

# THE SPIRIT OF GUN LAWS

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## INTRODUCTION

In an era of surging rates of gun ownership,<sup>1</sup> increasingly lax gun laws,<sup>2</sup> and widely publicized mass shootings,<sup>3</sup> the discourse surrounding gun control could remain largely a public health debate. That is, experts *could* compare public health models to determine which firearms laws would save the most lives. Instead, this country frames the issue quite differently: public health versus freedom.<sup>4</sup> This false dichotomy implies that any restriction on firearms inherently erodes individual liberty.<sup>5</sup>

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1. Sabrina Tavernise, *An Arms Race in America: Gun Buying Spiked During the Pandemic. It's Still Up.*, N.Y. TIMES, (May 29, 2021), <https://www.nytimes.com/2021/05/29/us/gun-purchases-ownership-pandemic.html>.

2. See *The Free and Fearless 20: Permitless Carry Wave Sweeps the Nation*, NRA-ILA, (April 26, 2021), <https://www.nra.org/articles/20210426/the-free-and-fearless-20-permitless-carry-wave-sweeps-the-nation>. Lax gun regimes might imply a lack of government regulation. However, many states have constitutionally questionable “antigun control” laws that regulate citizens quite harshly. See generally, Joseph Blocher, *The Right Not to Keep or Bear Arms*, 64 STAN. L. REV. 1.

3. Chris Bodenner, *Will the Media Ever Stop Publicizing Mass Shooters*, THE ATLANTIC, (June 20, 2016), <https://www.theatlantic.com/national/archive/2016/06/will-the-media-ever-stop-publicizing-the-mass-shooters/623726/>.

4. See JOSHUA HORWITZ & CASEY ANDERSON, GUNS, DEMOCRACY, AND THE INSURRECTIONIST IDEA 226 (2009). To reframe Justice Scalia’s famous observation, this might be akin to “judging whether a particular line is longer than a particular rock is heavy.” *Bendix Autolite Corp. v. Midwesco Enters., Inc.*, 486 U.S. 888, 897 (1988) (Scalia, J., concurring in the judgment).

5. See David Schoetz, *NRA to Obama: ‘Absolutism’ to You is a ‘Dirty Word’*, MSNBC, (Jan. 23, 2013), <https://www.msnbc.com/martin-bashir/nra-obama-absolutism-you-dirty-msna18098> (“We’re told that to stop insane killers, we must accept less freedom, less than the criminal class and the political elites, less than they keep for themselves. . . . That means we believe in our right to defend ourselves and our families with semiautomatic firearms technologies.”); Kim Parker, et al., *America’s Complex Relationship with Guns*, PEW RESEARCH, (June 22, 2017), <https://www.pewresearch.org/social-trends/2017/06/22/americas-complex-relationship-with-guns/> (explaining that 74% of gun owners associate the right to own guns with their personal sense of

Indeed, this appeal to liberty finds fertile ground in the United States, where Americans “intuitively reject the prospect of being less free, and given the choice will almost always opt for more freedom over less.”<sup>6</sup>

This understanding of gun regulation stems from the broad principle that any government regulation, however wise of a policy, inherently negates freedom.<sup>7</sup> Yet arguments against gun regulations venture a step further. Gun-rights supporters allege that firearms restrictions strike a particularly acute blow to liberty because guns are essential to both our political and personal freedoms. Some consider firearms to be inextricable with our political liberty because they “provide citizens with a means to oppose tyrannical government,”<sup>8</sup> and with our personal liberty because they “underlie and protect all our other freedoms,” including that of self-defense.<sup>9</sup> This framing has contributed to increasingly lax gun laws at the federal and state levels.<sup>10</sup>

Legal scholars have rightly observed that public carrying, the practice of carrying firearms in public spaces, can threaten multiple constitutional rights. For example, the licensure of armed protests burdens First Amendment rights to assemble and speak because “the presence of a gun in public has the effect of chilling or distorting the essential channels of a democracy—public deliberation and interchange.”<sup>11</sup> The legality of public carrying also complicates the standards for police searches and frisks, thus creating a conflict with

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freedom).

6. FIRMIN DEBRABANDER, *DO GUNS MAKE US FREE* xiii (2015).

7. See Andrew P. Napolitano, *The Right to Shoot Tyrants, Not Deer*, WASHINGTON TIMES, (Jan. 10, 2013), <https://www.washingtontimes.com/news/2013/jan/10/the-right-to-shoot-tyrants-not-deer/> (“Government—whether voted in peacefully or thrust upon us by force—is essentially the negation of freedom.”).

8. David E. Bernstein, *The Right to Armed Self-Defense in Light of Law Enforcement Abdication*, 19 GEO. J. L. & PUB. POL’Y 177, 178 (2021).

9. DEBRABANDER, *supra* note 6, at xiii.

10. *Id.*; *Guns in Public: Open Carry*, GIFFORDS LAW CENTER, <https://giffords.org/lawcenter/gun-laws/policy-areas/guns-in-public/open-carry/>; *Guns in Public: Concealed Carry*, GIFFORDS LAW CENTER, <https://giffords.org/lawcenter/gun-laws/policy-areas/guns-in-public/concealed-carry/>.

11. Darrell Miller, *Guns as Smut: Defending the Home-Bound Second Amendment*, 109 COLUM. L. REV. 1278, 1309–10; see also Gregory Magarian, *Conflicting Reports: When Gun Rights Threaten Free Speech*, 83 LAW & CONTEMP. PROBS. 169 (describing the potential collisions between free speech and gun rights).

Fourth Amendment rights.<sup>12</sup> Furthermore, guns near polling places might unconstitutionally burden a citizen's right to vote.<sup>13</sup>

Yet the presence of guns in public also has the potential to destroy a more general freedom at the core of our existence in the state.<sup>14</sup> A historically grounded conception of liberty in the United States includes the sense of security—the “tranquility of spirit”—that fosters self-expression without fear of arbitrary constraint.<sup>15</sup> This notion of liberty supports a different theory of gun rights: the presence of guns in public spaces causes fear, thwarting the government's primary role in promoting the “tranquility of spirit” among citizens.<sup>16</sup> Thus, public carrying itself, not its regulation, subverts liberty.

Philosophers have discussed theories of freedom since the discourses of the pre-Socratics.<sup>17</sup> Because any theory of gun rights must find its root in a proper relationship between free individuals and the sovereign, Part I of this Note traces the political theories of Aristotle, Thomas Hobbes, and John Locke to compare their understandings of this relationship. The creation of the U.S. government was itself an act of political philosophy, so it is vital to understand the material from which the founders drew. Though some excerpts of these philosophers may seem to support a right to public carry, this Note shows that the right to public armed self-defense departs from these theorists' depictions of liberty in society.

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12. See generally Nirej Sekhon, *The Second Amendment in the Street*, 112 NW. U. L. REV. ONLINE 271 (2018) (detailing the discordance between the expansion of gun rights and current policing standards); Jeffrey Bellin, *The Right to Remain Armed*, 93 WASH U. L. REV. 1 (2015) (highlighting the difficulties that modern Second Amendment jurisprudence poses for constitutional criminal procedure).

13. Joseph Blocher & Alan Chen, *Why Do States Ban “Electioneering” but Allow Guns at Polling Places?*, SLATE (Jan. 5, 2021), <https://slate.com/news-and-politics/2021/01/guns-polling-places-georgia.html>. But see *Group Can Monitor Arizona Ballot Drop Boxes, a U.S. Judge Has Ruled*, NPR, (Oct. 29, 2022), <https://www.npr.org/2022/10/29/1132589130/group-can-monitor-arizona-ballot-drop-boxes> (reporting that a district court judge permitting armed monitoring of ballot drop boxes).

14. I do not discount the effect that guns can have in the home, especially in domestic violence disputes. In this Note, however, I focus more narrowly on the presence of guns in public places and the consequences that has for the polity.

15. See BARON DE MONTESQUIEU, *THE SPIRIT OF THE LAWS* 155, 157 (Anne Cohler et al. eds., Cambridge University Press 1989) (1748) (noting that governments, like men, derive their inherent rights to defend and attack from notions of necessity and justice).

16. See *id.* (explaining that the conquerors of the Roman empire enacted laws creating and restoring liberty).

17. See generally, HESIOD, *THEOGONY* (c. 730–700 BC) (creating a theory of order in the universe that begins with the gods and only ends with lowly humans).

Part II explains Montesquieu’s vision of liberty and his proposed system of government that would protect this vision. Part III outlines Montesquieu’s immense influence in the framing of the U.S. government and how the fabric of the U.S. Constitution embodies his version of liberty.

Finally, Part IV discusses how one form of public carrying—open carrying—fits within Montesquieu’s regime and the U.S. This Note highlights the recent rise of armed vigilantism and how that practice poses a significant threat to freedom in the polity.

## I. PRE-MONTESQUIEU POLITICAL THEORY ON LIBERTY

The extent of liberty under civil government depends principally on the citizens’ relationship with the state and their fellow citizens. Aristotle, Hobbes, and Locke presented differing accounts of human entrance into political society and, by extension, the role of the polity in citizens’ lives.<sup>18</sup> Aristotle’s polity existed naturally because humans are instinctively “political animals.”<sup>19</sup> Hobbes and Locke, on the other hand, believed that man contracted with others to form political society and that this formation was contingent on a government of specified ends. These social contract theories diverge on the precise machinations of this contract and the scope of the new government’s authority.

Though these political philosophers present different accounts of our relationship to the state, their theories reject a conception of liberty that would condone unregulated public carry. Instead, each viewed state action—when directed toward a proper end—as a necessary ingredient for the liberty of all.

### A. Aristotle’s Politics

Aristotle’s political philosophy stems from his well-developed understanding of human complexity.<sup>20</sup> He observed that humans are

18. See JOHN LOCKE, TWO TREATISES OF GOVERNMENT 122 (Thomas I. Cook ed., Hafner Press 1947) (1689) (“To understand political power . . . we must consider what state all men are naturally in.”).

19. ARISTOTLE, POLITICS 28 (Benjamin Jowett trans., by Oxford University Press 1926) (350 BC).

20. See generally ARISTOTLE, NICOMACHEAN ETHICS (David Ross trans., Oxford University Press 2009) (c. 340 BC). Note, at times in this paper, when referring to subjects discussed by philosophers, I refer to human beings as “men” or “man.” I do not distinguish any difference in liberty interest between the sexes; I only reflect the terminology that these philosophers use. Their “men” derives from the latin, “*homo*,” or the ancient Greek “ἄνθρωπος”

the only animal with the faculties of speech and reason.<sup>21</sup> Because we possess these unique features, we naturally prefer to live with others.<sup>22</sup> Indeed, Aristotle argued that living in the polity is so essential to personhood that “he who is unable to live in society, or who has no need because he is sufficient for himself, must be either a beast or a god.”<sup>23</sup>

But these characteristics do not constitute the sole reasons humans live in a political community, according to Aristotle. Living in the polity is both practical and necessary to achieve our human ends. Of course, the efficiency of living in a community helps satisfy our basic human needs: “no man can live well, or indeed live at all, unless he be provided with necessaries.”<sup>24</sup> Yet the polity contributes so much more. Aristotle argued that the good life—a life that provides the most happiness—is one of virtue.<sup>25</sup> Because Aristotle’s virtues are inherently social, we need our fellow citizens to become virtuous. That is, we cannot learn generosity without others toward whom to be generous; we cannot learn fidelity without others toward whom to be loyal. Living in a society that creates and structures our relations with others is necessary to attain the good life.<sup>26</sup>

Indeed, Aristotle contended that we suffer immeasurably without our fellow citizens. Justice cannot exist outside of a state because justice is “the bond of men in states, and the administration of justice, which is the determination of what is just, is the principle of order in political society.”<sup>27</sup> Without justice, we are relegated to beasts: “man, when perfected, is the best of animals, but, when separated from law and justice, he is the worst of all.”<sup>28</sup> Thus, the state, as purveyor of law and justice, satisfies our bare needs and makes the good life attainable.

Though Aristotle provided no explicit account of liberty, his analysis of slavery identifies liberty’s primary characteristics. Aristotle believed some persons are born fit to become masters and others fit to

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(anthropos,) which each translate to man or mankind.

21. ARISTOTLE, *supra* note 19, at 5.

22. *See id.* (“In the order of Nature the state precedes the household and the individual. It is founded on a natural impulse, that towards political association.”). Note that, although Locke believed we contract into the commonwealth, it’s our natural inclination to do so. *See* notes 73-74.

23. *Id.* at 29.

24. *Id.* at 31.

25. *See* ARISTOTLE, *supra* note 20, at 5-7 (noting that men who seek happiness in life often identify virtue as their ends).

26. ARISTOTLE, *supra* note 19, at 28.

27. *Id.* at 29.

28. *Id.*

become servants.<sup>29</sup> The very concept of natural slavery implies that the distinction between slave and freeperson is not political status but a condition of the soul.<sup>30</sup> A natural master “can foresee with his mind,”<sup>31</sup> whereas a slave “has no deliberative faculty at all.”<sup>32</sup> Though Aristotle left the meaning of “foresee” vague in isolation, its contrast to the slave’s lack of deliberative faculty suggests that only masters can participate in deliberation with *phronesis*—practical wisdom, or the wisdom that one develops through deliberating about moral actions. In other words, *eleutheria*—liberty—consists of the “capacity to direct oneself to those ends which one’s reason rightly recognizes as choiceworthy” or “rational self-direction.”<sup>33</sup>

Living in the polity is a necessary precondition for this *eleutheria*. Humans need others to deliberate—Aristotle placed a primary importance on ethical friendship in *Nicomachean Ethics* for this reason.<sup>34</sup> By acting and deliberating with others, we develop virtuous habits, and our relations with others enable us to exercise those virtues.<sup>35</sup> Yet without the polity, we might not be able to form those bonds. Governments create a class of citizens equal in their relationship to the sovereign. Even in a tyrannical state, citizens are equally subordinate to the tyrant. Further, the state’s perpetuation requires a harmonious social structure. Without some level of cooperation, there can be no commerce or innovation. Thus, the polity plays a crucial role in creating social bonds and thus promoting *eleutheria*.

Because Aristotle recognized the state’s outsized role in achieving liberty, it is clear he would have flatly rejected the assertion that liberty consists of the ability to do what one wants without state interference.<sup>36</sup>

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29. *Id.* at 26. By any measure, Aristotle’s belief that some people were born fit only to be slaves is deplorable. I note it here not because of any inherent merit the idea has, but because it elucidates what he considers fundamental to a free person. Montesquieu rightly challenged the existence of any natural slaves. See MONTESQUIEU, *supra* note 15, at 261–62 (explaining that where “human nature should not be debased or dispirited, there ought to be no slavery.”).

30. Moira M. Walsh, *Aristotle’s Conception of Freedom*, 35 JOURNAL OF THE HISTORY OF PHILOSOPHY 495, 496 (1997).

31. ARISTOTLE, *supra* note 19, at 26.

32. *Id.* at 51.

33. Walsh, *supra* note 29, at 496.

34. ARISTOTLE, *supra* note 20, at 142–50.

35. *Id.*

36. Walsh, *supra* note 29, at 499 (“If to be free is to have the deliberative capacity of apprehending appropriate ends for oneself and directing oneself towards them, then the perfection of freedom, the fulfillment of the *ergon* [function] of a free man as such, is to do so well”).

### B. *Hobbes's* Leviathan

The social contract, as popularized in Thomas Hobbes's *Leviathan*, theorizes that government originated not by nature, but through a mutual agreement among mankind.<sup>37</sup> Hobbes envisioned mankind in its “natural condition” before the advent of organized civil society.<sup>38</sup> His depiction of the state of nature highlights why humans enter the compact and illustrates the state's resulting roles.

Hobbes argued that no positive law existed before government, and where there is no law, there is no injustice.<sup>39</sup> Thus, the only restraint on man's action is the law of nature, which dictates that “man is forbidden to do, that, which is destructive of his life, or taketh away the means of preserving the same.”<sup>40</sup>

Subject only to the law of nature, man exercises what Hobbes considered an absolute liberty. His theory of liberty derived from his signature theory of mechanical materialism—the idea that phenomena can be explained by the motion of materials.<sup>41</sup> Liberty in the state of nature is “the absence of externall Impediments: which Impediments, may oft take away part of a mans power to do what hee would[] but cannot hinder him from using the power left him, according as his judgment, and reason shall dictate to him.”<sup>42</sup> Hobbes's liberty is not a freedom from subjugation or unjust punishment; it is simply a freedom from external restraint.<sup>43</sup> Even action stemming from fear is free so long as reason dictates that the action is most advantageous.<sup>44</sup> Thus, man in the state of nature is in a condition of absolute liberty.<sup>45</sup>

But this absolute liberty inherently conflicts with man's sense of security because it implies that man has a right to everything, even a right to another's body.<sup>46</sup> The law of nature is insufficient to suppress

37. See THOMAS HOBBS, *LEVIATHAN* 120 (Lerner Publishing Group 2018) (1651).

38. *Id.* at 112.

39. *Id.* at 117.

40. *Id.* at 119.

41. See *id.* at 1 (“For what is the Heart, but a Spring . . . giving motion to the whole Body . . . that great LEVIATHAN called a COMMON-WEALTH . . . in which, the Sovereignty is an Artificiall Soul, as giving life and motion to the whole body.”).

42. *Id.* at 118.

43. See HOBBS, *supra* note 37, at 200 (“When a man throweth his goods into the Sea for Feare the ship should sink, he doth it neverthelesse very willingly, and may refuse to doe it if he will: It is therefore the action, of one that was Free”). This is a quite literal construction of liberty and likely one that is unrecognizable to modern understandings.

44. See *id.* (A free man is simply “he, that in those things, which by his strength and wit he is able to do, is not hindred to doe what he has a will to.”).

45. *Id.* at 119.

46. *Id.* (“[A]s long as this natural [r]ight of every man to everything endureth, there can be

man's passions,<sup>47</sup> and the absence of a written, enforceable legal code leads to a constant state of war—one that is “all against all.”<sup>48</sup> Without such a code, humans are relegated to brutes; they live “without other security, than what their own strength, and their own invention shall furnish them withal.”<sup>49</sup>

Man's first instinct is to arm himself in defense, but this only worsens his poor condition. Hobbes observed that this insecurity consumed our daily life: “when taking a journey, he armes himself, and seeks to go well accompanied; when going to sleep, he locks his dores; when even in his house he locks his chests.”<sup>50</sup> Yet remaining perpetually armed heightens his fear and erodes his relations with others. Man is afflicted with “continual feare, and danger of violent death; [a]nd the life of man, solitary, poore, nasty, brutish, and short.”<sup>51</sup> Furthermore, this armed standoff amongst men forecloses any potential cooperation, progress, or comfortable living: “In such condition, there is no place for Industry; because the fruit thereof is uncertain; and consequently no Culture of the Earth; no Navigation, nor use of the commodities that may be imported by Sea . . . no Knowledge of the face of the earth.”<sup>52</sup>

When mutual armed defense fails to dissipate fear, the need for self-preservation causes men to enter civil society.<sup>53</sup> In exiting the state of nature, man exchanges his natural, absolute liberty for the security that civil society brings.<sup>54</sup> Each person surrenders his absolute right of self-governance to the government; as a consequence, the government, in possession of all of the powers of men,<sup>55</sup> achieves absolute monarchy.

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no security to any man”).

47. *See id.* at 116 (“The Desires, and other Passions of man, are in themselves no Sin. No more are the Actions, that proceed from those Passions, till they know a Law that forbids them; which till Lawes be made they cannot know: nor can any Law be made, till they have agreed upon the Person that shall make it”).

48. *Id.* at 115. Note that, contrary to popular belief, Hobbes didn't think that life in the state of nature would include violence at all times against all men. In actuality, he thought that war “consisteth not in actuall fighting; but in the known disposition thereto, during all the time there is no assurance to the contrary.”

49. HOBBS, *supra* note 37, at 115.

50. *Id.*

51. *Id.*

52. *Id.*

53. *See id.* at 120 (“That a man be willing, when others are so too, as farre-forth, as for Peace, and defence of himself he shall think it necessary, to lay down this right to all things; and be contented with so much liberty against other men, as he would allow other men against himselfe.”).

54. *See id.*

55. Hobbes does exclude some inalienable rights, such as the right to self-defense in case of being attacked. *See* HOBBS, *supra* note 37, at 122.



And because the social contract aims to achieve security, the government possesses a monopoly on the means of achieving peace.<sup>56</sup>

### C. *Locke's Second Treatise of Government*

Locke's *Second Treatise of Government* also presented a social contract theory for the introduction of the commonwealth, but it departed from *Leviathan's* depiction of a brutal state of nature. Locke's commonwealth is tamer than Hobbes' for two main reasons: 1) Locke's depiction of the circumstances leading to the creation of civil society were tamer, and 2) Locke's civil society arises from prudence rather than necessary self-preservation. However, Locke agreed that the commonwealth fundamentally protects man's life and liberty.

Locke did not think life before government is lawless and violent, as in Hobbes's state of nature. Even before entrance into society, humans must abide by the law of nature: "the state of nature has a law of nature to govern it which obliges everyone . . . being all equal and independent, no one ought to harm another in his life, health, liberty, or possessions."<sup>57</sup> Thus, men are naturally driven to peace.<sup>58</sup> Indeed, the law of nature is so fundamental to mankind that those who violate it cease to be a human altogether; a transgressor grows "degenerate and declares himself to quit the principles of human nature and to be a noxious creature."<sup>59</sup>

The state of nature is inconvenient, however, and even potentially dangerous. Self-interested persons naturally come into conflict, and when they do, each person possesses an equal executive power.<sup>60</sup> If men were completely rational, this would not be an issue. Yet men are naturally "partial to themselves and their friends," and their passions "carry them too far in punishing others."<sup>61</sup> Therefore, the state of nature is deficient largely because humans cannot properly enforce the law of

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56. *Id.* at 167 ("Because the [e]nd of this [i]nstitution, is the [p]eace and [d]efence of them all; and whosoever has right to the [e]nd, has right to the [m]eans; it belongeth of [r]ight, to whatsoever [m]an, or [a]ssembly that hath the [s]overaignty, to be [j]udge both of the meanes of [p]eace and [d]efence . . . and to do whatsoever he shall think necessary to be done, both beforehand, for the preserving of [p]eace and [s]ecurity, by prevention of discord at home and [h]ostility from abroad; and, when [p]eace and [s]ecurity are lost, for the recovery of the same.").

57. LOCKE, *supra* note 18, at 123.

58. *Id.* at 124 ("[T]he law of nature be observed which willeth the peace and preservation of all mankind").

59. *Id.* at 125.

60. *Id.* at 127

61. *Id.* In today's vocabulary, we might say today that people have subconscious or cognitive biases.

nature amongst themselves—they need a common superior and an impartial judge.<sup>62</sup> Without an independent superior to adjudicate conflicts, every disagreement can lead to war.<sup>63</sup>

Thus, each man chooses to submit his individual executive power to a common sovereign, and the resulting commonwealth possesses all power to settle disputes and punish offenses.<sup>64</sup> In doing so, man ensures a “comfortable, safe, and peaceable living.”<sup>65</sup>

Because civil government arises as “the proper remedy for the *inconveniences* of the state of nature,” it possesses limited ends.<sup>66</sup> In fact, man only delegates one responsibility to the new government: the preservation of property.<sup>67</sup> Importantly, however—and too often overlooked by political commentators—Locke’s conception of property encompassed liberty.<sup>68</sup> Thus, Locke’s limited government primarily aimed to protect a liberty that can hardly exist in the state of nature.<sup>69</sup>

Before government, there can be no secure enjoyment of property. Man in the state of nature is simultaneously powerful and vulnerable:

[The] absolute lord of his own person and possessions, equal to the greatest, and subject to nobody . . . the enjoyment of [property] is very uncertain and constantly exposed to the invasion of others . . . the greater part [of mankind being] no strict observers of equity and justice, the enjoyment of the property he has in this state is very unsafe, very unsecure.<sup>70</sup>

Without laws, we can’t enjoy our freedom: “we are born free as we are born rational, not that we have actually the exercise of either.”<sup>71</sup> Once we’ve entered the commonwealth, liberty requires that man live under

62. *Id.* at 127, 130 (“[F]orce, or a declared design of force, upon the person of another, where there is no common superior on earth to appeal to for relief, is the state of war”).

63. LOCKE, *supra* note 18, at 131. Locke cites the battle in the Old Testament’s Book of Judges between Jephthah, judge of Israel, and Ammonites (the Kingdom of Ammon sits in modern-day Amman, Jordan): “Had there been any such court, any superior jurisdiction on earth, to determine the right between Jephthah and the Ammonites, they had never come to a state of war; but we see he was forced to appeal to heaven: ‘The Lord the Judge,’ says he, ‘be judge this day between the children of Israel and the children of Ammon.’”

64. *Id.* at 164.

65. *Id.* at 169.

66. *Id.* at 127 (emphasis added).

67. *Id.* at 168.

68. *Id.* (“[L]ives, liberties, and estates, which I call by the general name property . . .”).

69. LOCKE, *supra* note 18, at 132 (“The liberty of man in society is to be under no other legislative power but that established by consent in the commonwealth . . .”).

70. *Id.* at 184.

71. *Id.* at 150.

no “dominion of any will or restraint” unless the legislature restrain them with their own consent.<sup>72</sup> This is a procedural requirement for democracy. Yet the primary protection afforded to citizens under government is the mutual and unbiased enforcement of the law to protect their liberty and property.

Even if we are not born into government, the commonwealth, according to Locke, naturally emanates from man. Locke invokes God’s creation of a being that “in his own judgment it was not good for him to be alone, put him under strong obligations of necessity, convenience, and inclination to drive him into society, as well as fitted him with understanding and language to continue and enjoy it.”<sup>73</sup> Furthermore, the commonwealth stems from smaller societies, which exist naturally: such as between a master and servant or parents and children.<sup>74</sup> Though Locke certainly is not theorizing an Aristotelian natural government theory, his idea that we were “fitted” and naturally “inclined” to exist in civil society counters any hypothesis that our entrance into civil society was unnatural and done only out of sheer necessity.<sup>75</sup>

#### *D. The Three Philosophers in Sum*

For each of the foregoing political philosophers, the state plays an essential role in the enjoyment of freedom. Aristotle and Locke believed that government exists so we may flourish. For Aristotle, to flourish meant to cultivate virtue. Civil society brings consonance amongst citizens so they can deliberate together and practice being virtuous. For Locke, to flourish meant to enjoy our life, liberty, and property; the enjoyment of these goods requires the security that liberal government brings.<sup>76</sup> Hobbes was too grim to consider flourishing—in his view, the preservation of our lives required entrance into civil society. At base, all three agreed that the liberty with which we are naturally endowed is only tenuously exercised without the order of the state.

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72. *Id.* at 132.

73. *Id.* at 159.

74. *Id.*

75. LOCKE, *supra* note 18, at 159.

76. Even modern libertarians such as Robert Nozick recognize that the state’s monopoly of force is necessary for the freedom that liberty entails. See ROBERT NOZICK, ANARCHY, STATE AND UTOPIA 113 (Basic Books 1974).

Montesquieu built off these ideas to establish a theory of liberty in the modern republican state, emphasizing the importance of liberty for the preservation of the state and its citizens.

## II. MONTESQUIEU AND LIBERTY

Montesquieu's primary work, *The Spirit of the Laws*, bears an epigraph quoting from Ovid's *Metamorphoses*: "*Prolem sine matre creatum*"—an offspring created without a mother.<sup>77</sup> As much as he insisted his work stood on its own two feet,<sup>78</sup> Montesquieu drew from the foundational political theorists before him, perhaps none more than Aristotle, Hobbes, and Locke. As a protoliberal, continuing the tradition of Hobbes and Locke,<sup>79</sup> Montesquieu advocated for a government of limited ends.<sup>80</sup> Yet Montesquieu's task in *Spirit of the Laws* was actually more akin to Aristotle's than the protoliberals'. Unlike Hobbes and Locke, Montesquieu did not aim to judge political arrangements by some extra-political (or pre-political) standard.<sup>81</sup> Instead, he "restore[d] to political science its Aristotelian task of understanding the variety of regimes in the world, the causes of their corruption, and the conditions for their preservation."<sup>82</sup> Montesquieu studied Aristotle, Plato, and Cicero rigorously, keeping multiple copies of Aristotle's *Politics* at the ready while he wrote *Spirit of the Laws*.<sup>83</sup> He wrote of his particular "taste for the Ancients,"<sup>84</sup> leading some to liken his *Spirit of the Laws* to a revival of classical political science.<sup>85</sup> Understanding Montesquieu's political philosophy and its relationship to these three prior theorists illuminates the proper position of gun rights within the polity.

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77. MONTESQUIEU, *supra* note 15, at v.

78. See BARON DE MONTESQUIEU, *MY THOUGHTS* 110 (Henry Clark trans., Liberty Fund 2012) (1720) 50 (complaining that there were no philosophers "up until Descartes who did not derive his entire philosophy from the ancients").

79. KEEGAN CALLANAN, *MONTESQUIEU'S LIBERALISM & THE PROBLEM OF UNIVERSAL POLITICS* 31 (2018).

80. See MONTESQUIEU, *supra* note 15, at 155 ("Political liberty is found only in moderate governments.").

81. CALLANAN, *supra* note 79, at 39.

82. *Id.* at 39–40.

83. *Id.* at 36 ("In preparation for writing his masterwork, he acquired two French translations of the *Politics*, in addition to the Greek and Latin editions already on hand in his library at La Brède. His notebook on the *Politics* ran at least 100 pages").

84. MONTESQUIEU, *supra* note 78 ("I admit my taste for the Ancients. That Antiquity enchants me, and I am always led to say with Pliny: 'It is to Athens that you are going. Respect their gods'").

85. CALLANAN, *supra* note 79, at 31.

Montesquieu rejected the possibility that political liberty encompasses a freedom to act without governmental interference. He considered arguments that liberty consists of a right to revolt, a right to be governed by consent, or a right to grow a beard.<sup>86</sup> Indeed, Montesquieu even specifically considered the idea that political liberty includes the “right to be armed.”<sup>87</sup> He rejects them all: “political liberty in no way consists in doing what one wants.”<sup>88</sup> Instead, he has a more drawn out theory of how liberty emerges in political society.

Although Montesquieu thought that different governments have distinct principles— “human passions that set it in motion”<sup>89</sup>—*all* governments have the same goal: promoting tranquility.<sup>90</sup> In a despotic government, for example, the state attempts to promote tranquility through a principle of fear.<sup>91</sup> For despots to awe the people and effect their total obedience, fear must permeate, and eventually overtake, the masses.<sup>92</sup> Of course, even this fear achieves its own kind of tranquility: “[despotic government’s] end is tranquility; but this is not a peace, it is the silence of the towns that the enemy is ready to occupy.”<sup>93</sup> This silence suppresses the human spirit and constitutes a tranquility of the state, but certainly not of its citizens. Yet despotic government is the default government of mankind—without the right institutions, any form of government can quickly become despotic.<sup>94</sup> Republican governments thus need to take active efforts to prevent their reversion into despotism.

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86. MONTESQUIEU, *supra* note 15, at 154.

87. *Id.*

88. *Id.* at 154–55.

89. MONTESQUIEU, *supra* note 15, at 21.

90. See ANNE COHLER, MONTESQUIEU’S COMPARATIVE POLITICS AND THE SPIRIT OF AMERICAN CONSTITUTIONALISM 98 (University Press of Kansas 2021) (“Governments are instituted to keep these human entities from bumping into each other unduly—to protect each person’s liberty . . . Montesquieu offers us . . . an example of a government whose end, he says, is political liberty alone, a government that does not identify liberty with the liberty to pursue some particular end, such as expansion, war, religion.”).

91. *Id.* at 28.

92. *Id.*

93. *Id.* at 60.

94. See *id.* at 59–63 (“[I]t seems that human nature would rise up incessantly against despotic government. But, despite men’s love of liberty, despite their hatred of violence, most peoples are subjected to this type of government. This is easy to understand. In order to form a moderate government, one must combine powers, regulate them, temper them, make them act; . . . this is a masterpiece of legislation that chance rarely produces and prudence is rarely allowed to produce. By contrast, a despotic government leaps to view, so to speak; it is uniform throughout, as only passions are needed to establish it, everyone is good enough for that”).

The only way to maintain republican government is to stimulate a *feeling of security*, rather than fear, among citizens.<sup>95</sup> When states do so, a spirit of tranquility permeates the citizenry, and that spirit constitutes political liberty: “Political liberty in a citizen is that tranquility of spirit which comes from the opinion each one has of his security, and in order for him to have this liberty the government must be such that one citizen cannot fear another citizen.”<sup>96</sup> By removing fear of arbitrary constraints from fellow citizens, republican government also allows for philosophical liberty: “the exercise of one’s will or, at least . . . one’s opinion that one exerts one’s will.”<sup>97</sup> Without the feeling of security, it is impossible for citizens to express themselves—a far cry from Hobbes’s materialist theory of liberty.<sup>98</sup>

Yet republican government cannot foster liberty by remaining moderate and limited. Instead, lawmakers must take active steps to ensure that citizens do not intimidate each other: “When a constitution allows arbitrary constraint or compulsion beyond the scope of settled laws, political liberty is imperiled.”<sup>99</sup> Fear doesn’t have to stem from the law; “mores, manners, and received examples” can foster or diminish our feeling of safety and thus our liberty.<sup>100</sup> Indeed, when republican government is constructed properly, liberty consists of “the right to do everything the laws permit.”<sup>101</sup> Montesquieu thus constructed political institutions designed to enhance this tranquility of the people: political liberty.

Although the right political institutions are necessary to promote security, they are not sufficient. Montesquieu didn’t believe in a procedural form of liberty: “[L]iberty is not simply the condition of men living under a limited government of distributed powers, with legal rights of free speech, free worship, due process, and the like.”<sup>102</sup> Thus, Montesquieu sharply departed from Locke’s construction that “[f]reedom of men under government is[] to have a standing rule to live by, common to every one of that society, and made by the legislative

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95. CALLANAN, *supra* note 79, at 25; MONTESQUIEU, *supra* note 15, at 831, 892.

96. MONTESQUIEU, *supra* note 15, at 157.

97. *Id.* at 188.

98. HOBBS, *supra* note 37, at 1.

99. CALLANAN, *supra* note 79, at 237.

100. MONTESQUIEU, *supra* note 15, at 187.

101. *Id.* at 155.

102. CALLANAN, *supra* note 79, at 235.

power erected in it.”<sup>103</sup> These ideas fall short because they fail to account for our psychological state.

Montesquieu instead devised a system of political institutions specifically geared to dissipate fear and promote liberty in line with the goals of republican government. The stakes are high because “when a [republican] state lose[s] its liberty[,] it will perish.”<sup>104</sup>

He created two distinct institutional frameworks to deal with this fear: separation of powers and federalism. Separation of powers is specifically tailored to promote Montesquieu’s idea of liberty. Man’s natural passions threaten liberty in a state; as he will always seek more power and become despotic: “[Liberty] is present only when power is not abused, but it has eternally been observed that any man who has power is led to abuse it; he continues until he finds limits.”<sup>105</sup> Understanding that man is naturally flawed in this way, Montesquieu believed that liberal institutions must check man’s ability to gain power and thereby cause disorder.<sup>106</sup> Thus, he devised a government where each type of power—he delineated three—check each other so none can grow despotic:

When legislative power is united with executive power in a single person or in a single body of magistracy, there is not liberty, because one can fear that same monarch or senate that makes tyrannical laws will execute them tyrannically. Nor is there liberty if the power of judging is not separate from legislative power and from executive power. If it were joined to legislative power, the power of the life and liberty of the citizens would be arbitrary, for the judge would be the legislator. If it were joined to executive power, the judge could have the force of an oppressor. *All would be lost if the same man or the same body of principal men, either of nobles, or of the people, exercised these three powers.*<sup>107</sup>

In this way, separation of powers combats fear on the ground and at the source. It simultaneously mitigates the citizens’ fear that their government might turn despotic and limits the politicians’ ability to exercise despotism.<sup>108</sup>

Yet Montesquieu did not believe that simply avoiding the accumulation of powers in one set of hands would suffice to ward off

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103. LOCKE, *supra* note 18, at 134.

104. MONTESQUIEU, *supra* note 15, at 166.

105. *Id.* at 155.

106. *Id.*

107. *Id.* at 157 (emphasis added).

108. CALLANAN, *supra* note 79, at 239.

despotism. Instead, he thought the branches must have the ability to check one another, in certain circumstances, to prevent any one of them from growing despotic. He was most concerned about the legislative branch: “If the executive power does not have the right to check the enterprises of the legislative body, the latter will be despotic, for it will wipe out all the other powers, since it will be able to give to itself all the power it can imagine.”<sup>109</sup> This check of the legislature is the executive veto power.<sup>110</sup>

Montesquieu also conceived a second institutional structure designed to preserve the feeling of security: federalism. There are competing considerations when determining the proper size of a republican government. On one hand, Montesquieu recognized that a small government, especially republican government, could be insecure from attack by neighboring states.<sup>111</sup> If it were not for federalism, “it is very likely that ultimately men would have been obliged to live forever under the government of one alone” because otherwise they could not have survived external threats.<sup>112</sup> Conversely, Montesquieu sought to ward off the dangers of large governments, which tend to induce statesman to seek more power and dissipate liberty.<sup>113</sup>

He concluded that federalism—a “society of societies that make a new one”—was an effective remedy to these competing size considerations.<sup>114</sup> It renders the state secure from external and internal threats to tranquility. It also stems the threat of demagoguery because Montesquieu thought it unlikely that one person could gain the necessary widespread recognition in all of the confederated states. He theorized that “if he became too strong in one state, he would alarm all the others; if he subjugated a part, the part still free could resist him with forces independent of those he had usured and overwhelm him before he had completely established himself.”<sup>115</sup>

109. MONTESQUIEU, *supra* note 15, at 162.

110. *Id.* at 164.

111. *See id.* at 131. (“If a republic is small, it is destroyed by a foreign force; if it is large, it is destroyed by an internal vice”).

112. *Id.*

113. *Id.*

114. *Id.*

115. MONTESQUIEU, *supra* note 15, at 132. Montesquieu’s doctrinal focus on limiting government stems from his belief that “an infinity of abuses slips into whatever is touched by the hands of men.” *Id.* at 73. He did, however, proffer that Republican government needed to have effective tools to check citizens’ abilities to harm on another. Indeed, he categorizes four types of crimes; among those, he distinguishes between private citizens’ conduct which affects public security and those that affect public tranquility. *Id.* at 189. The appropriate punishment for one who violates these laws should be exactly proportionate in severity and *kind* to the conduct. *Id.*



### III. MONTESQUIEU'S INFLUENCE WITH THE FOUNDING GENERATION

Much of the text of the Constitution, especially within the Second Amendment, is quite vague. Scholars have resorted to corpus linguistics to attempt to analyze ambiguous language such as “bear arms” or “militia.”<sup>116</sup> Inherent in many constructions of constitutional text is a resort to understandings of liberty; indeed, the Constitution itself claims to “secure the Blessings of Liberty.”<sup>117</sup> Yet, the concept of liberty is inherently amorphous.<sup>118</sup> It is vital, especially in an era of originalism, to understand what the founding generation hoped to achieve in devising our government and how gun rights fit into that system.

There is compelling evidence that Montesquieu's understanding of liberty undergirds the United States' political system. Discontent with their relationship with the English monarchy, colonists in 1760 increasingly turned to theories of rights and government.<sup>119</sup> Booksellers consistently advertised the English translation of Montesquieu's *Spirit of the Laws* beginning in 1756.<sup>120</sup> By 1774, it was a best seller in the American colonies. American gazettes reprinted portions of the book, sometimes without the need to acknowledge it explicitly.<sup>121</sup> But *Spirit of the Laws* was not just a book for the masses. The works of Montesquieu were ubiquitous for the founders.<sup>122</sup> *Spirit of the Laws*

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Thus, when one commits conduct that hurts the public tranquility but doesn't physically harm others, the state should impose penalties “drawn from the nature of the thing and relate to that tranquility, such as deprivation, exile, corrections, and other penalties that restore men's troubled spirits and return them to the established order.” *Id.* at 191.

116. Dennis Baron, *Corpus Linguistics, Public Meaning, and the Second Amendment*, DUKE CENTER FOR FIREARMS LAW: SECOND THOUGHTS (July 12, 2021), <https://firearmslaw.duke.edu/2021/07/corpus-linguistics-public-meaning-and-the-second-amendment/>. Corpus linguistics is the study of language using collections of language stored in a “corpus” online. By understanding the language people used in a specific period, scholars can appreciate public contemporary understandings of that language.

117. U.S. CONST. PMBL.

118. *See, e.g., Meyer v. Nebraska*, 262 U.S. 390, 399 (“[Liberty] denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience . . . .”); *Bolling v. Sharpe*, 347 U.S. 497, 499 (“Liberty under law extends to the full range of conduct which the individual is free to pursue . . . .”). Different courts have construed liberty to encompass a wide array of rights and activities.

119. PAUL MERRILL SPURLIN, *THE FRENCH ENLIGHTENMENT IN AMERICA*, pt. 7, at 2 (Univ. of Ga. Press 1984).

120. *Id.*

121. *See id.* at 89 (explaining that publishers would occasionally not bother to acknowledge the source of excerpts of Montesquieu's ideas).

122. *See id.* at 88–89 (noting that the book was believed to be in the libraries of statesmen

appeared in both public libraries and college curricula.<sup>123</sup> In short, by the time of the constitutional convention, *Spirit of the Laws*, a French work, had become an “American” classic.<sup>124</sup>

Beyond its wide readership in the colonies, there is ample evidence that *Spirit of the Laws* served as a template of sorts for the United States government, especially its separation of powers and federal structure. Foundational political texts of this era considered it an “an authoritative handbook of political information.”<sup>125</sup>

*The Federalist Papers*—perhaps the most influential set of policy rationales for the Constitution—frequently cite Montesquieu when setting out the basic forms of the new government. In *Federalist*, No. 9, Alexander Hamilton nearly quotes Montesquieu when discussing the merits of the new federal system: “The utility of a Confederacy, as well to suppress faction and to guard the internal tranquility of States, as to increase their external force and security.”<sup>126</sup> Hamilton then, in a substantial portion of his essay, quotes Montesquieu’s treatment of federalism, noting, “I have thought it proper to quote at length these interesting passages, because they contain a luminous abridgment of the principal arguments in favor of the Union.”<sup>127</sup> Indeed, the essay is designed to defend against an anti-federalist claim that the proposed republic was too big,<sup>128</sup> per Montesquieu’s recommendation that republics remain contracted in size. Hamilton solves this problem by introducing Montesquieu’s federal structure.<sup>129</sup>

James Madison dedicates an entire paper, *Federalist*, No. 47, to defending against charges that the Constitution deviates from Montesquieu’s work.<sup>130</sup> In the paper, he explains the Constitution’s unique distribution and blending of powers among the three branches. He begins by alluding to Montesquieu’s invocation of tyranny

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including John Adams, Benjamin Franklin, Thomas Jefferson, John Marshall, James Wilson, and more).

123. *Id.*

124. *See id.* (“During the colonial period and under the government of the Continental Congress, it was quoted in books, newspaper articles, magazines, pamphlets, sermons, and speeches”).

125. *Id.*

126. THE FEDERALIST No. 9 (Alexander Hamilton).

127. *Id.*

128. Jacob Levy, *Beyond Publius: Montesquieu, Liberal Republicanism and the Small-Republic Thesis*, 27 No. 1 HISTORY OF POLITICAL THOUGHT 50, 58 (2006).

129. THE FEDERALIST No. 9 (Alexander Hamilton).

130. THE FEDERALIST No. 47 (James Madison).

whenever the three powers are accumulated in the same hands,<sup>131</sup> writing:

The oracle who is always consulted and cited on [separation of powers] is the celebrated Montesquieu. If he be not the author of this invaluable precept in the science of politics, he has the merit at least of displaying and recommending it most effectually to the attention of mankind. Let us endeavor, in the first place, to ascertain his meaning on the point.<sup>132</sup>

Madison then explains Montesquieu's reasoning as to why the unity of powers in the same hands destroys liberty, yet the partial mixture of powers can check each branch of government.<sup>133</sup> When Madison has satisfactorily proven that both the national Constitution and various state constitutions do not deviate from Montesquieu's theory, he concludes that the various constitutions' separation of powers doctrines "correspond[] precisely with the doctrine of Montesquieu, as it has been explained, and is not in a single point violated by the plan of the convention."<sup>134</sup>

Though some principles underlying the separation of powers doctrine preceded Montesquieu's work, Montesquieu brought the idea to the forefront in the era of constitutional drafting.<sup>135</sup> The state constitutions written shortly after the Declaration of Independence frequently contain passages that borrow heavily from *Spirit of the Laws*.<sup>136</sup> Delegates in the Constitutional Convention cited

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131. *Id.*; MONTESQUIEU, *supra* note 15, at 157 ("When legislative power is united with executive power in a single person or in a single body of the magistracy, there is no liberty, because one can fear that the same monarch or senate that makes tyrannical laws will execute them tyrannically . . . All would be lost if the same man or the same body of principal men, either of nobles, or of the people, exercised these three powers").

132. THE FEDERALIST No. 47 (James Madison).

133. *Id.*; MONTESQUIEU, *supra* note 15, at 157.

134. THE FEDERALIST No. 47 (James Madison). *See also* COHLER, *supra* note 90, at 155 (University Press of Kansas 2021) "Size, representation, and the division of powers—all serve to break up the unanimity that is the result of the passions and to encourage the variety of reason—that is, to discourage tyranny or despotism and to encourage liberty").

135. *See* SPURLIN, *supra* note 119, pt. 7 at 3. Montesquieu writes in *Spirit of the Laws* purporting to make observations on the British government. However, it's clear, and the subject of a frequent criticism of Montesquieu, that the British government didn't actually have this tripartition: "On the slightest view of the British Constitution, we must perceive that the legislative, executive, and judiciary departments are by no means totally separate and distinct from each other." THE FEDERALIST No. 47 (James Madison).

136. *See, e.g.*, VA. CONST. art. III, § 1 ("The legislative, executive, and judiciary departments, shall be separate and distinct, so that neither exercise the powers properly belonging to the other: nor shall any person exercise the powers of more than one of them, at the same time"); MASS CONST. pt. 1, art. XXX ("In the government of this Commonwealth, the legislative department shall never exercise the executive and judicial powers, or either of them: The executive shall never

Montesquieu three times when discussing pivotal issues such as the balance between large and small states,<sup>137</sup> representation,<sup>138</sup> and separation of powers.<sup>139</sup>

Indeed, the United States government essentially codified Montesquieu's "parchment barriers"<sup>140</sup>— separation of powers and federalism.<sup>141</sup> Because Montesquieu built these governmental structures to protect his idea of liberty, the founders must have wished to protect that same spirit of tranquility. If that is the case, and liberty in America consists of the citizens' tranquility of spirit, one must consider where gun rights could fit into this paradigm.

#### IV. MONTESQUIEU AND GUNS

Popular discourse often frames liberty and gun regulation as diametrically opposed: when we implement gun restrictions, we sacrifice freedom for mere policy preferences. However, the practice of public carrying interferes with the citizens' spirit of tranquility and therefore poses a vicious threat to liberty. Thus, regulations that target public carrying instead enhance liberty. The rise of armed vigilantism, often formulated as a natural right to self-defense, presents a prime example of why open, public carry must be curtailed to protect liberty.

The act of public carrying is incompatible with liberty because guns' capacity to cause grievous harm is frightening.<sup>142</sup> This should not be surprising. Though public health statistics involving firearms are limited

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exercise the legislative and judicial powers, or either of them: The judicial shall never exercise the legislative and executive powers, or either of them").

137. James Madison, Notes of Debates in the Federal Convention of 1787 Reported by James Madison, June 30 (1787) (Yale Law School Avalon Project), [https://avalon.law.yale.edu/18th\\_century/debates\\_630.asp](https://avalon.law.yale.edu/18th_century/debates_630.asp).

138. James Madison, Notes of Debates in the Federal Convention of 1787 Reported by James Madison, July 11 (1787) (Yale Law School Avalon Project), [https://avalon.law.yale.edu/18th\\_century/debates\\_711.asp](https://avalon.law.yale.edu/18th_century/debates_711.asp).

139. James Madison, Notes of Debates in the Federal Convention of 1787 Reported by James Madison, July 17 (1787) (Yale Law School Avalon Project), [https://avalon.law.yale.edu/18th\\_century/debates\\_711.asp](https://avalon.law.yale.edu/18th_century/debates_711.asp).

140. THE FEDERALIST NO. 48 (James Madison).

141. *See generally* THE FEDERALIST NOS. 48, 51 (James Madison) NOS. 9, 66 (Alexander Hamilton) (explaining the purpose of these fundamental governmental concepts).

142. It's significant to note that, in some locales, there may be a long-standing tradition of public carrying such that their presence doesn't tend to cause fright. The externalities to our liberty interests might similarly differ based on population density. If anything, this objection only shows that firearms regulation should be left to state and local governments to administer in accordance with their citizens' level of comfort. *See, e.g.*, Joseph Blocher, *Firearm Localism*, 123 YALE L. J. 121–24 (2013) (addressing the relevance of geographic variations such as the urban/rural distinction in an analysis of firearm localism).

by extensive lobbying efforts by the NRA,<sup>143</sup> studies show the obvious: the presence of guns leads to severe injury.<sup>144</sup> In 2020, 19,384 people were murdered by gunshot in the U.S.—the highest total in over half a century.<sup>145</sup> Yet the NRA minimizes the significance of the fear that guns evoke, claiming, “Our rights don’t end where your feelings begin.”<sup>146</sup>

But fear is not just a feeling; it can erode democracy. It sows mistrust and disorder until no one can exercise liberty; as Montesquieu described, fear is the ruling principle of despotic governments.<sup>147</sup> When we live with fear, it “vitiates love within the household . . . colonizes the whole of man’s inner life in despotic states, crowding out all other passions . . . in the presence of habitual fear, reason atrophies and man descends to the level of beasts.”<sup>148</sup> It does so because it chokes our sense of security—the “good which enables us to enjoy other goods.”<sup>149</sup>

But the fear can cut in the other direction too. Sixty-seven percent of gun owners purchase their weapon for self-protection<sup>150</sup> and then overwhelmingly carry their firearms due to a fear of victimization.<sup>151</sup> In this sense, the government must choose between two options: protecting the security of the armed or mitigating the fear of the unarmed.<sup>152</sup>

143. Sarah Zhang, *Why Can’t the U.S. Treat Gun Violence as a Public-Health Problem*, THE ATLANTIC (Feb. 15, 2018), <https://www.theatlantic.com/health/archive/2018/02/gun-violence-public-health/553430/>.

144. Sam Wang, *Scientific American’s Gun Error*, PRINCETON ELECTION CONSORTIUM, <https://election.princeton.edu/articles/scientific-americans-gun-error/>. There is an astounding, near-linear correlation between the rate of firearms ownership and firearms deaths when comparing different states. The correlation coefficient (R) between these two variables is .63. If R=1, there would be a perfect positive correlation between the variables, while R=0 would signify no correlative relationship. ]

145. John Gramlich, *What the Data Says About Gun Deaths in the U.S.*, PEW RESEARCH CENTER, <https://www.pewresearch.org/fact-tank/2022/02/03/what-the-data-says-about-gun-deaths-in-the-u-s/>.

146. See NRA (@NRA), TWITTER (Aug. 8, 2020, 7:35 PM), <https://twitter.com/NRA/status/1292243058784952321>; see also Tomi Lahren (@TomiLahren), TWITTER (Mar. 26, 2018, 9:58 PM), <https://twitter.com/TomiLahren/status/978451170447343617> (“Sorry, #marchforourlives kids but my rights don’t end where your feelings begin!”).

147. MONTESQUIEU, *supra* note 15, at 28.

148. CALLANAN, *supra* note 79, at 241.

149. MONTESQUIEU, *supra* note 78, at 1574, 1797.

150. Parker, *supra* note 5.

151. See generally Will Hauser & Gary Kleck, *Guns and Fear: A One-Way Street?*, 59 CRIME & DELINQUENCY 271 (2013) (noting that the fear of victimization by non-owners encourages them to own guns).

152. Of course, natural differences in size and strength create some disparities in force between unarmed individuals. However, no conceivable disparity in strength could overcome the potential gulf in force between an armed and unarmed individual.

Choosing the first option would only compound fear in the polity. Of course, any individual may be better protected—that is, better at defending themselves from violent attack—when they can carry a firearm.<sup>153</sup> Yet, when an individual carries a deadly weapon, it increases others’ risk of serious injury, as there is no way to distinguish the prototypical “good guy” with a gun from a “bad guy” with a gun.<sup>154</sup> Unarmed citizens in this regime have only a few options: 1) rely on the police to protect them, 2) trust that the stranger with a gun poses no risk of harm to them, 3) avoid areas where guns are present, or 4) arm themselves in response. Yet the first two options are irrational. One cannot rely on a police response when carrying a firearm is legal so long as the carrier does not display an intent to menace others.<sup>155</sup> And as Hobbes rightly observes, it is contrary to human nature to entrust one’s life in the hands of the armed stranger.<sup>156</sup>

Thus, the unarmed individual must choose between either avoidance or defensive arms. Needing to avoid public places due to the risk of harm is precisely the type of arbitrary restraint on our will that vitiates our liberty.<sup>157</sup> And the need to arm oneself to deter potential threats begets an arms race—a race to the bottom—that poses a compounding threat to our freedom.<sup>158</sup> This mutually assured destruction is not peace; it is *détente*.<sup>159</sup> Although an individual’s arms may constitute a productive solution to his own fear, the externalities are substantial. The state must prevent these costs to others.

The task of restricting guns in public is complicated by the argument that these restrictions would overburden personal freedoms, especially self-defense.<sup>160</sup> Commentators, such as Nelson Lund, frequently cite Locke to show that self-defense is a fundamental right:

153. While theoretically intuitive, this point is actually debatable. Individuals carrying a gun are 4.46 times more likely to be shot in an assault than unarmed individuals. Charles C. Branas et al., *Investigating the Link Between Gun Possession and Gun Assault*, 99 AMERICAN JOURNAL OF PUBLIC HEALTH 2034, 2037.

154. Schoetz, *supra* note 5.

155. Joseph Blocher & Reva B. Siegel, *When Guns Threaten the Public Sphere: A New Account of Public Safety Regulation under Heller*, 116 NW. U. L. REV. 139, 160–61.

156. HOBBS, *supra* note 37, at 116 (“[W]hen taking a journey, he armes himself, and seeks to go well accompanied; when going to sleep, he locks his doores; when even in his house he locks his chests.”).

157. CALLANAN, *supra* note 79, at 237.

158. See generally, Guha Krishnamurthi & Peter Salib, *Small Arms Races*, U. CHI. L. REV. (forthcoming), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=4007572](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4007572) (arguing that gun regimes which allow public carrying create small-scale arms races among rational citizens).

159. DEBRABANDER, *supra* note 6, at 157.

160. See Bernstein, *supra* note 8, at 179 (asserting that a constitutional right of self-defense,

In support of what our Declaration of Independence calls the unalienable rights to life, liberty, and the pursuit of happiness, Locke reasoned that a forcible attack on one's freedom or property, whether in the state of nature or in society, implies a design to take away everything else including one's life . . . that establishes the right to kill a robber.<sup>161</sup>

Indeed, the Supreme Court recently identified a constitutional right to carry arms in public for self-defense in *New York State Rifle & Pistol Association v. Bruen*.<sup>162</sup>

Yet taking Locke's *Second Treatise of Government* as a whole, Locke cannot be said to support a total right to public, armed self-defense. The governmental framework that would allow this—one that essentially resembles the state of nature—is precisely what Locke determines man will contract to exit. Indeed, it is the failure of private, armed defense that led to the establishment of government, and thus liberty, in the first place.<sup>163</sup> The state of nature grants each individual the unbounded responsibility to punish offenders.<sup>164</sup> Yet humans cannot exercise this responsibility adequately because they are self-biased and susceptible to intense passion.<sup>165</sup> It is precisely this disposition of humans that makes the state of nature, while naturally peaceful, instead teeter on the brink of war.<sup>166</sup> We cede these natural powers to the government to resolve conflicts between men and avoid war.

Furthermore, criminal law has long subjected self-defense, like all other rights, to reasonable regulation for the betterment of the polity. Although the doctrine varies by state, it is cabined by several requirements, including necessity, objectively reasonable belief, imminency, non-aggression, reasonable degree of force, and (in some

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which bars government regulation of firearms outside the home, is particularly important in the modern context); see also *Heller*, 599 (calling self-defense “the central component of the right” to keep and bear arms).

161. Nelson Lund, *The Future of the Second Amendment in a Time of Lawless Violence*, 116 *Nw. U. L. REV.* 81, 97 (2021).

162. 142 S.Ct. 2111, 2134–35 (2022); see also *Peruta v. California*, 137 S. Ct. 1995, 1998 (2017) (Thomas, J., dissenting from denial of certiorari) (“I find it extremely improbable that the Framers understood the Second Amendment to protect little more than carrying a gun from the bedroom to the kitchen”).

163. Paul Rosenberg, *Locke and Unload: Why the NRA Doesn't Understand Rights*, *AL JAZEERA* (Dec. 27, 2012), <https://www.aljazeera.com/opinions/2012/12/27/locke-and-unload-why-the-nra-doesnt-understand-rights>.

164. LOCKE, *supra* note 18, at 124.

165. *Id.* at 127.

166. Rosenberg, *supra* note 163.

jurisdictions) a duty to retreat.<sup>167</sup> Modern firearm usage compels a new limitation on self-defense. The right to self-defense should exclude the right to arm oneself openly and publicly, as the maximization of one’s preparedness to counter potential attacks comes at the vicious expense of others.

Armed vigilantism in recent years has shown how claims of armed, mobile self-defense can breed violence, deprivation of core constitutional rights, and grave harm to liberty. For example, the protests of 2020, in some cases, caused considerable damage. The outrage after George Floyd’s murder sparked rioting in the Twin Cities that caused at least \$500 million in property damage<sup>168</sup> and two deaths.<sup>169</sup> In many other cities, such as Portland<sup>170</sup> and New York City,<sup>171</sup> rioters similarly inflicted significant damage and violence. In the face of the protests, the public saw some police officers abdicate their duty by standing down, calling in sick, or resigning altogether.<sup>172</sup> These developments coincided with a push by progressive activists to “defund” police departments, though it is difficult to pin down a singular meaning of the term.<sup>173</sup>

In response to the perceived lawlessness in cities, some civilians urged that police no longer represented a viable means of protection and that people needed to arm themselves instead to defend their city.<sup>174</sup> Proponents argued that “[i]n the absence of a viable, effective

167. See generally Joshua Dressler & Stephen P. Garvey, *Criminal Law, Cases and Materials* 516–47 (8th ed. 2019) (explaining traditional and modern limitations on the exercise of self-defense).

168. Josh Penrod et al., *Buildings Damaged in Minneapolis, St. Paul After Riots*, STAR TRIB. (July 13, 2020), <https://www.startribune.com/minneapolis-st-paul-buildings-are-damaged-looted-after-george-floyd-protests-riots/569930671/> [<https://perma.cc/54CE-V6AE>].

169. Libor Jany, *Body Found in Wreckage of Pawnshop Burned During George Floyd Unrest*, STAR TRIB. (July 21, 2020), <https://www.startribune.com/body-found-in-wreckage-of-mpls-pawn-shop-burned-during-george-floyd-unrest/571838681/> [<https://perma.cc/3NZD-UBDT>].

170. Bryant Clerkey, *Downtown Portland has Lost \$23 Million in Recent Riots, Says Portland Business Alliance*, KGW8 (June 24, 2020), <https://www.kgw.com/article/news/local/protests/portland-business-alliance-puts-out-report-on-damages-during-riots/283-927c8812-0010-4561-921a-f0556a5b1a2b>.

171. Ashley Southall, *Shootings Have Soared. Is the N.Y.P.D. Pulling Back?*, N.Y. TIMES (July 16, 2020), <https://www.nytimes.com/2020/07/16/nyregion/nyc-shootings-nypd.html> [<https://perma.cc/D2UR-399S>].

172. Bernstein, *supra* note 8, at 197–202.

173. Ines Novacic, *“Defund the Police” Made Headlines. What Does It Look Like Now?*, CBS NEWS (Mar. 11, 2021), <https://www.cbsnews.com/news/defund-the-police-meaning/>.

174. Bernstein, *supra* note 8, at 179 (declaring that the “looting, rioting, and other lawless and violent behavior” during the summer of 2020 represented an abdication of the police’s role in providing personal security, and people “need firearms to defend themselves”).



police presence, the primary mechanism citizens have to protect themselves, their businesses, their employees, and their property from violence is armed resistance to the criminals who would prey upon them.”<sup>175</sup> This desire to muster an armed defense motivated Kyle Rittenhouse to travel from Antioch, Illinois to protests in Kenosha, Wisconsin.<sup>176</sup> Armed with an AR-15 style, semiautomatic rifle, Rittenhouse fatally shot two individuals and injured another.<sup>177</sup> His acquittal in November 2021 could galvanize others to armed vigilantism in purported defense of their city.

Actions like Rittenhouse’s threaten to crush liberty in the United States and turn the polity into an armed citizens’ despotism. According to Montesquieu, the government is not the only entity that can grow despotic; other citizens’ “mores, manners, and received examples” can crush the “tranquility of spirit which comes from the opinion each one has of his security.”<sup>178</sup> Indeed, the governmental structures that he popularized—and that were adopted by the Framers—aimed to ensure “one citizen cannot fear another citizen.”<sup>179</sup> Yet when civilians take it upon themselves to assume the policing of the state, they reintroduce the state of nature—a state characterized by fear and dominated by man’s passions and biases.<sup>180</sup> It is insufficient to argue that police alone are ineffective in providing for defense. When the government ineffectually carries out its duties, the solution to this problem must lie in democratic procedures and not in individuals arming themselves to the detriment of the rest. The danger of misidentifying ineffective governance with abdication is too steep and the cost to the liberty of all is too great.

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175. *Id.* at 209. Notably, local governments did not invite these vigilantes to supplant police departments. During summer protests in Chicago, Mayor Lori Lightfoot scolded citizens: “Do not pick up arms and try to be police. If there’s a problem, call 911.” Fran Spielman, *Lightfoot: ‘We did not Stand by to Watch the South and West Sides Burn’*, CHI. SUN-TIMES (June 1, 2020), <https://chicago.suntimes.com/city-hall/2020/6/1/21276893/chicago-protests-looting-aldermen-national-guard-troops-protect-neighborhoods>.

176. Haley Willis, et al., *Tracking the Suspect in the Fatal Kenosha Shootings*, NY TIMES (Aug. 27, 2020), <https://www.nytimes.com/2020/08/27/us/kyle-rittenhouse-kenosha-shooting-video.html>.

177. *Id.*

178. MONTESQUIEU, *supra* note 15, at 157.

179. *Id.*

180. See DEBRABANDER, *supra* note 6, at 72 (“[W]hen all are sovereign, the sovereignty of the individual is intolerably tenuous”).