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Lola I. Brown

Macalester College, lbrown11@macalester.edu

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Interpretations of Intent: Sovereignty, the Second Amendment, and US Gun Culture

Lola Brown

Political Science Department, Macalester College

Senior Honors Thesis

Advised by Professor Lesley Lavery

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Abstract

In this paper, I engage foundational theorists such as Jean Bodin, Thomas Hobbes, and John Locke to examine the philosophies of sovereignty that underpin the US Constitution and the creation of the Second Amendment. I find that the US Founders' reaction to these foundational theories of sovereignty allowed for a breakdown in the system of sovereignty in the country, and made way for the implementation of the Rule of Law. The Rule of Law, in turn, created the conditions of possibility for the psyche of radical individualism that now permeates the US. This radical individualism allowed for the reinterpretation of the Second Amendment as demonstrated in cases such as *DC vs Heller*, and in turn upholds models of liability that prevent gun violence from being addressed as a systemic issue. Utilizing traditional and contemporary theorists, I wade through all of this discourse in order to propose a normative shift toward a more connection based model of political engagement and gun policy in the United States.

Acknowledgements

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Introduction

I was in sixth grade when a gunman entered Sandy Hook Elementary school and killed 26 people. Before that day, the threat of gun violence had affected my understanding of education and the world around me, but the lack of political response after that tragedy shook me in a profound way. The fear, sadness, betrayal, and deep anger I felt motivates my work to create agency from within US political systems; to meet head on a fractured system that allows politicians to prioritize campaign funding from the National Rifle Association over keeping me and my fellow students safe.

The case of *District of Columbia v Heller* illustrates the futility some gun safety groups feel when working toward a society free from gun violence. In *Heller*, Justice Antonin Scalia writes "Nowhere else in the Constitution does ... "the people" refer to anything other than an individual right" (2008). The decision in this case establishes the Second Amendment as a proponent of personal rights. Justice Scalia calls himself a Constitutional originalist, meaning that he decides court cases by thinking through what the Founders intended at the time; therefore, one can assume that Scalia imagined the Founders intended the Second Amendment to be rooted in individual freedoms. Though clearly this "originalist" interpretation of the Amendment is not the only interpretation, I argue that it is also not the only originalist interpretation. The Scalia interpretation has prevented adequate gun safety legislation, including enhanced background checks, minimum age laws, and bans on large magazines from being passed by states. His interpretation, which has also been promoted and continued by succeeding justices in the past decade, hinges on individual rights, but historical context makes clear a different imagining of the amendment, one focused on sovereignty.

I define sovereignty as the supreme power to legislate, execute, and judge in a society. Scholar Jens Bartelson, one of the contemporary voices on the history of sovereignty, notes, "...sovereignty is constituted as a primitive presence from which all theorizing necessarily must depart" (Bartelson 1995: 24). Sovereignty *constitutes* a state. The way in which a state chooses mechanisms and bodies to legislate, execute, and judge, precedes and informs all distribution of rights and policies. Sovereignty is also directly related to having dominion over another person. In fact, the etymology of the word sovereign comes from 14th century Old French, meaning "authority, rule, supremacy of power or rank".

Early sovereignty scholars Jean Bodin, Thomas Hobbes, and John Locke suggest that there are two ways to examine the distribution of sovereignty within a society. A horizontal approach explores a state's division of power or lack thereof. For example, horizontal interpretations dictate whether there are separate and coequal branches of government or a single absolute ruler. More importantly for my work, though, is the vertical approach to the study of a state's sovereignty. To legislate, execute, and judge puts one above another, and through the action of those powers, sovereignty becomes a structure of domination and an engrained hierarchy.

In order to discuss the historical trajectory of sovereignty, I engage the foundational theorists' ideas chronologically as each of them builds off of the others through the centuries. Jean Bodin lived in the mid 16th Century, and based his philosophies on the transition from medieval feudal society to the domination of the Catholic Church (Grimm 2015). A century later, Thomas Hobbes wrote from his entrenched position as an English philosopher and responded directly to Jean Bodin's concerns about the division of sovereignty. John Locke wrote just a few

decades after Hobbes, engaging as his contemporary rather than in the more reverential way that Hobbes responds to Bodin.

These scholars informed the conversations held by the American Framers of the Constitution. Placing these foundational theorists in conversation with each other thus leads me to my argument that sovereignty as rule of law was a necessary conclusion to the political realities these philosophers faced. A key piece of my argument relates to the originalist interpretation of the Second Amendment. Essentially, I demonstrate that the specific language the Founders used to implement their ideas of sovereignty influenced the culture in the United States in a way that allowed for the reinterpretation of the Second Amendment by constitutional scholars like Justice Scalia. This is important because "originalist interpretations" as a legal concept are foundational to the decisions made by justices in court cases and directly impact policymaking possibilities – especially in the realm of the Second Amendment and gun policy. In the final sections of my paper, I engage contemporary theorists like Michel Foucault, Hannah Arendt, and Iris Marion Young to demonstrate alternative interpretations of this “originalist” intent.

Section I: Questions of Origins

My examination of sovereignty and gun rights begins in the theoretical world of pre-politics. For centuries, various scholars have theorized on the necessity of government, and the reason for societal organization that we can recognize as politics. Jean Bodin, Thomas Hobbes, and John Locke all attempted to explain the reasons behind the political system they experienced in their own lives – a sort of positivist perspective on ruling powers. However, Jean Bodin also wrote a more normative theory on the importance of an absolute ruler, based on the disorder of his own lived political experience. While each of these authors definitely imposed

their biases and worldviews on their theories of pre-political humankind, their views are an interesting insider justification for the hierarchical sovereignty model of governance. Here I discuss those justifications, delving into the questions that the foundational theorists had when thinking about the problems of government. I come to the conclusion that the development of hierarchical sovereignty came from both the fears surrounding the pre-political state of man and the problems introduced by the origins of human social organization.

Jean Bodin was the preeminent scholar to write on the necessity of a sovereign government, and set the foundation for Hobbes and Locke in the centuries to come. Bodin's framework came directly out of the territorial conceptions of power sharing within the feudal Middle Ages. He did not theorize on a hypothetical pre-political man, but instead used his present reality to propose an ideal governmental structure. In his political reality, power was divided among a ruling class in a chaotic and often unstandardized fashion. As Dieter Grimm, political theorist and professor, notes "Because it built upon individual powers, the characteristic of being sovereign did not suffer from the fact that its possessor was subordinate to a higher holder in regard to other powers. One could only be relatively, not absolutely, sovereign" (Grimm 14). Bodin believed this system caused society's internal conflict. It makes sense that when those who have direct control over people's lives (i.e. the lords of an estate) hold more practical power but not the ability to create law, there could be more corruption and abuse of what powers are conceivable by those who are only "relatively" sovereign. Bodin frames the issue as people becoming dependent on another's power which creates resentment and lack of ability to execute change. As an overarching understanding, the Bodin approach toward thinking of sovereignty involves using the behavior of collectives to justify a system of government.

A century after Bodin, Thomas Hobbes wrote his *Leviathan* about the needs of the pre-political man, which he calls the "state of nature". The standard quote that people pull to describe this state of nature is "solitary, poor, nasty, brutish, and short". Essentially, he believed that people were in a constant "war of all against all", an inherently combative environment and poor place to thrive. Hobbes' understanding of human nature highlights self preservation at its core, though not without its mutability. Despite humans' inclination to selfishness and violence when faced with scarcity, Hobbes believes, they must eventually come to agreements with each other – they create responsibilities to each other and to a new and nebulous form – a society, which he calls Leviathan.

Leviathan was written in the cultural context of the years following copious English religious wars. It was the 17th Century, and political strife in the absence of a strong sovereign power ran rampant. Hobbes' political theory attempted to resolve the long standing issues of fracturing and conflict and come up with the pure form of societal organization, based on man's "state of nature". Despite the apparent end goal of explaining the overall vertical system of governing, Hobbes' theories are based on the interpersonal dynamics of people on the individual level. He takes a "bottom up" approach in his justifications of sovereign hierarchy, using the will of the individual to explain why the Leviathan was necessary. The pertinent piece in this section is the reality that Hobbes feared the will of the individual, and framed his ideal, hierarchical, governmental design on that fear.

Several decades after Hobbes, John Locke wrote in *Of Civil Government*, "God hath certainly appointed government to restrain the partiality and violence of men. I easily grant that civil government is the proper remedy for the inconveniences of the state of nature". Using the same state of nature framework as Hobbes, Locke theorized about an entirely different

pre-political man. His understanding of the state of nature imagines that humans are designed to work together and collaborate. These people are also endowed with certain “inalienable rights” that stem from life itself, and therefore are not given to us by a supreme power, but do need to be protected.

Locke supposes that each individual (again, focus on individuals here) comes into being with a freedom that another person or a government cannot nor should not take away. The protection of inalienable rights lies at the root of Locke's fears for society, and informed his ideas for societal formation, as we can see by looking at his *Second Treatise of Government*:

And that all men may be restrained from invading others' rights, and from doing hurt to one another, and the law of nature be observed, which willeth the peace and preservation of all mankind, the execution of the law of nature is, in that state, put into every man's hands, whereby every one has a right to punish the transgressors of that law to such a degree, as may hinder its violation... (1690)

Specifically, the phrase "may be restrained from invading others' rights" tells us everything about the purpose of government. If each individual is endowed¹ with natural rights to life and liberty, the only threat comes from those who could take those rights away. In this instance, Locke refers to other individuals, but the concept extends to institutions later in the work. That is, while both fear the actions of the unrestrained (unsocialized?) individual, Hobbes concerns himself with the necessity of individuals to come together to promote self preservation, while Locke takes the other side of the view and imagines a governmental steward, there to protect the inalienable rights of individuals.

The difference between Locke and Hobbes versus Bodin speaks to the importance of perspective in political theorizing. Each of these men existed with tremendous privilege in the

¹ Interesting passive voice conundrum here: if I attempt to make this phrase active I run into the problem of the subject of the verb "endow". Who endows the rights to the individuals? This is part of the whole point, and the reason for the wonderings around rights and pre-politics in the first place, so for now I shall leave it passive.

societies they inhabit. An entire paper could be written on the personal influences present in their works. I believe that the fact that both Hobbes and Locke believed in an atomistic, individualistic pre-political man relates to the sovereign hierarchical monarchy in which they lived. Their perspective speaks to the freedom and independence each of these men experienced in their lives. They believed that, had there been no governmental constraints, they would not have any societal inclinations other than toward the end of self preservation. There are other options, as we saw with Bodin. Bodin didn't speak to these individualistic beliefs, and I believe it was because he wasn't steeped in a hierarchical power structure. There is a larger thread here that I will circle back to when we arrive at gun policy and the individualistic nature of contemporary United States political theory and practice. Essentially, the idea that sovereignty imposes structures of dominance that create a psyche of individualism in a political system, its policies, and the society at large. The roots of this idea were growing even at the inception of sovereign power.

Bodin, Hobbes, and Locke each arrive at a similar solution to their individual qualms with societal structuring – a sovereign government. A hierarchy, with distinct power delegated from somewhere to somewhere else. The next section will explore this system of sovereignty and what the fleshed out version envisioned by the philosophers became in the centuries following their theories.

Section II: The Sovereign Establishment

I wrote in the last chapter about the qualms with medieval society that inspired Bodin to theorize differing governmental structures. In the post medieval world, the diminution of the power and extent of the Catholic Church coincided with changing ideas about authority and governance structure (Jackson 2007). It is up for debate whether one was the result of the other or vice versa. This chicken-and-egg situation contextualizes the trajectory of political thought,

but this section is not a genealogy of the powers of the papacy nor the Catholic Reformation². Rather, I now explore the theoretical (as in the study of theory) and structural implications of the implementation of sovereignty as political practice. I explore questions surrounding the division of sovereign power and social contract theory, and then contextualize sovereignty toward the discussion of force, power, and guns by addressing Foucault and the political realities present in sovereign governments.

Jean Bodin viewed the fractional political offices of feudal lords to be problematic for peace and cohesion in society. He was the first person to propose that all power in a state be held in a singular office, jumpstarting the political trajectory of the idea of sovereign hierarchies (Grimm 2015). If one person held the power to legislate, execute, and hold judgment in society, there could be no crossed lines of communication nor political dependency. A system in which an all powerful sovereign ruled was designed to create peace, and avoid policy gridlock.

Prior to the 16th century, the term sovereignty appeared only in religious text and referred directly to the powers of God (Jackson 2007). Scholarship suggests that philosophers and politicians in 16th Century England reimagined the term as they negotiated new systems and boundaries alongside the creation of a post-Westphalian state system³. That is, in the 16th century context sovereignty referred exclusively to the relation of states to one another⁴.

² For that, I will refer you to both *Sovereignty: an Evolution of an Idea* by Robert Jackson (2007), and *Medieval Sovereignty* by Andrew Latham (2022).

³ The Treaty of Westphalia developed the international state system in the way that we understand it today. The concept of national boundaries, political institutions, and internal versus external politics were born from this Treaty.

⁴ I should also note that the world in which this conversation unfolds at this time and that lies within the scope of this paper is dramatically eurocentric. This is partially because the study of statehood and historical political theory as a discipline also led me in this direction, but it serves a purpose when confronted with the ideas shaping the U.S. Founders later on. Their political philosophies were also fueled by this particular political history. Therefore, when I refer to a collective such as "states," or "political systems," one can assume they lie within what is now referred to as the "global West".

Bodin's works further shifted the popular understanding of the term sovereignty into “an organizing principle or a constitutive rule, endowed with powers of its own” (Bartelson 1995, 17), though it also continued its use in the international politics sphere, endowing the word with an all-encompassing definition related to both internal and external powers. For this paper, the internal definition holds more relevance, though the external factors do come into play when discussing the creation of the US Constitution and Second Amendment.

Bodin's concept of this singular "sovereign" also established the concept of coextensive sovereignty. Because “the power to govern was always held by a person who also exercised it,” (Grimm 2015: 14) it was therefore “coextensive”, and there was no possibility for a shared or divided responsibility within a state who could then claim to have sovereign power. A sovereign was necessarily someone “who had no lord above them in regard to such power and [was] not dependent on the consent of others” (ibid). This was the first use of this particular sovereignty language, and thus was the basis for ensuing political theories about the distribution of power in society.

In order to see the extent to which Bodin's theories were accepted, one only has to look at the pushback against them. Over the following centuries, as the medieval political system fell away and was replaced by monarchy, more and more political discussions revolved around sovereignty. As it became the political theory term "du jour", other philosophers began to push the boundaries of its usage, namely, pushing back against Bodin's idea that all sovereigns must be absolute. Scholars began to debate the "indivisibility doctrine", which noted, as Bodin believed, that to be sovereign, all powers must reside in a singular office. Bodin believed one could not have "mixed" or "coequal" sovereignty, where different arms of government hold

separate powers, but others questioned what different divisions of power could look like and how they would function.

This debate over the dimensions of authority can be generalized to the topic of "locus", or where sovereignty resides in a society. The topic of locus goes in two directions. One source of debate is the horizontal manifestation of sovereignty, as mentioned within the indivisibility doctrine. Can sovereign power be split and still contain a state's sovereignty? The Founders of the United States considered this topic extensively when debating the separation of powers, and found themselves a loophole to Bodin's concerns which I shall discuss more elaborately in the Rule of Law section. Another consideration for sovereignty's locus is the vertical capacity. Where, among a state's hierarchy of power, does sovereignty reside? Does a figurehead like a President hold all the sovereignty? Or would it be possible to host sovereign power lower on the hierarchical chain, such as within the citizenry? For the purposes of this section, this second debate is more important.

The devolution of the locus of sovereignty directly coincides with its historical trajectory. As noted above, the original usage of sovereignty referred directly to the powers of the divine. Eventually, following the implementation of monarchical political systems, the "sovereign" referred to the king, often in relation to his "divine right to rule", which continued to connect a monarch's power to divine sources. In 1651, however, Thomas Hobbes proposed manifesting sovereignty somewhere other than the monarch. His Leviathan is a body of authority, not a king, and therefore represents the first time a sovereign could be anything other than a divinely inspired ruler.

For Hobbes, people form the "sovereign" through the sacrifice of their rights to an institutional structure, or "Leviathan". Sovereignty only exists because of the covenant between

individuals. Therefore, the sovereign is absolute and infallible. The sovereign is contingent upon the consent and will of the populace, which means it either exists or does not exist, and can only be dissolved through the dissolution of the covenant of the state's citizens.

One can see how Bodin's ideas on sovereignty directly influenced Hobbes. They both hold true the idea of absolute sovereignty – that one either is or is not sovereign, and that the concept cannot be divided into parts or separate offices. The absolute sovereign, which Bodin creates as a means for resolving issues of feudal tensions and wielding peace, becomes Hobbes' necessary and solitary conclusion to the political realities of individuals. When individuals come together, there will be an absolute sovereign. There must, or else there is chaos.

The trajectory of sovereignty's locus continues to devolve from the top of the political hierarchy downwards from Hobbes, and with Locke the idea of popular sovereignty arises⁵. Locke is the first to vest all power in the people, and bring the idea that they, in the end, hold all sovereignty because they endow the ability to legislate and execute, and ultimately judge, to the government. A key part of his philosophy, though, is that citizens do not lose any of their sovereignty in their endowment of power to the government, and the governmental institutions only exist with the consent of the sovereign individuals who make up the body politic⁶. One could say that Locke's theories are more democratic than Hobbes', as the source of power is more centrally based in the citizenry, but the overall takeaway relates to the relationship and the power that flows between the people and the institutions.

⁵ The term "popular sovereignty" was actually coined in the 19th century by the Democratic candidate for President Lewis Cass, but the idea holds up as applied to Locke.

⁶ This "consent of the majority" idea furthers my earlier comments regarding the bias present in these scholars' works. Locke would have only been speaking about the populace that already had power in governing matters, which would make a very homogenous group of white men with whom to debate political powers. What does this mean for a body politic which represents myriad identities and polar opposite ideas? Definitely a subject for further discussion.

To solidify those ideas, both Locke and Hobbes use a version of what gets termed "social contract theory". In both cases, the citizens determine a state's sovereignty. Hobbes' version requires a contract between the citizens themselves, and a sacrifice of their individual sovereignty to be endowed to the Leviathan. For Locke, the contract rests between the citizens and their government, can be revoked at any time, and doesn't require any individual loss of sovereignty. This distinction is important when considering the functions of government. For Hobbes, the government is solely a negative rights manifestation. People give up their freedoms, and in exchange, receive safety from the Leviathan. Meanwhile, Locke needs a steward of all of our natural rights. There is a more extensive purpose for the government. Historian Robert Spitzer explains in his book *The Politics of Gun Control*, "Beyond the simple maintenance of order⁷, 'government is the guarantor of the public good. Ideally this is achieved as government regulates private functions to maximize public welfare'" (Spitzer 2012, 3).

I connect the establishment of sovereignty as the ruling political theory to guns by way of Michel Foucault. In general, turning to contemporary theory allows for the incorporation of modern ideas of power. Foucault, and later Hannah Arendt and Iris Marion Young give a reference for the effects of these foundational theorists on contemporary society. Foucault himself wrote in the later 20th Century, and provides expertise on the connection between power and death.

In his 1978 *History of Sexuality*, Foucault opens a section on biopower by saying "For a long time, one of the characteristic privileges of sovereign power was the right to decide life and death" (1976: 135). By connecting the power of monarchs and emperors to the classical theories of sovereignty, Foucault argues that the "right to life" became "a specific right that was manifested with the formation of that new juridical being, the sovereign" (ibid). This "specific

⁷ Which would be the interest of a Hobbesian government.

right" can take on an agency of its own, removed from the social contract of Locke and Hobbes. When a sovereign uses the power over life and death as a source of legitimacy and in order to protect its own power, it is no longer tied to the needs of the citizenry and has therefore gone from just to unjust in the eyes of the social contract. This problem of sovereigns would eventually become the basis for the American founders' fears about a tyrannical government, informing the text of the Second Amendment.

There exists a morally gray area when it comes to the importance of legitimizing a new government. Foucault argues that through extra-judicious uses of the sword and overall indiscriminate use of power, the sovereign "evidenced his power over life only through the death he was capable of requiring" (136). These actions characterized early sovereign governments which did not have historical precedence and therefore needed to legitimize their power. From the Hobbesian social contract perspective, this could be ethical. A government may want to demonstrate that people have given up their individual sovereignty in order to ensure the power of the Leviathan. Nothing is quite so demonstrative of sovereign power than the ability to take away an individual's life.

However, Foucault then argues that the power over life and death took on an agency of its own in monarchies – that killing was no longer based on justifying the power of the sovereign, but rather protecting and enshrining it. He writes, "If someone dared to rise up against him...then he could exercise a direct power over the offender's life: as punishment, the latter would be put to death" (135). Rather than using death as a tool to protect the citizenry, which is the goal of social contracts, states used the power over life and death to protect itself. This brings a new light to the idea of war as well. Foucault explains, "The principle underlying the tactics of battle – that one has to be capable of killing in order to go on living – has become the principle that defines the

strategy of states" (137). Basically all forms of state sanctioned death took on a new agency, independent of the need to legitimize a sovereign state from the eyes of the citizenry.

Foucault studies the actions of members of society's hierarchies, and in examining his philosophies, I connect sovereignty and power. More specifically, I connect sovereignty and the most extreme form of power – control over life and death. Power exists as domination and control – utilizing power over life and death can just be one way for the sovereign establishment to solidify itself, moving itself toward tyranny.

One way to track the link between sovereignty and power over life is to look to the government's perspective on guns. When a state's power is threatened, or they are looking to reach to new depths of authority, the government will often restrict or dole out access to guns. In early cases, one could look at the Glorious Revolution in Europe (Latham 2022), where Protestants were given the right to arms while Catholics were not. Another example is the lack of rights to guns for black and native Americans in the early days of the United States. This paper will not delve fully into the questions of inequality and race that are inextricably tied to the evolution of gun rights, as it focuses on the tension between personal rights to guns and the other governmental decisions to provide access to them, rather than the choice to prevent access. However, that does not mean that inequality was not a part of the story. It has often been true that those who threaten the state, if they are not outright killed, can no longer have access to weapons of death, and black and native Americans have been historically prevented from that access.⁸

Alas, the exclusionary nature of gun access is at most an intriguing parenthetical to the story of how the historical ideas of sovereignty informed gun culture in the United States. As stated above, when death becomes something other than an action taken out of necessity in order

⁸ There are many fascinating works that delve into these studies, one of which is *The Second: Race and Guns in a Fatally Unequal America* by Carol Anderson

to protect the populace at large, it is removed from the social contract theory that theoretically informed the governance structure in the first place. In the cases of both Locke and Hobbes, the government's power rests upon a covenant between either the individuals themselves or the populace and the sovereign. In either case, if anyone decides that the covenant should be broken, it should be. The Leviathan does not have unconditional power, and the rights which are sacrificed for the sake of peace and protection can be reclaimed. To put it simply, power over the existence of a government must remain in the hands of the citizenry.

The problem is that most citizens only seek to dissolve governments that are no longer interested in the will of the citizenry. Disruption in the establishment of a viable sovereign has informed copious political struggles up to this day. It follows like this: the unnecessary use of death as a tactic for governments to retain their power is unjust, and power for the sake of power is tyranny. Pushback against tyranny in the form of rebellions, uprisings, and full revolutions come from this type of sovereign overreach. The American government was formed through this ideological flow. Whether it be absolute or divided, a Hobbesian Leviathan or in the form of Lockean consent of the majority, each sovereign government ends up with power over life and death. The governments then, in turn, try to protect themselves by abusing this power, promoting pushback from the citizens. In the American case, we will see how this pushback manifests in another kind of power over life and death: the distribution of the right to guns.

Section III: Implementing the Rule of Law

Those of us raised in the United States have been taught our entire lives that the foundation of this country is exceptional. Here I speak to some of those exceptionalities, drawing on certain qualities of the American Revolution and arguing that the United States represents an

unique political transformation. More specifically, I argue that the Founders, in their pushback against England's tyrannical monarchy, shifted the global state system away from hierarchical sovereignty as the established political structure, and into the Rule of Law. Further, I argue that the Second Amendment works to protect and enshrine this transformation, and therefore was not created for the protection of individual rights as it is interpreted today.

The previous section established that tyranny is a common byproduct of hierarchical sovereignty. Often, such tyranny invites response from the citizenry in the form of rebellion or full revolt. Such was the case in what were the American Colonies in the later 18th Century. In 1776, noted activist and philosophical instigator Thomas Paine drew direct lines between monarchy and despotism in *Common Sense* – a pamphlet he designed to provoke resentment and, in simplified terms, get the colonists prepared for a political revolt. He wrote, "a thirst for absolute power is the natural disease of monarchy" (1776, 73), which was at this time essentially heretical – speaking against the monarchy was seen as speaking against divine power. To further the sacrilege, he says about absolute rulers that "Such a power could not be the gift of a wise people, neither can any power, *which needs checking*, be from God" (ibid). Disrupting the Divine Right of Kings is a politically powerful move that harkens back to the discussion about sovereignty's locus. If you can delegitimize the right to absolute power, you make space for a new system. That was the goal of the Founders, and unlike many other revolts of the time⁹, eventually that goal came to fruition.

The common phrase during the instigation of the American Revolution "no taxation without representation" also speaks to the vertical distribution of power in the society, and

⁹ The French and Bolshevik Revolutions, revolts of enslaved persons in the Caribbean, and South American liberations against Spain all come to mind as other versions of pushback against tyranny. However, the focus of this work is the question of the root of American gun culture itself, therefore will continue to use the American case.

therefore speaks to sovereignty. Remembering that sovereignty equals the power to legislate, execute, and judge in a country, the desire for representation in policymaking is asking for a downward shift in the sovereign powers of the US. This fact contributes to the idea that the American Colonists were pushing back against the manifestation of sovereignty.

In the face of a successful Revolution, the leaders of the new American government knew that they had to implement the monarchy-defying rhetoric that they had used to garner support from the colonists, while also working within the bounds of political feasibility. However, the only politically feasible governments any of them had known were based in hierarchical sovereignty – the direct precursor to tyrannical monarchy as they had just experienced. The thinkers referred to such a sovereign power as “the primary and essential condition of all political society” (Grimm 2015: 34). Thus, they had to grapple with this question – how to mold a successful, less hierarchical system of government – before any others. Historians note that "James Madison, the leading mind at the convention, at first considered an “aggregate” or “coequal” sovereignty to be conceivable" (38). However, the revolutionaries once again encountered Bodin's indivisibility doctrine, asserting that they could not simply divide sovereign power into different offices without risking the faction-dependence, corruption, and gridlock of the aged Medieval feudal societies.

Before I move to the outcome of these philosophical discussions, I find it vital to make the distinction between the *design* and the *consequences* of the US governmental system. The design informed the setup of the US Constitution, but the consequences of this setup represent a completely different result. The result therefore has separate ramifications for the political realities of the United States, and US gun culture specifically.

As for the *design* of the Founders, we likely all know the story of a government "of the People, by the People, and for the People". However, the connecting threads between that statement and the transition away from hierarchical sovereignty are also important to tease out. Historical political theorist Dieter Grimm suggests that the Founders created "a transfer of sovereignty from the people of the individual states to the people of the United States" (2015, 38). Basically, their goal was to implement a complete diffusion and simultaneous collectivization of sovereignty into the citizens of the US. The citizens, collectively, would be king. Bodin's invisibility doctrine applies to splitting sovereign powers between offices, and does not necessarily prohibit the concept of shared sovereignty among individuals, so that was the Founders' loophole to maintain sovereignty. If the People represent a collective office, there is no division of sovereign power.

On the face of it, this "popular sovereignty", or shared sovereignty of the polity, actually ties in quite nicely to the evolution of the *locus* framework discussed previously in this paper. Namely, the adaptation from Hobbes to Locke concerning the source of sovereignty. Hobbes, remember, believed in the sacrifice of an individual's sovereignty to endow it to the Leviathan. Locke transformed this idea to the "consent of the governed" premise, wherein the people themselves hold the sovereignty to endow power to the government. The American use of sovereignty's locus is quite similar to Locke's. The locus resides with the people, but while in Locke's version the polity consents to the authority of another, namely the monarch, the US version's governmental setup keeps the People as the primary authority (Grimm 2015).

While the US Constitution definitely reflects a more Lockean philosophy than a Hobbesian one, this last specification differentiates the US from any previous version of social contract theory. The original version of the social contract was the covenant between individuals

that Hobbes theorized. Then, Locke addressed the contract as between the community and their sovereign – creating the concept of the consent of the majority. Locke's social contract denotes an authority with absolute power, and while that authority is contingent upon the consent of the majority, the majority does not retain any other authority. In contrast, the US Constitution sets up a government integrally related to the authority of the citizens. The "majority" retains much more authority in this version of a social contract and does not sign away absolute power to a single monarch. For example, not only does the citizenry vote, which would be as far as a Lockean social contract would need to go, but they themselves stand for office, participate in bureaucracy, elect judges, lobby the government, protest, and form all other kinds of the pluralistic action that the US Constitution enumerates and protects. So, the intentions of the US Founders were to enshrine this popular sovereignty, but in a way that upheld the authority of every member of society, rather than maintain a sovereign hierarchy.

These intentions bring us full circle, back to the overarching story of the American Revolution: a group of men, no friends to the English monarchy, created a new system of government in which "all men are created equal". That was the philosophy behind the birth of federalism, a system that looks hierarchical and hugely dependent on the division of power, but was intended to simply steward the authority of the citizenry through those checks and balances mentioned above.

A key piece of these checks involved the national standing army. The Founders were loath to create a national army in the first place, given their history with a tyrannical king and an army that worked at his behest. Sam Adams himself said "a standing army, however necessary it may be at sometimes, is always dangerous to the liberties of the people" (Spitzer 2012: 23). He and his colleagues knew all too well the power an army could have against the belief in the

consent of the governed. However, they also knew that national defense required an army. So, they needed another check to keep the authority of the governed in place.

Herein lies the Second Amendment:

"A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed."

"The people," as written by the Founders, must have access to weapons in order to create state militias ("A Militia") and protect the institution of federalism. The intention of the Second Amendment was directly based in the transition away from hierarchical sovereignty, and in enshrining the authority of the people over any possible single office having dominion over the new country.

To be clear, this characterization of the Second Amendment is precisely how historians, politicians, and the Supreme Court of the United States had understood it as well. In 1886, this belief was tested in *Presser v Illinois*. Historian Robert Spitzer writes, "The *Presser* case confirmed the understanding that the right to bear arms came into play only in connection with the formation and conduct of the militia, as formed and regulated by the government" (Spitzer 2012, 33). The intention of the Amendment, from a historical standpoint, was protecting federalism as an institution through providing resources to state militias. In no way does the Amendment refer to the individual right to arms. The concept of individual rights was far removed from this particular tenet of the Constitution, and only entered in from contemporary interpretations that I argue come from a move away from popular sovereignty as the ruling ideology of the country.

It is clear that the Second Amendment provides a stark example of the Founders' attempt to prevent any dominion of one body over another. Each person needed access to firearms in

order to form state militias. These state militias were designed to protect the institution of federalism by keeping a federal standing army from taking control over any states. This way, the People remained in authority, and there was no dominion of one over another. Because sovereignty is inherently hierarchical, though, the Founders actually shifted away from the idea of sovereignty in their creation of the US Constitution, and as I will explain next, they moved into the Rule of Law.

Section IV: Rule of Law Consequences

The founding setup leads into the actual consequences of a brand new system of governance. As the country transitioned from having kings, to having laws, leaders lacked a structure of domination. I argue that this lack of a system of domination created the conditions for radical individualism. Radical individualism, in turn, allowed for the reinterpretation of the Second Amendment within the sphere of individual rights rather than the historical understanding. Then, reinforced through the rule of law and judicial system of culpability and personal responsibility, the US was left with a system unable to handle the structural issue of gun violence which the reinterpretation of the Second Amendment promulgates.

In order to wade through this argument, I incorporate Hannah Arendt and readdress Foucault to discuss systems of domination and how the Founders implemented a new regime of the domination of law, which promoted a psychology of radical individualism. Then, I discuss how this supports the reinterpretation of the Second Amendment through cases such as *DC vs Heller*. Discussing this case allows the integration of conversations of modern gun violence as a structural problem, left unresolved by the judicial system that the Rule of Law created.

The Founders' concept of the "general will" of the public was designed to remove the tyranny of man over man¹⁰; however, this removal of a hierarchical monarchy only allowed for the Rule of Law to step in as the dominating force in society. Despite the Founders' intentions, the Constitution instituted a false transition to popular sovereignty. One could make the argument from this case that popular sovereignty is in itself a paradox. Since, as we know, sovereignty necessitates domination, one cannot have sovereignty vested among an equal class of citizens. The goal of diffusing power works against the idea of sovereignty in the US. However, while it is not the typical sovereign hierarchy, the Founders did create a system of domination – but rather than the domination of man over man, they implemented the domination of laws.

In thinking through this transition with the goal of using it to explain modern phenomena, it is helpful to hear the voices of contemporary theorists. Hannah Arendt characterized the Founders' work while discussing the conflation of power and violence in political theory in her essay entitled *Communicative Violence*. She noted that the goal of the Founders was in line with the political theory of Athenian and Roman republics "whose essence did not rely on the command-obedience relationship and which did not identify power and rule of law and command" (1986, 62). However, their error lay in replacing the obedience structure rather than eliminating it. Arendt voices that by writing, "they too, unhappily, still talked about obedience – obedience to laws instead of men; but what they actually meant was support of the laws to which the citizenry had given its consent" (ibid). In this quote she clearly delineates the Founders' design from the consequences of the system. I'd argue that this quote even exemplifies the larger situation which I had explored earlier. The Founders intended to create a system which valued

¹⁰ Specifically, white land owning man over white land owning man, as the men who created this system also supported the institution of slavery and the subjugation of native and many other classes of people in the country.

the consent of the citizenry as its form of legitimacy. However, this "consent as legitimacy" flipped and turned into "obedience of the legitimate system of laws".

The Second Amendment also demonstrates the Constitution's "obedience to the system" outcome. Even though the intention was for state militias to be a check on the potential tyranny of the federal government, the language demonstrates that the people only had the right to bear arms in order to protect the institutions of the Rule of Law. "The right of the people to keep and bear Arms" serves to create "a well regulated Militia" which exists to protect "the security of a free State". The domination of the law, or in this case, the institutions of federalism, are the reason for this particular right, rather than people having endowed rights based solely on the natural law of man (which is the premise of Locke's popular sovereignty). In this case, we see *that power is exercised by the law, over people*, rather than the reverse which was the theoretical intention of the Founders.

This system of domination of law connects directly back to Foucault. Once again, in his conversation around the power of kings and the necessity of violence as legitimacy, he writes, "But if someone dared to rise up against him and transgress his laws, then he could exercise a direct power over the offender's life: as punishment, the latter would be put to death" (1976, 137). The American founding upheld this exact system, except instead of punishment legitimizing the power of the king, it legitimizes the power of the law itself.

The primary example of how the US valorizes the power of the law over the needs and being of its people is its judicial system based on personal responsibility and blame.

Contemporary political theorist Iris Marion Young speaks to the problems of this "liability model" of justice in her book *Responsibility for Justice*. She explores the US' problem with dealing with structural problems such as poverty due to the setup of the judicial system. She

explains that "within standard frameworks of moral and legal responsibility, it is necessary to connect a person's deeds linearly to the harm for which we seek to assign responsibility" (Young 2011, Chapter 4). Essentially, our justice system seeks to punish one person for one (mis)deed at a time. Based on this, the country can't look at problems as having nebulous or systemic causes and effects. For example, we seek to punish a woman for shoplifting baby food and simply lock the formula behind cases, rather than look to the structures that caused the crime and help the mother. Instead of having a system designed for addressing the implications of sociological structures (poverty, racism, sexism, etc.), the judicial system frames individual actions and individual agents.

I argue that this concept extends the political realm alongside the sociological. The US political system can only handle issues on an individual rather than holistic or systemic basis, keeping the idea of the consent of the governed, and the "general welfare" of the populace firmly behind the needs of legitimizing institutions. While the intent of the founders was to promote the influence of the governed on the government itself, the political system cannot handle the shifts that structural issues necessitate. Constitutional processes, policymaking, and the other checks and balances that the government setup allows for can only address one problem at a time, and only within the bounds of political possibility as decided by the elected officials who aren't often the ones affected by the structural issues that the "governed" are attempting to change. Similar to Young's liability model, the political system operates on individual problems and actors.

The effect of our political setup, and its ability to only address individual problems, is a psychology of radical individualism that has taken over the US psyche. Radical individualism speaks to actions of US citizens along with elected officials (and therefore also the sentiment of legislation at large) that elevates personal rights over collective welfare. It makes sense that a

citizenry faced with the continuous oppression necessary to the legitimizing of a new system of government would be invested in pushing personal rights to the fore. Over the course of the first century or so of the US, individual rights and responsibilities developed as the foremost political priority, in the wake of moving fully away from popular sovereignty and into the oppression of the Rule of Law.

This development toward individual rights created the conditions of possibility for the reinterpretation of the Second Amendment. After the founding, the Second Amendment fell rapidly out of relevance. Historian Robert Spitzer pointed out that “In sum, the possession of firearms referred to in the Second Amendment comes into play only at such time as the unorganized militia is activated by a state or the federal government, a practice effectively abandoned before the Civil War...” (2012, 32). After states began to finance their state militias themselves, the necessity of the Second Amendment became even less important, because the law only existed for the case when the states could not provide armament to their own militia. This sentiment was widespread, and “In a 1901 message to Congress, President Theodore Roosevelt called for long-overdue legal change, saying that ‘our militia law is obsolete and worthless’” (id. 31). So, the Second Amendment began to fall flat in societal meaning, but at the same time, the conversation around personal rights was on the rise.

It follows, then, that the words of the Second Amendment could be re-imbued with a different meaning. The complete move to the personal rights reading of the Amendment happened in 2008, when the US Supreme Court decided for Dick Heller in the case of *DC vs Heller*. This landmark decision resolved for the first time that the Second Amendment applied directly to an individual's right to own guns, rather than relating solely to the formation of state militias. As I noted in the introduction, Constitutional originalist Antonin Scalia sided for the

personal rights reading, saying "Nowhere else in the Constitution does ... "the people" refer to anything other than an individual right". Justice Scalia had been so swayed by the political milieu, which argues that individual rights were the forefront of the Founders' intent, that he believed that sentiment had informed even this historically irrelevant Amendment.

The problem is, studies have demonstrated that increased access to guns, supported by Court decisions which uphold gun owner's rights over community safety, leads to increased gun violence. On the podcast *Today, Explained*, in the episode "Gun Laws that Work", host Sean Rameswaram explores the efficacy of different gun safety policies with an expert in gun violence as a public health issue. For instance, the eight states that have strict discretionary laws regarding who can carry firearms, including enhanced background checks, Extreme Risk Protection Orders, and minimum age laws, also have lower aggregate gun violence rates (Vox 2022). The *Heller* decision makes it harder for states to pass these laws that will save lives.

The reinterpretation of the Second Amendment primarily prevents the gun laws that address the results of the systemic gun issue; as we know from above, our system cannot handle addressing the systemic problem itself. Gun violence *is* a structural problem when you think about violence as desperation. Hannah Arendt quotes C. Wright Mills in her essay on Communicative Violence, saying "All politics is a struggle for power; the ultimate kind of power is violence" (Arendt 1986, 59). Arendt fundamentally disagrees with Mills, as she argues that power and violence, while often conflated, are fundamentally different. In my view, though, their substance differs from their use. Institutions use violence in order to maintain their power in the realm of politics. In a distilled sense, violence is a tool of politics. Gun violence itself arises from the oppressed, or the oppressors, vying for power, and as noted previously, the US Constitution will always place its systems of power over the citizenry and the purpose of governance.

If gun violence is a structural problem, the US government both caused it and is unable to address it. The intermediary pieces in here include the movement toward the Rule of Law and away from the intended popular sovereignty of the Founders, which then influenced the radical individualism psychology which now permeates the States. This radical individualism created the conditions for the reinterpretation of the Second Amendment, which only perpetuated the systemic violence caused by the oppression of the American people by making guns easier to access. The US judicial system comes back into play here, only having band-aid solutions to the gaping wound of violent crime that our gun crisis creates. It's all cyclical: weaving between power and violence and systems of relief and subjugation at the same time. The next, and final, section will move to offer some pragmatic solutions to this mess that the Founders accidentally inflicted upon an unwitting citizenry.

Section V: Conclusion and Possible Solutions

I have spent the last many pages laying out the argument that American society treats guns in an unique and problematic way. I have moved from the philosophers who contextualized and informed political thought over the past centuries, through the US Framers who created the Constitution with both a desire to push back against tyranny and implement a just and functioning system, all the way to modern interpreters of the law and the consequences of the founding set up. In closing, I engage the activists, scientists, and policy experts who seek to eradicate gun violence in the United States. Using their wisdom alongside what I have learned from exploring the political theory that underpins US gun culture, I seek to offer both overarching and specific solutions to the systemic injustice of gun violence.

In the last section, I used Iris Marion Young's framework for discussing the US liability model of justice. While her scholarship focuses on sociological systemic injustice, she provides

solutions that extend to the political realm as well. Young's "social connection model" can be summarized through this passage:

The social connection model of responsibility says that individuals bear responsibility for structural injustice because they contribute by their actions to the processes that produce unjust outcomes. Our responsibility derives from belonging together with others in a system of interdependent processes of cooperation and competition through which we seek benefits and aim to realize projects. (Young 2011, Chapter 4)

Young's notion of collective responsibility at first feels like a theorist's attempt at kumbaya without any backing in political reality. However, she goes on to discuss individual policy points in response to specific aspects of the liability model of jurisprudence. While those aren't necessarily relevant to the scope of this project, I do take this work as validation for upholding the idea of social connection as it extends to the political.

I really like Young's framing of responsibility because it connects to the etymology of the word responsible. The Latin root *respons* means 'answered, offered in return', and if you break it down even further, *spons* means 'to promise, to pledge'. So, with a slight reconfiguration in linguistic history, responsibility would be defined as 'our promise to each other'.

This linguistic framework encompasses my overarching solution for the systemic issue of gun violence and its cause, radical individualism in the US. The antidote to individualism is community. Interestingly, this concept brings us full circle in many ways – back to Hobbes and Locke. For instance, by reaching backward to Thomas Hobbes and his theory of the original covenant between individuals, our political approach can achieve the original intent of government as he defines it – keeping us safe from each other. Hobbes argues that it is only with sacrifices of our individual sovereignty that we can have a government protect us from our inclination to cause violence to each other, and what I argue is along those same lines.

Despite the fact that the argument I am trying to make is that the antidote to radical individualism is community, I keep returning in my mind to the reality that humans, in every political situation, find something or someone to serve. Most theorists and philosophers look at this as the inclination to dominate (power corrupts and all that) but I honestly think that it can also be looked at as the inclination to *be dominated*. For instance, even in the "radical democracy" (in the standards of that time) of Ancient Athens, it was primarily a theocracy that devoted extensive time and resources to the uplifting of community deities. Christian Republics like Rome operated in a similar way, plus the addition of Emperors and other state leaders. This is precisely the situation the US has found itself in, in relation to the Rule of Law. Instead of serving a deity or king, we serve the laws and political system which, ironically, were intended to prevent domination.

Hobbes' Leviathan also serves in this capacity, functioning as a source of power above a community, but instead of viewing the government as a necessary evil to which we must lose parts of ourselves as he expresses, I wonder at the possibility of reframing it as the administration of community. The possibility of holding democracy and sovereignty together feels like the outcome most suited to human nature, and ties back to Young's social connection model as well, with its key placement and importance of responsibility. If the government becomes the necessary administrator of a network of *responsible* individuals, i.e. individuals who each hold service to their communities as their personal responsibility, it incorporates participatory democracy with the necessity of powerful institutions. Within the current political framework, that would look like active pluralistic action, by every person, toward a strong government on every level of the federalist system.

For those who fear the language of collectivism that I may have employed, as it leans toward organicism and all the policy disasters associated with it, I have a response. Community and integration as a political and philosophical response does not necessitate "serving the good of the collective". Rather, it harkens all the way back to Thomas Hobbes and the original covenant between individuals but as an extended network. In my framework, we are individuals who promise things to each other, not to the society as a whole.

Locke's consent of the majority comes back into the fold, here, when thinking about how non-homogenous groups relate to each other. In the societies in which Locke discussed, the "majority" looked and acted much alike. They were white, upper class men, and if a majority of them decided something, it makes sense that it could speak for the will of the group. A majority is not as reasonable a measure today when considering the desires of our entire society. Diverse communities hold separate needs that cannot be spoken for by solely listening to the most populous desire. Thus, if someone operates from within a network of diverse needs, and the government focuses on the implementation of policies decided by communities rather than the contest of deciding the majority, we can address the issue of the powerful majority speaking over the needs of each individual.

Applying this framework forces a reevaluation of the current political infrastructure in the US. Unfortunately, the current foundation of US politics is first-past-the-post, horse race style elections. These are a direct byproduct of our reverence for the Rule of Law, where we end up putting the needs of the legitimacy of the office over the consequences of the electoral process. So, if we were to rethink them from a community-based, social connection model lens, they should instead valorize the input of entire constituencies. The best way to move a step in this direction is to take away the power of wealth in elections. The impact of *Citizens United v FEC*

cannot be overstated when it comes to increasing radical individualism in the US. Getting money out of elections by overturning *Citizens United* would dramatically improve the level of community-mindedness that the US political system necessitates.

Overturning *Citizens United* is a necessary first step toward a social connection model of US politics, and all of the following gun policy changes would be far more politically feasible if it occurred. There is a certain grouping of gun policies – From Extreme Risk Protection Orders or ERPOs, to Minimum Age Requirements and Red Flag laws – that have been proven to genuinely address levels of violence. On our way toward the larger systemic changes associated with the social connection model, we must also advocate for and pass such effective violence prevention measures.

All of these policy fixes, though, come to head against the current understanding of the originalist interpretation of the Second Amendment. If conservative justices insist on the personal rights aspects of the Second Amendment, as demonstrated by the recent *New York State Rifle & Pistol Association, Inc. v. Bruen* decision, policy fixes such as the ones I mention above will be both harder to pass and more likely to be struck down.

However, one of the main arguments I make is that there are different interpretations of the original intent of the Founders when crafting the Second Amendment. Namely, that the words were designed actually counter to the personal sovereignty that contemporary interpretations are so intent to protect. By looking back to the Founders' experience with militias and the need to protect institutions above individuals, we can see an interpretation of the Second Amendment that could actually benefit conservative and progressive gun policy: the interpretation that the Amendment is irrelevant in our modern age, and can and should be left out of the conversation about the merits and drawbacks of state and federal gun policy. While it may

seem surprising that this idea could benefit conservative gun ideology, I believe that the move away from personal rights will not stop gun ownership in the US, and will actually help the country to shift away from the psyche of radical individualism – promoting more effective policies all around. US society will be better able to protect its communities, the individuals within them, and the legitimacy of its democratic institutions if we look to the future instead of getting hung up on the archaic worries of an intelligent but out of touch group of men.

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