect yourself because the state is not going to be there for you. It is the Supreme Court that condoned state failure to protect and ruled that the state is under no obligation to do so, and it is the same Supreme Court that then appealed to these facts to posit that there is no alternative to self-protection.

The earlier moment is exemplified in the 1989 case of *DeShaney v. Winnebago County Department of Social Services*. Here, the Supreme Court rejected a constitutional claim that the government was obligated to prevent severe physical and mental damage inflicted on a child by his father, who officials knew was abusive. Government, the *DeShaney* Court held, is under no positive obligation to protect persons from private violence. The Due Process Clause guarantees individuals some protections against state harms but not against those inflicted by other individuals.[287] As one commentator noted, this case supports the individual rights interpretation of the Second Amendment: "If the government generally has no obligation to protect citizens, how can it prevent its citizens from bearing arms in their own defense?"[288] Though a right to firearms would

284. *See* Zanita E. Fenton, *Disarming Sate Action; Discharging State Responsibility*, 52 HARV. C.R.-C.L. L. REV. 47 (2017); DARRYL K. BROWN, FREE MARKET CRIMINAL JUSTICE: HOW DEMOCRACY AND LAISSEZ FAIRE UNDERMINE THE RULE OF LAW (2016); GARLAND, *supra* note 49.

285. Caetano, 136 S. Ct., at 1029 (Alito, J., concurring).

286. *Infra* notes 300, 324, and accompanying texts.

287. DeShaney v. Winnebago County Dep't of Soc. Servs., 489 U.S. 187, 109 S. Ct. 998, 1002–07 (1989). For analysis and critique, see Louis Michael Seidman, *State Action and the Constitution's Middle Band*, 117 MICH. L. REV. 1, 11–19 (2018); Steven J. Heyman, *The First Duty of Government: Protection, Liberty and the Fourteenth Amendment*, 41 DUKE L.J. 507 (1991).

288. Murley, *supra* note 37, at 40; *see also* Fenton, *supra* note 284, at 50–51; Don. B. Kates & Alice Marie Beard, *Murder, Self-Defense, and the Right to Arms*, 45 CONN. L. REV. 1685, 1691–93 (2013); West, *supra* note 34, at 403.

not have availed the four-year-old junior DeShaney.[289] Furthermore, Supreme Court jurisprudence has since extended *DeShaney* to hold more generally that the Constitution does not mandate police protection.[290]

One might have supposed that the constitutionalization of the means of self-defense would enhance the prospects for protection of persons' bodily integrity. But, you see, it is *self*-defense, not security of the person, that is constitutionally protected. Second Amendment rights do not provide a carte blanche; a self-defender will need to answer and account for his actions under the criminal law. But criminal law procedures are often tokens of the failures of better alternatives, like communication and prevention. Ironically, the auxiliary constitutionalization of self-defense relegates the dealing with private violence to the criminal law. This increases violence. One manifestation is that the greater malleability of statutory criminal law as opposed to constitutional law allows legislatures to empower private citizens to engage in conduct that constitutional protections forbid police officers from performing, such as shooting at protesters suspected of rioting or looting.[291] Another manifestation is again exemplified by *DeShaney*. The criminal process, as Vincent Chiao comments, "was not worth very much to the boy, as it failed to protect him from being beaten by his father. But in the Court's view, public institutions are not required to prove their worth. They are just required to respect rights."[292] The senior DeShaney's aggression derived from his Lockean God-given right to manage and protect his own household, where the state is not welcome. He got punished, to return to Dubber's terminology, for being a failed patriarch: an imprudent ruler who is unfit to rule not for lack of legitimacy but due to bad management of human resources.[293]

The Hobbesian sovereign is under an obligation to represent both DeShaneys' interests and to make sure the boy has no reason to resort to self-defense. Resistance to coercion is as necessary from the subject's point of view as keeping order is from the sovereign's perspective. The sovereign may not have the moral upper hand, but he does have legitimate political authority. He still represents the subjects' will and coerces on their behalf. For this reason, the sovereign has absolute discretion and a

289. *See* Charles, *supra* note 92, at 64–65 (discussing the exclusion of children from the scope of the Second Amendment).

290. Town of Castle Rock v. Gonzales, 125 S. Ct. 2796, 2810 (2005); *see* Alexandra Natapoff, *Underenforcement*, 75 FORDHAM L. REV. 1715, 1758, 1768 (2006).

291. Jacob D. Charles & Darrell A.H. Miller, *Violence and Nondelegation*, 135 HARV. L. REV. F. 463 (2022).

292. VINCENT CHIAO, CRIMINAL LAW IN THE AGE OF THE ADMINISTRATIVE STATE 3 (2018).

293. *Supra* note 254.

right to all available means. He doesn't leave you to your own devices, if he triumphs in the difficult task of maintaining sovereign authority. Hobbesian subjects are "agents of their own security, not mere passive recipients of protective services."[294] But it is precisely *when the sovereign fails*, leaving the management of violence to the means of the criminal law, that this statement becomes pertinent.[295] DeShaney's father deserved to be punished for his crimes, but it is his status as a political subject that legitimizes the Hobbesian sovereign's ex ante actions to prevent abuse in the first place.[296] This is a matter of responsibility. The entity responsible for the junior DeShaney's grievance is thus the sovereign no less than his father.

The argument should not be misread for a normative call for more policing. It is not about suggesting solutions for dealing with violence but rather about assessing the nature of the problem and placing responsibility for it. Critics of overpolicing agree with Hobbes that violence indicates a failure of the state.[297] The solutions they prefer are often opposite to those that Hobbes favors (and may be similar to those favored by progun conservatives),[298] because they reject his absolutist view of sovereignty and instead think of violence as structural, implicating dispersed agents of sovereignty with economic and patriarchal social institutions.[299] This still implies, however, that when people get hurt, the sovereign should answer for it. For the Second Amendment Court, there is no failure at all, as far as the state is concerned, and nothing to be accountable for.

294. Ristroph, *Respect*, *supra* note 33, at 618 n.81.

295. *See* RAMSAY, *supra* note 34, at 215–16.

296. CHIAO, *supra* note 292, at 32–33 (making a similar critique of *DeShaney*, though not by way of Hobbes: "By insisting on the criminal law as an institution devoted to blaming and punishing individuals for their wrongful acts, while ignoring the significance of other public institutions in responding to crime as a collective problem for the polity, a private right conception [of the criminal law] finds common ground with the *DeShaney* court").

297. Natapoff, *supra* note 290, at 1719 ("understanding underenforcement in its own right as a potential site for distributive and democratic failure reveals that underenforcement is not necessarily an alternative to overenforcement but often its corollary").

298. To illustrate, both left-wing abolitionists and right-wing gun enthusiasts reject calling 911 to deal with incidents of violence. *Compare* Luke, *supra* note 241, at 18 (referring to gun enthusiasts) *with* Ejeris Dixon, *Building Community Safety: Practical Steps Toward Liberatory Transformation*, *in* WHO DO YOU SERVE, WHO DO YOU PROTECT? POLICE VIOLENCE AND RESISTANCE IN THE UNITED STATES 161, 169 (Maya Schenwar et al. eds., 2016) (referring to abolitionists). There are important differences between these groups, of course, but both share profound mistrust of authorities and think they can be done without; cultivation of political trust is not considered a worthwhile goal at all.

299. *See* WENDY BROWN, STATES OF INJURY: POWER AND FREEDOM IN LATE MODERNITY 16 (1995).

### *C. Hobbes v. Mass Shooters*

Justice Thomas includes in his *Bruen* opinion a comment that, in line with the entire decision, relates on its face a historical incident but speaks volumes about contemporary society. In the Court's view, to be an equal citizen is to have the power to protect yourself, because the government is not going to, nor do you wish it to. Reconstruction secured this right for Black Americans as part of the status of citizenship. In this context, Justice Thomas highlights the story of a Black schoolteacher in postbellum Maryland, who was given a revolver by the local sheriff to protect his students against violence by white mobs.[300] Despite the historical setting, arming teachers as a solution to a pressing social problem of violence will sound familiar to the opinion's contemporary audience: it is analogous to gun rights advocates' responses to incidents of mass shootings at schools.

Although no other issue related to gun violence captures public attention in the same way as mass shootings, advocates on both sides of the Second Amendment debate have warned against designing gun laws with mass shootings in mind, since they are only responsible for a fraction of gun violence in the United States.[301] Yet it is important to try and understand the cultural connections between mass shootings and Hellerian Second Amendment: two uniquely American phenomena related to gun culture, which have surged in the twenty-first century.[302] In the context of the place of self-defense in public life, the contrast between self-defense as a political problem and self-defense as putting persons in their place is starkly demonstrated by considering the relationship between gun rights

300. *Bruen*, 142 S. Ct. at 2151. Note that in this story, a state official provided the means of protection to the teacher. It is therefore more a story about delegation of responsibility and acknowledgement of failure than one about self-sufficiency.

301. Sam Kamin, *The Citizen's Guide to Gun Control at 30*, 23 BERKELEY J. CRIM. L., no. 3, 2018, 47 at 56–58 (proregulation); Clayton E. Cramer, *Mass Murder: American Unexceptionalism, D.C. v. Heller, and "Reasonableness*,*"* 43 S. ILL. U. L.J. 43 (2018) (proguns).

302. There have been mass shootings in other countries as well, but the U.S. has had the most incidents "by far," comprising roughly a third of all global incidents of this kind. Adam Lankford, *Public Mass Shooters and Firearms: A Cross-National Study of 171 Countries*, 31 VIOLENCE & VICTIMS 187, 192 (2016). In the last two decades the numbers of mass shootings have gone increasingly up. James Densley & Jillian Peterson, *We Analyzed 53 Years of Mass Shooting Data. Attacks Aren't Just Increasing, They're Getting Deadlier*, L.A. TIMES (Sept. 1, 2019), https://www.latimes.com/opinion/story/2019-09-01/mass-shooting-data-odessa-midland-increase; GABOR, *supra* note 11, at ch. 5; Amy P. Cohen, Deborah Azrael & Matthew Miller, *Rate of Mass Shootings Has Tripled Since 2011, Harvard Research Shows*, MOTHER JONES (Oct. 15, 2014), https://www.motherjones.com/politics/2014/10/mass-shootings-increasing-harvard-research. *But cf.* Cramer, *supra* note 279 (challenging the data by counting, e.g., terrorist attacks, killing as part of organized criminal enterprises, and nonfirearm mass murders. The article's methodology is not rigorous, but even if this would render the U.S. less exceptional, it obscures the specificity and cultural significance of the examined phenomenon).

and mass shootings. On their face, mass shootings are pure aggression and so may seem like the opposite of defensive action, but they occur against the backdrop of two major social conditions that have everything to do with the Second Amendment: the availability of guns and the power of cultural scripts.[303]

Following incidents of mass shootings, progun commentators regularly invoke three types of responses: first, framing the problem as one of evil individuals whom law-abiding citizens should be able to quell (solution: arm good guys to take on bad guys);[304] second, suggesting that violence is inevitable and the way to ameliorate its harms is reducing social interaction (solutions: fortify school buildings to prevent perpetrators from entering,[305] homeschool children);[306] third, lamenting lack of social cohesion and virtuousness that might prevent some mass shootings (solution: strengthen community-building and morality-inducing institutions such as churches).[307] The third response contradicts the first two. One cannot promote individual gun rights for self-protection against criminals and in the same breath wish for stronger communities. Your neighbor is either your potential killer or your confidant. Second Amendment decisions unequivocally convey the former message. The third response correctly identifies that acts of violence are products of culture and that the cultural problem that yields mass shooting is one of alienation. Second Amendment jurisprudence clarifies that this problem is not just the mass shooters' but ours.

Sociologist Zygmunt Bauman has impactfully argued that the extermination camp was not a departure from, but rather a paradigmatic manifestation of, European modernism.[308] Progun responses to mass

303. Amy Shuffelton, *Consider Your Man Card Reissued: Masculine Honor and Gun Violence*, 65 EDUC. THEORY 387, 387 (2015).

304. *See* Larry Buchanan & Lauren Leatherby, *Who Stops a 'Bad Guy With a Gun'?*, N.Y. TIMES (June 22, 2022), https://www.nytimes.com/interactive/2022/06/22/us/shootings-police-response-uvalde-buffalo.html.

305. María Méndez & Jolie McCullough, *Trump and Cruz Propose "Hardened" One-Door Schoolhouses. Experts Say That's Not a Credible Solution*, TEX. TRIBUNE (May 28, 2022), https://www.texastribune.org/2022/05/28/uvalde-shooting-school-doors. This solution is reminiscent of the Castle Doctrine but applied to a public space and so consistent with Stand Your Ground ideology that turns the public into private. *Supra* text accompanying notes 50-52.

306. Jordan Boyd, *Tragedies Like the Texas Shooting Make a Somber Case for Homeschooling*, FEDERALIST (May 25, 2022), https://thefederalist.com/2022/05/25/tragedies-like-the-texas-shooting-make-a-somber-case-for-homeschooling.

307. Justin Baragona, *Ron Johnson Literally Blames Uvalde Shooting on 'CRT' and 'Wokeness'*, DAILY BEAST (May 27, 2022), https://www.thedailybeast.com/gop-sen-ron-johnson-literally-blames-uvalde-shooting-on-crt-and-wokeness (the senator suggested that "the solution is renewed faith, stronger families, more supportive communities").

308. ZYGMUNT BAUMAN, MODERNITY AND THE HOLOCAUST 12–30, 93–116 (2000).

shootings—which the majority Justices in *Bruen* echo, legitimize, and arm with legal validity—invite a similar argument with regard to mass shootings and contemporary American culture. The extermination camp revealed the ominous undercurrents of a Weberian state that holds a monopoly on violence within a bureaucratic culture that instrumentalizes all human experience. Mass shootings reveal the ominous undercurrents of a deresponsibilized state that diffuses legitimacy to use violence within a culture that romanticizes and naturalizes self-sufficiency. Gun advocates often make the comparison explicitly, suggesting a "violence optimality" whereby if the U.S. did not have its especially high rates of private violence, it would have instead large-scale group violence: "The down-side of 'gun control' is genocide."[309]

Their horrific acts should not cloud the fact that mass shooters are devout defenders of the mainstream American cultural narrative, not a deviation therefrom. The demographic of mass shooters tracks that of gun owners except for age: mass shooters are overwhelmingly male and generally white and nonurban, but young.[310] A central motivation attributed to many of these perpetrators is "aggrieved entitlement."[311] They often cannot reconcile an unfair, competitive reality with an ideal image of what it was supposed to be like, for them. There is no one person responsible for this gap, yet, in the mass shooter's view, someone must pay for robbing them of the personal and social successes to which they feel entitled. Their ostensibly deserved social capital is reclaimed from society at large—revenge is exacted on the collective and persons become legitimate targets as symbols of this unmerited deprivation.[312] Mass

309. Weisberg, *supra* note 281, at 36–37; David C. Williams, *Constitutional Tales of Violence: Populists, Outgroups, and the Multicultural Landscape of the Second Amendment*, 74 TULANE L. REV. 387, 415 (1999) (respectively). *See also* Levinson, *supra* note 191, at 657 n.95. While the U.S. has not had extermination camps, stretching the historical scope would also reveal large-scale violence, including genocide, slavery, civil war, and violent apartheid.

310. Michael Rocque & Grant Duwe, *Rampage Shootings: An Historical, Empirical, and Theoretical Overview*, 19 CURRENT OPINION PSYCHOL. 28, 31 (2018); Jill Filipovic, *One Undeniable Factor in Gun Violence: Men*, TIME (Oct. 4, 2017), http://time.com/4968842/one-undeniable-factor-in-gun-violence-men; John Haltiwanger, *White Men Have Committed More Mass Shootings Than Any Other Group*, NEWSWEEK (Oct. 2, 2017), www.newsweek.com/white-men-have-committed-more-mass-shootings-any-other-group-675602; Michael Kocsis, *Gun Ownership and Gun Culture in the United States of America*, 16 ESSAYS PHIL. 154, 159 (2015).

311. Rachel Kalish & Michael Kimmel, *Suicide by Mass Murder: Masculinity, Aggrieved Entitlement, and Rampage School Shootings*, 19 HEALTH SOC. REV. 451, 459–62 (2010); *see also* Adam Lankford, *Race and Mass Murder in the United States: A Social and Behavioral Analysis*, 64 CURRENT SOC. 470 (2016).

312. A mass shooter who left behind a "manifesto" illustrates with chilling clarity: "I knew that if it came to that, I would exact my revenge upon the world in the most catastrophic way possible." The shooter's main source of frustration had been rejection by girls, and so he exacted his revenge on

shooters defend the narrative of merited success that emanates naturally from social dominance, by showing how catastrophically its fallacy is felt when it materializes.[313] The individual finds in violence a "self-justifying sense of righteousness,"[314] which protects and restores the self when it fails to stand up to imaginary standards. These standards nonetheless seem natural—and therefore reality is where the problem lies—owing to the power of myths to dramatize society's moral consciousness and make it appear as "natural law."[315]

It has been suggested that mass shooters have "followed the time-honored script of the American Western."[316] Now recall Green's appeal to the cultural resonance of vigilantism to justify *Heller*.[317] In the same spirit, Justice Alito invoked the need for firearms in the 1791 frontiers to support his *Bruen* concurrence,[318] and in oral argument, he questioned whether today's New York City subways are relevantly different,[319] bringing to mind the famous case of Bernhard Goetz, the "subway vigilante."[320] Gun owners distance themselves from violence by insisting that their weapons would only be used if they encounter a "bad guy" in action. Yet the continuous presence of personal means of violence—thanks to *Bruen*, always and everywhere save "sensitive places"—incurs a constant search for such an opportunity to be a romantic hero and salvage a sense of self from uselessness and failure. Vigilantes like Goetz remind us that the lines between good guys and bad guys can be blurry. The "bad guy" gun users mistake victims for targets and self-defense for revenge, but they too use guns to cope with a sense of siege,[321] inferring that the justified provision of these means of violence, thanks to self-defense law, ought to make

girls who symbolized the ones he had pursued, and guys who symbolized the ones who had "got" them; this show of power over both made him, for the first and last time, an "alpha male" like the ones who, in his words, "deserved to die horrible, painful deaths just for the crime of enjoying a better life than me." ELLIOT RODGER, MY TWISTED WORLD: THE STORY OF ELLIOT RODGER 101–07 (2014).

313. *See* MICHAEL J. SANDEL, THE TYRANNY OF MERIT: WHAT'S BECOME OF THE COMMON GOOD? (2020) (on the fallacy of the American interpretation of social desert).

314. Kalish & Kimmel, *supra* note 311, at 453.

315. SLOTKIN, *supra* note 10, at 6.

316. Kalish & Kimmel, *supra* note 311, at 463.

317. Text accompanying *supra* note 249.

318. *Bruen*, 142 S. Ct. at 2161 (Alito, J., concurring).

319. Oral argument at 1:02:49, N. Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111 (2022) (No. 20-843), https://www.supremecourt.gov/oral_arguments/audio/2021/20-843.

320. *See* FLETCHER, *supra* note 232.

321. Shuffelton, *supra* note 303, at 399.

one's use of them just: "Gun rights advocates seem to equate rights with rightness."[322]

The mass shooter is conceptually troubling precisely because he is an overconformer who "swallowed every poison pill our culture could throw at him and was outraged when he became sick."[323] The gun helps secure, or vent frustration over the loss of, what one is owed by society. That the gun is the American man's best friend translates the social frustration of aggrieved entitlement into a particular form of mass sacrificial violence. This is not a bureaucratic form of violence with scientific justifications, like the Holocaust, nor one loaded with collective metaphysical meanings and religious justifications, like many terrorist acts. The American way of translating (suburban and rural) alienation into violence is to act alone, shooting indiscriminately at multitudes of fellow citizens using a personal gun.

In his *Bruen* concurrence, Justice Alito referenced statistics about gun violence cited by the dissent, including about mass shootings, to underscore that they present another reason to expand gun rights—not to curb them; the more violence there is, the greater the need for self-defense.[324] Indeed, mass shootings are consistently followed by peaks in gun sales (partly for fear of victimization and partly for fear of increased regulation).[325] Hellerian Second Amendment promotes the cultural script of "me and my gun against the world" and thanks to my gun I am entitled to put people—including myself—in their rightful place. Mass shooters thus vindicate the Hellerian world-view, help it stay relevant, and oil its wheels.

Three mutually-augmenting human drives, Hobbes believed, impede the achievement of safety and welfare: competition, glory (or "vain-glory"), and diffidence, i.e., mistrust.[326] If the above analysis is correct, these are the same factors that fuel and exacerbate mass shootings, whereby individuals use other persons' bodies as means to establish their self-worth. To an extent, Hobbes believed these drives are inevitable and remain with us when we enter civil society. Particularly diffidence, as

322. James E. Fleming & Linda C. McClain, *Ordered Gun Liberty: Rights with Responsibilities and Regulation*, 94 B.U. L. REV. 849, 855 (2014).

323. Matthew Fleischer, *What We Should Learn from Elliot Rodger's '*Twisted *World,'* L.A. TIMES (June 6, 2014), www.latimes.com/opinion/opinion-la/la-ol-elliot-rodger-my-twisted-world-20140605-story.html (referring to RODGER, *supra* note 312).

324. *Bruen*, 142 S. Ct. at 2157 (Alito, J., concurring).

325. Rachael A. Callcut et al., *Effect of Mass Shootings on Gun Sales—A 20-Year Perspective*, 87 J. TRAUMA ACUTE CARE SURG. 531 (2019).

326. LEVIATHAN, *supra* note 101, at 185.

Alice Ristroph explains: "the uneasiness or anxiety that all individuals, including and especially law-abiding ones, have about their own security and standing vis-à-vis one another . . . proliferates as society gets larger and more heterogeneous."[327] The responses to mass shootings concerned with alienation attempt to address this problem. They broaden circles of responsibility to voluntary associations, but they join and strengthen Second Amendment decisions' hopelessness about representative politics and institutional solutions, as well as their distribution of violence based on the principle of moral desert, which Hobbes thought only increases diffidence.[328]

While we cannot eliminate diffidence, Hobbes did think we can and should decrease it.[329] Hobbes notes that "where there is no trust, there can be no contract."[330] The role of political institutions—first and foremost the institution of sovereignty—is to quell the lethality of proud, romantic, self-elevating competition, and thereby to increase trust as well. The upshot is that persons become safe enough, psychologically and physically, to speak with each other. The language of interpersonal comportment created by Hellerian Second Amendment law comprises contract for syntax and violence for semantics. Notwithstanding the centrality of fear for life, Hobbes believed we should wish for ourselves a public space that cultivates "the most noble and profitable invention of all other . . . that of SPEECH . . . without which, there had been amongst men, neither Common-wealth, nor Society, nor Contract, nor Peace, no more than amongst Lyons, Bears, and Wolves."[331] When the political sphere is diluted—the result of all Hellerian responses to mass shootings—the opposite of public discourse, which is violence, ensues. *Bruen* further stifles the move from violence to communication, by substituting guns for reasons.[332] *Bruen* strikes down the requirement to communicate reasons before being given a gun license, as no less than unconstitutional. It thus cements the narrative that the gun can do your talking for you.

327. Ristroph, *Diffidence*, *supra* note 131, at 23–24.

328. *Id.* at 28.

329. *Supra* note 116 and accompanying text (noting that nonsociability under Hobbes can be ameliorated but not eradicated).

330. Hobbes, *De Cive*, *supra* note 142, at 282.

331. LEVIATHAN, *supra* note 101, at 100.

332. *See also* Mary Anne Franks, *The Second Amendment's Safe Space, Or the Constitutionalization of Fragility*, 83 L. & CONTEMP. PROBS. 137, 146–47 (2020) (explaining how the Second Amendment enables the use of guns to silence public debate).

### *D. Hobbes v. Consensual Dysphoria*

This final section returns to the fundamental challenge that frames all Second Amendment law after *Heller*—how to reconcile individual natural rights and popular sovereignty—from the perspective of Hobbes's materialist and egalitarian approach to self-defense.

In modern law like in the Hobbesian state of nature, self-defense regimes harbor aggression alongside protection. *Bruen* frequently conflates the two, stating, for instance, that the Second Amendment protects a right to be "armed and ready for offensive or defensive action in a case of conflict with another person,"[333] and that it builds on a history of English laws that associated bearing "arms"—weapons or armor—with breaching the peace.[334] In America today as well, preparedness for defensive action is often a proxy for aggressive behavior. I have already mentioned that self-defense law is often utilized, perniciously or in good faith, for violent purposes.[335] To illustrate further, groups like the KKK have claimed to perform self-defense, reasoning that lack of state protection leaves people no recourse but self-help,[336] and a white supremacist militant group that helped organize the breach of the U.S. Capitol on January 6, 2021, called themselves the "Ministry of Self Defense."[337] Consider also cases of persons dressing in a "warlike manner"[338] or pointing guns to demonstrate their commitment to the Second Amendment or to cause a social stir that might lead to violence, whether justified or not.[339]

Against this backdrop of militant upholding of rights becoming literally militant, it is no wonder that Second Amendment law is front and center in the current cycle of critiques of rights absolutism in American

333. *Bruen*, 142 S. Ct. at 2134 (quoting *Carry Arms or Weapons*, BLACK'S LAW DICTIONARY (6th ed. 1990)).

334. *Id.* at 2139–40.

335. *Supra* text accompanying notes 291–292, 316–322.

336. Whitley R. P. Kaufman, *Self-Defense, Imminence, and the Battered Woman*, 10 NEW CRIM. L. REV. 342, 364 (2007); Miller, *Guns as Smut*, *supra* note 41, at 1329–34, 1347–49.

337. Press Release, U.S. Dep't of Justice, U.S. Attorney's Office, D.C., Leader of Proud Boys and Four Other Members Indicted in Federal Court for Seditious Conspiracy and Other Offenses Related to U.S. Capitol Breach (June 6, 2022), https://www.justice.gov/usao-dc/pr/leader-proud-boys-and-four-other-members-indicted-federal-court-seditious-conspiracy-an-0.

338. *Bruen*, 142 S. Ct. at 2145 (quoting Simpson v. State, 13 Tenn. 356, 358 (1833)).

339. *See, e.g.*, Joseph Blocher et al., *Pointing Guns*, 99 TEX. L. REV. 1173 (2021); Fleming & McClain, *supra* note 322, at 857; Lindsay Whitehurst, *Rittenhouse Verdict Comes Amid a Fraught Gun Landscape*, AP NEWS (Nov. 22, 2021), https://apnews.com/article/kyle-rittenhouse-wisconsin-shootings-united-states-gun-politics-c53a5144773fb54dd2b75c9e51b680bc.

constitutional law.[340] Jamal Greene has labeled the addiction to rights in American constitutional culture "an epidemic."[341] To wit, it is a malaise of the body politic to rely so heavily on binary judicial assessments, based in linguistic fixations, about whether a given right is constitutionally protected—if it is, the claimant wins; if not, they lose. This leaves no doctrinal space for recognizing competing rights that apply simultaneously and balancing the various protected interests with an eye toward good public policy. Adjudicating with "rights terms" instead of "human terms," as Greene puts it, focuses solely on fitting a claim into the categories of judicial interpretation that recognize a protected right. The ensuing management difficulties for the political community, which doctrines of means-ends analysis should accommodate, do not matter.[342] In *Bruen*, the judicial anxiety that the Second Amendment might be considered a "second class right" led the Court to assert that proceeding to scrutinize its rationality or proportionality undermines its constitutional status.[343] In the same spirit that guided gun advocates' response to the proregulation protest "march for our lives" with an event entitled "march for our rights,"[344] the Court makes the case for a Gordian knot connecting constitutional rights with misery and violence. Constitutional rights are costly—including in the currency of bodies—but that is no reason to normatively demote them.[345]

340. LOUIS MICHAEL SEIDMAN, FROM PARCHMENT TO DUST: THE CASE FOR CONSTITUTIONAL SKEPTICISM chs. 7–8 (2021); WEST, *supra* note 283, at 228–32; MARY ANNE FRANKS, THE CULT OF THE CONSTITUTION 70–75 (2019); Jamal Greene, *The Supreme Court, 2017 Term—Foreword: Rights as Trumps?*, 132 HARV. L. REV. 28, 54–56 (2018); *see also* Joseph Blocher, Response, *Rights as Trumps of What?*, 132 HARV. L. REV. F. 120, 131 (2019) (Second Amendment cases present "a near-perfect test of the arguments that Greene makes at length").

341. Jamal Greene, 2020 MLK Lecture: The Rights Epidemic, Address before Vanderbilt University Law School (Jan. 31, 2020), *in* YouTube, https://www.youtube.com/watch?v=DKFb_2wyh-M [hereinafter Greene, *MLK Lecture*]. The book that incorporates this pre-COVID lecture no longer carries the same title, though still maintains that rights "have gone viral." JAMAL GREENE, HOW RIGHTS WENT WRONG: WHY OUR OBSESSION WITH RIGHTS IS TEARING AMERICA APART xiv (2021).

342. Greene, *MLK Lecture*, *supra* note 341, at 10:00–25:00. Again, Greene's book, *supra* note 341, uses different language to make the same point.

343. *Bruen*, 142 S. Ct. at 2156; *see* Eric Ruben & Joseph Blocher, *"Second-Class" Rhetoric, Ideology, and Doctrinal Change*, 110 GEO. L.J. 613 (2022) (analyzing the prevalent rhetoric of "second-class right" in Second Amendment opinions and advocacy).

344. *See* Danielle Kogan, *March for Our Rights: Pro-Gun Activists Rally in 13 Cities Across U.S.*, NEWSWEEK (July 7, 2018), https://www.newsweek.com/black-guns-matter-march-our-rights-march-our-lives-rally-conservative-gun-1012966.

345. Greene and others who wish to scale back American rights absolutism turn to comparative law, where it is commonplace that the protection of a constitutional right in a given case would be subject to context-sensitive review. Justice Scalia refused to consult foreign law in constitutional cases, the only exception being pre-1787 English law. Mary Ann Glendon, The Scalia Lecture: Who Needs

In consenting to the Second Amendment, the Supreme Court submits, the American people made sure that they would always be prepared for violent confrontation with their fellow citizens, even upon the erection of a republican polity.[346] Two factors that consistently correlate with lower rates of homicide in the U.S. are high levels of trust in government and of sentiments of solidarity and "fellow feeling" among social groups.[347] According to the Supreme Court's Second Amendment decisions, the American people want neither, and the Court further suggests that this is a good thing. As a matter of faith, ethos, and law, Americans want always to be prepared for confrontation, with officials or with civilians; they are correct to want this; and they would still be correct to want it even if public policy considerations, such as public health, would advise otherwise.

Grounding authoritative meaning in the way ordinary citizens who consented to the original covenant understood its terms, public meaning originalism sounds an ambitious appeal to the notion of a social contract, "preserving the highest promise of democracy."[348] In a pre-*Heller* article, Elaine Scarry argued that the Second Amendment is an exceptionally potent instance of the social contract in action.[349] Focusing on instances of massive violence like war, Scarry resisted accounts of emergency as a time when requirements of consent for political legitimacy can be relaxed. Instead, she reads the American Constitution as strengthening the demand to acquire the explicit consent of the people when weapons are in use. Scarry identified the Second Amendment as the constitutional location of this "Hobbesian form of consent."[350]

Foreign Law?, Address before Harvard Law School, (Feb. 24, 2020), *in* YouTube, https://www.youtube.com/watch?v=ghkNzJSPkqM, at 07:00.

346. The relationship between the originalist methodology and the self-defensive rationale of Second Amendment decisions remains underexplored, but few attempts have been made. FRANKS, *supra* note 340, at ch. 2 (framing it as a matter of constitutional fundamentalism); Greene, *supra* note 94 (framing it as a matter of cultural cognition); Siegel, *supra* note 60 (framing it as a matter of the culture wars).

347. RANDOLPH ROTH, AMERICAN HOMICIDE 17–18 (2009).

348. WHITTINGTON, *supra* note 73, at 111; *see also id.* at 156 ("By enforcing the original terms of the constitutional contract as articulated by its authors, an originalist Court ensures that the efforts of the sovereign are not in vain") (though Whittington here defends an originalism of authorial intent rather than public meaning).

349. *But cf.* Tom Ginsburg, *Constitutions as Contract, Constitutions as Charter*, *in* SOCIAL AND POLITICAL FOUNDATIONS OF CONSTITUTIONS 184 (Denis J. Galligan & Mila Versteeg eds., 2013); Joseph H. Kary, *Contract Law and the Social Contract: What Legal History Can Teach Us about the Political Theory of Hobbes and Locke*, 31 OTTAWA L. REV. 73 (1999) (raising doubts over whether contract is a good framework for thinking about constitutions).

350. Elaine Scarry, *War and the Social Contract: Nuclear Policy, Distribution, and the Right to Bear Arms*, 139 U. PA. L. REV. 1257, 1257–58, 1260 (1991). This is a reading of Hobbes opposite to that of Carl Schmitt, who flagged times of emergency as when Hobbesian absolutism shines through

Diving into the proceedings of ratification, "the performative action of consent,"[351] Scarry finds that the provisions' purposes, echoing the purpose of the ratification process itself, is to widely distribute political power. Internal inequity of arms is equated with hostile invasion: both break up the social contract. Today, this translates not to actual weapons but to the power to authorize their use—Scarry advocated for removing the power to authorize use of nuclear weapons from the exclusive hands of the executive.[352] She further argues that the Bill of Rights *in toto* is aimed at facilitating a process of equitable power distribution among the people. This process is not fixed in time, because the ratifiers ensured that the Constitution be a site of ongoing, vibrant, formally diverse consent:

> The distributional work of the first ten amendments is, then, twofold: they multiply the number of consensual gates (assembly, jury, free press, arms) available to the limited population (white male) already included within the 1789 Constitution; they also vastly multiply over time the scale of the population that will eventually have access to those multiplied consensual gates.[353]

If nondistribution is defeat, then distribution across various social divides is "the material realization of contract,"[354] entrenching the defense of a *body* politic. Materiality, and particularly sentient materiality, might be key to understanding the Second Amendment. Scarry finds an abundance of references to the physical and the passionate in the ratification records. The participants tied political representation with intersubjective "fellow feeling," true to the etymology of *consent* as *consentir*—to feel with.[355] Nothing makes this more explicit than the physical bearing of the weight of the gun and its potential physical consequences. This elicited from the ratifiers aesthetic praise not for military gestures but for their containment in a contractual frame of civil rights that cuts across demographic power structures. In their view, "the loss of the distributive is the loss of civil beauty."[356]

Unfortunately, along with her materialist and public readings of the Second Amendment, Hellerian Second Amendment law also rejects Scarry's trajectory of exponential opening of consensual gates. This adds

modern illusions such as popular consent. *See also* RAMSAY, *supra* note 34, at 215 (arguing that Schmitt got Hobbes wrong).

351. Scarry, *supra* note 350, at 1272.

352. *Id.* at 1279–83.

353. *Id.* at 1276.

354. *Id.* at 1287.

355. *Id.* at 1291–94.

356. *Id.* at 1302–03.

a methodological layer of irony to *Heller*'s focus on the home.[357] Post-*Heller* Second Amendment law has expanded the classes of people allowed to become patriarchs, but only under the aegis of the original patriarchal vision. Originalism's quest for authoritative meanings fixed to a moment in the past lends itself to a view of the social contract that invariably revers the settlements of past generations,[358] or rather those of whom that were considered legitimate decision-makers. Because of the wish to vindicate popular sovereignty, originalism has evolved to substitute intent with public meaning, seeking the words as "understood by the voters . . . ordinary citizens of the founding generation."[359] And yet, the Justices only look to elite sources, such as dictionaries, treatises, statutes, and court opinions, rather than sources reflecting the understandings of men and women on the streets.[360] What the Court tries to track are the messages sent by the powerful to the masses, and the masses are assumed to have understood and accepted them as sent. The ordinary person of yesterday is thus not really a layperson but rather, like the reasonable person of today, a judge. There is no attempt to track kitchen table conversations, because sentient spaces like the kitchen and the bedroom are not considered relevantly political fora.[361]

For Hobbes, notwithstanding the requirement that consent be conferred by all natural persons without exception, it is not explicitly solicited from them as a practical matter but always already presumed to have been given. The state of nature is not a historical fact, it is a rational construction.[362] Hobbes's philosophy is therefore fundamentally forward-

357. *Supra* notes 24, 44 and accompanying texts (discussing other ironies surrounding the Hellerian idea of home).

358. *See* Keith E. Whittington, *Is Originalism Too Conservative?*, 34 HARV. J.L. & PUB. POL'Y 29 (2011); Adam M. Samaha, *Dead Hand Arguments and Constitutional Interpretation*, 108 COLUM. L. REV. 606 (2008); David Luban, *Legal Traditionalism*, 43 STAN. L. REV. 1035 (1991).

359. *Heller*, 128 S. Ct. at 2788, 2792.

360. Merkel, *supra* note 191, at 673.

361. *See, e.g.*, Richard H. Fallon, Jr., *The Chimerical Concept of Original Public Meaning*, 107 VA. L. REV. 1421, 1465–71 (2021); Mary Anne Case, *The Ladies? Forget About Them. A Feminist Perspective on the Limits of Originalism*, 29 CONST. COMMENT. 431 (2013).

362. *See* Forsyth, *supra* note 108, at 42 ("the people as constituent power are but a fleeting moment"); Alice Ristroph, *The Imperfect Legitimacy of Punishment*, *in* HOBBES TODAY, *supra* note 167, at 190, 195 n.18 ("the notion of 'hypothetical consent' is the wrong way to address the worry that Hobbes's state of nature is not a historically accurate description"); David Gauthier, *Taming Leviathan*, 16 PHIL. & PUB. AFF. 280, 294 (1987) (book review) (questioning the description of the Hobbesian contract as hypothetical in the Rawlsian sense, yet arguing that for Hobbes, "any rational person in any situation would also choose to institute or to maintain an absolute sovereign"); CONDREN, *supra* note 116, at 40 ("Perpetually, Hobbes's contract hovers uncertainly between being a purely hypothetical model describing certain human propensities and being an abstraction from immediate social experience"); *id.* at 48 (making a similar point).

looking, yet he too ascribes special significance to origins. He thought that origin frames identity: the essential qualities necessary to assert sameness despite change depend on a thing's initial institution. This view explains why the social contract is what defines a political order.[363] Once made, the commonwealth is represented by the sovereign, and in this sense the union of wills "continue[s] to bind the successors of the original contractors."[364] Unlike Locke, who believed that ancestral consent cannot bind contemporary persons who are moral equals, Hobbes did not think continuous cross-generational consent was necessary for political legitimacy—the original contract suffices for the legitimacy of the law.[365]

However, as Murray Forsyth elucidates, "the function of a constituent assembly is precisely to constitute—not to rule, nor to sit permanently in judgment. For Hobbes the primary aim is not to control, but rather to *make* a body politic that accords with the logic of politics."[366] Although the sovereign's legitimacy is anchored in a presumed past, not so his discretion. One reason why Hobbes opposed constitutionalism is because judicial review would divide and usurp sovereignty. A complementary reason is that all politics is malleable, subject to the sovereign's exercise of public judgment, which remains rational and coherent over time. Furthermore, Hobbes did not think that rights are trumps. Rather, as he bluntly put it, "clubs are trump."[367] Even after consent takes over force, contracts are enforceable thanks to the threat of the sword, not the duty to respect rights. Natural rights cannot be "forfeited" as Lockeans would have them, but they do not "trump" anything, because rights do not entail an ought—not for other people to respect them and not for their bearer to necessarily act on them because she has them. Hobbesian natural rights are in "constant clash,"[368] I may have a right to something and my neighbor may also have a right to the very same thing. The resolution of the dispute is not to determine who is righteous and who is wicked but to come to an agreement, e.g., on who should have the power to adjudicate.[369]

363. Meyler, *supra* note 67, at 591.

364. Forsyth, *supra* note 108, at 39. *See also* Jaume, *supra* note 154, at 201; *supra* note 138 and accompanying text.

365. John Simmons, *Political Obligation and Consent*, *in* THE ETHICS OF CONSENT, *supra* note 121, at 305, 308–09; Barber, *supra* note 215, at 58.

366. Forsyth, *supra* note 108, at 42.

367. THOMAS HOBBES, A DIALOGUE BETWEEN A PHILOSOPHER AND A STUDENT OF THE COMMON LAWS OF ENGLAND 140 (Joseph Cropsey ed., 1971) (1681) (quoted in Ristroph, *Respect*, *supra* note 33, at 613).

368. Forsyth, *supra* note 108, at 44.

369. *See* WHITTINGTON, *supra* note 73, at 117 (Hobbes's sovereign "is valued for his decisiveness, not for his decision").

Hellerian Second Amendment law incurs a consensual dysphoria of the body politic: it sets us free and gets us killed. Like in the domains of sexual relations, exchange of goods, and the labor market, there might be a gap between what we *choose* and what we *feel* is good for us. We feel it in our bodies that there is a mismatch between the primacy of our will and the price we pay for it in life and limb. Robin West argues that this gap does not negate the moral magic of consent—to transform a thing from bad (e.g., rape, slavery, theft, tyranny) to, at least, OK (e.g., sex, work, exchange, sovereignty)—but it does call on us to be attentive to the costs of consent. Contract has taken over status to become our sole source of legal legitimacy. It has also, however, become a source of value, since the exercise of free will is considered intrinsically worthy, making us freer, and because it gets us things we want more than those we give up, making us richer.[370] Yet "lawful consent at least sometimes produces an emotionally toxic undercurrent," blinding us to the effects that private power has on our sentient and emotional lives, which do not feel like liberation or enrichment but rather like self-alienation.[371]

West emphasizes in this context the outsized reverence for constitutional adjudication in American culture.[372] Indeed, "for Americans," adds John Simmons, "it is especially hard to think of political obligation as other than consensual in origin . . . acts of consent create special moral *justifications* for conduct."[373] The Hellerian Court culminates the view that consent is a good unto itself. The reason is twofold. First, the act of consent—like self-defense, in the Court's view—vindicates personal autonomy. Second, consent legitimizes government, and originalism promises to respect this and only this authorization: "originalism insists on the reality of consent."[374] If social conditions are

370. Robin West, *Law's Emotions*, 19 RICH. PUB. INT. L. REV. 339, 349–50 (2016) [hereinafter West, *Law's Emotions*]. *See also* Robin West, *Consent, Legitimation, and Dysphoria*, 83 MODERN L. REV. 1 (2020) (focusing on sex); Robin West, *Bartleby's Consensual Dysphoria*, *in* POWER, PROSE, AND PURSE: LAW, LITERATURE, AND ECONOMIC TRANSFORMATIONS 191 (Alison LaCroix et al. eds., 2019) (focusing on labor).

371. West, *Law's Emotions*, *supra* note 370, at 350.

372. *Id.* at 343–48.

373. Simmons, *supra* note 365, at 305–06; *see also* Arendt, *Civil Disobedience*, *supra* note 215, at 94 ("'The spirit of the laws' . . . is the principle by which people living under a particular legal system act and are inspired to act. Consent, the spirit of American laws, is based on the notion of a mutually binding contract").

374. WHITTINGTON, *supra* note 73, at 156 (justifying originalism by rejecting the notion of tacit consent and instead relying on the notion of "potential sovereignty," which denotes an active, deliberative populace. Originalism defends popular sovereignty because in between historical moments of constitutional deliberation, "the only available expression of the sovereign will is the constitutional text." *Id.* at 129. Living constitutionalism usurps sovereignty from the people.

given primacy over consent, individual autonomy and popular will are both undermined.[375] In the political realm of *Heller*, joined by the economic realm of *Bruen*, the body politic comes together to break itself up. Each opinion contributes to the formation of contractarian epistemology and social alienation: *Heller* offers reverence to the founding generation's products of political consent; *Bruen* offers reverence to subsequent consumer choices made by autonomous economic actors who favored rights over lives.[376]

Hobbes shares with contemporary constitutional skeptics the resistance to origin fetishization as well as the attempt to conceptualize rights as a matter of everyday politics. The latter, for him, requires that the purpose of rights be not primarily to set us free but to make us safe and well. And us means all of us. The Second Amendment Supreme Court has not heeded Scarry's call for civil beauty. Instead, it desires to restore an idealized past,[377] both nostalgic and utopian, where honorable patriarchs defend themselves against criminal classes who are justly excluded from the political community due to their wrongdoing. Violence, for Hobbes, tightens the need and raises the bar for political representation, since consent is an instrument for benefit. As opposed to later theorists, Hobbes directed the principle of popular sovereignty toward creating a stable order of *political* morality, i.e., ethics that are conditional on cooperation and implementation, rather than some moral imperative.[378] The purpose, as one Hobbes scholar notes, is "meeting man's practical, earthly, political needs."[379] These are first and foremost material needs, though they may also encompass something more akin to flourishing. The sovereign is not subject to the second law of nature—that people would be willing to put

Whittington thus construes originalism as a forward-looking theory, "not driven by a fawning celebration of historical figures but by the patient waiting for renewed popular deliberation on constitutional form. The past is remembered and preserved in order to sustain the constitutional faith in the possibility of a return of the popular sovereign." *Id.* at 156. This is doubtfully how judicial originalists view originalism; Justice Scalia remarked that the "whole purpose" of the Constitution is "to prevent change." Scalia, *supra* note 67, at 40. Judicial originalists, unlike academic ones, do not seem to view the founders' dead hand as a conceptual problem that needs solving).

375. *See* Chad Kautzer, *Good Guys with Guns: From Popular Sovereignty to Self-Defensive Subjectivity*, 26 L. CRITIQUE 173, 175 (2015).

376. While Hobbes has been accused of ushering both contractarian epistemology and market supremacy into modern public life, he has also been read as oppositional to capitalism. LUC BOLTANSKI & LAURENT THÉVENOT, ON JUSTIFICATION: ECONOMIES OF WORTH 97–102 (Catherine Porter trans., 2006).

377. Siegel, *supra* note 60, at 216–25; Miller, *Guns as Smut*, *supra* note 41, at 1321 (*Heller* creates "a history of firearms that is more romance than real").

378. Forsyth, *supra* note 108, at 43–44; ELSHTAIN, *supra* note 155, at 123; Jaume, *supra* note 154, at 202, 207; Waldron, *supra* note 107, at 733–43.

379. Forsyth, *supra* note 108, at 39; *see also* Johnston, *supra* note 121, at 33.

down their right to anything and everything if everybody else does the same—but it is nonetheless his duty as transferee to encode this mutual commitment to peace into law.[380] The office he holds requires protection of the safety of the people, but, in Hobbes's own words, "by Safety here, is not meant a bare Preservation but also all other Contentments of life."[381]

## VI. CONCLUSION

The intellectual exercise animating this article may make it seem especially vulnerable to critiques such as Pierre Schlag's, who ridicules legal scholarship for treating Supreme Court opinions as "a kind of literature worthy of comparison with the works of Plato or Aristotle" despite being "written by clerks and read like C.F.R."[382] In the case of Hobbes and the Supreme Court's Second Amendment decisions, it is precisely the intellectual gaps between them that render the comparison fruitful. Since *Heller*, the Court roams in Hobbesian territory, taking us all with it, and yet denies that this involves and requires deep normative thinking. This article has used Hobbes to highlight some salient normative problems with contemporary Second Amendment law. However, it has resisted the underlying thrust lamented by Schlag: "Like the prototypical Hollywood blockbuster, the true *pièce de résistance* in legal thought must end on a high note."[383] Skeptical of prescribing a solution that would seamlessly stitch the troublesome phenomenon identified into a systemically coherent and normatively appealing legal fabric, this article rather ends on a bleak note.

380. CURRAN, *supra* note 101, at 105–09.

381. LEVIATHAN, *supra* note 101, at 376.

382. Pierre Schlag, *This Could Be Your Culture—Junk Speech in a Time of Decadence*, 109 HARV. L. REV. 1801, 1819 (1996) (book review); *see also* SEIDMAN, *supra* note 341, at 49 ("the more serious problem [with the Supreme Court] is not flagrant incompetence or mendacity but plain vanilla mediocrity").

383. Schlag, *supra* note 382.