

# POSTSCRIPT: SOME OBSERVATIONS ABOUT GUNS AND SOVEREIGNTY

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## I

### INTRODUCTION

The symposium on the Second Amendment sponsored by the Brennan Center elicited uniformly first-rate works of scholarship. Given other commitments and my doubts that I had anything new to say about the Second Amendment, I volunteered instead to offer some comments by way of a postscript to the various articles. Although each deserves careful reading and much discussion, I am going to focus on a central theme—the concept of sovereignty—that dominates Darrell Miller’s fascinating article and is present as well in Saul Cornell’s.<sup>1</sup>

Sovereignty is a word that, despite all of the criticisms leveled against it by political theorists and political scientists alike,<sup>2</sup> simply refuses to go away; it remains an important aspect of popular discourse and of scholarly writing, despite the skepticism about the utility of the term in the twenty-first century. What generates such skepticism in many cases is the empirical reality that one can scarcely find real-world exemplars of the classical sovereign: one who is capable of unlimited rule and is not subject even to the slightest authority of anyone else.

Not surprisingly, this notion of sovereignty is most easily associated with divine potentates.<sup>3</sup> It is no coincidence that I begin my course, “Aspects of

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1. I offered a reading course at the Harvard Law School in the fall of 2016 titled “Aspects of Sovereignty,” and I offered a full-scale seminar with the same title in the spring of 2017 at my home institution, the University of Texas Law School. Among other topics covered in that seminar was the deep connection between firearms and sovereignty, the central topic of this postscript.

2. See generally DIETER GRIMM, *SOVEREIGNTY: THE ORIGIN AND FUTURE OF A POLITICAL AND LEGAL CONCEPT* (Belinda Cooper trans., 2015) (offering a brief and accessible overview by a distinguished academic and former member of the German Constitutional Court); STEPHEN D. KRASNER, *SOVEREIGNTY: ORGANIZED HYPOCRISY* (1999) (presenting a classic critique of the term sovereignty by a political scientist); *SOVEREIGNTY IN FRAGMENTS* (Hent Kalmo & Quentin Skinner eds., 2010) (providing an excellent introduction to the immense challenges presented by political theorists who are sensitive to historical changes in the use of key concepts).

3. See, e.g., JEAN BETHKE ELSHTAIN, *SOVEREIGNTY: GOD, STATE, AND SELF* (2008) (arguing that the notion of sovereignty as complete independence and self government have shaped contemporary notions of God, state, and self).

Sovereignty,”<sup>4</sup> with an examination of Abraham’s apparent willingness to obey the Divine command to sacrifice his son Isaac<sup>5</sup> and other exemplifications of an all-powerful God to whom nothing more than unquestioning obedience and glorification is due. This point is powerfully made as well by the Book of Job.<sup>6</sup> It is not difficult to find similar materials in the two other religions linked with Abraham, Christianity and Islam. With regard to Christianity, consider only Jonathan Edwards’s classic sermon, *Sinners in the Hands of an Angry God*. “There is nothing that keeps wicked men at any one moment out of hell,” Edwards thundered, “but the mere pleasure of God.” It is surely not any sense of desert. And Edwards emphasizes that “[b]y the mere pleasure of God, I mean his sovereign pleasure, his arbitrary will, restrained by no obligation, hindered by no manner of difficulty . . . .”<sup>7</sup>

For Islam, one can cite not only a number of Q’ranic passages,<sup>8</sup> but also relevant parts of Saudi, Pakistani, and Iranian constitutions.<sup>9</sup> Religion and state are completely joined inasmuch as these states proclaim their status as Islamic republics with concomitant duties to be faithful to Allah’s commands. For all such gods or instantiations of a single Abrahamic God, sovereignty is most visible

4. See *supra* note 1.

5. See *Genesis* 22:10.

6. The entire book of *Job* is an illustration of the arbitrary infliction of sheer power on someone who by no plausible theory “deserves” what happens to him. Paradoxically or not, the principal inflictor is Satan, though he can be viewed as exercising power that has been delegated to him by the “true” sovereign—God. See, e.g., *Job* 1:6–12. (“Now there was a day when the sons of God came to present themselves before the LORD, and Satan came also among them. And the LORD said to Satan, From where come you? Then Satan answered the LORD, and said, From going to and fro in the earth, and from walking up and down in it. And the LORD said to Satan, Have you considered my servant Job, that there is none like him in the earth, a perfect and an upright man, one that fears God, and eschews evil? Then Satan answered the LORD, and said, Does Job fear God for nothing? Have not you made an hedge about him, and about his house, and about all that he has on every side? you have blessed the work of his hands, and his substance is increased in the land. But put forth your hand now, and touch all that he has, and he will curse you to your face. And the LORD said to Satan, Behold, all that he has is in your power; only on himself put not forth your hand. So Satan went forth from the presence of the LORD.”). Whatever might be said about the lessons taught by Job, it is surely not that God (or any other “sovereign”) is necessarily just; instead, the principal lesson is that God has limitless power, which mortals must recognize, submit to, and, indeed, praise. See also *Job* 41:10–11 (“ . . . who then is able to stand before me? Who hath prevented me, that I should repay him? whatsoever is under the whole heaven is mine.”).

7. JONATHAN EDWARDS, *SINNERS IN THE HANDS OF AN ANGRY GOD. A SERMON PREACHED AT ENFIELD, JULY 8TH, 1741, AT A TIME OF GREAT AWAKENINGS AND ATTENDED WITH REMARKABLE IMPRESSIONS ON MANY OF THE HEARERS* (Reiner Smolinski ed., 1741), <http://digitalcommons.unl.edu/cgi/viewcontent.cgi?article=1053&context=etas> [<https://perma.cc/4TGG-CHFV>].

8. Among many verses that could be quoted are the following:

3: Al-Imran: 26 (“Say: O Allah! Owner of Sovereignty! Thou givest sovereignty unto whom Thou wilt, and Thou withdrawest sovereignty from whom Thou wilt. Thou exaltest whom Thou wilt and Thou abasest whom Thou wilt. In Thy hand is the good. Lo! Thou art to do all things.”); 9: At-Taubah: 116 (“Lo! Allah! Unto Him belongeth the sovereignty of the heavens and the earth. He quickeneth and He giveth death. And ye have instead of Allah no protecting friend nor helper.”).

9. See THE CONSTITUTION OF SAUDI ARABIA, Mar. 1, 1992, arts 1, 5–8; THE CONSTITUTION OF THE ISLAMIC REPUBLIC OF PAKISTAN, Apr. 12, 1973, pmbl., ISLAMIC REPUBLIC OF IRAN CONSTITUTION, Mar. 29–30, 1979, art. [2].

when it generates often terrible violence with accompanying death and destruction that is inflicted on those who would dare to question Divine authority.<sup>10</sup>

God only rarely governs directly. Human rulers are appointed for that purpose, and St. Paul assured his readers in the Letter to the Romans that all such rulers are in fact the agents of God and, therefore, not to be questioned.<sup>11</sup> How do rulers engender proper respect among their flock? The answer is often by inflicting public violence to both deter anyone who might be tempted to rebel and just as importantly, to use the spectacle of violence as proof of one's sovereign authority.<sup>12</sup> Thus, I think it important to look at some recent examinations of the history of torture and capital punishment. Both involve claims by sovereign authority to exercise complete and utter control with all of the rights to use the object of control as the equivalent of any other chattel within the owner's sovereign's domain.<sup>13</sup>

## II

### THE HISTORY OF SOVEREIGNTY

As Paul Kahn in particular has stressed with great eloquence, sovereignty has since the beginning of time been associated with a willingness to kill, sacrifice, or risk being killed (or sacrificed) while fighting the sovereigns' wars or otherwise fulfilling the sovereign's desires.<sup>14</sup> What distinguishes the sacrifices of Isaac and Jesus is not only that the first apparently was unconsummated.<sup>15</sup> Rather, it is that

10. For an example of eternal damnation resulting in the endless suffering obscenely set out by Dante in the *Inferno* portion of what he dares to call *The Divine Comedy*, see DANTE, *THE DIVINE COMEDY, BOOK I: INFERNO* (Clive James ed., 2013) (1307).

11. See *Romans* 13:1–3 (“Let everyone be subject to the governing authorities, for there is no authority except that which God has established. The authorities that exist have been established by God. Consequently, whoever rebels against the authority is rebelling against what God has instituted, and those who do so will bring judgment on themselves.”).

12. See, e.g., *Numbers* 16 (describing the infliction of death and destruction as the exemplification of divine sovereignty when God causes an earthquake to swallow up Koreh and his followers who dared to challenge the authority of Moses as God's singular agent).

13. See, e.g., *ZERO DARK THIRTY* (Columbia Pictures 2013) (where an interrogator, Daniel, states to Amar, the prisoner, “I own you, Amar. You belong to me.”). To belong to someone is to be a slave, to be entirely subject to someone claiming sovereign power over oneself. Incidentally, this is what made Roger Taney's assertion in *Dred Scott* that blacks had no rights that whites “[were] bound to respect” so telling. *Scott v. Sandford*, 60 U.S. 393, 407 (1857). He did not say that blacks as a matter of legal reality had no rights anywhere in the United States. Surely that was false. Instead, he claimed that any such rights were by sufferance of those who were exclusively sovereign within the United States, who by Taney's account could include no black people at all. What the sovereign whites gave, they could take away in an instant. Again, that's just what sovereignty entails. To say otherwise is to assert that they are not really sovereign, for they have only limited powers. From one perspective, all constitutionalism, insofar as it tries to limit rather than simply enable power, is a critique of sovereign authority.

14. See PAUL KAHN, *SACRED VIOLENCE, TORTURE, TERROR, AND SOVEREIGNTY* 21–41 (2008). Kahn also emphasizes the willingness to accept one's own sacrifice in the name of sovereign command. This willingness is exemplified by Isaac's and Jesus' readiness to sacrifice themselves. See *Genesis* 22:10; *Romans* 3:25.

15. But see SHALOM SPIEGEL, *THE LAST TRIAL: ON THE LEGENDS AND LORE OF THE COMMAND TO OFFER ISAAC AS A SACRIFICE*, 60–61 (Judah Goldi trans., 1993) (suggesting from a collection of

Abraham was apparently prepared to do his nefarious deed in private or, perhaps more to the point, before the one and only audience that counted: God.<sup>16</sup> In contrast, Jesus was publicly crucified in order to illustrate the purported sovereign power of Rome,<sup>17</sup> and it was important that an extensive and largely unsympathetic audience could observe the humiliation of the ostensible messiah and his unimaginable suffering on the cross. David Garland, in his outstanding book on capital punishment, notes the public character of that form of state violence at least into the eighteenth century.<sup>18</sup> In its own way, the carnival-like spectacle glorified the claims to authority of the monarchs ordering it, often in the name of God.<sup>19</sup>

Carl Schmitt famously, or infamously, suggested that sovereign power can be identified by asking who can declare a state of exception to ordinary law that may result in turning the normal legal universe upside down.<sup>20</sup> Perhaps we might amend that to include the ability of the would-be sovereign, in addition to naming the state of exception, to also order the infliction of death and mayhem on those regarded as enemies<sup>21</sup> and impose the risk of being killed or suffering torture while in the service of the sovereign.

### III

#### MODERN SOVEREIGNTY

Does it matter that the dominant concepts of sovereignty shift over the centuries with the contemporary states often relying on the myth of popular sovereignty instead of obeisance to monarchs who claim the divine right of kings? Why exactly does that make a crucial difference, save in the rhetoric of politics? After all, those who proclaim that they legitimately rule because they are the chosen representatives of We the People<sup>22</sup> or who otherwise instantiate the people as a Leninist vanguard are faced with the same dilemmas and temptations that all other rulers face. How do contemporary rulers, as ordinary human beings, manage to persuade others that they enjoy the trappings of sovereign power against those who might resist their claims? As H.L.A. Hart famously argued, the difference between the gun-brandishing thief and the tax collector boils down to

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Jewish stories that Abraham did slay his son).

16. See *Genesis* 22:10.

17. See *Romans* 3:25.

18. See DAVID W. GARLAND, *PECULIAR INSTITUTION: AMERICA'S DEATH PENALTY IN AN AGE OF ABOLITION* 75–87 (2010) (characterizing the public death penalty as a way to promote state interests from 1400 to 1700).

19. See *id.* at 84–87 (arguing that monarchs used ritual gestures and symbols to create connections to spiritual authority).

20. See CARL SCHMITT, *POLITICAL THEOLOGY: FOUR CHAPTERS ON THE CONCEPT OF SOVEREIGNTY* 5 (George Schwab trans., 2006) (defining sovereignty as whoever can pronounce and bring into effect the state of exception).

21. Schmitt's emphasis on the importance of "the enemy" is at the heart of his book. See CARL SCHMITT, *THE CONCEPT OF THE POLITICAL* 26 (1996) ("The specific political distinction to which political actions can be reduced is that between friend and enemy.").

22. U.S. CONST. pmb1.

an internal feeling of obligation based on complex “rules of recognition” that connect the collector, unlike the thief, to someone or to some institution that is in fact licensed to issue commands that ought to be obeyed.<sup>23</sup> Most persons undoubtedly do not consciously wish to imagine themselves as criminals doing the wrong thing, but under the cloak of an institution they are not criminals but civil servants.

Consider Daniel, an American about to interrogate a suspected terrorist, Amar, at the beginning of the movie *Zero Dark Thirty*, which examines American practices of interrogation in the Afghanistan and Iraqi wars.<sup>24</sup> Daniel no doubt believes that he is simply being a loyal American attempting to serve the public interest by defending the community against what was defined as the global war on and against terrorism. As Mark Osiel so powerfully pointed out in his own study of the Dirty War in Argentina, at least some of those who tortured others did not immediately believe they were doing the right thing.<sup>25</sup> They had to be persuaded by a mixture of political leaders, generals within the military, and priests that they were serving abstract justice and the higher interests of the Argentine people.

More than a quarter century ago, I suggested that there is a deep tension between Anglo-American civic republican political theory and a far more statist theory identified especially with the German sociologist Max Weber.<sup>26</sup> He contended that force is legitimate only “so far as it is either permitted by the state or prescribed by it.”<sup>27</sup> Weber notably argued that “[t]he claim of the modern state to monopolize the use of force is as essential to it as its character of compulsory jurisdiction and continuous organization.”<sup>28</sup> I argued instead that Weber’s definition was not in fact truly analytic, but was instead a contingent description of only some states rather than of all modern states.<sup>29</sup> At least some versions of both civic republican and liberal theory placed legitimate use of the means of violence in a political community that was privileged to hold ostensible sovereigns accountable ultimately by exercising their right to attempt the violent overthrow of tyrannical sovereigns.<sup>30</sup>

23. H.L.A. HART, *THE CONCEPT OF LAW* 96 (3d ed. 2012).

24. See *ZERO DARK THIRTY* *supra*, note 13.

25. See Mark Osiel, *The Mental State of Torturers: Argentina’s Dirty War*, in *TORTURE* 133 (Sanford Levinson ed., 2006). See generally MARK OSIEL, *MASS ATROCITY, ORDINARY EVIL, AND HANNAH ARENDT* (2002) (examining the social conditions and personal justifications used by high-ranking officials in Argentina’s Dirty War); MARK OSIEL, *OBEYING ORDERS* (1999) (arguing that enlarging the role of legal counsel would help ground professional ideals for conduct in the military with morality and thus decrease mass atrocity).

26. See Sanford Levinson, *The Embarrassing Second Amendment*, 99 *YALE L.J.* 637, 637–59 (1989).

27. See MAX WEBER, *THE THEORY OF SOCIAL AND ECONOMIC ORGANIZATION* 156 (T. Parsons ed., A.M. Henderson & T. Parsons trans., 1947).

28. *Id.*

29. Levinson, *supra* note 26, at 650.

30. See, e.g., RICHARD UVILLER AND WILLIAM MERKEL, *THE MILITIA AND THE RIGHT TO ARMS, OR, HOW THE SECOND AMENDMENT FELL SILENT* (2002), reviewed in Sanford Levinson, *Superb History, Dubious Constitutional and Political Theory: Comments on Uviller and Merkel, The Militia and the Right to Arms*, 12 *WM. & MARY BILL RTS. J.* 315, 315–33 (2004).

The most noteworthy example of such a rejection of ordinary sovereign authority, for Americans, is the American Revolution. It was actually a violent secession from the British Empire with the justification proffered in the Declaration of Independence. Most judges at the time, who had been appointed by the Crown, likely recognized the sovereignty of the King in Parliament following the Glorious Revolution of 1688. This was also true, no doubt, of many well-trained lawyers, even as others—those we now deem patriots or founders of the new nation—ended up rejecting British sovereignty in the name of their new popular sovereignty. The arguments made at that time have penumbras and emanations that resonate even in our own time. Consider in this context Edward Abbey's emendation of the famous bumper sticker that when guns are outlawed, only criminals will have guns. That is demonstrably false, even as a conceptual matter. As Abbey put it, "If guns are outlawed, only the government will have guns."<sup>31</sup> Whether one would welcome or instead be horrified by this prospect defines a fundamental cleavage in contemporary American politics, usually expressed, whether cogently or not, in arguments about the Second Amendment.

#### IV

#### SOVEREIGNTY'S EFFECT ON THE RIGHT TO CARRY ARMS THROUGHOUT HISTORY

Both Darrell Miller's examination of medieval English law and theory<sup>32</sup> and Saul Cornell's references to the importance of the king's peace in understanding the limits of any right to carry arms in old England and their American colonies<sup>33</sup> help us understand the degree to which we live in decidedly different times that operate under quite different assumptions. Both underscore the importance of historical perspective, best expressed, perhaps, in L. P. Hartley's famous statement at the beginning of his 1953 novel *The Go Between*: "The past is a foreign country; they do things differently there."<sup>34</sup> It is important to be attentive to these differences even as we might wish also to recognize certain continuities between past and present. From earliest times, individuals have never been freely authorized to kill one another. For example, the Sixth Commandment prohibited killing.<sup>35</sup> But the conventional reading of this commandment is that it prohibits only murder—the taking of life by private individuals. God has no compunctions about killing those who are perceived as opponents of Divine authority, a view that is maintained by those who see themselves as instantiations of such authority.<sup>36</sup> One can act in service of the sovereign in ways that would be

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31. Levinson, *supra* note 26, at 650 (citing EDWARD ABBEY, *ABBEY'S ROAD* 130 (1991)).

32. See Darrell A. H. Miller, *Self-Defense, Defense of Others, and the State*, 80 *LAW & CONTEMP. PROBS.*, no. 2, 2017, at 87–91.

33. See generally Saul Cornell, *The Right to Keep and Carry Arms in Anglo-American Law, Preserving Liberty and Keeping the Peace*, 80 *LAW & CONTEMP. PROBS.*, no. 2, 2017.

34. L. P. HARTLEY, *THE GO BETWEEN* 9 (1953).

35. See *Exodus* 20:13.

36. This is not to deny the presence of radically pacifistic readings of the text, especially with regard to the authority of humans to kill one another. See generally STANLEY HAUERWAS, *THE PEACEABLE*

forbidden if only private ends were at stake. Thus Miller's careful reconstruction of the difference between the privileged taking of life while serving the sovereign monarch and those takings of life that required royal pardon is illuminating. It demonstrates the profound difference between the sensibility of the England that he is writing about and that drawn upon by Justice Scalia in his *Heller* opinion<sup>37</sup> that rested the Second Amendment on a desire to privilege private individuals when engaging in self-defense.

Many contemporary defenders of a robust Second Amendment are themselves devotees of libertarian natural rights. One need not necessarily reject that political philosophy in order to believe that it has almost nothing in common with the political theory so well delineated by Miller and alluded to by Cornell as well.<sup>38</sup> If one begins with notions of states-of-nature from which individuals emerge in order to protect their personal security, an emphasis on a right of self-defense makes a lot of sense. Why would individuals forego the right to protect themselves by having access to guns and then using them, if need be,<sup>39</sup> to kill those who appear to threaten that security? If this were the case, then why would it be necessary to receive the king's pardon after engaging in individual self-defense, whereas no pardon was necessary if death had been inflicted while defending the monarch or some cause favored by the monarch? One could ask similar questions about the priority of preserving the king's peace over preserving one's individual security. Hobbes and Locke are important historical personages in part because of the role they played in overthrowing a prior political consciousness and creating what we might wish to term a more modern understanding of politics. But the fact that we might even view that understanding as based on self-evident truths does not mean that these ostensible truths were grasped or accepted by prior generations, just as there are those who contest them today. That past *was* a different country; Miller, especially, is writing about an age when the divine right of kings was still taken seriously and the Lockean critique of tyrannical monarchs was almost literally unthinkable.<sup>40</sup>

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KINGDOM (1991). Not to mention the various Quaker, Mennonite, and other courageous enactors such commitments during times of war. Still, the point is that they are a decided minority even among those who profess to take the Sixth Commandment seriously. *See, e.g.,* Antonin Scalia, *God's Justice and Ours*, FIRST THINGS (May 2002), <https://www.firstthings.com/article/2002/05/gods-justice-and-ours> [<https://perma.cc/4R2Q-XZSB>]. Scalia quotes Paul's letter to the Romans and its argument that "government—however you want to limit that concept—derives its moral authority from God. It is the 'minister of God' with powers to 'revenge,' to 'execute wrath,' including even wrath by the sword (which is unmistakably a reference to the death penalty). Paul of course did not believe that the *individual* possessed any such powers. Only a few lines before this passage, he wrote, 'Dearly beloved, avenge not yourselves, but rather give place unto wrath: for it is written, Vengeance is mine; I will repay, saith the Lord.' And in this world the Lord repaid—did justice—through His minister, the state." For Scalia, "[t]hese passages from Romans represent the consensus of Western thought until very recent times," and it is fair to say that Scalia did not himself reject it.

37. District of Columbia v. Heller, 554 U.S. 570, 628 (2008).

38. *See* Miller, *supra* note 32, at 95; Cornell, *supra* note 33, at 39.

39. At least from the perspective of the scared individual.

40. Miller, *supra* note 32, at 87–93.

I believe that Miller indisputably demonstrates that the common law background of a right not only to bear arms, but more importantly, to *use* them for one of their intended functions—the killing of other human beings—is closely connected to recognition of the primacy of the sovereign monarch. “Early self-defense law in the Anglo-American tradition presumed that homicide—even in self-defense—required the pardon of the sovereign.”<sup>41</sup> He quotes another scholar for the proposition that “private citizens have power to execute their judgment ‘only insofar as they stand in the shoes of public officials to whom this authority belongs.’”<sup>42</sup> It is not the case that individuals were necessarily prevented from using their firearms to kill; rather, they had to point to some authorization from the sovereign, most commonly, impressment into the king’s service in order to fight a war or embark on a religious crusade to recapture the Holy Land. As is true today, those clothed with public authority are entitled to use deadly force against those perceived as enemies of the state. Or, to be a bit more precise, perhaps, it may take relatively little to clothe police officers with immunity from any prosecution when, for example, they are accused, at least in the court of public opinion, of employing unjustified deadly force with regard to young African-American males.<sup>43</sup> But at least we might take cold comfort in the fact that one had to be an actual police officer. There is a reason that we usually refer to those who are not clothed with such authority as vigilantes or members of lynch mobs without the same entitlement to immunity from prosecution.<sup>44</sup> The tin star or other badge signifying public office still seems to matter, and we might ask exactly why this is the case.

The answer can perhaps be found in the most important sentence in Miller’s article, which is his reminder that “[t]he common law of self-defense doesn’t begin with the individual, it begins with the sovereign.”<sup>45</sup> And one of the most important duties or prerogatives of the sovereign was precisely to establish a “king’s peace” that would supplant not only “the patchwork of local regulations,” but also “private vengeance [] and family feuds” that were too often present.<sup>46</sup> But this scarcely brought an end to killing or torture. Instead, there developed a sharp distinction between justifiable homicide—“those [killings] expressly ordered by the crown”<sup>47</sup>—and what was merely excusable homicide, the latter of which we today call self-defense. The clearest example of justifiable homicide is the executioner’s lopping off the head of a poor wretch (or, perhaps, Sir Thomas

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41. *Id.* at 86.

42. *Id.* at 87 (quoting Malcolm Thorburn, *Justification, Powers, and Authority*, 117 *YALE L.J.* 1070, 1126 (2008) (emphasis added)).

43. Julia Craven, *More than 250 People were Killed by Police in 2016*, HUFFINGTON POST (July 7, 2016, 9:45 AM), [http://www.huffingtonpost.com/entry/black-people-killed-by-police-america\\_us\\_577da633e4b0c590f7e7fb17](http://www.huffingtonpost.com/entry/black-people-killed-by-police-america_us_577da633e4b0c590f7e7fb17).

44. Save, of course, in “stand your ground” states that maximize the ability of private individuals to claim a privilege to kill anyone deemed threatening to them.

45. Miller, *supra* note 32, at 87.

46. *Id.* at 87–88.

47. *Id.* at 88.



Moore or Anne Boleyn) who had been sentenced by a monarch's magistrate to die. But this would also apply to those "happy few"<sup>48</sup> who accompanied Henry V to Agincourt and happily slaughtered the hapless French soldiers opposing them.

To be sure, it was not always easy to discern exactly when one was standing in the shoes of the sovereign, especially when it became the case that one could engage in "justifiable homicide" when trying "to arrest a manifest felon" or an "outlaw" attempting to resist arrest.<sup>49</sup> But the point, as Miller summarizes, is that "[h]omicide was justified only when one acted as an actual or implicit agent of the sovereign."<sup>50</sup> In that case, acquittal was the proper verdict for a defendant charged with homicide who could establish such agency. That was not the case for someone whose claim was only what we would call self-defense, unconnected with a truly public purpose. In that case, acquittal was improper even if many such killers were pardoned by a merciful sovereign willing, perhaps, to recognize the justice of taking the law into one's own hands. But there is no doubt that the law emanated from sovereign authority, not from the views of any individual that he was genuinely entitled to kill. Not until 1828 did Parliament officially eliminate the functional difference between homicide on behalf of the law and homicide in self-defense.<sup>51</sup> Perhaps what legal sociologists call the "law in the books" finally caught up with the "law in action" insofar as it had basically become routine for those who killed in self-defense to escape punishment.<sup>52</sup> But this should not license us to ignore the profound shift in consciousness that accompanies placement of such power in the hands of individuals. Consider the implications of Sir Matthew Hale's 1736 statement that "private persons are not trusted to take capital revenge on each other,"<sup>53</sup> which Miller, like Weber, interprets as standing for the proposition "that the king is to monopolize violence."<sup>54</sup>

A revolution (or secession) took place in the United States in the half-century after Hale wrote his words, but it did not at all settle the question of sovereignty

48. See WILLIAM SHAKESPEARE, KING HENRY THE FIFTH act 4, sc. 3

("And Crispin Crispian shall ne'er go by,  
From this day to the ending of the world,  
But we in it shall be remembered-  
We few, we happy few, we band of brothers;  
For he to-day that sheds his blood with me  
Shall be my brother; be he ne'er so vile,  
This day shall gentle his condition;  
And gentlemen in England now-a-bed  
Shall think themselves accurs'd they were not here,  
And hold their manhoods cheap whiles any speaks  
That fought with us upon Saint Crispin's day.")

49. Miller, *supra* note 32, at 88.

50. *Id.* at 89.

51. *Id.*

52. See Jean-Louis Halperin, *Law in Books and Law in Action: The Problem of Legal Change*, 64 ME. L. REV. 46 (2011).

53. SIR MATTHEW HALE, THE HISTORY OF THE PLEAS TO THE CROWN 481 (W.A. Stokes & E. Ingersall eds., 1847).

54. Miller, *supra* note 32, at 90.

other than to displace any notion that it was embodied in a monarch. Instead, the Revolution—and the Constitution afterward—were based on the power of the people to exercise control over their own fate. But the central question is the degree to which the people—or the representatives, whose authority was based on speaking on behalf of and with the consent of the people—could exercise the control formerly granted kings or queens. What precisely does popular sovereignty mean?

An old maxim, “the voice of the people is the voice of God,” denounced in a 796 letter from Alcuin to Charlemagne, took on a much more affirmative valence.<sup>55</sup> Some might interpret this as simply an assertion that God speaks through the voice of the majority, which maintains a strong link to more traditional notions of Divine sovereignty; others, less sectarian, might suggest that we can have no real idea what God might desire or even if there is a God, and that the authority once assigned to God should instead now be assigned to the voice of the people. In either case there will be significant difficulties in identifying the people who count as authoritative.

Does this refer, for example, only to a unanimous declaration by the relevant people as to some proposition, with even one dissent making any claim of overriding authority invalid? Or, on the other hand, do we accept some notion of majority or super-majority rule even at the price of overriding the good-faith objections of those who dissent?<sup>56</sup> We know beyond a shadow of a doubt that those who framed the Constitution, ordained in the name of the people, were indifferent to the inevitable reality of disagreement, so long as it did not become large enough to capture control of a given convention charged with ratifying the Constitution. After all, there was not a hint of a suggestion that the 30-27 vote in New York rendered illegitimate that state’s ratification of the Constitution. To be sure, neither Rhode Island nor North Carolina was in the Union when George Washington was inaugurated on April 30, 1789,<sup>57</sup> that is evidence, though, only for the proposition that each state did have to assent, as a corporate entity, before being bound by the new Constitution. But anti-Federalist minorities within the states were out of luck. The point of this excursus into American constitutional history is to establish that popular or even state sovereignty has almost nothing in it for individual dissidents.

This is one reason that many supported what became known as the Bill of Rights, which includes the Second Amendment. Yet all but the most devoted partisans agree that the Amendment is less than self-evident in its meaning and

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55. See, Alcuin, *Letter from Alcuin to Charlemagne*, in THE LIBRARY OF THE WORLD’S BEST LITERATURE. AN ANTHOLOGY IN THIRTY VOLUMES (C.D. Warner ed., 1917), <http://www.bartleby.com/library/prose/135.html> [<https://perma.cc/KAQ5-3SH6>].

56. See, e.g., MELISSA SCHWARTZBERG, COUNTING THE MANY (2013) (challenging the rationale behind the use of supermajority rule as an alternative to majority decisionmaking).

57. See *Observing Constitution Day*, NAT’L ARCHIVES (Aug. 16, 2016), <https://www.archives.gov/education/lessons/constitution-day/ratification.html> [<https://perma.cc/69RS-K2DX>] (noting that neither state had ratified the Constitution, which seems a condition precedent to being part of the newly created United States).

that it is we who must construct, from the available historical and other materials, an Amendment that quite literally we can live with in the twenty-first century. And, not surprisingly, it continues to be the case that notions of sovereignty are central to the meaning we might wish to assign to the Amendment.

## V

### THE CONTEMPORARY INTERSECTION OF SOVEREIGNTY AND BEARING ARMS

Many contemporary proponents of a maximalist view of the Amendment, including that articulated in Scalia's *Heller* opinion,<sup>58</sup> can be described as libertarians, a position defined by its opposition to all but the most minimal state. This is certainly true of Randy Barnett, a vigorous and articulate defender both of libertarianism and of what has come to be called the individual rights view of the Second Amendment.<sup>59</sup> Barnett finds much of his constitutional and political philosophy on a debatable reading of the Declaration of Independence and a more plausible reading of the opinions of Chief Justice Jay and Justice James Wilson in *Chisholm v. Georgia*.<sup>60</sup> These distinguished justices unequivocally rejected "state sovereignty" in favor of a more individualized notion of sovereignty. For Barnett, "the people" means what he repeatedly refers to as "the people as individuals, each and every one."<sup>61</sup> With respect to the Declaration, Barnett, like many Americans, focuses almost exclusively on the notion that each individual has an equal and inalienable right to "life, liberty, and the pursuit of happiness" that, by definition, cannot be abridged by the state.<sup>62</sup> Indeed, it might even comprise tyranny for the state to do so. This reading is used to support Barnett's strong insistence on the ontological existence of "natural rights" (and our epistemological abilities to discern exactly what they are), though he does not seem to ground those rights on a Creator instead of, say, a capacity given all reasoning beings to discern the teachings of "natural law."<sup>63</sup>

In any event, Barnett's version of the Declaration leads to an individualist, near-anarchist, account that requires a quite radical revision of what the Declaration at its beginning might mean by reference to "the one people."<sup>64</sup> It is this collective entity who seceded from the British Empire and in doing so, were decidedly non-unanimous, given the plethora of Loyalists who opposed

58. *District of Columbia v. Heller*, 554 U.S. 570 (2008). Putting to one side the obvious fact that Scalia simply announced, without anything resembling a genuine argument, that most federal constraints on the possession of firearms continued to be constitutional.

59. See generally RANDY E. BARNETT, *OUR REPUBLICAN CONSTITUTION* (2016) (arguing that "We the People" should be interpreted as individual rights and protect against abuses by the majority); Randy E. Barnett, *We the People: Each and Every One*, 123 *YALE L.J.* 2576, 2579–87, 2593–96 (2014) (critiquing Bruce Ackerman's view that a supermajority can, without a formal constitutional amendment, override the text of the Constitution that is meant to protect individual rights).

60. *Chisholm, Ex'r v. Georgia*, 2 U.S. 419 (1793).

61. See BARNETT, *supra* note 59, at 68.

62. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

63. See BARNETT, *supra* note 59, at 37 (emphasizing the importance of "natural law").

64. THE DECLARATION OF INDEPENDENCE para. 1 (U.S. 1776) ("When in the course of human events, it becomes necessary for *one people* to dissolve the political bands . . ." (emphasis added)).

secession. There are more than a few overtones in Barnett's approach of Margaret Thatcher's famous statement that "there is no such thing [as society]! There are [only] individual men and women."<sup>65</sup>

It is much easier to defend a strong view of individual gun rights, whether predicated on the Second Amendment or on a theory of natural rights, if one ignores the claims of the surrounding social order and polity, whether instantiated in the national government or, in what the Supreme Court continues to refer to as "sovereign states."<sup>66</sup> Thus, in what I have termed "the best nine-page opinion ever written,"<sup>67</sup> Seventh Circuit Court of Appeals Judge Frank Easterbrook notes that traditional conservatives had often supported the ability of states to use their police power to vindicate what was thought to be the health and safety of the general populace, even if this required some limitation of individual rights.<sup>68</sup> Easterbrook concludes his opinion by quoting Brandeis's hoary chestnut about states as laboratories of experiment,<sup>69</sup> thus throwing the federalism gauntlet before, say, Justice Kennedy, who often writes of the dignity of states and the necessity of federal courts to protect that dignity against those who would unduly limit state autonomy.<sup>70</sup> The penultimate line of Easterbrook's remarkable opinion, "Federalism is an older and more deeply rooted tradition than is a right to carry any particular kind of weapon,"<sup>71</sup> turns federalism into just another form of statism—and sovereignty—with a potential for curbing the kind of radical individualism that Barnett and other libertarians exalt.

To put it mildly, the contemporary Supreme Court has no coherent notion of sovereignty, however often it uses the word in its opinions. The Supreme Court majority's disdain for federalism in *McDonald*<sup>72</sup> is in some tension with all of the

65. See Margaret Thatcher, *Aids, Education, and the Year 2000!* ("there is no such thing as society") WOMAN'S OWN (Oct. 31, 1987), <http://www.margarethatcher.org/document/106689> [<https://perma.cc/BN8G-GF2F>] (conceding that there also existed "families," which generates profound problems for libertarian theory more generally); Sanford Levinson, *Randy Barnett's Critique of Democracy (and John Marshall?)*, 32 CONST. COMMENT. 113 (2017).

66. See Mark Killenbeck, *Political Facts, Legal Fictions*, in NULLIFICATION AND SECESSION IN MODERN CONSTITUTIONAL THOUGHT 223 (Sanford Levinson ed., 2016) (analyzing the use of "state sovereignty" rhetoric by the modern Supreme Court).

67. See Sandy Levinson, *The Best Nine-Page Opinion Ever Written!*, BALKINIZATION BLOG (June 12, 2009, 5:34 PM), <https://balkin.blogspot.com/2009/06/best-nine-page-opinion-ever-written.html> [<https://perma.cc/L6MA-D8Q6>].

68. *Nat'l Rifle Ass'n of America v. Chicago*, 567 F.3d 856, 857 (7th Cir. 2009).

69. *Id.* at 860. His opinion was joined, incidentally, by his formidable colleague Richard Posner.

70. See *Alden v. Maine*, 527 U.S. 706, 714 (1999) (Maine protected against suit even within its own courts for violation of a federal law because "[t]he federal system established by our Constitution preserves the sovereign status of the States in two ways. First, it reserves to them a substantial portion of the Nation's primary sovereignty, together with the dignity and essential attributes inhering in that status.").

71. *Nat'l Rifle Ass'n of America*, 567 F.3d at 857.

72. *McDonald v. Chicago*, 561 U.S. 742 (2010). See, e.g., *Puerto Rico v. Sanchez-Valle*, 136 S. Ct. 1863, 1870 (2016) (Justice Kagan conceding the lack of a truly coherent notion of sovereignty. "Truth be told, however, 'sovereignty' in this context does not bear its ordinary meaning. For whatever reason, the test we have devised to decide whether two governments are distinct for double jeopardy purposes overtly disregards common indicia of sovereignty."); *United States v. Lara*, 541 U.S. 193, 215 (2004) ("As

cases that sing praises to federalism in the name of the retained “sovereignty” and “dignity” of the states.<sup>73</sup> One might say that this incoherence is built into the very notion of constitutionalism, with its promise of “limited sovereignty” at least when referring to agencies of government even as the specter of “popular sovereignty,” whatever that means exactly, hovers in the background.<sup>74</sup>

Justice Blackmun at the end of his career announced that he would no longer collaborate in the “machinery of death,”<sup>75</sup> thereby formally renouncing any participation in what has historically been one of the most telling appurtenances of sovereignty. Many of us commend him for doing so, but perhaps we should realize that the most important mechanism of death in the modern United States is indeed firearms. One might defend the private possession of firearms, as I have been willing to do myself.<sup>76</sup> But that does not lessen the fundamental reality of the linkage between guns and death. That, in turn, should remind us that the ability to kill is a classic attribute of sovereignty. The “sovereign” who can be defined by the capacity to declare the “state of exception,” to recall Schmitt’s formation, can transform murder into legitimate killing.<sup>77</sup> Whether it is the state or the individual who claims such a privilege may be almost irrelevant from the perspective of those who suffer the imposition of the specific violence. But even those of us who are onlookers, so to speak, neither directly inflicting the violence nor bearing its brunt, have reason to be concerned about the circumstances of its occurrence given both the moral questions surrounding them and the sheer political and social consequences for the societies we live in.

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this case should make clear,” wrote Justice Thomas in a concurring opinion, “the time has come to reexamine the premises and logic of our tribal sovereignty cases. It seems to me that much of the confusion reflected in our precedent arises from two largely incompatible and doubtful assumptions. First, Congress (rather than some other part of the Federal Government) can regulate virtually every aspect of the tribes without rendering tribal sovereignty a nullity. Second, the Indian tribes retain inherent sovereignty to enforce their criminal laws against their own members.”)

73. For a canvas of some recent relevant cases, see Killenbeck, *supra* note 67.

74. See generally RICHARD TUCK, *THE SLEEPING SOVEREIGN* (2015).

75. *Callins v. Collins*, 510 U.S. 1141, 1145 (1994).

76. See Levinson, *Why Didn't the Supreme Court Take My Advice in the Heller Case? Some Speculative Responses to an Egocentric Question*, 60 HASTINGS L.J. 1491, 1495 (2009).

77. See CARL SCHMITT, *POLITICAL THEOLOGY: FOUR CHAPTERS ON THE CONCEPT OF SOVEREIGNTY* 5 (George Schwab trans., 2006).