

## Natural Rights Arguments for the Second Amendment\*

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Until recently courts uniformly read the Second Amendment's justification clause, which speaks of the necessity of "a well-regulated Militia" to "the security of a free State," as referring solely to organized state militias like the National Guard.<sup>1</sup> As a result, only federal regulation of firearms that would impair individuals' ability to bear arms in these organized state militias stood a chance of being ruled unconstitutional.

In the last two decades, however, this reading of the Second Amendment has been subjected to vigorous academic attacks, sometimes from surprising corners. The heart of these critiques is that the term "Militia" refers, not to organized state militias, but to the citizenry as a whole. The Second Amendment protects the right of all Americans to keep and bear arms.<sup>2</sup>

Recently two federal courts of appeals, citing the academic literature, have adopted this "individual-right" interpretation, rather than the "collective-right"

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<sup>1</sup> *United States v. Hale*, 978 F.2d 1016, 1020 (8th Cir. 1993); *Gillespie v. City of Indianapolis*, 185 F.3d 693, 710 (7th Cir. 1999); *United States v. Wright*, 117 F.3d 1265, 1273-74 (11th Cir. 1997); *United States v. Rybar*, 103 F.3d 273, 286 (3d Cir. 1996); *Love v. Pepersack*, 47 F.3d 120, 124 (4th Cir. 1995); *Thomas v. Members of City Council*, 730 F.2d 41, 42 (1st Cir. 1984) (per curiam); *United States v. Oakes*, 564 F.2d 384, 387 (10th Cir. 1977); *United States v. Warin*, 530 F.2d 103, 106 (6th Cir. 1976).

<sup>2</sup> Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131, 1162-73 (1991); Don B. Kates, Jr., *Handgun Prohibition and the Original Meaning of the Second Amendment*, 82 MICH. L. REV. 204, 214-20 (1983); Sanford Levinson, *The Embarrassing Second Amendment*, 99 YALE L.J. 637, 643-57 (1989); Nelson Lund, *The Second Amendment, Political Liberty, and the Right to Self-Preservation*, 39 ALA. L. REV. 103, 105-08 (1987); William Van Alstyne, *The Second Amendment and the Personal Right to Arms*, 43 DUKE L.J. 1236 (1994). It has also been argued that justification clauses, which are common in state constitutions, should not be read as limiting the scope of the constitutional right they justify. Eugene Volokh, *The Commonplace Second Amendment*, 73 N.Y.U. L. REV. 793 (1998).

interpretation favored by other federal circuits.<sup>3</sup> In *United States v. Emerson*, the Fifth Circuit upheld the challenged federal regulation of firearms despite reading the Second Amendment as an individual right.<sup>4</sup> But just this month, in *Parker v. District of Columbia*, the D.C. Circuit struck down various D.C. laws on Second Amendment grounds,<sup>5</sup> including a law that required all firearms to be kept unloaded and disassembled (or bound by a trigger lock or other device). The court found this law unconstitutional because it kept citizens from having a usable firearm readily accessible and so amounted to “a complete prohibition on the lawful use of handguns for self-defense.”<sup>6</sup>

Given that the adoption of an individual-right interpretation in *Emerson* was dicta,<sup>7</sup> it is not surprising that the Supreme Court declined to hear the case.<sup>8</sup> But it may choose to hear *Parker*. Justice Thomas has already indicated sympathy for the individual-

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<sup>3</sup> *Parker v. Dist. of Columbia*, --- F.3d ---, 2007 WL 702084, at \*6 (D.D.C. Mar. 9, 2007); *United States v. Emerson*, 270 F.3d 203, 260 (5th Cir. 2001). The courts rejected two types of collective-right interpretation. Under the first, the Second Amendment is a right of state governments to preserve and arm their state militias. Indeed, the Ninth Circuit took this interpretation to what would appear to be its logical conclusion, ruling that individuals have no standing to challenge federal regulation of firearms on Second Amendment grounds. *Silveira v. Lockyer*, 312 F.3d 1052 (9th Cir. 2002); *Hickman v. Bock*, 81 F.3d 98, 102 (9th Cir. 1995). Under the second, “sophisticated,” collective right interpretation, the Second Amendment protects a right of individuals, but the right extends only to their participation in organized state militias. *Parker*, 2007 WL 702084 at \*6. *Emerson*, 270 F.3d at 218-21.

<sup>4</sup> The federal statute in *Emerson* forbade firearm possession while one is subject to a temporary injunction prohibiting “the use, attempted use, or threatened use of physical force against . . . [an] intimate partner or child.” *Emerson*, 270 F.3d at 212-15 (referencing 18 U.S.C. § 922(g)(8)(C)(ii) (2000)). *Emerson* argued that his Second Amendment rights were violated, because the Texas state court issuing the temporary injunction against him had not arrived at an explicit finding that he posed a credible threat of violence to his wife and children. Nevertheless, the Fifth Circuit found that the general evidentiary standards for a temporary injunction under Texas law established a sufficient nexus with “lawless violence” to override *Emerson*’s individual right to bear arms. *Id.* at 264.

<sup>5</sup> *Parker*, 2007 WL 702084 at \*27.

<sup>6</sup> *Id.* at \*1, 26 (referencing D.C. Code § 7-2507.02).

<sup>7</sup> See 270 F.3d at 272 (Parker, J., concurring).

<sup>8</sup> *Emerson v. U.S.*, 536 U.S. 907 (2002) (denying cert).

right interpretation.<sup>9</sup> Second Amendment enthusiasts are excited, and gun-control advocates dismayed, that four other Justices might agree with him.

But how much would an individual-right interpretation of the Second Amendment really hamper gun control efforts?<sup>10</sup> As the *Emerson* and *Parker* courts – as well as most Second Amendment advocates – have noted, the right to bear arms, like most other constitutional rights, can be subject to reasonable regulation in the interest of public safety.<sup>11</sup> The question remains open, therefore, just how far the federal government may regulate arms before infringing the right.

Courts do not shy away from finding that otherwise socially beneficial governmental action violates the First Amendment, because they are guided by a rough conception of the value of free speech, to which social benefits can plausibly be subordinated. The Fourth Amendment's scope has likewise been read in the light of the

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<sup>9</sup> *Printz v. United States*, 521 U.S. 898, 936-39 (1997) (Thomas, J., concurring). The individual-right interpretation is also favored by the current Department of Justice. Brief for the United States in Opposition app. at 1, *Emerson v. United States*, 536 U.S. 907 (2002) (No. 01-8780), available at <http://www.usdoj.gov/osg/briefs/2001/0responses/2001-8780.resp.pdf>.

<sup>10</sup> Unless the Supreme Court subsequently finds that the right to bear arms is incorporated into the Fourteenth Amendment, *state* regulations of firearms will be unaffected. The Supreme Court held in the late nineteenth century that the Second Amendment can be violated only by the federal government, not by the states. *Presser v. Illinois*, 116 U.S. 252 (1886); *United States v. Cruikshank*, 92 U.S. 542 (1876). But it is not clear that it would come to the same conclusion if it addressed the issue again. *Presser* and *Cruikshank* were decided on the basis of a now-discredited *Barron v. Baltimore*, 32 U.S. (7 Pet.) 243 (1833), according to which none of the provisions in the Bill of Rights can be violated by the states. Most, although not all, of the provisions in the Bill of Rights have now been held to apply to the states through their incorporation into the Fourteenth Amendment.

<sup>11</sup> *Emerson*, 270 F.3d at 261-65; *Parker*, 2007 WL 702084 at \*25-26; Randy Barnett & Don Kates, *Under Fire: The New Consensus on the Second Amendment*, 45 EMORY L.J. 1139, 1142 (1996); Col. Charles J. Dunlap, Jr., *Revolt of the Masses: Armed Civilians and the Insurrectionary Theory of the Second Amendment*, 62 TENN. L. REV. 643, 677 (1995) (“[The Second Amendment] should be subject to the same balancing test that has been successfully used in reconciling conflicting interests with respect to other amendments.”); Don B. Kates, *The Second Amendment: A Dialogue*, 49 LAW & CONTEMP. PROBS., Winter 1986, at 143, 145-46; Nelson Lund, *The Past and Future of the Individual's Right to Bear Arms*, 31 GA. L. REV. 1, 49 (1996) (suggesting that the Second Amendment requires “balancing individual liberty against public safety”); Van Alstyne, *supra* note 2, at 1253-54.

value of privacy, which can justify reduced efficiency in the administration of the criminal law.

A coherent account of the Second Amendment's scope requires an analogous theory of the value of bearing arms. The *Parker* court saw arms as valuable because they may be used in self-defense. But it did not say *why* using arms in self-defense is valuable. Is it valuable *on its own* – the way we might understand the value of privacy or free speech? Or is using it *instrumentally* valuable – in particular, because it tends to protect other rights, such as one's right to life?

Many Second Amendment advocates appear to take an instrumental approach. Since one has a right to life, they argue, one must have a right to an instrument, like a gun, that tends to protect one's life.<sup>12</sup> Bearing arms is valuable because it makes us safer – or, more generally, because it increases the likelihood that all our rights will be respected.<sup>13</sup>

But plenty of people argue, plausibly, that widespread gun ownership makes us less safe. Some claim that the risk of accidents makes guns dangerous to their owners (or their owners' friends and family), or that guns are an ineffective means of protection against those who would seek to kill or harm us.<sup>14</sup> But even

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<sup>12</sup> See, e.g., Jeffrey R. Snyder, *Fighting Back: Crime, Self-Defense, and the Right to Carry a Handgun*, CATO POL'Y ANALYSIS, Oct. 22, 1997, available at <http://www.cato.org/pubs/pas/pa-284.html> (“Each person has a right to life.... Indeed, our Declaration of Independence asserts that governments are instituted to secure the right to life. The right to life of necessity implies the right to maintain or continue one's life by defending it against violent criminal assault.... Since the right to life implies a right to the means to protect that life, the individual's right to his own life necessarily implies a right to keep and bear arms suitable for self-defense.”).

<sup>13</sup> See, e.g., Barnett & Kates, *supra* note 11, at 1234–59; Orrin G. Hatch, *The Brady Handgun Prevention Act and the Community Protection Initiative: Legislative Responses to the Second Amendment?*, 1998 BYU L. Rev. 103, 117-122 (citing statistics showing that states which pass “shall issue” gun laws experience a reduction in violent crime); John R. Lott, Jr. & David B. Mustard, *Crime, Deterrence, and Right-To-Carry Concealed Handguns*, 26 J. LEG. STUD. 1, 64–65 (1997).

<sup>14</sup> PHILIP J. COOK & JENS LUDWIG, GUN VIOLENCE: THE REAL COSTS 37 (2000) (concluding that inside the home, “it is quite rare for victims to be able to deploy a gun against intruders even when they have one available”); Jens Ludwig, *Gun Self-Defense and Deterrence*, 27 CRIME & JUST. 363, 387 (2000) (raising the possibility that gun use increases risky behavior, thereby increasing the incidence of victimization and escalating confrontations when they occur); Franklin Zimring, *Firearms, Violence and Public*

if acquiring a gun makes one safer with respect to a fixed population, guns might nevertheless present a collective action problem. Each of us, recognizing that he will be safer with respect to a fixed population by having a gun, is rationally motivated to acquire one, *collectively* rendering us less secure.<sup>15</sup>

What should a court do if the Second Amendment ultimately depends upon a false instrumental theory of the value of firearms possession? How can the right to bear arms be balanced against considerations of public safety? If the court really takes public safety seriously, it should allow the right to be eviscerated. On the other hand, if the factual error standing at the basis of the constitutional right is entitled to deference, how much deference should that be?

Second Amendment advocates have argued that a right to bear arms would not apply to “weapons such as machine-type guns, flamethrowers, artillery, and atomic weapons, whose use, even in strict self-defense, would quite obviously menace one’s neighbors.”<sup>16</sup> The truth is, however, a machine gun is like any other gun. One’s (innocent) neighbors are safe if it is pointed in the right direction. Furthermore, a machine gun can be a crucial instrument of self-defense against an attacker with a machine gun. It is true that such legitimate uses of machine guns are rare. But their rarity is a consequence of the legal prohibition of machine guns. If machine guns were legal and thus widely available, they would be as important for self-defense as handguns and so, it seems, constitutionally protected. If a court can uphold the prohibition of machine guns on the ground that their very prohibition makes them unnecessary for self-defense, the federal government should be able to prohibit handguns on the ground that, once

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*Policy*. SCI. AM., Nov. 1991, 48-54 (arguing that using a firearm to resist a violent assault increases a victim’s risk of injury or death); Brady Campaign to Prevent Gun Violence – Guns in the Home, <http://www.bradycampaign.org/facts/issues/?page=home> (last visited Mar. 13, 2007) (“[A] gun in the home is 22 times more likely to be used in a criminal, unintentional, or suicide-related shooting than to be used in a self-defense shooting.”).

<sup>15</sup> Sven Ove Hansson, *Welfare, Justice, and Pareto Efficiency*, HUMAN., SOC. SCI. & L. 361, 368 (2004); David McDowall & Colin Loftin, *Collective Security and the Demand for Legal Handguns*, 88 AM. J. SOC. 1146, 1148 (1983).

<sup>16</sup> Kates, *supra* note 11, at 146; *see also* Stephen P. Halbrook, *What the Framers Intended: A Linguistic Analysis of the Right to “Bear Arms”*, 49 LAW & CONTEMP. PROBS., Winter 1986, 151, 160 (arguing that the Second Amendment’s scope should exclude “dangerous and unusual” weapons, such as bombs or grenades, because of their tendency to harm both the innocent and the guilty).

prohibited, they too will be unnecessary for self-defense. On the other hand, if the Second Amendment forces a court to presume that handguns do not present a collective action problem, it would appear that it must make the same presumption about machine guns.

The profound problems with determining the scope of the Second Amendment are not the only reason to look for a different theory of guns' value. It is a significant fact that perspectives on the Second Amendment are largely insensitive to empirical evidence about the relationship between guns and violence.<sup>17</sup> And some Second Amendment advocates have made it clear that they believe the right to bear arms would exist even if its collective exercise made our other rights *less* secure.<sup>18</sup> The Second Amendment, they argue, protects an inalienable autonomy right to use arms in self-defense.<sup>19</sup> As Charlton Heston, the President of the National Rifle Association, has put it:

What civil right could possibly be more fundamental than the right to protect your life, your family and your freedom from whoever would take it away? The right to keep and bear arms may be our Second Amendment as Americans, but you can bet on this: It's our first freedom as humans.... "All men were created equal" may have been our message in 1963. Today, let our message be just as simple and just as strong: "All people have an

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<sup>17</sup> See generally Dan M. Kahan & Donald Braman, *More Statistics, Less Persuasion: A Cultural Theory of Gun-Risk Perceptions*, 151 U. PENN. L. REV. 1291 (2003).

<sup>18</sup> See, e.g., Nicholas J. Johnson, *Principles and Passions: The Intersection of Abortion and Gun Rights*, 50 RUTGERS L. REV. 97, 129 n.144 (1997) ("The fact that a right is relatively costly does not justify giving it a narrow, rather than broad construction."); Levinson, *supra* note 2, at 657 ("[W]hy do we not apply such consequentialist criteria to each and every part of the Bill of Rights?"); Adam Mossoff, *Gun Control and The Right to Self-defense*, CAPITALISM MAG., June 5, 1998, available at <http://www.capmag.com/article.asp?ID=53> ("Statistical arguments on gun control are a red herring... While the National Rifle Association (NRA) and other defenders of the right to bear arms argue over statistic... the real issues remain untouched and are sacrificed to the enemies of our freedom.").

<sup>19</sup> See, e.g., <http://www.capitalism.org/faq/guns.htm> ("The right to own guns is not based on the second amendment. If there were no second amendment in the U.S. Constitution, one would still possess a right to own a weapon of self-defense, which in today's context, means a firearm, i.e., a gun.").

unalienable right to defend their lives and their liberty from whomever [sic] would harm them, and with whatever means necessary.”<sup>20</sup>

In this respect, Second Amendment advocates sound like other civil libertarians. After all, the Fourth Amendment undoubtedly has serious costs, given the frequency with which its exercise frustrates otherwise legitimate criminal prosecutions. But these costs cannot, on their own, provide a reason to reject the Fourth Amendment. It is precisely *because* protecting the right of privacy has these costs that the Fourth Amendment is necessary.

Like privacy or free speech, bearing arms in self-defense might have value that is not instrumental to our other rights. Indeed, the idea that self-defense has value even though it makes our other rights more vulnerable stands at the basis of John Locke’s view of the state of nature. According to Locke, we have a natural executive right to protect and enforce natural rights as we see fit, even though the collective exercise of the executive right makes our other rights less secure.

But, Second Amendment critics might argue, it is precisely because the executive right makes our other rights less secure that we alienated it upon entering civil society. Instead of protecting a right that limits governmental authority, the Second Amendment is incompatible with governmental authority. It is “anarchistic”<sup>21</sup> and contrary to “communal strateg[ies] for collective security.”<sup>22</sup> As Gary Wills has put it:

Every civilized society must disarm its citizens against each other. . . .

Every handgun owned in America is an implicit declaration of war on one’s neighbor. When the chips are down, its owner says, he will not trust any other arbiter but force personally wielded.<sup>23</sup>

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<sup>20</sup> Charlton Heston, Address to the Congress of Racial Equality at Its Annual Banquet in Honor of Dr. Martin Luther King, Jr. (March 20, 2001), *available at* <http://www.newsmax.com/archives/articles/2001/3/19/210522.shtml>.

<sup>21</sup> Carl T. Bogus, *The Hidden History of the Second Amendment*, 31 U.C. DAVIS L. REV. 309, 320 (1998).

<sup>22</sup> Michael A. Bellesiles, *Suicide Pact: New Readings of the Second Amendment*, 16 CONST. COMMENT. 247, 259 (1999).

<sup>23</sup> *Quoted in* Don B. Kates, Jr., *Public Opinion: The Effects of Extremist Discourse on the Gun Debate*, in *THE GREAT AMERICAN GUN DEBATE: ESSAYS ON FIREARMS AND VIOLENCE* 93, 109 (Don B. Kates, Jr. & Gary Kleck eds. 1997).

One might conclude that these two perspectives on the Second Amendment are the result of fundamentally different political theories. But it has been my experience that both sides tend to appeal to the same – roughly Lockean – principles.<sup>24</sup> The disagreement concerns their application. Defenders of the Second Amendment consider bearing arms an inalienable autonomy right, whereas its critics believe this right – if it ever existed – was alienated upon entering civil society.

My goal is to explore this disagreement. I begin, however, with a second instrumental theory of the value of bearing arms. This theory is suggested by the *Parker* court’s comment that the Second Amendment protects the use of arms in self-defense not merely against “private lawlessness,” but also against “the depredations of a tyrannical government.”<sup>25</sup>

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<sup>24</sup> That Americans tend to be Lockean, especially when discussing the Bill of Rights, is not surprising. The Founders largely understood the Bill of Rights in Lockean terms, *see* BERNARD BAILYN, *THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION* 182–87 (1967); LEONARD W. LEVY, *ORIGINAL INTENT AND THE FRAMERS’ CONSTITUTION* 139 (1988); GORDON S. WOOD, *THE RADICALISM OF THE AMERICAN REVOLUTION* 164–66 (1992). And Locke has remained an important part of American political and legal traditions. *See, e.g.*, MIRJAN R. DAMAŠKA, *THE FACES OF JUSTICE AND STATE AUTHORITY* (1986) (discussing influence of consent theories of political authority in the United States).

<sup>25</sup> *Parker v. Dist. of Columbia*, --- F.3d ---, 2007 WL 702084, at \*21 (D.D.C. Mar. 9, 2007).

## I

### The Right to Bear Arms as Political Right

Under Locke's account of the social contract, individuals in the state of nature give up to the political community certain of their natural rights. The most important of these is their "executive" right to adjudicate whether violations of natural law have occurred and "to punish transgressors of [the natural] law to such a degree as may hinder its violation."<sup>26</sup> After entering into the social contract, only the political community possesses these powers,<sup>27</sup> although it exercises them through a government to which it (revocably) gives its trust.<sup>28</sup>

The motivation for entering into the social contract is the "inconveniences" of the state of nature.<sup>29</sup> Although everyone in the state of nature has a natural duty not "to harm another in his life, health, liberty, or possessions,"<sup>30</sup> people are fallible judges about whether natural rights have been violated. As a result, the state of nature can devolve into a state of war. Someone who perceives his rights to have been violated will seek to exercise what he believes is his right to punish, creating what the punished party perceives to be a rights-violation allowing *her* to punish. This devolution is likely because people tend to interpret their own rights and the rights of their kin too broadly.<sup>31</sup> As a result, private enforcement of natural law puts everyone in a worse position than they would be if they were subject to a single arbitrator.

So understood, the social contract is essentially a normative, not a social, transformation – it changes the moral rights and obligations possessed by individuals. But people are not motivated to enter into the social contract due to dissatisfaction with the

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<sup>26</sup> JOHN LOCKE, THE SECOND TREATISE OF GOVERNMENT, in POLITICAL WRITINGS OF JOHN LOCKE § 7 (David Wooton ed., 1993) (1681); *see also id.* §§ 94–99.

<sup>27</sup> *Id.* §§ 95, 99; A. JOHN SIMMONS, ON THE EDGE OF ANARCHY: LOCKE, CONSENT, AND THE LIMITS OF SOCIETY 69–71 (1993); D.A. LLOYD THOMAS, LOCKE ON GOVERNMENT 27 (1995).

<sup>28</sup> LOCKE, *supra* note 26, §§ 136, 149, 211–12, 221–22, 240.

<sup>29</sup> *Id.* §§ 124–27.

<sup>30</sup> *Id.* § 6.

<sup>31</sup> *Id.* §§ 13, 125.

normative situation *per se*. The distribution of rights and obligations in the state of nature is an adequate – indeed probably the ideal – standard for human behavior. The problem is that this normative situation brings about certain objectionable social facts (namely feuding) and the normative change brought about by the social contract eliminates or reduces these social facts.

The inconveniences of the state of nature are the result of our limited ability to determine our moral rights and obligations. Although Locke insists that we have the power through reason to arrive at the general principles of natural law,<sup>32</sup> the inconveniences would not occur if we were *infallible* in our determinations of what natural law requires. The problem, Locke argues, is that we can make mistakes, particularly in our application of the principles of natural law to the facts.<sup>33</sup>

Having chosen to enter civil society, an individual is bound by the decision of the majority of the political community. The decision of the community (or a government that has its trust) is binding even if the citizen believes that the decision fails to track his alienated right's true scope. If his disagreement on the matter freed him of the state's authority, there would be no reason to abandon the state of nature in the first place.<sup>34</sup> But it is also essential to Locke's theory that certain rights are retained against the political community. If *these* rights are violated by the political community or its government, individuals return to the state of nature and may exercise their natural entitlement to protect themselves.

There are, therefore, two ways that an individual may enter into legitimate conflict with a government. The first is as a participant in the political community, when the government has acted beyond its entrusted powers. The second is as an individual,

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<sup>32</sup> *Id.* §§ 6, 12, 124.

<sup>33</sup> *Id.* § 124 (“[T]hough the law of Nature be plain and intelligible to all rational creatures, yet men, being biased by their interest, as well as ignorant for want of study of it, are not apt to allow of it as a law binding to them in the application of it to their particular cases.”); *see also id.* § 136.

<sup>34</sup> *Id.* § 94 (“*No Man in Civil Society can be exempted from the Laws of it.* For if any Man may do, what he thinks fit, and there be no Appeal on Earth, for Redress or Security against any harm he shall do; I ask, Whether he be not perfectly still in the State of Nature, and so can be *no part or Member of that Civil Society*: unless any one will say, the State of Nature and Civil Society are one and the same thing, which I have never yet found any one so great a Patron of Anarchy as to affirm.”).

when the political community, or a government that has its trust, violates reserved rights. One conception of the Second Amendment is tied to the role that arms might play in the *first* type of conflict.

Although the act of trust that legitimates a government is roughly majoritarian in nature, Locke did not think that a government receiving this trust need have a democratic political structure.<sup>35</sup> The political community may entrust its authority to a monarchy, for example. The only political right that an individual entering civil society *must* be given is the right to participate in the creation of the trust that the political community as a whole gives to the government, and the right to withdraw this trust through legitimate revolution.

Locke's argument for democracy, therefore, is instrumental only. If the political community chooses to delegate its authority to a democratic government, it is because popular elections of governmental officials help ensure that the officials are still acting with its trust.<sup>36</sup> This decision would be the source of individuals' political right to democratic representation.<sup>37</sup>

Some understand the right to bear arms as a political right in this sense. An armed population ensures that the government has retained the political community's trust, by increasing the community's power to revolt if a tyrant should arise.<sup>38</sup> This political-right interpretation of the Second Amendment is a natural consequence of reading the term "Militia" in the justification clause as referring to the people as a whole. "Militia" would refer to all citizens, but only when they are acting in concert.<sup>39</sup>

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<sup>35</sup> *Id.* §§ 132-33; RUTH W. GRANT, JOHN LOCKE'S LIBERALISM 117-19 (1987); THOMAS, *supra* note 27, at 27-29.

<sup>36</sup> See LOCKE, *supra* note 26, § 94.

<sup>37</sup> I don't want to suggest that a more robust right to democratic participation might not be argued for on the basis of Lockean principles. The right to vote might be understood not merely as a political right, but also as an autonomy right that one possesses even against the political community.

<sup>38</sup> AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION 47-49 (1998); Levinson, *supra* note 2, at 649; Lund, *supra* note 2, at 111-17; Brent J. McIntosh, *The Revolutionary Second Amendment*, 51 ALA. L. REV. 673, 679-81 (2000).

<sup>39</sup> Akhil Reed Amar, *Forward: The Document and the Doctrine*, 114 HARV. L. REV. 26, 127 (2000).

Some gun control advocates have expressed skepticism about a political-right interpretation of the Second Amendment. The likelihood that a tyrannical regime will arise, they argue, is too small to justify the costs of widespread arms possession,<sup>40</sup> and even if such a tyrant should arise, small arms would provide insufficient powers of resistance.<sup>41</sup>

But many Second Amendment enthusiasts are hostile as well. As a threshold matter, one can question whether a political-right interpretation would allow the Second Amendment to invalidate *any* democratically-enacted form of gun control. If the Second Amendment exists to protect the political community's interests, how could it invalidate gun control legislation that is the presumptive expression of this community's will? If the political community is willing to compromise protection from tyranny in the interest of public safety, it is hard to see why its judgment should be rejected.

Nor could one argue that an interpretation of the Second Amendment's scope must assume that the legislature is *not* the representative of the political community – that it is *already* acting beyond the political community's trust. For that would give the Second Amendment a power from which even its greatest advocates would recoil. It could, for example, strike down laws that prohibit us from engaging in armed insurrection.

The most realistic possibility is to understand the Second Amendment as a strategy of precommitment by the political community.<sup>42</sup> Anticipating that it might improperly sacrifice protection against tyranny for public safety, the political community chooses to entrust its authority to a government in which firearms possession is a constitutional right capable of invalidating democratically-enacted legislation. Analogous precommitment might explain constitutionally protected voting rights. In this case the worry would be that protection against tyranny might be sacrificed for governmental

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<sup>40</sup> Bellesiles, *supra* note 22, at 250.

<sup>41</sup> Wendy Brown, *Guns, Cowboys, Philadelphia Mayors, and Civic Republicanism: On Sanford Levinson's The Embarrassing Second Amendment*, 99 YALE L.J. 661, 665 (1989); McIntosh, *supra* note 38, at 696; Elaine Scarry, *War and the Social Contract: Nuclear Policy, Distribution, and the Right to Bear Arms*, 139 U. PA. L. REV. 1257, 1268–86 (1991).

<sup>42</sup> See JEREMY WALDRON, *Disagreement and Precommitment*, in LAW AND DISAGREEMENT 255 (1999).

efficiency. Of course, the political community could still make the unwise sacrifices. Even if constitutional amendment is impossible, it always retains the power to withdraw its trust in favor of a new constitutional regime. But constitutional precommitment would ensure that the improper sacrifices could not be made precipitously.

But even if the Second Amendment can strike down democratically-enacted legislation intended to promote public safety, its scope would remain limited by the political community's interest in avoiding tyranny. And this would seriously limit the Second Amendment's scope. Indeed, Akhil Amar, a defender of the political-right interpretation, has argued that the purposes that motivated the Second Amendment might be best served not through protection of private gun ownership at all, but by ensuring that the standing army is representative of the general population.<sup>43</sup> The Second Amendment would give gay men and lesbians a constitutional right to participate in the military.

Even if one disagrees with this particular account of the Second Amendment's scope, it is certainly true that the political-right interpretation would not put guns in the hands of citizens for private self-defense. A law like that at issue in *Parker*, which required all firearms to be kept unloaded and disassembled, would be constitutional.

It is true that in some respects a political-right interpretation of the Second Amendment would put *greater* burdens on the government, for it would have an affirmative obligation to create the conditions for individuals to join together as a popular armed force.<sup>44</sup> But the fact remains that if the Second Amendment is interpreted as a political right, it would be weaker in a way that is unsatisfactory to most Second Amendment enthusiasts, in not protecting individuals' interest in the *private* use of arms for self-defense.<sup>45</sup>

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<sup>43</sup> Amar, *supra* note 39, at 126–29.

<sup>44</sup> In contrast, if the Second Amendment protected a natural right to private self-defense, the government would have only a duty of non-interference. This is similar to the difference between the right to vote and the First Amendment right to express one's views about the government. The right to vote, as a political right, is stronger, in the sense that it puts an affirmative obligation on the government to hold elections. The government has not respected this political right simply by not interfering when people express their views about who should run the government.

<sup>45</sup> See Brannon P. Denning, *Gun Shy: The Second Amendment as an "Underenforced Constitutional Norm,"* 21 HARV. J.L. & PUB. POL'Y 719, 730 (1998); Lund, *supra* note 11, at 31 n.72.

## II

### The Natural Right to Bear Arms

As we have seen, many Second Amendment advocates argue that it protects an inalienable natural right to bear arms. What is the basis of this natural right?

One cannot understand it as instrumental to our other natural rights – that is, as existing because it tends to make these other rights more secure. For no natural right to bear arms would exist if, as seems likely, disarmament would help protect our other natural rights. Disarmament could be a good policy in the state of nature even if people generally try to respect natural rights, for they may be *wrong* about what natural rights require. By allowing people to more effectively exercise their executive right to protect and enforce natural rights as they see fit, arms exacerbate the inconveniences of the state of nature. With guns, the inevitable feuds in the state of nature are more deadly. If protecting our other natural rights were the only concern, we would have a natural right (and duty) to universal disarmament.

Rather than seeking the natural right to bear arms in the contribution that arms make to our safety, it might be found in the role arms play in the exercise our executive right. Once again, if the executive right itself is understood as merely instrumental to our other rights – as a means of assuring that these other rights are protected – the inconveniences of the state of nature would be sufficient to show that it does not exist. We would have a natural duty to enter civil society.<sup>46</sup> But Locke does not think there is such a natural duty. In the state of nature, each of us has the right “to judge of his right and, according to the best of his power, to maintain it.”<sup>47</sup>

Such statements by Locke might be understood, not as attributing a value to enforcing natural rights as one sees fit, but as a claim about the scope of one’s other natural rights. It could be understood as attributing to everyone in the state of nature a

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<sup>46</sup> *Cf.* DAVID SCHMITZ, *THE LIMITS OF GOVERNMENT: AN ESSAY ON THE PUBLIC GOODS ARGUMENT* 38 (1991) (arguing that since one has a right to punish only by the least risky acceptable method, even independents remaining in the state of nature have to let the state punish for them).

<sup>47</sup> LOCKE, *supra* note 26, § 91.

Hohfeldian privilege to act according to his own moral lights. If one punishes what he takes to be a rights violation, he has not violated the punished person's natural rights. Conversely, if the punished person takes the punishment to be a rights-violation, he will not violate natural rights if he retaliates.<sup>48</sup> The state of war would result from the collective exercise of these privileges. And the social contract would consist of the alienation of these privileges to the political community.

But this cannot make sense of Locke's frequent claims that those acting according to their moral lights remain bound by natural law.<sup>49</sup> They are answerable to God if they get things wrong: "[I]f he that judges, judges amiss in his own, or any other case, he is answerable for it to the rest of mankind."<sup>50</sup> Natural law is still the "measure God has set to the actions of men."<sup>51</sup> Rather than understanding the executive right as really about the scope of our other natural rights, we should understand it as assigning an independent value to enforcing natural rights as one sees fit. It is *good* to act according to one's own moral lights, although we are fully answerable for the consequences.<sup>52</sup>

If exercising the executive right has value, despite its costs, bearing arms has value as well, insofar as arms allow us to more effectively exercise our executive right.<sup>53</sup>

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<sup>48</sup> This reading is suggested in Arthur Kuflik, *The Inalienability of Autonomy*, 13 PHIL. & PUB. AFF. 271, 276-77; GRANT, *supra* note 35, at 173-74.

<sup>49</sup> LOCKE, *supra* note 26, § 4; *see also* §§ 21, 59, 128.

<sup>50</sup> *Id.* § 13; *see also id.* §§ 21, 241-42.

<sup>51</sup> *Id.* § 8; *see also id.* §§ 11, 135, 241.

<sup>52</sup> We are answerable for the consequences even if our decision was *reasonable* when made. *See* A. JOHN SIMMONS, *THE LOCKEAN THEORY OF RIGHTS* 145 (1992). Indeed, Locke's account of how the state of nature devolves into a state of war seems predicated upon mistaken but reasonable punishment being itself a rights violation. If people in the state of nature had a duty to accept reasonable punishment erroneously applied it is probable that many, and perhaps most, cases of punishment would not merit, and would not be perceived as meriting, retaliation.

The idea that *all* boundary-crossings can be retaliated against in the state of nature, even if they are the result of reasonable activities, is not as odd as it might at first seem. There is a sense in which the non-negligent person who harms *ought not* have done as he did (and the reckless person who harms no one acted *permissibly*). *See* G.E. MOORE, *ETHICS* 121 (1912); JUDITH JARVIS THOMSON, *RIGHTS, RESTITUTION AND RISK* 177-79 (William Parent ed., 1986).

<sup>53</sup> The value of arms possession might therefore be seen as instrumental in some sense – since its value depends upon its aiding our executive right. But it is not instrumental in the sense that arms possession collectively increases the likelihood that our other natural

Unlike other possessions in the state of nature, arms increase our capacity to enforce natural law as we see fit: They allow us to defend our natural rights and punish their violation. Because of their connection to the executive right, our autonomy would be more profoundly violated by disarmament than by misappropriation of our other property.

It is a delicate matter, however, determining the strength of this natural right to bear arms. Although it gives us the freedom to expose one another to a heightened risk of rights-violations, there is surely some point at which the risk becomes so great that the person exposed may take preventative action. Locke is clear that in the state of nature I may permissibly thwart *attempts* to violate my natural rights: My respect for another's executive right does not require me to wait until my rights have actually been violated to respond.<sup>54</sup> In the course of thwarting such attempts, I surely may disarm my attacker. It is also likely that in the state of nature I may disarm someone who is using his firearm in a reckless manner – for example, spraying his machine gun in my direction.

But it is clear that I may not prophylactically disarm someone who merely *possesses* a firearm. It is true that people tend to make mistakes about the proper scope of natural rights and so misuse of the firearm might occur. But if the inconveniences of the state of nature could justify disarmament, they could also justify forcible induction into civil society.

In the state of nature, therefore, individuals possess a natural right to bear arms, including quite dangerous arms like machine guns. The only case where disarmament might be permissible is when a weapon's mere possession – as opposed to the possibility of its misguided use – poses unreasonable risks. I might be able to disarm a neighbor who keeps fragile vials of nitroglycerin, for example, even though they might be used by him in defense of his natural rights.

I believe this is the best interpretation of arguments that the Second Amendment protects a natural right of self-defense.<sup>55</sup> Such arguments often emphasize little old ladies

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rights will be protected. Indeed, its value is not even dependent upon its collectively increasing the likelihood that we will be able to exercise our executive right.

<sup>54</sup> See LOCKE, *supra* note 26, at § 16.

<sup>55</sup> See also David E. Murley, *Private Enforcement of the Social Contract: DeShaney and the Second Amendment Right to Own Firearms*, 36 DUQ. L. REV. 827, 828–29 (“The

using guns to protect themselves against violent intruders.<sup>56</sup> This suggests that the value of gun possession is its tendency to make our right to life (as well as our other rights) more secure. But also present in such arguments is the idea that guns have value because they allow us to exercise our executive right. They have value not merely when a little old lady justifiably kills a violent intruder, but also when she kills a postman, mistaking him for a violent intruder. For in the latter case as well, guns allowed her to vindicate natural rights as she saw fit, and to face the consequences.

It is because Second Amendment advocates see arms as tied to one's executive right – and more broadly to Lockean values of autonomy and individualism – that they so often speak of arms in terms unrelated to safety. Guns ownership, they argue, fosters “vigorous virtues of independence, self-reliance and vigilance”<sup>57</sup> and disarmament is “a humiliating and debasing degradation” to the state.<sup>58</sup>

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Second Amendment provides a guarantee that citizens may keep arms for their self-defense against violence that our government is unable, or unwilling, to prevent.”).

<sup>56</sup> See, e.g., ROBERT A. WATERS, *THE BEST DEFENSE: TRUE STORIES OF INTENDED VICTIMS WHO DEFENDED THEMSELVES WITH A FIREARM* (1998); ROBERT A. WATERS, *GUNS SAVE LIVES: TRUE STORIES OF AMERICANS DEFENDING THEIR LIVES WITH FIREARMS* (2002); Robert L. Barrow, *Women With Attitude: Self Protection, Policy, and the Law*, 21 T. JEFFERSON L. REV. 59, 59-60 (1999); Nicki Fellenzer, Editorial, *Travesty of Justice – the Plight of Melvin Spaulding*, KEEPANDBEARARMS.COM, Dec. 7, 2003, available at

<http://www.keepandbeararms.com/newsarchives/XcNewsPlus.asp?cmd=view&articleid=2867> (supporting a 71-year-old man's use of a handgun to stop the beating of a 63-year-old neighbor by “three thugs” who had “a history of terrorizing the neighborhood”).

<sup>57</sup> David Harmer, *Securing a Free State: Why the Second Amendment Matters*, 1998 BYU L. REV. 55, 100; see also Kahan & Braman, *supra* note 17, at 3000-01; Bruce Mills, Editorial, *Gun Ownership is a Net Benefit to Society*, HAMILTON SPECTATOR (Can.), Oct. 19, 2006, at A14 (“The gun culture... fosters independence, self-reliance, self-esteem and confidence in the individual.”); Glenn Reynolds, Editorial, *A Rifle in Every Pot*, N.Y. TIMES, Jan. 16, 2007, at A21 (describing a town's mandatory gun ownership law as “a statement about preparedness in the event of an emergency, and an effort to promote a culture of self-reliance”).

<sup>58</sup> James B. Whisker, *The Citizen-Soldier Under Federal and State Law*, 94 W. VA. L. REV. 947, 963 n.52 (1992) (quoting 3 ELLIOT'S DEBATES 168-69 (statement of Patrick Henry)); see also Justin Darr, *Why Liberals Love Gun Control*, RENEWAMERICA.US, Jan. 10, 2005, <http://www.renewamerica.us/columns/darr/050110> (“[G]un control laws... will erode the sense of independence and self reliance of regular people until they feel that they can do nothing that does not meet government approval.”).

### III

#### Reserving the Natural Right to Bear Arms: Imminent Violence

But if there is a natural right to bear arms that is derived from our executive right, Heston would appear to be wrong in claiming that this right is inalienable. For the executive right itself is alienable, and indeed must be alienated upon entering civil society. When leaving the state of nature one must give up the liberty “to do whatsoever he thinks fit for the preservation of himself” and “the power to punish the crimes committed against [natural] law.”<sup>59</sup> One no longer possesses the right to act upon one’s own judgment concerning the proper scope of self-defense and punishment. One is bound by the judgment of the majority of the political community (and a government that retains its trust), even when one believes that its decision is mistaken.<sup>60</sup> Since our executive right can be alienated, it is hard to see how the right to bear arms, which is in service of the executive right, cannot be.<sup>61</sup>

But simply because the executive right is alienable does not mean it can be alienated *in toto*. Locke himself argued that when I am faced with imminent violence, from which the government may not protect me, I reenter the state of nature and so may defend myself as I see fit. This residual right of self-defense, he argues, is inalienable:

Thus a thief, whom I cannot harm, but by appeal to the law, for having stolen all that I am worth, I may kill, when he sets on me to rob me but of my horse or coat; because the law, which was made for my preservation, where it cannot interpose to secure my life from present force, which, if lost, is capable of no reparation, permits me my own defence, and the right of war, a liberty to kill the aggressor, because the aggressor allows not time to appeal to our common judge, nor the decision of the law, for remedy in a case where the mischief may be irreparable. Want of a common judge with authority, puts all men in a state of nature: force

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<sup>59</sup> LOCKE, *supra* note 26, at §§ 128-30.

<sup>60</sup> *Id.* § 87.

<sup>61</sup> See Steven J. Heyman, *Natural Rights and the Second Amendment*, 76 CHICAGO-KENT L. REV. 237, 243 (2000).

without right, upon a man's person, makes a state of war, both where there is, and is not, a common judge.<sup>62</sup>

A number of Second Amendment advocates have appealed to Locke's argument to justify an inalienable right to bear arms in civil society.<sup>63</sup> Once again, the argument is not – or should not be – that we have a right to bear arms because guns make us *safer* in these state-of-nature pockets (although this is usually claimed as well). Rather, we regain our full executive right, including the right to bear arms with all its attendant costs, in the pockets.

There are two steps in this argument. The first is that those threatened by private violence in circumstances in which the government cannot immediately render aid are in a state-of-nature pocket. The second is that are we all entitled to bear arms *now*, in civil society, in anticipation that we might find ourselves in such a pocket.

To take the second step first, it is hard to see how the mere fact that state-of-nature pockets arise can justify a general right to bear arms. I might have a right to bear arms *within* the pocket – a right that would allow me to fashion arms on the spot to deal with the threat. But it would not follow that the government must provide me with a right to bear arms in *anticipation* that I might find myself in such a pocket.<sup>64</sup>

It is true that denying me arms in civil society will limit my ability to exercise my returned executive right in a pocket. But if the possibility that I would return to the state of nature meant that the government could do nothing that would compromise my returned executive right, the powers of the state would be absurdly narrowed. It is possible, after all, that a minority of citizens should find itself utterly abandoned by the United States government. As we shall later see, the minority would return to the state of nature and would regain its executive right. Had this minority always been in the state of nature, it could have created a private army to protect itself. But it would hardly follow

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<sup>62</sup> LOCKE, *supra* note 26, at § 19.

<sup>63</sup> See, e.g., David C. Savino, Self-Defense and the Right to Bear Arms: A Historical Examination and Analysis of these Populist Rights (May 3, 1999), [http://www.talonsite.com/armory/Articles%5CpapSelfDefense\\_and.htm](http://www.talonsite.com/armory/Articles%5CpapSelfDefense_and.htm); Gary A. Shade, The Right to Keep and Bear Arms: The Legacy of Republicanism vs. Absolutism (Jan. 10, 1993), available at [http://www.firearmsandliberty.com/militia\\_.htm](http://www.firearmsandliberty.com/militia_.htm).

<sup>64</sup> Heyman, *supra* note 61, at 245-46.

that the government must provide the minority with the right to create a private army *now*, in anticipation that it might be abandoned in the future.

More fundamentally, Locke was wrong to conclude that someone confronted with a threat of imminent violence is in a state-of-nature pocket. Certainly the mere fact that the government is unable to defend my rights cannot put me in the state of nature. I am not in the state of nature with respect to trespassers on my lawn because the DA or the police don't have the budget to pursue them. In such a case, the government's inability to protect my rights simply means my rights are not protected. It does not, on its own, authorize me to protect them myself.

What is more, if imminent violence really produced state-of-nature pockets, the government would not have the authority to determine what one may or may not do in a pocket. And governments legislate concerning permissible and impermissible self-defense all the time. Indeed, the act to which Locke claims we have an inalienable right – killing the thief who threatens one's property – is routinely prohibited. Although many people disagree with such laws, that is different from considering them not binding at all.

But just because Locke was wrong about imminent violence creating state-of-nature pockets, it does not follow that he was wrong that there is an inalienable right of self-defense when subject to such threats. Assume that the government forbids me from protecting myself in cases of imminent violence. If a violent intruder enters my home, I may do *nothing* in self-defense, even if I find flight impossible. The most I can do is inform the intruder that his actions are illegal and subject to punishment by the government.

It is fair to say that if I abided by such a law, my life would be profoundly vulnerable. The possibility of punishment after the fact would not be enough to protect me against all violent intruders. Indeed, in many cases punishment might not occur at all, since the best witness for the prosecution (namely me) would be dead.

In short, a government that failed to accord its citizens a right to defend themselves against violent threats – at least from culpable aggressors in cases where retreat is not possible – would be doing a *very bad* job protecting their right to life. And a Lockean argument could be constructed that freed citizens from such very bad laws. As Locke puts it, we enter civil society “only with the intention in everyone the better to

preserve himself his liberty and property.” For this reason, “the power of the society, or legislative constituted by them, can never be supposed to extend further than the common good.”<sup>65</sup> Self-defense may be “regulated by the laws made by the society,” but only “so far forth as the preservation of himself and the rest of society shall require.”<sup>66</sup>

Notice that the argument is not that if the government denied us a right of self-defense, we would be worse off than in the state of nature. The government might be protecting rights – including the right to life – sufficiently in other areas to make civil society superior. The argument is that we can also escape from the government’s authority when it does a manifestly bad job of protecting certain rights. Laws prohibiting self-defense would be an example. But so would laws requiring people to plow their fields with stones rather than seeds or requiring them to feed their children arsenic.

Locke makes similar claims about the regulation of property in civil society. In a sense, we alienate our property to the political community. Anyone who enters into civil society “annexes also and submits to the community those possessions which he has, or shall acquire.”<sup>67</sup> This alienation is essential for us to be bound by the government’s judgments concerning our property rights. “[I]t would be a direct contradiction for anyone to enter into society with others for the securing and regulating of property, and yet to suppose his land, whose property is to be regulated by the laws of the society, should be exempt from the jurisdiction of that government.”<sup>68</sup> But this alienation is conditional – it is only to better secure one’s natural rights, including one’s property rights, and the alienation is limited by this end.<sup>69</sup> And Locke puts conditions on how the state may regulate one’s property in order to stay within that limitation. The state may not, for example, arbitrarily appropriate one’s property.<sup>70</sup>

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<sup>65</sup> LOCKE, *supra* note 26, at § 131.

<sup>66</sup> *Id.* § 129.

<sup>67</sup> *Id.* § 120.

<sup>68</sup> *Id.*

<sup>69</sup> *Id.* §§ 135-37.

<sup>70</sup> Indeed, Locke argues that government “cannot take from any man any part of his property without his own consent.” *Id.* § 138. Read literally, this limitation is far too strong, for it would mean that I am not bound by an improper, but lawful, determination that something is not mine. It would also mean that the government would not have the power to compel the payment of a tax. Locke’s discussion of the matter is muddled, however, because he takes “consent” to include “the consent of the majority, giving it

But doesn't the government exist to resolve disagreement about natural rights? And doesn't that mean that its decisions must bind us even if we think they are wrong? As Locke himself puts it, if someone may "plead exemption" from the law, "the state of nature and civil society [would be] one and the same."<sup>71</sup> So mustn't we be bound even by manifestly bad laws?

The problem with this argument is that it is too strong. Let us assume that one may not plead exemption to laws that are manifestly bad. The fact remains that Locke is committed to the limited authority of the political community, and so other avenues for pleading exemption will remain.

Locke argues that we cannot alienate our rights to the political community unconditionally, because it is beyond our power to consent to be a *slave*, that is, someone who may be killed (or left to be killed by others) for any reason. One reason he gives is that it would be irrational to enter into such an agreement.<sup>72</sup> This argument is suspect, however, since possessing a right generally entails the power to alienate it even unreasonably,<sup>73</sup> unless the unreasonableness becomes so great that it amounts to incompetence. And circumstances can be imagined (for example, great benefits given to one's children) in which unconditional alienation is not *that* unreasonable.

More promising is Locke's argument that "[n]obody can give more power than he has himself; and he that cannot take away his own life cannot give another power over it."<sup>74</sup> I cannot give someone the right to kill me arbitrarily, because I have no right to kill myself arbitrarily.<sup>75</sup> It is often assumed the permissibility of suicide undermines this

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either by themselves or their representatives chosen by them." *Id.* § 140. But this limitation appears too weak, for it would allow wholesale appropriation of my property, without compensation, if that were consented to by the majority.

<sup>71</sup> *Id.* § 94.

<sup>72</sup> *Id.* § 131 ("[N]o rational creature can be supposed to change his condition with an intention to be worse."); *see also id.* § 137 ("It cannot be supposed that [people] should intend . . . to give to any one, or more, an absolute arbitrary power over their persons and estates . . . . This were to put themselves into a worse position than the state of nature, wherein they had a liberty to defend their right against the injuries of others.").

<sup>73</sup> A. John Simmons, *Inalienable Rights and Locke's Treatises*, 12 PHIL. & PUB. AFF. 175, 200-04 (1983).

<sup>74</sup> LOCKE, *supra* note 26, at § 23; *see Simmons, supra* note 73, at 191-93.

<sup>75</sup> This is, technically, not an argument against the alienability of one's natural rights, but an argument about their pre-existing scope.

argument. But the right to rational suicide (say, in response to great suffering) is not the same as the right to kill oneself on a whim.<sup>76</sup> If I have the right to kill myself only rationally, that would limit the government to whom I alienate my rights. It might have the power to kill me for the same reasons that I might permissibly choose to kill myself, but not arbitrarily.

It seems, therefore, that a right to “plead exemption” to the social contract will always exist. Of course, the fact that we alienate our natural rights with limitations does not mean that one of those limitations is that laws may not do a manifestly bad job of protecting our rights. We might, for example, be freed from governmental authority only if we would be better off in the state of nature.<sup>77</sup>

Indeed, one might think that governmental authority must include the power to enact manifestly bad laws, because citizens’ determinations about whether a law is manifestly bad would invoke the same conflicting moral judgments that give rise to the inconveniences of the state of nature. Since governmental authority was meant to overcome this moral disagreement, the disagreement cannot be recapitulated in the determination of whether governmental authority exists.

But citizens’ determination of whether a law is manifestly bad need not recapitulate the disagreement civil society is meant to overcome. Consider, by analogy, an arbitrator deciding a controversy. It is true that the litigants will not have submitted to the arbitrator’s authority if they reserve the right to reject his decision when it is, by their own moral lights, wrong. If they reserved this right, their determination of whether the arbitrator is within his authority would indeed recapitulate their original disagreement. But it does not follow that the arbitrator’s authority would evaporate simply because they retain the right to determine, with respect to each of his decisions, whether it is authoritative. Determining that his decision is not binding because he was drunk or bribed, for example, would not require them to engage the conflicting moral judgments

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<sup>76</sup> Locke himself appeared to think that suicide was prohibited. But his claim that no man has “the liberty to destroy himself,” LOCKE, *supra* note 26, at § 6, might best be understood as referring to a genuine liberty to destroy oneself – that is, a right to do so arbitrarily.

<sup>77</sup> SIMMONS, *supra* note 27, at 50.

that gave rise to their original disagreement.<sup>78</sup> And determining that his decision was clearly wrong might be analogous to determining that he was drunk or bribed. The litigants in a simple contract case do not have to assess, according to their own moral lights, who ought to prevail to know that an arbitrator who orders that the defendant be summarily executed is outside his authority.

It is not implausible, therefore, that we are not bound by manifestly bad laws. Accordingly, there are reasons to believe that a government must provide us with a right of self-defense when we are threatened with imminent violence by a culpable aggressor. This would amount to our possessing an inalienable right to self-defense, since we are released from governmental authority – at least with respect to laws governing self-defense – if the right is not provided.

But this does *not* mean that we are in the state of nature when faced with imminent violence. If the government fails to provide a right of self-defense, *all* citizens return to the state of nature, not merely those who are facing imminent violence. And if a government provides us with such a right, it retains authority over us in cases of imminent violence.

I believe that Locke wrongly thought imminent violence creates state-of-nature pockets, because the right of self-defense that the government must provide us gives a certain adjudicative power. *We* must make a determination of whether someone falls within the scope of the legal right of self-defense. We cannot wait for the government's guidance. But the situation is best understood not as a state-of-nature pocket, but as a case in which the government, in the interest of the protection of our rights, delegates some of the executive right that we alienated to it *back* to us. We remain in civil society despite this delegation, for the government retains the sole power to adjudicate and punish us if we abuse our delegated power.

Furthermore, to say we have an inalienable right to self-defense does not mean that we have the full right of self-defense that we possessed in the state of nature.<sup>79</sup> It may

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<sup>78</sup> See JOSEPH RAZ, *THE MORALITY OF FREEDOM* 42 (1986).

<sup>79</sup> It is worth noting that even in the state of nature there should be some limits on what one may do in defense of one's rights. Locke insists that the right to punish is not a right to act "according to the passionate heats, or boundless extravagancy of his own will, but only to retribute to him, so far as calm reason and conscience dictates, what is

not follow that we have an inalienable right of self-defense against innocents, for example, or indeed against the culpable when our acts of self-defense have effects on innocents' rights.<sup>80</sup> For these may not be areas where allowing self-defense would so manifestly promote the protection of my rights that the government must allow self-defense or cede its authority. Although the decision by the government to prohibit self-defense against innocents would disadvantage me if I were threatened by an innocent, it would protect me if I were the innocent doing the threatening.

This point is even clearer with respect to the right to bear arms. Disarmament is not a manifestly bad way of protecting our rights. A government may reasonably conclude that we are safer in a world without arms. Although, considered as an individual, I would be better able to protect myself against threats if I had a gun, the government may decide that in the long run I benefit from the prohibition, since my chance of being threatened by someone with a gun would also decrease.

It is worth mentioning that there is another, less plausible, interpretation of Locke's argument for an inalienable right of self-defense in cases of imminent violence. This is that we should be *excused* from engaging in self-defense in such cases, because we would never be able to keep a promise not to engage in self-defense when the time came.<sup>81</sup> We will always defend ourselves and take the chance of punishment for violating our promise. This is arguably the reason that Hobbes thought that "the right of resisting them that assault him by force" cannot be alienated, even to the sovereign.<sup>82</sup>

A number of Second Amendment advocates have appealed to Hobbes as well as Locke to justify an inalienable right to bear arms in civil society.<sup>83</sup> But even if Hobbes's argument managed to show that we should be genuinely excused for our acts of self-

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proportionate to his transgression." LOCKE, *supra* note 26, at § 8. Presumably some restrictions would apply to defense of one's rights as well.

<sup>80</sup> See Claire Finkelstein, *On the Obligation of the State to Extend a Right of Self-Defense to its Citizens*, 147 U. PA. L. REV. 1361 (1999).

<sup>81</sup> An excuse for self-defense would not carry with it duties of non-interference on other parties. See *id.* at 1388-94.

<sup>82</sup> THOMAS HOBBS, *LEVIATHAN* ch. XIV at 8 (Edwin Curley ed., 1994) (1668).

<sup>83</sup> Barnett & Kates, *supra* note 11, at 1177-78 n.184; Lund, *supra* note 2, at 119.

defense,<sup>84</sup> it would not follow that we have an excuse to bear arms. It is true that we might be excused for fashioning arms on the spot, or using arms that are immediately available, to deal with the imminent threat. But it is simply false that someone not subject to an imminent threat would, when ordered to disarm, always choose to remain armed and take the chance of punishment for disobedience of the order.<sup>85</sup> Coerced disarmament is possible.

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<sup>84</sup> It is not clear that Hobbes is arguing for an excuse in the normal sense of the word at all. He appears to be arguing for something like a Hohfeldian privilege to engage in self-defense. One will not be violating any duties to the sovereign by resisting, but the sovereign still may permissibly punish one's attempts at self-defense. See Jeremy Waldron, *Self-Defense: Agent-Neutral and Agent-Relative Accounts*, 88 CALIF. L. REV. 711, at 732 (2000); Finkelstein, *supra* note 80, at 1388-90. For a fuller discussion of Hobbes's argument, see Claire Finkelstein, *A Puzzle about Hobbes on Self-Defense*, 82 PAC. PHIL. Q. 332 (2001).

<sup>85</sup> Indeed, it is not clear that people would always prefer self-defense over punishment – there are, after all, worse things than death.

## IV

### Reserving the Natural Right to Bear Arms: Violation of Reserved Rights

But imminent violence is not the only area where Second Amendment advocates argue that we retain an inalienable right to bear arms. Another is when the political community, or a government that retains its trust, violates the reserved rights of individuals and so acts beyond its authority.

Sometimes Second Amendment advocates argue that an armed citizenry helps *ensure* that the government will respect reserved rights. African-Americans' guns, they argue, helped protect them against hostile state authorities during Reconstruction,<sup>86</sup> and guns would have protected Jews against the Nazis.<sup>87</sup>

This amounts to a third instrumental argument for a right to bear arms. The *first*, it will be remembered, was that arms increase the likelihood that individuals' right to life (and other rights) will be respected by other individuals. The *second* was that arms increase the likelihood that the government will act with the political community's trust. This *third* argument is that arms increase the likelihood that the political community (or a government that has its trust) will respect the reserved rights of individuals or minorities.

But this third instrumental argument is suspect. First of all, it is questionable that a political community would ever find it reasonable to empower individuals to frustrate its own will. This is not to say that it would be insensitive to individuals' reserved rights. But to the extent that it wants to respect these rights, it is free to do so. It may refuse to entrust its authority to a government unless it respects these rights. Indeed, it is even free to entrust its authority only to a government in which these rights are enshrined in a constitution.

It is hard to see, however, how the political community would come to the judgment that reserved rights would be best protected by giving individuals the power to resist its will. A foundational premise of social contract theory is that individuals'

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<sup>86</sup> Robert J. Cottrol & Raymond T. Diamond, *The Second Amendment: Toward an Afro-Americanist Reconsideration*, 80 GEO. L.J. 309 (1991).

<sup>87</sup> Daniel D. Polsby & Don B. Kates, Jr., *Of Holocausts and Gun Control*, 75 WASH. U. L. Q. 1237 (1997).

judgments concerning natural rights tend to be distorted by self-interest. People perceive the extent of their rights and the rights of their kin too broadly, leading to feuding and mistaken acts of self-defense. The right to bear arms, by giving individuals the power to act on these flawed perceptions, simply reintroduces the chaos of the state of nature that civil society was supposed to end.<sup>88</sup> It would lead to violent feuds between the political community and dissenting individuals or minorities. Furthermore, one can question whether arms would be beneficial from the perspective of the individuals and minorities setting themselves against the political community. Arms, one might argue, cannot protect rights that they have against the political community, for the political community will always have more arms than they.<sup>89</sup>

The argument at issue here is not instrumental, however. Consider someone who, after joining civil society, finds himself utterly unprotected by the political community. This person returns to the state of nature and may reassert his full executive right to protect himself. The alienation of his executive right was a voluntary decision made according to his self-interest and should be conditioned at least upon his receiving superior protection for his rights than that available in the state of nature.<sup>90</sup> Once his executive right is returned, he may use arms in defense of his rights. This is valuable *on its own*, as an expression of the Lockean principles of autonomy and individualism. It does not depend upon arms making it more probable that his rights will in fact be respected. The treatment of Jews in Nazi Germany, for example, would return to them their natural right to bear arms even if their feuding among one another were more dangerous to them than the Nazis.

But even if a government's violation of an individual's reserved rights returns to him his natural right to bear arms, the question remains what obligation this puts upon

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<sup>88</sup> David C. Williams, *Constitutional Tales of Violence: Populists, Outgroups, and the Multicultural Landscape of the Second Amendment*, 74 TUL. L. REV. 387, 483 (1999); see also Bellesiles, *supra* note 22, at 250.

<sup>89</sup> Carl T. Bogus, *Race, Riots, and Guns*, 66 S. CAL. L. REV. 1365, 1367 (1993) (“African-Americans have been particularly victimized by guns and the so-called ‘right to bear arms.’”); Williams, *supra* note 88, at 463 (Minorities “should fear a regime of decentralized violence because they are relatively weak and powerless; they do not have as many guns as their enemies.”).

<sup>90</sup> LOCKE, *supra* note 26, at §§ 17, 22-23, 91, 149; SIMMONS, *supra* note 27, at 50.

governments generally. As we have seen, it is hard to see how the mere possibility that an individual might return to the state of nature means that the government has a duty to give him the right to bear arms *now*. It is true that, by refusing to provide the right, the government will have compromised the individual's executive right if he returns to the state of nature. But the government would also be compromising his executive right by refusing to allow him a machine gun, or keeping him from creating a private army.

It is also questionable that all governmental violations of a citizen's reserved rights return to him his full executive right. Assume, for example, that the political community arbitrarily appropriates a citizen's property. He would certainly return to the state of nature with respect to that governmental action, and so – to some extent – would regain his executive right. But it is not clear that he would regain his right to bear arms. Notice that the issue is not whether he could randomly shoot people in defense of his property. Even if he returned to the state of nature completely, he would be subject to proportionality restrictions that limit the exercise of his executive right.<sup>91</sup> The question is whether the political community's minor infringement of a reserved right would leave him still subject to some laws. This question would have to be answered by reference to one's obligations under natural law when another party to an agreement has committed a minor breach.

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<sup>91</sup> See footnote 79.

## V

### **Reserving the Natural Right to Bear Arms: Disagreement about Reserved Rights**

Arguments that the Second Amendment protects an inalienable natural right to bear arms seemed promising, because they captured the intuition that bearing arms has non-instrumental value. But so far these arguments have run into the following problem: To the extent that there is such an inalienable natural right, it may be exercised only if one stands *outside* the political authority of the state. Second Amendment advocates appear to demand something contradictory – the full executive right of the state of nature *in* civil society.

Surprisingly, an argument for this contradiction may be possible. Consider someone who entered civil society but who now *believes* that his reserved rights have been violated in a manner that returns to him his full executive right, including his right to bear arms. The political community (or a government that has its trust) disagrees. Does the political community have the authority to decide the disagreement? Is the individual bound by its decision on the matter?<sup>92</sup>

The argument that he is not bound is powerful. If the community has the authority to decide disagreements about whether reserved rights are violated, then all limits on its authority evaporate. For if reserved rights were in fact violated, it would nevertheless retain its authority, as long as it came to the conclusion that reserved rights were not violated.

At times Locke appears to accept that the community has the final word even concerning the reserved rights of individuals.<sup>93</sup> To give the individual the right to “plead

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<sup>92</sup> My argument in this section is drawn in large part from Michael Steven Green, *The Paradox of Auxiliary Rights: The Privilege against Self-Incrimination and the Right to Keep and Bear Arms*, 52 DUKE L.J. 113, 119-28, 168-73 (2002).

<sup>93</sup> LOCKE, *supra* note 26, §§ 87, 88.

exemption” to the social contract would render it voidable at will.<sup>94</sup> The political community alone has the right to resist tyranny.<sup>95</sup>

This is certainly the approach taken by William Blackstone. Although Blackstone speaks of personal security, personal liberty and private property as “absolute” constitutional rights,<sup>96</sup> he denies that violations of these rights allow an individual to resist the political community. Defense of these rights is justifiable only when “the public voice proclaims such resistance necessary.”<sup>97</sup> Giving “every individual the right of . . . employing private force to resist even private oppression,” Blackstone argues, is “productive of anarchy.”<sup>98</sup>

For this reason, Second Amendment advocates’ infatuation with Blackstone is misguided.<sup>99</sup> It is true that he speaks of the right to bear arms as a “barrier[] to protect and maintain inviolate . . . primary rights.”<sup>100</sup> But for Blackstone, there are no rights – and so *a fortiori* no right to bear arms – against *the political community*. The political community’s will, as expressed in the legislature, has an “absolute despotic power.”<sup>101</sup>

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<sup>94</sup> *Id.* §§ 94, 243.

<sup>95</sup> *Id.* §§ 149, 240, 243; *see also* SIMMONS, *supra* note 27, at 172–74 (“The standard reading. . . seems to be that Locke’s right of resistance can be held only by the body of the people, its proper exercise to be determined only by the majority of the body politic.”); THOMAS, *supra* note 27, at 70 (“Apparently Locke’s meaning is that the deprivation of the rights of a particular person may be a sufficient *occasion* for the majority to withdraw its consent, but no one has a *right* to resist unless this single instance has persuaded the majority to withdraw its consent.”).

<sup>96</sup> 1 WILLIAM BLACKSTONE, COMMENTARIES \*136.

<sup>97</sup> *Id.* at \*244.

<sup>98</sup> *Id.* (“For civil liberty, rightly understood, consists in protecting the rights of individuals by the united force of society: society cannot be maintained, and of course can exert no protection, without obedience to some sovereign power: and obedience is an empty name, if every individual has a right to decide how far he himself shall obey.”).

<sup>99</sup> JOYCE LEE MALCOLM, TO KEEP AND BEAR ARMS: THE ORIGINS OF AN ANGLOAMERICAN RIGHT 130 (1994); Cottrol & Diamond, *supra* note 86, at 322–23; Don B. Kates, Jr., *The Second Amendment and the Ideology of Self-Protection*, 9 CONST. COMMENT. 87, 93 (1992); Nelson Lund, *supra* note 2, at 120 n.41.

<sup>100</sup> 1 BLACKSTONE, *supra* note 96, at \*136; *see also id.* at \*139–41.

<sup>101</sup> *Id.* at \*156. It is because he thought that individuals have no rights against the political community that Blackstone rejected judicial review. *Id.* at \*91. The legislature is “the sovereign power . . . [which] acknowledges no superior upon earth.” *Id.* at \*90; *see also id.* at \*157.

Blackstone's right to bear arms can be understood only as a *political* right, that is, a right that one exercises as a member of the political community.<sup>102</sup>

But, despite occasional language to the contrary, Locke appears to take a different approach. An individual has the right to defend himself against the community if it violates his reserved rights: "And where the body of the people, *or any single man*, is deprived of their right, or is under the exercise of a power without right, and have no appeal on earth, there they have a liberty to appeal to heaven, whenever they judge the cause of sufficient moment."<sup>103</sup> Indeed, Locke is concerned to show that the general recognition of this right will not create serious disorder, since aggrieved individuals cannot overcome the coercive power of the political community as a whole.<sup>104</sup> There would be no need to respond to this worry if individuals did not have the right of resistance to begin with.<sup>105</sup>

Locke cannot, therefore, give the political community the authority to decide disagreements between it and an individual concerning reserved rights. But must we therefore conclude that an individual reenters the state of nature whenever he disagrees with the political community about reserved rights, even if, in fact, the political community has not violated these rights? Wouldn't political authority as a whole evaporate?

One possible solution to this problem is to argue that the community may enforce its will even though it lacks authority to decide the disagreement because, like any other player within the state of nature, it is free to act on the basis of its views about natural law. Since it believes that it has not violated reserved rights, it is free to act on its perception that it has authority over the individual.<sup>106</sup> Locke himself suggests this when he claims that the individual's right to resist the political community is unlikely to create disorder, since individuals have little power to thwart the community's will. This assumes that that the political community may act on its perception that it has authority.

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<sup>102</sup> See Green, *supra* note 92, at 128-32; Heyman, *supra* note 61, at 252-60.

<sup>103</sup> LOCKE, *supra* note 26, § 168 (emphasis added).

<sup>104</sup> *Id.* §§ 208, 230.

<sup>105</sup> See SIMMONS, *supra* note 27, at 174-77.

<sup>106</sup> This was the position I took in Michael S. Green, *The Privilege's Last Stand: The Privilege Against Self-Incrimination and the Right to Rebel Against the State*, 65 BROOK. L. REV. 627, 698-99 (1999).

But such an argument conflicts with core Lockean principles. For Locke, the community may exercise a monopoly on coercive power only if it has *authority*, not simply because it thinks its views on natural law are right and happens to have the power to enforce its will. If the ability to coerce others to abide by its moral judgment were enough to justify the political community's monopoly on force, there would be no need for the social contract in the first place.<sup>107</sup> Accordingly, if the political community lacks authority over the individual dissenter, it appears as if it has no right to coerce compliance with its laws.

One need not conclude from this that the social contract is useless. For disagreement about reserved rights might be far less frequent than the disagreement about natural rights that motivated the social contract. The social contract could still reduce the inconveniences of the state of nature.

If an individual returns to the state of nature by virtue of his disagreement with the political community, he might regain his full executive right, including his right to bear arms. The community cannot argue that a right to bear arms need not be provided because, by its moral lights, his reserved rights are being respected. For, as we have seen, that would amount to claiming authority to decide disagreements about its authority.

It is understandable, therefore, that Second Amendment advocates take the right to bear arms to be an inalienable limitation on governmental authority. In denying arms to citizens, a government would be asserting an absolutely despotic power. This helps explain the close relationship that Second Amendment advocates see between disarming a population and totalitarianism:

If one believes that the people are to serve the state, that the rights of the people are created or granted by the state, or that the security of the state itself has paramount importance, then the right to keep and bear arms is a dangerous vehicle for subversion that must be eliminated; and eliminated it has routinely been in totalitarian countries.<sup>108</sup>

Second Amendment critics are mystified by such views, given that many liberal democracies have extremely restrictive gun control laws. Since these countries give their

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<sup>107</sup> See THOMAS, *supra* note 27, at 49.

<sup>108</sup> Harmer, *supra* note 57, at 55–56.

citizens the same general rights to free speech, privacy, and autonomy that citizens of the United States receive, it seems absurd to say that they are totalitarian. And yet by failing to give individuals the ability to defend their reserved rights as they see fit, these governments *are* totalitarian in insisting that the only views about the limits of their authority that matter are *their own*.

On the other hand, it is also understandable that Second Amendment critics find the right to bear arms anarchistic. Those asserting a right to bear arms are indeed assuming the government's lack of authority. The intractable nature of the debate over the right to bear arms, it seems, is the reflection of an irresolvable conflict within Lockean political theory itself, and is a testament to this theory's importance within the American political and legal tradition.

The anarchistic nature of this argument for an inalienable right to bear arms will also frustrate attempts to delineate the scope of the right in a meaningful fashion. If one accepts that there is such an inalienable right, all governments must give to citizens the full executive right they would possess in the state of nature. To the extent that the government attempts to balance this right against considerations of public safety, it would be reasserting a despotic power.

Consider, for example, the question of *who* has the right to bear arms. The Supreme Court has held that convicted felons may be deprived of their Second Amendment rights.<sup>109</sup> But the conclusion that felons lose their right to bear arms assumes that someone legitimately struggling against the government would never have been convicted of a felony. And this, of course, is false. Indeed, felons would appear to be the type of people who should *particularly* have a right to bear arms, since someone involved in a campaign of legitimate resistance is likely to have been convicted of a felony at some point.

To be sure, as the social costs of the Second Amendment grow, one will find the desire to limit its scope overwhelming. A line will be drawn. But it will not be drawn in a manner that is sensitive to the inalienable right of self-defense it is supposed to protect.

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<sup>109</sup> Lewis v. United States, 445 U.S. 55, 65 n. 8 (1980).

## VI

### A Third Option

Although the *Emerson* and *Parker* courts spoke vaguely about an “individual right” interpretation of the Second Amendment,<sup>110</sup> there is, in fact, a large number of interpretations available. At least three assign *instrumental* value to bearing arms. Arms might have value because they protect our rights from being violated by other lawless individuals, because they protect the political community against a tyrannical minority, or because they protect individuals’ reserved rights against a tyrannical majority.

As we have seen, however, these instrumental interpretations – with the possible exception of the second – have serious problems that would frustrate the attempt to coherently draw the Second Amendment’s scope. It was for this reason that we looked to non-instrumental theories of the value of arms possession – in particular, theories that the Second Amendment protects an inalienable natural right to bear arms. But most of these arguments also failed. The only one that stood a chance of success looked more like a *reductio ad absurdum* of Lockean theories of political authority than an argument for the Second Amendment.

There is a third option, however: The Second Amendment might protect an *alienable* natural right to bear arms. Although the right *could* have been alienated upon entering civil society, we might have chosen to reserve it anyway. After all, other rights protected in the Bill of Rights – such as the right of privacy – are alienable. And yet there are good reasons to think that they were in fact reserved against the political community.

Does such a theory of the Second Amendment have a chance of success? Privacy, although an alienable right, has a value that continues to make sense in civil society. The situation with arms possession might be different. Since the motivation for joining civil

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<sup>110</sup> The *Emerson* court cited indiscriminately academics who argue that the Second Amendment protects a right of individuals against the political community, *Emerson*, 270 F.3d at 255-57, and those who argue that it protects political right to participate in a communitarian revolution against a tyrannical minority, *E.g., id.* at 252. The *Parker* court spoke of the use of arms in self-defense protected by the Second Amendment as including either “resistance to either private lawlessness or the depredations of a tyrannical government.” *Parker*, 2007 WL 702084 at \*21.

society is escaping the inconveniences of the state of nature, why reserve something that brings about precisely the problem one is seeking to solve?

One might argue, however, that this shows insufficient sensitivity to the non-instrumental value of the executive right. This value does not evaporate once its costs are recognized. And because it has value, someone entering civil society might want to preserve *some* of the executive right, while alienating enough of it to ensure that the most serious inconveniences of the state of nature are avoided.

For example, it is not inconceivable that individuals entering civil society might reserve a right to duel – provided that it was carefully delineated to avoid its exercise devolving into a state of war. They might reserve this right not because they think it is inalienable (it isn't) and not because they think dueling is an effective way of protecting one's rights (it isn't), but out of respect for Lockean values of autonomy and individualism.

Indeed, although views about firearms differ, I believe most of us are committed to such a reserved executive right. There is a point at which governmental interference in individuals' capacity to exercise their executive right will seem impermissible. Imagine that people have the capacity to throw a punch – or engage in similar violent or coercive acts – only because of the presence of a naturally occurring substance in drinking water. (The substance does not generate violent desires, but simply allows one to act upon them.) This substance has always been present, which is why we always assumed we were biologically capable of violence. But it can easily be removed. Is it within the government's authority to do so?

I believe that the answer is no. The reason cannot be that the ability to punch makes us safer. We would all be safer – and our rights more secure – if we lacked this capacity. And yet I cannot help feeling that losing this power means losing some of my autonomy – because it would limit my capacity to protect and vindicate my rights as I see fit. I would describe it exactly as Second Amendment advocates describe disarmament – a humiliating subordination to the state. I have this feeling even though I know that the authority of the state exists precisely to limit my capacity to vindicate my rights as I see fit.

The difference between Second Amendment advocates and me is that they have the same attitude toward guns that I have toward my fists. Their attitude may be in tension with the very idea of governmental authority – it may be mildly anarchistic – but it is not irrational. Indeed, it is entirely conceivable that such a reserved right might have been enshrined in the United States Constitution.

But if the Second Amendment protects such a reserved right to bear arms, how do we delineate its scope? How is this right balanced against considerations of public safety? Because the right is non-instrumental, its scope cannot be determined by figuring out how safety, or the protection of our other rights, might best be achieved. But because the right has been artificially carved out of our natural right to bear arms, its scope cannot be determined by examining the contours of the natural right. Like a right to duel, it seems, its scope will be a messy question of tradition and aesthetics.