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WHY PROTECT PRIVATE ARMS POSSESSION? NINE THEORIES OF THE SECOND AMENDMENT

*Michael Steven Green**

INTRODUCTION

The Second Amendment to the United States Constitution reads: "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed."¹ Until recently, federal courts adopted a "collective-right" interpretation of the Amendment.² According to this interpretation, the Second Amendment's scope is limited by its prefatory clause: the people have a right to bear arms only insofar as it contributes to a "well regulated Militia." Furthermore, the term "Militia" refers to organized state militias, whose only modern equivalent is the National Guard.

Under the collective-right interpretation, the Second Amendment protects the interests of state governments, not individuals. For this reason, only regulations of firearms that impair states' abilities to arm their militias can be unconstitutional.³ No challenged regulation has ever come close to this threshold.

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1 U.S. CONST. amend. II.

2 See, e.g., *Gillespie v. City of Indianapolis*, 185 F.3d 693, 710 (7th Cir. 1999); *United States v. Hale*, 978 F.2d 1016, 1020 (8th Cir. 1993). As we shall see, the choice of the term "collective right" is unfortunate. See *infra* Part II.A.

3 Indeed, the Ninth Circuit took the collective-right interpretation to what would appear to be its logical conclusion, ruling that individuals have no standing to

*District of Columbia v. Heller*⁴ changed all that. The Supreme Court, in an opinion authored by Justice Scalia, held that the Second Amendment protects an individual right to bear arms for purposes unrelated to state militia service, including personal self-defense, and struck down two gun control laws on the ground that they violated this individual right.⁵ The District of Columbia's prohibition on most private ownership of handguns was unconstitutional because it banned a class of arms that "is overwhelmingly chosen by American society for [self-defense]."⁶ Its requirement that other firearms be kept disassembled or bound by a trigger lock or similar device that would render them incapable of immediate use was struck down because the law made it "impossible for citizens to use them for the core lawful purpose of self-defense."⁷

This Article will not discuss the textual and historical arguments Scalia offered in favor of his reading. I will assume that the Second Amendment protects an individual right to bear arms. At the same time, I will not address the normative question of whether the Second Amendment would exist in an ideal world—that is, whether individuals' interests in arms possession truly merit constitutional protection. The method of this Article can best be described as normative reasoning under constraint. Assuming that there should be an individual constitutional right to bear arms, what are the best normative arguments available in favor of this conclusion? What are the most plausible individual interests in private arms possession that such a right would protect?

Such an inquiry would not be necessary if Scalia had provided a detailed account of these interests himself. To be sure, his opinion is

challenge federal regulation of firearms on Second Amendment grounds. See *Silveira v. Lockyer*, 312 F.3d 1052, 1066–67 (9th Cir. 2002).

4 *District of Columbia v. Heller*, 128 S. Ct. 2783 (2008). The decision in *Heller* was influenced by vigorous academic attacks on the collective-right interpretation over the past two decades, sometimes from surprising corners. See 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 Past and Future of the Individual's Right to Bear Arms*, 31 GA. L. REV. 1, 25–26 (1996); William Van Alstyne, *The Second Amendment and the Personal Right to Arms*, 43 DUKE L.J. 1236, 1254 (1994); Eugene Volokh, *The Commonplace Second Amendment*, 73 N.Y.U. L. REV. 793, 812–13 (1998).

5 *Heller*, 128 S. Ct. at 2797–98.

6 *Id.* at 2817 (striking down D.C. CODE § 7-2502.02(a)(4) (2001)); see also *id.* at 2818 (describing the handgun as the "quintessential self-defense weapon").

7 *Id.* at 2818 (striking down D.C. CODE § 7-2507.02 (2001)).

peppered with references to the “natural”⁸ or “inherent”⁹ right of self-defense. But he does not say *why* the natural right to self-defense exists or how it grounds a right to bear arms.

Indeed, Scalia fails to answer what is surely the most fundamental question about the right to bear arms, namely whether it exists because it contributes to our safety. Granted, when I use arms in justifiable self-defense against a violent intruder, that act makes me safer. But a system of private arms possession, in which others (including the intruder himself) also possess arms, might increase my vulnerability to violence. Is Scalia saying that the Founders rejected this possibility? Was the Second Amendment enacted because a system of private arms possession was thought to make citizens safer than one in which they were disarmed? Or did they think individuals have some autonomy interest in arms possession worth protecting even in the face of increased violence? And if the Second Amendment does protect an autonomy interest, what is this interest? As we shall see, this matter is far more complicated than it might at first appear.

In this Article, I will seek to identify the most plausible interests in private arms possession that might stand behind the Second Amendment, even if these interests would not justify the decision in *Heller*. For example, one possible justification for the Second Amendment is that it protects our democratic institutions by empowering citizens to rebel by force of arms against a tyrannical minority. Although this justification can explain why individuals, and not merely states, have Second Amendment rights, it fails to explain the result in *Heller*, since it gives us no reason to believe that individuals have constitutionally protected interests in the use of arms in self-defense against private violence.¹⁰

I will concentrate, however, on interests that could justify the *Heller* decision. Indeed, an ideal account would justify, not merely the result in *Heller*, but the other claims that Scalia made, in dicta, about the scope of the Second Amendment. Most significantly, he argued that individuals have a constitutionally protected interest only in bearing arms “typically possessed by law-abiding citizens for lawful pur-

8 *Id.* at 2838 (quoting 1 WILLIAM BLACKSTONE, COMMENTARIES *139); *id.* at 2809 (quoting *Nunn v. State*, 1 Ga. 243, 251 (1846)); *see also id.* at 2805 (quoting ST. GEORGE TUCKER, *View of the Constitution of the United States*, in 1 BLACKSTONE'S COMMENTARIES app. at 300 (St. George Tucker ed., Phila., William Busch Young & Abraham Small 1803) (“[T]he right to self-defense is the first law of nature.”)).

9 *Id.* at 2817.

10 *See infra* Part II.A.

poses,”¹¹ a principle that would exclude “dangerous and unusual weapons” such as machine guns.¹² The closest I will come to such an ideal account is the argument that the Second Amendment protects bearing arms in self-defense, not as a means of making us safer from violence, but out of respect for Lockean values of autonomy and individualism.

Once again, I offer these arguments not as a defender of the Second Amendment, but rather as a defender of principled reasoning about questions of constitutional law. Sensitivity to the variety of possible interests protected by the Second Amendment is essential to any intellectually responsible discussion of the topic. This is true even if one seeks solely to discern the Founders’ intent. Unless one is aware of all the reasons they may have thought private arms possession was worthy of constitutional protection, one stands the chance of overlooking their actual reasons.

Clarity about the Second Amendment’s purposes is particularly important when deciding questions of scope unanswered by *Heller*. Consider, for example, the appropriate standard of review for laws that infringe upon protected Second Amendment interests—a matter that Scalia left open in his opinion.¹³ Should the standard be strict scrutiny,¹⁴ which upholds such laws only if they are justified by a compelling governmental interest and are narrowly tailored to further that interest?¹⁵ In free speech contexts, whether strict or intermediate scrutiny is chosen depends upon the strength of the interest at issue. Laws that burden commercial speech, for example, get intermediate scrutiny because the interests standing behind such speech are less significant.¹⁶ We cannot figure out which standard of review the Sec-

11 *Heller*, 128 S. Ct. at 2816. He derives this limitation from *United States v. Miller*, 307 U.S. 174, 179 (1939).

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

13 *See id.* at 2817–18.

14 *See, e.g.*, *United States v. Playboy Entm’t Group*, 529 U.S. 803, 813 (2000).

15 *See* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW 519–20 (2002). Such a standard might threaten laws prohibiting convicted felons from possessing firearms. Scalia claimed, in dicta, that “nothing in our opinion should be taken to cast doubt” on such laws. *Heller*, 128 S. Ct. at 2816–17. But even if one assumes that the considerations of public safety that motivate them are compelling, they appear seriously overinclusive, since many felonies (such as white-collar crimes) do not suggest a tendency to gun violence. *See* Adam Winkler, *Scrutinizing the Second Amendment*, 105 MICH. L. REV. 638, 721 (2007).

16 *See* *Ohralik v. Ohio State Bar Ass’n*, 436 U.S. 447, 455–56 (1978). Under intermediate scrutiny, a law infringing upon a protected interest is constitutional if it is justified by an important governmental interest and is substantially related to that interest. *See* *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 220 (1995).

ond Amendment deserves without a theory of the interests it protects.¹⁷

Another question of scope left unanswered by *Heller* is whether the Second Amendment should be incorporated into the Fourteenth Amendment Due Process Clause and applied to the states. Incorporation has been held to apply only to those provisions in the Bill of Rights that are "fundamental to the American scheme of justice."¹⁸ For example, the Sixth Amendment right to a jury trial was held to be

17 Another possibility is a reasonableness standard of review, similar to that applied in Fourth Amendment contexts. Under the Fourth Amendment, an invasion of privacy can be constitutionally permissible even if it is only roughly tailored to a governmental interest, and even if that interest is something less than compelling, provided that the invasion is reasonable—a matter that is determined "by balancing [the] intrusion on the individual's Fourth Amendment interests against [the] promotion of legitimate governmental interests." *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 652–53 (1995); *see also* *Skinner v. Ry. Labor Executives' Ass'n*, 489 U.S. 602, 629 n.9 (1989) ("The reasonableness of any particular government activity does not necessarily or invariably turn on the existence of alternative 'less intrusive' means." (citing *Illinois v. Lafayette*, 462 U.S. 640, 647 (1983))).

A reasonableness standard should be distinguished from a rational basis standard. Under the latter, a law would be upheld if it is a rational means of furthering some legitimate governmental interest. *See, e.g., San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 54–55 (1973). The existence of a governmental interest supporting the law is all that matters—this interest is not balanced against some constitutionally protected interest of the individual. The rational basis test is used in Equal Protection cases when the challenged governmental action does not implicate a protected class or fundamental right. *See Romer v. Evans*, 517 U.S. 620, 631 (1996). As Scalia notes, a rational basis standard of review for the Second Amendment would provide arms possession with no greater protection than it would have in the absence of the Second Amendment. *Heller*, 128 S. Ct. at 2817–18 n.27.

The court of appeals in *Heller* and many Second Amendment advocates appear to adopt a reasonableness standard. They claim, for example, that the right to bear arms can be subject to reasonable regulation in the interest of public safety. *See, e.g., Parker v. District of Columbia*, 478 F.3d 370, 398–400 (D.C. Cir. 2007), *aff'd sub nom. District of Columbia v. Heller*, 128 S. Ct. 2783 (2008); *United States v. Emerson*, 270 F.3d 203, 261–65 (5th Cir. 2001); Randy E. Barnett & Don B. Kates, Jr., *Under Fire: The New Consensus on the Second Amendment*, 45 EMORY L.J. 1139, 1190 (1986); 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, Jr., *The Second Amendment: A Dialogue*, LAW & CONTEMP. PROBS., Winter 1986, at 143, 145–46; Lund, *supra* note 4, at 49 (explaining that the Second Amendment requires "balancing individual liberty against public safety"); Van Alstyne, *supra* note 4, at 1253–54. *But see* Winkler, *supra* note 15, at 691–93 (discussing strict scrutiny language used in *United States v. Emerson*, 270 F.3d 203 (5th Cir. 2001), and by some Second Amendment advocates).

18 *Duncan v. Louisiana*, 391 U.S. 145, 149 (1968).

incorporated because it was a "fundamental right"¹⁹ that protected criminal defendants' interests in a fair and unbiased trial.²⁰ Once again, we cannot know whether the Second Amendment deserves the same treatment without a theory of the interests it protects. Although I will not seek to resolve these important problems of the Second Amendment's scope in this Article, the interests in private arms possession that I identify must form the basis of any resolution.

In his opinion, Scalia did not merely state that individuals have an interest in private arms possession. He described them as having a *natural* right to bear arms, a right that preexisted the enactment of the Second Amendment.²¹ This natural right would have limited the government's authority even if the Founders had failed to recognize it in the Constitution.²² In keeping with Scalia's account, the justifications I describe will generally seek to explain how the interests individuals have in private arms possession are sufficiently *fundamental* to limit the authority of the government.

In many cases, these justifications will rely on Lockean arguments about the limits of governmental authority.²³ For Locke, the source of the government's authority is the consent of the governed, and the limits of this authority are determined by the scope of that consent. It is useful to discuss the Second Amendment in the context of Locke's theory of political authority, because it was popular among the Founders.²⁴ But because many today no longer accept this theory, I will also attempt to outline how such justifications might fare under theories that do not take political authority to depend upon consent.

19 *Id.* at 158.

20 *Id.* at 156.

21 *Heller*, 128 S. Ct. at 2797.

22 To be sure, he also speaks of the Second Amendment as codifying a preexisting *legal* right created by the English Bill of Rights. *Id.* at 2797-2800. But Scalia quotes favorably views that this English right was grounded in a natural right. *Id.* at 2799 ("It is a natural right which the people have reserved to themselves, confirmed by the Bill of Rights, to keep arms for their own defence." (quoting *Journal of Occurrences: March 17*, N.Y. J., Apr. 13, 1769, at supp. 2)); *id.* at 2798; see also David B. Kopel, *The Natural Right of Self-Defense: Heller's Lesson for the World*, 58 SYRACUSE L. REV. (forthcoming 2008) (manuscript at 1), available at <http://ssrn.com/abstract=1172255>.

23 See JOHN LOCKE, *THE SECOND TREATISE ON CIVIL GOVERNMENT* (Prometheus Books 1986) (1690).

24 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).

I. JUSTIFICATIONS BASED ON SELF-DEFENSE

As we have seen, Scalia understood the Second Amendment as protecting “an individual right to use arms for self-defense.”²⁵ But the question remains *why* such an individual right exists. What is the value to individuals of bearing arms in self-defense?

A. *Public Safety*

The first and most straightforward argument is that allowing individuals to possess arms for use in (justifiable) self-defense increases the likelihood that innocent life will be preserved. Since each of us has an interest in preserving his innocent life, we have an interest in private arms possession, an interest that is sufficiently fundamental to limit the authority of the government.²⁶ It is not within the power even of a democratically elected government to undermine an individual's interest in the safety from harm that private arms possession brings.

The first justification is unique among those discussed in this Article in claiming that a system of private arms possession makes us safer from violence at the hands of our fellow citizens. As we shall see, the remaining justifications do not demand that it have this beneficial effect.

Scalia never explicitly endorses the first justification. To be sure, he speaks of the usefulness of arms, and particularly of handguns, when engaging in justifiable self-defense.²⁷ But even if I am made safer with respect to a fixed population by possessing a gun,²⁸ it does not follow that a system in which citizens are generally allowed to own arms for self-defense will make me safer than one in which we are all disarmed.

Possessing a gun can expose others to risks of harm. These risks include the possibilities: (1) that the owner will use his gun to commit

25 *Heller*, 128 S. Ct. at 2811.

26 For possible examples of this argument, see Samuel C. Wheeler III, *Self-Defense: Rights and Coerced Risk-Acceptance*, 11 PUB. AFF. Q. 431 (1997); Jeffrey Snyder, *Fighting Back: Crime, Self-Defense, and the Right to Carry a Handgun* (Oct. 22, 1997), http://www.cato.org/pub_display.php?pub_id=1143 (“[C]itizens have the right to defend themselves against criminal attack. And since criminals can strike almost anywhere at any time, the last thing government ought to be doing is stripping citizens of the most effective means of defending themselves.”).

27 *Heller*, 128 S. Ct. at 2818–20.

28 This might be doubted. Some of the risks that gun possession creates for the gun's owner are the possibilities: (1) that he might use it to commit suicide; (2) that he might harm himself accidentally; or (3) that an assailant (or a child) might take his gun and use it against him.

a crime (including a crime of passion against a spouse or family member); (2) that he might use the gun in a mistaken act of self-defense; and (3) that he might accidentally discharge the gun, harming someone.²⁹ The mutual imposition of these risks of harm might collectively render us less safe compared to compelled disarmament. In short, allowing private arms possession might put citizens in a prisoner's dilemma. The choice to arm dominates, in the sense that it is in one's interest to arm oneself, whether or not others do so as well. But when everyone makes the same choice, the mutually imposed risks of harm make us all worse off.³⁰

1. Does a System of Private Arms Possession Make Us Safer?

Much debate over the Second Amendment has revolved around this empirical question of the effects of a system of private arms possession on public safety.³¹ If the government's choice were simply between successful disarmament and uncontrolled individual arms possession, it is very likely that the former would make citizens safer. But the matter is more complicated, because the government's choice is not between these two strategies. First of all, the government's policy of disarmament might be only partially successful. Indeed, it might predominantly affect law-abiding citizens, who would use arms in justified self-defense, without affecting the use of arms by criminals. The D.C. Circuit, whose decision was affirmed by the Supreme Court in *Heller*, suggested that this is true, at least in the District of Columbia:

As amici point out, and as D.C. judges are well aware, the black market for handguns in the District is so strong that handguns are readily available (probably at little premium) to criminals. It is

29 For a discussion of these risks, see *Guns in the Home*, <http://www.bradycampaign.org/facts/issues/?page=home> (April 2002) (last visited Sept. 18, 2008).

30 Arms races between nations are routinely modeled as prisoner's dilemmas, so it should not be odd to understand individuals' decisions to arm analogously. See Russell Hardin, *Unilateral Versus Mutual Disarmament*, 12 PHIL. & PUB. AFF. 236, 248 (1983).

31 Compare Barnett & Kates, *supra* note 17, at 1234–59 (arguing that the “more guns = more murders” assertion is empirically disproven), and John R. Lott, Jr. & David B. Mustard, *Crime, Deterrence, and Right-to-Carry Concealed Handguns*, 26 J. LEGAL STUD. 1, 64–65 (1997) (“[C]oncealed handguns are the most cost-effective method of reducing crime . . .”), with *Guns in the Home*, *supra* note 29 (“[G]uns kept in the home for self-protection are more often used to kill somebody you know than to kill in self-defense . . .”). This debate is well described in Justice Breyer's dissent in *Heller*. *Heller*, 128 S. Ct. at 2832–36 (Breyer, J., dissenting).

asserted, therefore, that the D.C. gun control laws irrationally prevent only law abiding citizens from owning handguns.³²

Second, the government does not have to allow uncontrolled individual arms possession. It can regulate, at least to some extent, who may own firearms, which firearms may be owned, and how they are used—thereby increasing the use of arms in justified self-defense and decreasing accidental and intentional misuse of arms.

It is possible, therefore, that a system of private arms possession would make us safer than disarmament. It is worth noting, however, that even if it does make us safer, this is true within a particular context, which might change. For example, if a policy of disarmament currently undermines public safety because the government is unable to effectively disarm criminals, the technological, legal, or political causes of this inability might later be overcome. One possible criticism of the first justification, therefore, is that if private arms possession makes us safer, this fact is too contingent upon present circumstances to justify anything as enduring as a constitutional right.

2. If Private Arms Possession Makes Us Safer, Does That Mean It Is Beyond the Government's Authority to Disarm Us?

Furthermore, even if it is true that a system of private arms possession makes us safer, that does not mean that the government would be acting outside its authority if it disarmed the population. One cannot assume that the government has exceeded its authority simply because it has made a mistake. An essential element of the government's authority is its ability to require a citizen to obey its decisions even if they are wrong.³³ If the government's decisions were binding only if they were the best available, governmental authority would evaporate, since citizens would take themselves to have a reason to conform to a governmental decision only when they thought it was the best available and so would have conformed even in the absence of the decision. They would, in effect, be free of a duty of obedience, able to enforce their own views about the scope of people's rights and duties.

This is not to say that governmental authority over individuals must be unlimited. The government, we can assume, is not free to make mistakes concerning the fundamental interests of individuals, such as whether free speech should be suppressed or cruel and unusual punishments imposed. But it must be allowed to make some mis-

³² *Parker v. District of Columbia*, 478 F.3d 370, 399 n.17 (D.C. Cir. 2007).

³³ See, e.g., Philip Soper, *Legal Theory and the Claim of Authority*, in *THE DUTY TO OBEY THE LAW* 213, 222 (William A. Edmundson ed., 1999) ("The typical claim of the legal authority is that directions are to be followed even if they are wrong . . .").

takes, and the question remains why disarmament is not one of those areas where governmental mistakes are permissible.

The reason cannot simply be that our interest in safety is so significant that governmental decisions that impact it cannot be mistaken. One problem with such an argument is that if private arms possession makes us *less* safe, as many people believe, it would be beyond the government's authority to *fail* to disarm the population. My guess is that few defenders of the Second Amendment would concede that if they are wrong about the beneficial effects of private arms possession, a constitutional amendment requiring disarmament would be necessary. What is more, the government routinely makes decisions—for example, concerning the distribution of police protection or when to go to war—that have profound consequences for our safety. And yet we consider ourselves obligated to accept these decisions even if they are mistaken.

Of course, even if the government does not act beyond its authority simply by making a *mistake* concerning public safety, it would surely be acting beyond its authority if it failed to provide citizens with a minimal level of safety. Locke thought that individuals had an inalienable right to a certain level of security from harm. It was not within the power of one submitting to governmental authority to give over to the government the right to make any decision it wants concerning his safety.³⁴ No one can consent to be a *slave*, that is, someone who may be killed, or left to be killed, at will.³⁵ In particular, no one could consent to receive a level of security inferior to that experienced in the state of nature (that is, in the absence of governmental authority).³⁶ After all, one leaves the state of nature and consents to governmental authority to escape the violence and feuding of private enforcement of rights,³⁷ and “no rational creature can be supposed to change his condition with an intention to be worse.”³⁸

34 See LOCKE, *supra* note 23, § 131, at 71–72.

35 See *id.* § 23, at 18.

36 See *id.* § 137, at 76 (“It cannot be supposed that [people] should intend . . . to give 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”); see also A. JOHN SIMMONS, *ON THE EDGE OF ANARCHY* 50 (1993) (“Despotical power cannot be acquired by compact.”).

37 See *infra* Part I.D.1.

38 LOCKE, *supra* note 23, § 131, at 71–72. Locke's inalienability argument appears to appeal to the fact that it would be irrational to consent to be a slave. But Locke offers another argument that voluntary slavery is impossible, namely because “[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.” *Id.* § 22, at 18. I cannot give someone

Could one argue that individuals have a right to bear arms because the government, by disarming us, would be failing to provide us with this minimal level of protection? One problem with this argument is that even if the government makes us less safe by disarming us, it does not follow that our total level of protection from violence would be inadequate. The government might still be providing us with the level of protection that is our right (for example, by stationing a policeman on every block). For such an argument to work, therefore, one would have to show not merely that private arms possession makes us safer, but that its contribution to our safety is so profound that the government can provide us with the minimal level of security that is our right *only* if it allows us to be armed. That is an impossibly tall order.

It is important to distinguish the first justification from another, which we will discuss later, that assumes that the government has already failed to provide us with the minimal level of personal security that is our right.³⁹ As we shall see, one advantage of this later justification (our fifth) is that the government's failure can ground a right to bear arms whether or not arms make us safer. Once the government violates its obligations to provide security, we return to the state of nature, freeing us to use arms to protect ourselves despite any costs to our safety that private arms possession generates. But we are currently considering an argument that is different in two crucial respects from the fifth: (1) it claims that the government can remain within the limits of its authority by giving us a right to bear arms, not that we have such a right because the government has lost its authority over us; and (2) it grounds the right to bear arms in the contribution that arms make to our safety, rather than claiming that we have such a right whether or not we are made safer as a result.

A final reason that the public safety benefits of private arms possession might justify a right to bear arms is that governmental decisions concerning public safety that are *manifestly wrong* are beyond the government's authority, even when the government is providing indi-

the right to kill me arbitrarily, not because I have the right to kill myself arbitrarily that I cannot alienate, but simply because I have no right to kill myself arbitrarily to begin with. For a further discussion of this argument, see A. John Simmons, *Inalienable Rights and Locke's Treatises*, 12 PHIL. & PUB. AFF. 175, 197–98 (1983).

Of course, many modern philosophers reject consent theories of political obligation. See *infra* notes 109–12 and accompanying text. But even these philosophers see political authority as limited by certain fundamental interests of individuals. These would presumably include an interest in a certain minimal level of security.

39 See *infra* Part I.E.1.

viduals with the level of security that is their right. A law prohibiting arms possession might be such a manifest error.

The idea that manifest errors are beyond the government's authority would not lead governmental authority to evaporate. It is true that I have not submitted to the government's authority if I reserve the right to reject its decisions whenever they are wrong. But refusing to submit to manifestly wrong decisions is not the same as refusing to submit to wrong decisions.⁴⁰ It is compatible with the government's authority to regulate farm production, for example, that farmers would not be bound by a regulation compelling them to sow their fields with stones rather than seeds.

A limitation on governmental authority for manifest errors might explain why individuals have a fundamental interest in self-defense (as distinguished from a fundamental interest in bearing arms for self-defense). Many people, including Locke, have argued that the government cannot permissibly prohibit citizens from engaging in self-defense in cases of imminent violence.⁴¹ One reason for this limit on the authority of the state may be that the public safety benefits of self-defense are so manifest.⁴²

It certainly seems that the prohibition of some acts of self-defense would manifestly fail to promote public safety. Imagine that a government completely forbids self-defense even against culpable aggressors. If a violent intruder enters my home, I may do nothing to defend myself, 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. Such a law, if in fact complied with by the population, would compromise public safety. It is true that it would discourage wrongful or mistaken acts of self-defense—and we would benefit insofar as we might be the target of such acts. But the cost to our safety would be great, since we would be uniquely vulnerable to acts of violence by culpable aggressors.⁴³ The possibility of punishment after

40 See JOSEPH RAZ, *THE MORALITY OF FREEDOM* 38–42 (1986).

41 See, e.g., LOCKE, *supra* note 23, § 19, at 16–17; see also GEORGE BOWYER, *COMMENTARIES ON UNIVERSAL PUBLIC LAW* 233 (London, V&R Stevens & G.S. Norton 1854) (“Every man has a right to defend himself or his property, or even to defend others, where there is not time or opportunity to call the aid of the civil power.”).

42 As we shall later see, individuals’ right to self-defense might be justified on grounds other than public safety. See *infra* Part I.B.

43 Examples of public safety arguments for self-defense can be found at PAUL H. ROBINSON, *CRIMINAL LAW DEFENSES* § 131(a) (1984); BOAZ SANGERO, *SELF-DEFENCE IN CRIMINAL LAW* § 1.6 (2006); Claire Oakes Finkelstein, *On the Obligation of the State to Extend a Right of Self-Defense to Its Citizens*, 147 U. PA. L. REV. 1361, 1397–98 (1999); and Paul H. Robinson, *Competing Theories of Justification: Deeds v. Reasons*, reprinted in *HARM AND CULPABILITY* 45, 46 (A.P. Simester & A.T.H. Smith eds., 1996).

the fact would not be enough to protect us. Indeed, in many cases punishment might not occur at all, since the best witness for the prosecution would be dead.

But even if a limitation on governmental authority for manifest errors could justify a right to self-defense, it is unlikely to justify a right to bear arms. A law compelling disarmament in the interest of public safety, even if *in fact* a mistake, is hardly *manifestly* a mistake. The question of whether arms possession makes us safer is one concerning which there is reasonable disagreement. This suggests that it is precisely the sort of issue that is within the scope of the government's authority.

As we have seen, the opinion of the court of appeals in *Heller* suggested that the District of Columbia's ban on handguns might be a manifest error, because it "irrationally prevent[s] only law abiding citizens from owning handguns."⁴⁴ But the District could plausibly argue that the reason the ban currently makes citizens of the District less safe is because of the failure of *neighboring states* to enact similar bans. Gun violence, it could argue, must be overcome through collective action. And collective action will not occur unless some government takes the first step, even if the first mover will temporarily make its citizens worse off. It is hard to see how it is beyond a government's authority to adopt such a strategy.

3. Are Constitutional Rights That Promote Public Safety Necessary?

But let us assume that the Founders, in addition to thinking that there were public safety benefits to private arms possession, believed that these benefits somehow limited the government's authority to disarm the population. It still is unclear why they would have thought that a constitutional right protecting this limit should be necessary.

Consider, once again, self-defense in cases of imminent violence at the hands of culpable aggressors. If we have a fundamental interest in self-defense in such cases, why is there no right to self-defense specified in the U.S. Constitution?⁴⁵ The reason, surely, is that constitu-

44 *Parker v. District of Columbia*, 478 F.3d 370, 399 n.17 (D.C. Cir. 2007).

45 To the extent that protection for fundamental interests might be read into the Due Process Clause of the Fifth or Fourteenth Amendment, one could argue that there is such a constitutional right. But the question would still remain why the fundamental interest in self-defense was not explicitly protected the way privacy and dignity interests were explicitly protected by the Fourth and Eighth Amendments.

Courts have generally refused to read a constitutional right of self-defense into the Due Process Clause. See *Rowe v. DeBruyn*, 17 F.3d 1047, 1052 (7th Cir. 1994); *White v. Arn*, 788 F.2d 338, 347 (6th Cir. 1986); *Fields v. Harris*, 675 F.2d 219, 220 (8th Cir. 1982). But see *Griffin v. Martin*, 785 F.2d 1172, 1177 (4th Cir. 1986), *with-*

tional rights are needed to protect only those limits on governmental authority that might conceivably be violated. The dangers that would result from prohibiting all acts of self-defense would be so widespread that a democratic government, being sensitive to the interests of the majority, would never enact such a law.

In contrast, the fundamental interests protected by other provisions in the Bill of Rights *could* conceivably be sacrificed by the majority, making constitutional rights protecting these interests advisable. A common justification for the Eighth Amendment, for example, is that without it the dignitary interests of those convicted of crimes would be sacrificed to create punishments with maximum deterrent effect.⁴⁶ Majoritarian processes cannot be counted on to protect these interests, because the costs of protection are felt by everyone (in the form of increased crime), while the benefits are felt only by criminal defendants.

A similar story can be told about many other constitutional rights. The standard theory of the Fourth Amendment⁴⁷ is that it keeps the privacy interests of those suspected of crimes from being sacrificed for the benefits that the majority would receive from more efficient enforcement of the criminal law.⁴⁸ And a common, if not the standard, theory of the Free Speech Clause of the First Amendment⁴⁹ is that it keeps the autonomy interests that individuals have in speaking

drawn, 795 F.2d 22 (4th Cir. 1986); *Isaac v. Engle*, 646 F.2d 1129, 1140 (6th Cir. 1980) (Merritt, J., dissenting) (asserting that the Constitution prohibits a state from eliminating the justification of self-defense). For the argument that a constitutional right to self-defense exists, see Nicholas J. Johnson, *Beyond the Second Amendment: An Individual Right to Arms Viewed Through the Ninth Amendment*, 24 RUTGERS L.J. 1, 1-16 (1992) (arguing that the right to self-defense is incorporated within the Ninth Amendment); Anders Kaye, *Dangerous Places: The Right to Self-Defense in Prison and Prison Conditions Jurisprudence*, 63 U. CHI. L. REV. 693, 704-09 (1996); James E. Robertson, "Fight or Flee" and Constitutional Liberty: An Inmate's Right to Self-Defense When Targeted by Aggressors, 29 IND. L. REV. 339, 358-59 (1995).

46 See, e.g., *Roper v. Simmons*, 543 U.S. 551, 560 (2005); *Furman v. Georgia*, 408 U.S. 238, 269-305 (1972) (Brennan, J., concurring).

47 U.S. CONST. amend. IV ("The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.").

48 See, e.g., *Schmerber v. California*, 384 U.S. 757, 767, 772 (1966).

49 U.S. CONST. amend. I ("Congress shall make no law . . . abridging the freedom of speech . . .").

their own minds from being sacrificed to protect the public from the dangers that such speech might cause.⁵⁰

But we have as yet no analogous story of how the majority would be motivated to sacrifice the fundamental interest in possessing arms to which the first justification appeals. The benefits of arms possession, like the benefits of self-defense, are apparently widespread. If private arms possession makes us safer, the majority should be in favor of it, making constitutional protection unnecessary.⁵¹

Of course, it is not difficult to imagine why a government that is *insensitive* to the interests of the majority might be motivated to disarm the population. Such a tyrannical government might choose disarmament, despite any costs to public safety, because it is worried that an armed citizenry could rise up against it. But this speaks to the sixth

50 See, e.g., David A.J. Richards, *Free Speech and Obscenity Law: Toward a Moral Theory of the First Amendment*, 123 U. PA. L. REV. 45, 90 (1974) [hereinafter Richards, *Obscenity Law*]; David A.J. Richards, *Toleration and Free Speech*, 17 PHIL. & PUB. AFF. 323, 324–25 (1988) [hereinafter Richards, *Toleration*].

51 It is conceivable that only a minority is made safer by a system of private arms possession, while the majority benefits from disarmament. Such an idea appears to stand behind Lester Hunt's and Todd Hughes' defense of the right to bear arms. See Todd C. Hughes & Lester H. Hunt, *The Liberal Basis of the Right to Bear Arms*, 14 PUB. AFF. Q. 1 (2000). Hunt and Hughes argue that even if private arms possession makes the majority safer, that does not mean that the government may permissibly disarm individuals:

Let us assume, for the sake of the argument, that the alleged causal relationship between guns and crime really exists. Is this sufficient to justify a government ban on firearms? In a liberal state, the answer is simple: it is no. In a consistently liberal system, it is considered highly problematic to dispose of the rights and liberties of citizens—where these rights and liberties are believed by their owners to be important—simply and solely because the community can extract a benefit from doing so.

Id. at 2. The fact that guns *as a class* are dangerous to the population “is not a legitimate reason for banning guns.” *Id.* at 11. In particular, a policy of disarmament violates the individual rights of someone who needs arms in self-defense: “To disarm [such a person], exposing her to mortal danger, because of behavior for which she apparently bears no causal responsibility at all, is grossly unfair to her.” *Id.* at 12.

Hunt and Hughes do not explain, however, why the benefits the minority receives from arms possession give it a fundamental interest that can compromise the safety of the majority. As we have seen, by assuming that the minority is made less safe by disarmament we do not yet know the aggregate risk of harm to which it is exposed. It might be receiving the minimal level of security that is its right. If the package of methods that the government uses to protect citizens from violence is providing it with an adequate level of protection, how can it object that disarmament is part of that package? Hunt and Hughes appear to assume, without argument, that disarmament would take the minority below the minimal level of security that the government must provide.

justification for the Second Amendment, which I will discuss later.⁵² Under this justification, the Second Amendment exists as a protection against tyranny. Individuals should be given arms for the purpose of a popular revolution, rather than for private self-defense.

In his opinion, Scalia manages to sidestep the problem of the Founders' motivation for constitutionally protecting the public safety benefits of private arms possession. He admits that the enactment of the Second Amendment was not motivated by a desire to protect the use of arms in self-defense. The Founders, he argued, were contemplating the justification expressed in the prefatory clause (probably our sixth). But he insists that even if "self-defense had little to do with the right's *codification*; it was the central component of the right itself."⁵³ Although the Founders had no motivation to constitutionally protect the use of arms in self-defense, such protection was a side effect of the constitutional protection of its use to overthrow or discourage tyranny.

4. A Puzzle Concerning Scope

Assuming that the Second Amendment protects private arms possession because of its public safety benefits, what consequences does this have for the Amendment's scope? If the first justification is correct, the Second Amendment constitutionalizes the empirical judgment that private arms possession promotes public safety. As a result, courts would have to be skeptical about legislatures' judgments concerning the public safety benefits of arms regulation. But we do not know how far this skepticism is supposed to go. Assume, for example, that the legislature chooses to ban machine guns because it thinks this will promote public safety. Most defenders of the Second Amendment believe that this is constitutionally permissible. Don Kates has argued, for example, that the 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."⁵⁴

On the one hand, we can criticize Kates' argument on the merits: if, as he believes, our system of private ownership of handguns makes us safer, this must be because the system is distributing them to a siza-

52 See *infra* Part II.A.

53 *District of Columbia v. Heller*, 128 S. Ct. 2783, 2801 (2008).

54 Kates, *supra* note 17, at 146; see also Stephen P. Halbrook, *What the Framers Intended: A Linguistic Analysis of the Right to "Bear Arms,"* LAW & CONTEMP. PROBS., Winter 1986, at 151, 160 ("[H]eavy ordinances are not constitutionally protected. Nor are other . . . unusual weapons . . ." (citations omitted)).

ble number of law-abiding citizens who are able to exercise good judgment about when they can be used justifiably. If everyone constantly used handguns carelessly or mistakenly—if, for example, they often pointed them in the wrong direction—disarmament would surely be a better option. But in this respect machine guns look much more like handguns than nuclear weapons. Although the rapid succession of machine gun fire to some extent heightens the risk of unjustified harm to third parties, machine guns are perfectly safe if pointed in the right direction. If Kates is right that our handguns will generally be pointed in the right direction, why wouldn't the same thing be true about our machine guns? The two weapons, it seems, should share the same constitutional fate.

But the more fundamental problem with Kates' argument is that he appeals to considerations of public safety to determine the scope of the Second Amendment. And the Second Amendment is meant to constitutionally mandate skepticism about public safety arguments.⁵⁵ How do we know that Kates' argument is not one of those about which a court should be skeptical? To be sure, he has offered a plausible argument that prohibition of machine guns would make us safer.⁵⁶ But the Brady Campaign to Prevent Gun Violence can offer plausible arguments that the prohibition of handguns—or, indeed, all guns—would make us safer. If a court is not allowed to accept the Brady Campaign's arguments, how do we know it can accept Kates'?

The first justification makes the Second Amendment look very different from many other provisions in the Bill of Rights. As we have seen, rather than having been enacted *because* of public safety considerations, many provisions in the Bill of Rights exist to keep autonomy interests from being sacrificed *for* public safety. To determine the scope of these constitutional rights, the strength of these autonomy interests can be our guide.⁵⁷ But because under the first justification the Second Amendment protects public safety, nothing like this procedure is possible.

55 See *supra* Part I.A.2–3.

56 BRADY CENTER TO PREVENT GUN VIOLENCE, WITHOUT A TRACE: HOW THE GUN LOBBY AND THE GOVERNMENT SUPPRESS THE TRUTH ABOUT GUNS AND CRIME 18 (2006), <http://www.bradycenter.org/xshare/pdf/reports/giw.pdf> ("Crime gun tracing studies show that gun laws, by regulating the behavior of gun sellers and buyers in the legal market, have a profound impact on access to guns by criminals in the illegal market.").

57 It is common in Fourth Amendment contexts to "'balanc[e] . . . intrusion on the individual's [privacy] interests against . . . promotion of legitimate governmental interests,'" including governmental interests in public safety. *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 652–53 (1995) (quoting *Skinner v. Ry. Labor Executives' Ass'n*, 489 U.S. 602, 619 (1989)).

It is not surprising, therefore, that Scalia answered the question of which arms are protected by the Second Amendment in a manner unrelated to considerations of public safety. Drawing on *United States v. Miller*,⁵⁸ he argued that individuals have a constitutionally protected interest only in arms "typically possessed by law-abiding citizens for lawful purposes."⁵⁹ This principle excludes "dangerous and unusual weapons" such as machine guns.⁶⁰

The fact that a category of weapon passes the *Miller* test does not mean that we would not be safer if it were prohibited. According to the *Miller* test, machine guns would be constitutionally protected if their possession became widespread. And yet they still might undermine public safety.⁶¹ By the same token, the fact that a newly invented category of weapon fails the *Miller* test—because, being new, it is not typically possessed—does not mean that its widespread possession would not substantially contribute to our safety.⁶² The scope of the Second Amendment becomes unrelated to its underlying justification.

Indeed the *Miller* test is unrelated not merely to the interests appealed to in the first justification, but also to those standing behind the sixth. If the purpose of the Second Amendment is to discourage governmental tyranny, citizens arguably have an interest in possessing machine guns, since any tyrannical government would have such weapons at its disposal.⁶³

As we have seen, a question of scope not answered in Scalia's opinion is the standard of review used to assess laws that infringe upon individuals' Second Amendment interests. An example is a law that prohibits all convicted felons from owning any firearms. One might think that if the first justification is correct, strict scrutiny is the appropriate standard. After all, under the first justification the Second Amendment protects citizens' interests in their self-preservation. This interest is one of the strongest imaginable. The government, one might argue, cannot sacrifice this interest unless it has an extremely compelling reason.

Keep in mind, however, that the first justification gives the Second Amendment a purpose importantly different from other provi-

58 307 U.S. 174, 179 (1939).

59 *District of Columbia v. Heller*, 128 S. Ct. 2783, 2816 (2008).

60 *Id.* at 2817.

61 *See id.* at 2869 (Breyer, J., dissenting).

62 *See id.*

63 Scalia recognizes this problem. *See Heller*, 128 S. Ct. at 2817 (majority opinion).

sions in the Bill of Rights. The Eighth Amendment⁶⁴ exists to keep the majority from sacrificing individuals' dignitary interest for some other governmental goal, such as deterring crimes. The strength of the Eighth Amendment, therefore, is tied to the strength of this dignitary interest. But under the first justification the majority is likely to disarm the population, not because it wants to sacrifice citizens' interest in self-preservation for some other governmental goal, but instead because it thinks disarmament protects this interest. The strength of the Second Amendment should be tied, therefore, not to the strength of individuals' interest in safety, but to the strength of the empirical conclusion standing behind the Second Amendment that private arms possession best promotes safety. The question of the standard of review should depend upon the strength of this empirical conclusion. The same point would apply to the question of whether Second Amendment rights are incorporated into the Fourteenth Amendment. Second Amendment rights are fundamental and so deserving of incorporation only to the extent that the empirical conclusion standing behind the Second Amendment is strong.

There is a final reason to question the first justification. It is a significant fact that support for the Second Amendment remains even in the face of evidence that gun ownership makes us less safe.⁶⁵ In affirming the right to bear arms despite this evidence, Second Amendment advocates sound like traditional civil libertarians. The Fourth Amendment likely makes us less safe, given the frequency with which its exercise frustrates otherwise legitimate criminal prosecutions. But this does nothing to undermine its justification. To its defenders, the same point applies to the Second Amendment.⁶⁶ We therefore should take seriously arguments that the right to bear arms in self-defense is justified by an autonomy interest unrelated to questions of public safety.⁶⁷

64 U.S. CONST. amend. VIII ("Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.").

65 See generally Dan M. Kahan & Donald Braman, *More Statistics, Less Persuasion: A Cultural Theory of Gun-Risk Perceptions*, 151 U. PA. L. REV. 1291, 1293-94 (2003) ("[H]ow an individual feels about gun control will depend a lot on the social meanings that she thinks guns and gun control express, and not just on the consequences she believes they impose.").

66 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 4, at 657 ("[W]hy do we not apply such consequentialist criteria to each and every part of the Bill of Rights?").

67 To be sure, this support for private arms possession in the face of gun violence could be explained by the idea that it protects against a tyrannical government. Peo-

To make the difference between the first and subsequent justifications clear, I will assume in what follows that a system of private arms possession makes us more vulnerable to private violence. The choice to arm oneself presents a prisoner's dilemma. The choice dominates, in the sense that it makes one safer compared to a fixed population. But when everyone bears arms, the mutually imposed risks make us all worse off. The remaining justifications claim that private arms possession has value meriting constitutional protection despite this fact.⁶⁸

B. *Excuse*

Let us return to the "natural right of resistance and self-preservation,"⁶⁹ which Scalia thinks is connected to the right to bear arms. We have already discussed a public safety argument for a natural right of self-defense. But there are circumstances where we think individuals should be allowed to engage in self-defense even when no clear public safety benefits can be discerned. Consider, for example, the innocent threat, as described by Robert Nozick:

If someone picks up a third party and throws him at you down at the bottom of a deep well, the third party is innocent and a threat; had he chosen to launch himself at you in that trajectory he would be an aggressor. Even though the falling person would survive his fall onto you, may you use your ray gun to disintegrate the falling body before it crushes and kills you?⁷⁰

Although the legal status of self-defense against innocent threats is unclear,⁷¹ many people believe that self-defense in such cases should be permitted.⁷² We cannot justify this right of self-defense on public safety grounds, for allowing self-defense against innocent

ple might be willing to accept gun violence in order to receive security against tyranny.

68 Of course, it is not essential to these later justifications that private arms possession undermines public safety. These justifications simply claim that its value is unrelated to considerations of public safety. But this is best highlighted by assuming scenarios where its contribution to public safety is negative.

69 *District of Columbia v. Heller*, 128 S. Ct. 2783, 2838 (2008) (quoting 1 BLACKSTONE, *supra* note 8, at *139).

70 ROBERT NOZICK, *ANARCHY, STATE, AND UTOPIA* 34 (1974); *see also* Judith Jarvis Thomson, *Self-Defense*, 20 PHIL. & PUB. AFF. 283, 287 (1991) (presenting another example of the innocent threat and concluding that there is no moral difference in the use of self-defense when the aggressor is innocent or villainous).

71 *See* Sanford H. Kadish, *Respect for Life and Regard for Rights in the Criminal Law*, 64 CAL. L. REV. 871, 875-76 (1976).

72 *See* Kimberly Kessler Ferzan, *Self-Defense and the State*, 5 OHIO ST. J. CRIM. L. 449, 468-69 (2008) ("[A]t the very least, a liberal state should excuse the killing of an

threats does not increase the likelihood that innocent life will be saved.

Why do we think self-defense in such cases is justified? One possibility is that it is not justified at all, but simply excused.⁷³ Defending oneself against an innocent threat should not be punished, because we would never be able to abide by a law prohibiting self-defense when the time came. The desire for self-protection would simply be too great. We would always defend ourselves and take the chance of punishment for violating the law. Given that we cannot abide by a law prohibiting self-defense in such circumstances, it is beyond the government's authority to enact such a law.

Excuse 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.⁷⁴ A number of Second Amendment advocates have appealed to such passages in Hobbes as support for an inalienable right to bear arms. This suggests that they think the right to bear arms, like the right to self-defense, is based on excuse.⁷⁵ Scalia too might be referring to excuse when he speaks of the right to bear arms as grounded in a "natural right of resistance and self-preservation."⁷⁶

But excuse is insufficient to justify a right to bear arms. Self-defense is excused because we could not possibly abide by a law prohibiting self-defense. We would always defend ourselves even if

innocent aggressor because the defender in such a case has lived up to all we can reasonably expect of him."); Kadish, *supra* note 71, at 875–76.

73 Both Kadish and Ferzan themselves suggest that self-defense against an innocent is justified rather than excused. See Ferzan, *supra* note 72, at 452; Kadish, *supra* note 71, at 881–82. I shall not discuss this issue here.

74 See THOMAS HOBBS, *LEVIATHAN* 82 (Edwin Curley ed., Hackett Publ'g Co. 1994) (1651). It is not clear, however, that Hobbes is arguing for an excuse in the normal sense of the word at all. He might be arguing for something like a Hohfeldian privilege to engage in self-defense. See WESLEY NEWCOMB HOHFELD, *FUNDAMENTAL LEGAL CONCEPTIONS AS APPLIED IN JUDICIAL REASONING* 35–50 (photo. reprint 2000) (Walter Wheeler Cook ed., 1919). One will not be violating any duties to the sovereign by resisting, but the sovereign will not be violating any duties by punishing one's resistance. See Finkelstein, *supra* note 43, at 1388–90; Jeremy Waldron, *Self-Defense: Agent-Neutral and Agent-Relative Accounts*, 88 CAL. L. REV. 711, 732 (2000). For a fuller discussion of Hobbes's argument, see Claire Finkelstein, *A Puzzle About Hobbes on Self-Defense*, 82 PAC. PHIL. Q. 332 (2001). For an excuse theory of self-defense, see Larry Alexander, *A Unified Excuse of Preemptive Self-Protection*, 74 NOTRE DAME L. REV. 1475 (1999).

75 See Barnett & Kates, *supra* note 17, at 1177–78 n.184; Nelson Lund, *The Second Amendment, Political Liberty, and the Right to Self-Preservation*, 39 ALA. L. REV. 103, 119 (1987).

76 *District of Columbia v. Heller*, 128 S. Ct. 2783, 2838 (2008) (quoting 1 BLACKSTONE, *supra* note 8, at *139).

self-defense were subject to very serious penalties. It is simply false, however, that people could not possibly abide by a law prohibiting private arms possession. If that were true, it would be impossible for the government to disarm us. We would always choose to remain armed, and take the punishment for violating the law. But there simply is no overwhelming desire to possess arms that is analogous to our instinct to defend ourselves in response to an immediate threat. For this reason, the government has no grounds for excusing arms possession.

It is true that someone *faced with imminent violence* will have an overwhelming desire for a gun—a desire so strong that he would be willing to arm himself *at that time* whatever the law says about the matter. This could excuse someone, like MacGyver, who fashions arms on the spot to deal with the threat.⁷⁷ It would also excuse anyone who grabs arms that happen to be at hand to protect himself. But the fact that the government cannot prohibit a citizen from using arms that are in fact present does not mean that it cannot prohibit that citizen from having them present in the first place.

This is not to say that many people do not experience a strong desire to arm themselves, even when they are not currently facing an attacker. But rather than being the sort of irresistible impulse that could be the basis of an excuse, this desire can be explained by the fact that arming oneself is the dominant strategy in a prisoner's dilemma. One will always be safer compared to a fixed population if one is armed. But even if arms possession is attractive for this reason, it still might be the case that when we all choose to arm ourselves, the mutually imposed risks of harm make us collectively worse off. Since a primary purpose of a government's authority is overcoming prisoner's dilemmas, the fact that we desire arms is no reason to think that disarmament is beyond the government's authority.

C. Equality

Another common argument for private arms possession appeals to the leveling character of arms. They reduce disparities in physical strength:

The capacity of firearms to be a tool for self-defense promotes equality in general, and not merely between battered women and their male batterers The force of non-gun weapons such as knives and clubs is, like the force of bare hands, strongly contingent on the size, strength, and skill of their users: the weaker of two people equally armed with a non-gun weapon is still at a potentially fatal

77 *MacGyver* (ABC television broadcast 1985–1992).

disadvantage. In typical self-defense situations, however, firearms are equally harmful in anyone's hands, provided the individuals handling them have the capacity to fire them and reasonably good aim at close range. Two people equally armed with guns, then, are very likely to have equal harming and coercive power, regardless of their physical disparities. Firearms actually equalize the balance of power between persons who are naturally unequal.⁷⁸

Of course, we can question whether arms really have an equalizing effect. For example, if men, in addition to being generally larger and stronger, are naturally more aggressive and so more likely to acquire arms, allowing private arms possession may exacerbate the inequality between the sexes. But let us assume that the equalizing effect is real.

Another problem with this justification is that if the value of arms lies in their equalizing effect, it would appear to justify arms possession only for those at a physical disadvantage. Giving arms to the physically dominant frustrates the goal of equalization. So we would not have an argument that *all* citizens have a fundamental interest in arms possession.

But, more significantly, it is hard to see how a compelling argument for the Second Amendment can be derived simply from the equalizing effect of arms. We need to keep in mind that we are trying to figure out why individuals have a fundamental interest in private arms possession even if arms *reduce* public safety—that is, even if people are made more vulnerable to armed criminal assaults. I doubt that equality of physical strength is such an important value that we would be willing to limit a democratic government's ability to make the public safer to protect it.

In fact, the third justification is probably a version of the first. Those offering such an argument are probably envisioning the equalizing effect of innocent women using arms in justified self-defense against culpable men. They are not thinking of the equalizing effect of culpable women using arms to engage in violent criminal assaults against innocent men. Nor are they considering how, independent of the equalizing effect, arms might be used in violent criminal assaults by women against women and by men against men. By concentrating only on justified uses of arms they appear to assume that such uses predominate and thus that private arms possession makes us safer. They simply add to the first justification the observation that private arms possession brings a secondary beneficial effect—namely a reduction of the disadvantages felt by women, the small, and the weak.

78 Hughes & Hunt, *supra* note 51, at 16.

D. Lockean Autonomy

The fourth justification is the most elusive, but in the end might be the most promising. It claims that individuals have a fundamental interest in possessing arms for self-defense, as an expression of Lockean values of autonomy and individualism. But to show why arms possession might be valuable for this reason, I need to say a bit more about Locke's political theory and why, according to Lockean principles, there is a right to bear arms in the state of nature.

1. Locke on the Origin and Limits of Governmental Authority

For Locke, the government's authority has its source in the consent of the governed. People are free to live independently of any political obligation, in what he called the "state of nature," if they choose to do so. They have no duty to submit to the state. But Locke thought that individuals would in fact give up many of the rights they enjoy in the state of nature to the majority (or the government to which the majority entrusts its power).⁷⁹ Most significantly, they would give up their natural "executive" right to private enforcement of natural rights. After entering into the social contract, only the majority (or its government) possesses the power to adjudicate and punish violations of rights.⁸⁰ Individuals are bound by its decision, even if they believe it is wrong.

Individuals are motivated to enter into the social contract because of the "inconveniences" of the state of nature.⁸¹ These inconveniences do not result from the fact that we may do whatever we want. Within the state of nature we have duties not "to harm another in his life, health, liberty or possessions."⁸² The problem is instead that we are fallible judges about whether natural rights have been violated. Although we have the power through reason to recognize the general principles of natural law,⁸³ we can make mistakes, particularly in our application of the principles of natural law to the facts.⁸⁴ This

79 See LOCKE, *supra* note 23, §§ 94–99, at 54–55.

80 *Id.* §§ 95, 99, at 55–56; D.A. LLOYD THOMAS, LOCKE ON GOVERNMENT 27 (1995).

81 LOCKE, *supra* note 23, §§ 124–27, at 70–71.

82 *Id.* § 6, at 9.

83 *Id.* § 6, at 9, § 12, at 13, § 124, at 70.

84 *Id.* § 124, at 70 ("[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, at 76–77 (discussing the need for standing laws to reduce human mistakes in adjudication).

is because we tend to interpret our own rights and the rights of our kin too broadly.⁸⁵

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 that in turn allows *her* to punish. Because of these mutually imposed risks of mistaken judgments about rights violations, private enforcement puts everyone in a worse position than they would be if they were subject to a single arbitrator, even though the arbiter can itself make mistakes.

But Locke did not think that individuals would alienate all their rights. Some they would reserve against the majority and its government. Indeed, some rights, being inalienable, would remain reserved even if individuals tried to give them up.⁸⁶ If these reserved rights are violated, one is released from the government's authority and so may justifiably resist. A Lockean justification for the Second Amendment, therefore, would argue that individuals have a right to bear arms in the state of nature and that they reserved this right when entering into the social contract. Notice that it is not sufficient to argue, as Scalia does, that there is a natural right to bear arms, in the sense that one possesses that right in the state of nature. One must show that the natural right was reserved upon entering into the social contract.

2. The Natural Right to Bear Arms

Our first question is whether one has a right to bear arms in the state of nature. There is a simple argument that such a natural right exists. For Locke, the only rights possessed by a government are those alienated to it by individuals. Therefore, if individuals had no natural right to bear arms, nations would have no right to arm themselves. Although disarmament by nations is commonly thought to be advisable, few people would say that a nation is acting beyond its authority by having an army.

But a more detailed Lockean argument for a natural right to bear arms can also be provided. The right, one can argue, is derivable from the natural executive right—that is, one's right in the state of

85 *Id.* § 13, at 13, § 125, at 70.

86 To say a right is inalienable is not to make a claim about the strength of the right. It does not mean, for example, that the right cannot be overridden by other moral considerations. Furthermore, to say that inalienable rights cannot be voluntarily relinquished does not mean that they cannot be forfeited, for example, through wrongdoing. On Locke's understanding of inalienable rights, see Simmons, *supra* note 38.

nature "to judge of his right [and], according to the best of his power to maintain it."⁸⁷ Furthermore, this derivation makes it clear that the right to bear arms exists independently of any tendency of private arms possession to make us safer.

It is worth emphasizing that the executive right itself cannot be understood as existing because it contributes to public safety or, more generally, because it ensures that our other natural rights will be respected.⁸⁸ We enter into the social contract because our natural rights are less secure when we possess the executive right. With a right to private enforcement of natural rights, we overreach—and this overreaching results in violations of natural rights. If our only concern were ensuring that our other natural rights were not violated, we would have no executive right at all. Instead, we would be morally required to give up our power to punish to the state.⁸⁹ And it is a defining characteristic of Locke's political theory, and consent theories of the state generally, that there is no duty, independent of that created by consent, to submit to governmental authority.

We must assume, therefore, that Locke assigned a value to the executive right that is independent of its tendency to protect our other natural rights. He understood it to be valuable *on its own*, in a manner tied to fundamental principles of autonomy and individualism. Each of us has the right to private enforcement of natural rights even though the combined effect of the exercise of this right is the increase in rights violations.

Precisely because it increases the violation of our other natural rights, our executive right exists in uneasy tension with those other rights. It is tempting to resolve this tension by accommodating our other natural rights to our executive right. For example, one might argue that in the state of nature each of us has a Hohfeldian privilege to act as he sees morally fit. If I punish what I take to be a rights violation, I have 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 my natural rights if he retaliates.⁹⁰ The inconveniences of the state of nature would result from the collective exercise of these privileges.

87 LOCKE, *supra* note 23, § 91, at 51.

88 Locke himself sometimes suggests this, for he argues that "every one has a right to punish the transgressors of that law to such a degree as may hinder its violation." *Id.* § 7, at 10.

89 Cf. DAVID SCHMIDTZ, *THE LIMITS OF GOVERNMENT* 38–39 (1991) (suggesting that if one has a right to punish only by the least risky acceptable method, even those remaining in the state of nature have to let the state punish for them).

90 See HOHFELD, *supra* note 74, at 35–50.

But this cannot make sense of Locke's frequent claims that natural rights are still the "measure God has set to the actions of men."⁹¹ Those acting according to their moral lights in the state of nature remain responsible 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."⁹² One must conclude, therefore, that Locke thought that the executive right exists despite its conflict with our other natural rights. What is good about our executive right is not that it will increase the chance that natural rights are respected, but rather that it allows us to use our own moral judgment to take a chance—even a bad chance—at vindicating natural rights.

A natural right to bear arms appears to follow from this executive right. We may bear arms in the state of nature because it allows us to more effectively enforce our own vision of natural rights. Arms are not good because they make us safer. Indeed, because they allow us to more effectively exercise our executive right, arms exacerbate the inconveniences of the state of nature. Feuding and mistaken acts of self-defense become more deadly when people are armed. But, once again, if these inconveniences were sufficient to justify disarmament, they would also justify a duty to submit to the state.

This natural right to bear arms is not simply an agent-relative right that I assert for myself, as a means of vindicating my vision of natural rights.⁹³ It is not as if, from my perspective, I can arm myself and disarm you and, from your perspective, you can arm yourself and disarm me. Rather, the right is one that each must extend to everyone else in the state of nature. I may not disarm you simply because of the chance that you may make a mistake concerning natural rights. You too have the right to take a chance and vindicate natural rights as you see fit. But you remain answerable for the consequences. If I find that you have misused your guns, I may retaliate.

It is a delicate matter, however, determining the strength and scope of the natural right to bear arms. Although it gives each of 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

91 LOCKE, *supra* note 23, § 8, at 10–11; *see also id.* § 241, at 131 (declaring that God is "judge of the right").

92 *Id.* § 13, at 14; *see also id.* § 4, at 8, § 17, at 15–16, § 59, at 34–35, § 128, at 71, §§ 241–42, at 131 (acknowledging that in the state of nature, men are subject and bound by the law of nature). We are answerable for the consequences even if our decision was *reasonable* when made. *See* SIMMONS, *supra* note 36, at 145.

93 I thank Stephen Perry for motivating me to clarify this point.

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.⁹⁴ In the course of thwarting such attempts, I surely may disarm my attacker.

But I may not 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. Indeed, it is possible that we would all be safer if we were forcibly disarmed. But, again, if the inconveniences of the state of nature could justify disarmament, they could also justify forcible induction into the state. And that is contrary to core Lockean principles. In the state of nature, therefore, individuals possess a right to bear arms, including dangerous arms like machine guns.

Many arguments that the right to bear arms is tied to a natural right of self-defense can be interpreted as referring to our natural executive right. Such arguments often wrongly emphasize little old ladies using guns to protect themselves against violent assailants.⁹⁵ This suggests that the acts covered by the natural right of self-defense include only *justified* self-defense and that arms are valuable for the reasons claimed by the first justification. Because the use of arms in justified self-defense will outweigh their unjustified use, a system of private arms possession makes us safer from unjustified harm. But also present in such arguments is the idea that the use of arms even in *unjustified* self-defense has value. Arms are valuable not merely when a little old lady justifiably kills a violent assailant, but also when she kills a postman, mistaking him for a violent assailant. For in the latter case as well, she was able to vindicate what she took to be her rights—and face the consequences. It is because Second Amendment advocates see arms as tied to one's natural executive right—and more broadly to Lockean values of autonomy and individualism—that they so often claim that gun ownership fosters “vigorous virtues of independence, self-reliance, and vigilance.”⁹⁶

94 See LOCKE, *supra* note 23, § 16, at 15.

95 See, e.g., ROBERT A. WATERS, *THE BEST DEFENSE* (1998); ROBERT A. WATERS, *GUNS SAVE LIVES* (2002); ROBERT L. BARTOW, *Women with Attitude: Self Protection, Policy, and the Law*, 21 T. JEFFERSON L. REV. 59, 59–60 (1999).

96 David Harmer, *Securing a Free State: Why the Second Amendment Matters*, 1998 BYU L. REV. 55, 100; see also Kahan & Braman, *supra* note 65, at 1300–01 (referencing works that have identified guns as symbols of honor, courage, chivalry, and individual self-sufficiency); Bruce Mills, Editorial, *Gun Ownership Is a Net Benefit to Society*, HAMILTON SPECTATOR (Can.), OCL. 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

3. Wasn't the Natural Right to Bear Arms Alienated Upon Entering the Social Contract?

But to say that there is a natural right to bear arms does not mean that individuals have a fundamental interest in arms possession that limits the authority of the government—for the natural right might have been *alienated* upon entering the social contract.

Many Second Amendment advocates argue that the right is inalienable. As Charlton Heston, then President of the National Rifle Association, 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 unalienable right to defend their lives and their liberty from whomever [sic] would harm them, and with whatever means necessary."⁹⁷

Once again, this might be understood as the first justification. Heston might be claiming that a system of private arms possession so contributes to our safety that we have a fundamental interest in owning arms, an interest that we cannot relinquish. But Heston's claim that the right allows one to use any means necessary, apparently without regard for the mutually imposed risks that might result, suggests that he believes this right exists even if we are made less safe as a result. He appears to be pointing to a right to bear arms that is derived from our natural executive right.

But, so understood, Heston is clearly wrong that the right is inalienable. There is no reason to think that we could not, in the interest of collective security, give up our natural right to bear arms. In fact, we have done so to some extent, insofar as we think is within the government's authority to prohibit very dangerous firearms such as machine guns, which we would be able to possess in the state of nature.

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").

97 Charlton Heston, Address to the Congress of Racial Equality at Its Annual Banquet in Honor of Dr. Martin Luther King, Jr. (Jan. 15, 2001), *available at* <http://www.newsmax.com/archives/articles/2001/3/19/210522.shtml>.

Indeed, the idea that any part of the natural right to bear arms might have been reserved appears problematic. To be sure, we might reserve certain natural rights, like privacy, upon entering the social contract, even though these rights are alienable.⁹⁸ But privacy has a value that continues to make sense when one is subject to the authority of the state. The same, one might argue, is not true about arms. One enters into the social contract because of the inconveniences of the state of nature. Why reserve a right to something—like the possession of handguns—that brings about the very inconveniences that one is seeking to avoid?

This resistance to the idea that *any* part of the natural right to bear arms would be reserved is undoubtedly tied to the idea that alienation of the executive right—unlike the alienation of a right to privacy—is essential to the social contract. As Locke put it, 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.”⁹⁹ 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 even when one believes that its decision is mistaken.¹⁰⁰ Since our executive right must be alienated, it appears that the right to bear arms—which is tied to the executive right—must also be.¹⁰¹

It is for this reason that many see Second Amendment advocates as “anarchistic”¹⁰² and opposed to “communal strateg[ies] for collective security.”¹⁰³ They seem to reject the very reason we have governments in the first place. 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.

98 It seems permissible for individuals who are very worried about crime to give to the government greater investigative powers than the Fourth Amendment currently allows. If a Lockean understands the Fourth Amendment as enforcing a preexisting limitation on the authority of the government, therefore, he must understand the reserved right of privacy that the Amendment protects as alienable, but not in fact alienated.

99 LOCKE, *supra* note 23, § 128, at 71.

100 *See id.* § 87, at 49.

101 *See* Steven J. Heyman, *Natural Rights and the Second Amendment*, 76 CHI.-KENT L. REV. 237, 243–44 (2000).

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

103 Michael A. Bellesiles, *Suicide Pact: New Readings of the Second Amendment*, 16 CONST. COMMENT. 247, 259 (1999).

When the chips are down, its owner says, he will not trust any other arbiter but force personally wielded."¹⁰⁴

It is undoubtedly true that any argument that the natural executive right limits the authority of the government faces an uphill battle. But simply because the executive right creates the inconveniences of the state of nature, it does not follow that upon submitting to governmental authority its value evaporates. It remains something that we can appreciate. Indeed its value is constantly affirmed in popular culture, when a Charles Bronson figure takes the enforcement of rights into his own hands.¹⁰⁵ And because it has enduring attraction despite its costs, a Lockean might argue that someone entering the social contract could, as a discretionary matter, choose to reserve it to some extent, while delineating the scope of the reserved right sufficiently to ensure that the most serious inconveniences of the state of nature are avoided.

For example, individuals might reserve a right to duel—provided that its exercise would not devolve into a state of war.¹⁰⁶ This does not mean dueling is an inalienable right. It clearly is not. Nor do those reserving a right to duel have to believe that dueling is valuable because it tends to protect their other rights. They may recognize that people interpret the scope of their rights in their favor, making dueling an inefficient method of rights enforcement. But they might nevertheless reserve the right to duel out of respect for Lockean values of autonomy and individualism.

A similar story might be told about the Second Amendment. Citizens might have retained some of the natural right to bear arms, provided that it was carefully circumscribed to avoid too many of the inconveniences of the state of nature. Once again, this right would be reserved, even though it would increase the level of violence between private citizens, out of respect for Lockean values of autonomy and individualism. Such a justification captures the commonly held view that arms are "ideal symbols of freedom and sovereignty"¹⁰⁷ and that

104 Don B. Kates, Jr., *Public Opinion: The Effects of Extremist Discourse on the Gun Debate*, in *THE GREAT AMERICAN GUN DEBATE* 93, 109 (Don B. Kates, Jr. & Gary Kleck eds., 1997) (internal quotation marks and citation omitted).

105 See *DEATH WISH* (Dino De Laurentis Company 1974) (depicting the story of Paul Kersey, a mild-mannered New York businessman turned vigilante after the murder of his wife and rape of his daughter).

106 One limitation that keeps dueling from descending into the state of war is that both parties to the duel consent to the harms that occur in the context of the duel. The fact that someone is killed in a duel may not itself be pointed to by the decedent's kin as a wrong that justifies another duel.

107 David Neilson, *The Biggest Con* (May 3, 2000), <http://www.keepandbeararms.com/information/XcIBViewItem.asp?ID=619>.

compelled disarmament by the government is a "humiliating and debasing degradation."¹⁰⁸

But what about those who reject consent theories of the state? After all, Lockean theories of governmental authority are no longer in favor among political philosophers. John Rawls, for example, considered individuals to have a duty to support and obey the law of largely just states whether or not they have consented to the state's authority.¹⁰⁹ The duty exists simply by virtue of being human.¹¹⁰ Ronald Dworkin is another example of someone who does not take governmental authority to rest upon consent.¹¹¹

To be sure, even those who reject consent theories of political obligation see the authority of democratic governments as limited by certain fundamental interests of individuals.¹¹² For these philosophers, therefore, a justification for the Second Amendment might still be available, if it was shown that individuals have a fundamental interest in private arms possession that limits the authority of all governments. But a belief in a duty to submit to governmental authority makes it particularly difficult to see arms possession as a fundamental interest. A Lockean might admire Charles Bronson. But those who reject consent theories of political obligation, one might argue, would see no value in Bronson's exploits. They think that we have a duty to submit to governmental authority because of the risks created by private enforcement—a duty, in short, not to be Charles Bronson. Since we have such a duty, how can they think we have a fundamental interest in arms possession?

108 James Biser Whisker, *The Citizen-Soldier Under Federal and State Law*, 94 W. VA. L. REV. 947, 963 n.52 (1992) (quoting § THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 168 (Jonathan Elliot ed., 1836) (statement of Patrick Henry)); see also Justin Darr, *Why Liberals Love Gun Control* (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.").

109 See JOHN RAWLS, *A THEORY OF JUSTICE* 115, 333–42 (1971).

110 See *id.*

111 See RONALD DWORKIN, *LAW'S EMPIRE* 195–202 (1986).

112 See RONALD DWORKIN, *A MATTER OF PRINCIPLE* 105 (1985); RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 147 (1977); JOHN RAWLS, *POLITICAL LIBERALISM*, xvi–xviii (1993); RAWLS, *supra* note 109, at 363–65. For Rawls, these principles of justice limiting the authority of the state are those that would have been consented to by rational actors in ignorance of many particular facts about themselves. But this is not a consent theory of the Lockean form. The consent is hypothetical, not actual, and is not used to demonstrate that the individual in fact has a duty of obedience. It is instead a method of arriving at our considered intuitions about justice.

The best argument available is to point to other interests commonly thought of as fundamental that themselves appear tied to the executive right. Consider the right of a civil plaintiff to bring a lawsuit. This right is often described as protecting certain participatory interests, interests that are independent of the truth-seeking function of the trial.¹¹³ But by respecting these interests, we have recreated some of the inconveniences of the state of nature. By bringing a lawsuit and compelling the defendant to bear the burdens of a response, the plaintiff is allowed to exact a penalty upon someone she believes has violated her rights, despite the fact that she will tend to interpret the scope of her rights in her favor. Indeed, the result can be feuding: *A*, perceiving her rights to have been violated, will sue *B*, an act which *B* will perceive as a violation of his rights, motivating him to retaliate by counterclaiming against *A*.¹¹⁴

To be sure, these participatory rights are reined in, most notably by limits—largely weak and underenforced—on frivolous litigation.¹¹⁵ But why do they exist at all? Can't one argue that they are contrary to the very purpose of governmental authority? After all, one has a duty to submit to such authority because of the conflict that results when people engage in private enforcement. Why would one have a fundamental interest in engaging in the very activity that the government is meant to end? Why shouldn't the government have the authority to fully control rights enforcement? Why do civil lawsuits exist? An answer is that individuals have a fundamental interest in the protection, to some extent, of Lockean values of autonomy and individualism. This is something that even those who reject consent theories of political obligation can accept.

The same point can be made concerning the participatory rights of criminal defendants. Consider the argument that the privilege against self-incrimination "rebukes government when, by omission or

113 See, e.g., Lawrence B. Solum, *Procedural Justice*, 78 S. CAL. L. REV. 181, 273–305 (2004).

114 Benjamin Zipursky has recently offered an account of private law as involving a partial alienation to the state of the rights that one possesses in the state of nature. See Benjamin C. Zipursky, *Philosophy of Private Law*, in THE OXFORD HANDBOOK OF JURISPRUDENCE AND PHILOSOPHY OF LAW 631–32 (Jules Coleman & Scott Shapiro eds., 2002). One's alienation is partial insofar as one retains a right of action, which one can exercise, at one's discretion, through the court system. One's natural right to redress is channeled through the state. *Id.* at 632–36; see also John C.P. Goldberg, *The Constitutional Status of Tort Law: Due Process and the Right to a Law for the Redress of Wrongs*, 115 YALE L.J. 524, 541–44 (2005) ("In sum, Locke's social contract theory claims that victims of wrongs possess a natural right to reparations from wrongdoers and that government . . . owes it to them to provide a law of reparations.").

115 See, e.g., FED. R. CIV. P. 11.

commission, it inhibits, stultifies, or interrupts the process by which the accused decides what to do about whatever criminal responsibility rests at his doorstep."¹¹⁶ This popular argument for the privilege seems in conflict with the very idea of governmental authority. The whole point of the state is to keep the individual from relying on his own judgment about his wrongdoing. To the extent that he relies on his own judgment, he will read the scope of rights and duties in his favor. Allowing a criminal defendant to frustrate the government's investigation, simply on the ground that he believes he has done nothing wrong, sounds anarchistic.¹¹⁷ It recreates the very conflict that government was meant to end. The existence of governmental obligation should, it seems, carry with it an obligation to participate in its investigation into one's own wrongdoing. Why then is the privilege thought to go "to the nature of a free man and to his relationship to the state"?¹¹⁸ The answer, once again, is that it is a limited protection of Lockean values of autonomy and individualism.

The same argument can be used to justify an individual right to bear arms. Granted, private arms possession tends to increase the costs of mistaken judgments about the scope of one's rights. But the right to initiate civil lawsuits and the privilege against self-incrimination have similar costs. In each case, we preserve some of the entitlement that we possessed in the state of nature, out of respect for individual autonomy.

4. A Thought Experiment

Admittedly, not everyone sees firearm possession as having the symbolic significance of participatory rights at trial. But I believe that most of us are committed to the idea that we have a fundamental interest in some sort of capacity to engage in violent defense of what we perceive to be our rights—an interest that is in tension with the very idea of the authority of the state. There is a point at which governmental interference in this capacity will seem impermissible.

That most of us have such intuitions can be revealed by the following thought experiment: Imagine that people have the capacity to

116 Thomas S. Schrock et al., *Interrogational Rights: Reflections on Miranda v. Arizona*, 52 S. CAL. L. REV. 1, 49 (1978).

117 See 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, 133–56 (2002) [hereinafter Green, *Paradox*]; 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 (1999) [hereinafter Green, *Last Stand*].

118 *United States v. Wade*, 388 U.S. 218, 261 (1967) (Fortas, J., concurring in part and dissenting in part).

throw a punch or engage in similar violent acts—whether in aggression or self-defense—only because of the presence of a naturally occurring substance in drinking water. (The substance does not generate the intention to act violently, but simply allows one to carry out the intention physically.) 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 most of us would say no. The reason is not that the government would be interfering with our right against bodily interference. The government would not be introducing a substance into our bodies that makes us passive. It would merely keep a substance from entering our bodies that allows us to act violently. Nor can the reason be that the ability to punch makes us safer. It is entirely possible that we would be safer—and our rights more secure—if we lacked this ability. The reason, it seems, is that losing this ability means losing some of our autonomy, because it would limit our capacity to protect and vindicate our rights as we see fit. We would experience it as a humiliating subordination to the state, even though we know that the authority of the state exists precisely to limit our capacity to vindicate rights as we see fit. In short, we would describe it exactly the way Second Amendment advocates describe disarmament.

The difference between Second Amendment advocates and their opponents, it seems, is that the former have the attitude toward guns that the latter have toward their fists. *Both* attitudes are in tension with the very idea of governmental authority. It should not be inconceivable, therefore, even to those who fail to see the powerful symbolic value of guns, that an individual right to bear arms might have been enshrined in the United States Constitution.

Notice that this justification is able to identify the special value of guns that makes them worthy of protection. The problem with disarmament is not that it restricts our liberty to do what we want. Any law does that. Guns are special because they allow us to defend our vision of our rights. Because they are connected to our status as moral agents, our autonomy is more profoundly violated by disarmament than by misappropriation of our other property.

5. Problems of Scope

Although the fourth justification captures common intuitions in favor of the Second Amendment, it makes determining the scope of the Amendment very difficult. The scope of provisions in the Bill of Rights is commonly determined by reference to the autonomy interest

that is protected.¹¹⁹ And the nature and strength of this interest is a matter about which courts usually have robust intuitions.

Things are more difficult with the Second Amendment. A court might have a fairly clear view about the scope of the natural right to bear arms. But the Second Amendment cannot conceivably protect the entire natural right. The problem is not merely that we would be allowed to own machine guns. The natural right to bear arms is tied to our natural executive right. If the entire right were protected, we would have the right to be Charles Bronson: we would be allowed to bypass the criminal justice system and use our guns to hunt down and kill someone we suspected to have murdered a family member. We could not be punished for our actions, as long as we were in the end right about who the murderer was.

The Second Amendment must protect something significantly less than the natural right, just as the right to duel protects something less than the natural executive right. And, like the right to duel, the scope of the right to bear arms will largely be determined by symbolic considerations.¹²⁰ Only arms that are the symbolic embodiments of Lockean autonomy and individualism would be protected.

Curiously, the fourth justification could give some support to the *Miller* test advocated by Scalia in *Heller*.¹²¹ A type of arms is unlikely to play a symbolic role if it is not typically owned by the population. Likewise, the protected *use* of arms might be limited to typical use—most notably legally permissible self-defense. It would not extend to the vigilantism that is allowed in the state of nature.

E. Anarchism

The next justification (our fifth) does not claim that the use of arms in private self-defense is a fundamental interest that limits the authority of the state. It is not a condition for governmental authority that citizens are allowed to possess arms—the way it is a condition that they are allowed to engage in free speech or that cruel and unusual punishments are not imposed. Instead, the fifth justification is anarchistic: the natural right to bear arms in self-defense is returned

119 The scope of the Fourth Amendment, for example, is determined by reference to individuals' privacy interests. See *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 654–57 (1995).

120 This is comparable to the difficulty that courts have found determining the scope of the Fifth Amendment privilege against self-incrimination. See Green, *Paradox*, *supra* note 117, at 149–56.

121 See *supra* notes 58–60 and accompanying text.

to individuals because they have escaped from the authority of the state. They are in the state of nature.

1. The Government Has Failed to Provide Sufficient Personal Security

Under one example of this justification, we have returned to the state of nature because the government is not providing us with sufficient personal security. The inadequacy of police protection returns to us our natural right to bear arms, whether or not a system of private arms possession makes us safer.

This justification is easily confused with the first, which appeals to the public safety benefits of private arms possession. When we imagine the government failing to satisfy its obligations to protect citizens from violence—that is, a situation in which the fifth justification is applicable—we are likely imagining a scenario in which it is incompetent at disarming criminals. If so, the first justification might also apply: since criminals are armed, the primary effect of a policy of disarmament might be a decrease in the use of arms in justified self-defense.

But the two justifications are distinguishable. Assume that the government is meeting its obligation to provide a minimal level of security from violence, for example, because a policeman is stationed on every block. If so, the fifth justification cannot apply. But if the government is nevertheless incompetent at disarming criminals, the first justification might still apply. These relatively well-protected citizens might be made still safer by private arms possession, and this fact might put disarmament beyond the government's authority.

Conversely, assume that the first justification does not apply. Private arms possession does not make people safer. Indeed, let us imagine that the government has successfully disarmed the entire population, including criminals, and it cannot allow the law-abiding access to guns without too many criminals rearming themselves as well. But in other respects the government is doing a bad job of protecting citizens from violence. Unarmed criminals (or criminals armed with knives) roam at will. If this is the case, the fifth justification could still apply. The government's violation of citizens' fundamental interest in a minimal level of security from violence might return to them their natural right to bear arms.

To be sure, it need not follow from the fact that the government is failing to abide by one of its obligations that citizens enter the state of nature entirely and regain all of their natural rights. It does not follow from the fact that the government has violated one's right to

free speech, for example, that one can refuse to abide by its resolution of an unrelated contract dispute.¹²² But it certainly seems possible that the government's failure to abide by its obligation to provide sufficient personal security would return to citizens their natural right to bear arms. After all, the government's failure to protect citizens from violence returns to them some of their executive right. They may engage in acts that would normally be reserved for the police alone. And the right to bear arms, as we have seen, is tied to this executive right.

It might appear odd that the fact that citizens are vulnerable to violence would give them the right to something that would make the level of violence even worse. Keep in mind, however, that we are assuming that the choice to arm dominates, in the sense that it makes one safer compared to a fixed population. The government seeks to disarm the population because it has concluded that when everyone makes this choice, we are all less safe. By abiding by the law compelling disarmament, therefore, one is disadvantaging oneself in order to contribute to the creation of a public good. And it is arguable that one would no longer have an obligation to contribute if the government is failing to provide a minimal level of security. In such situations one may choose the dominant strategy. Every man, as they say, for himself.

Whether those who reject consent theories of the state would come to the same conclusion is less certain. To be sure, they too would likely understand the government as obligated to provide citizens with a minimal level of security from violence. Furthermore, if the government failed to meet this obligation, citizens would surely be permitted to take protection into their own hands to some extent. But it is more questionable whether they would also be freed of their obligation to obey laws disarming the population (assuming, as we are, that such laws make the population safer). A natural duty of political obedience—a duty independent of our consent—is arguably tied to an obligation to participate in the creation of public goods.¹²³

Let us assume, however, that the violation of our fundamental interest in security does allow us to bear arms. The fifth justification still suffers from its anarchistic premises. If one is worried that the

122 What we need is a theory regarding which natural rights are returned to individuals when the government fails to satisfy some of its obligations, an issue which Locke does not adequately explore. This question would presumably have to be answered by reference to one's obligations in the state of nature when another party to an agreement has committed a limited breach.

123 See JOHN RAWLS, *Legal Obligation and the Duty of Fair Play*, reprinted in JOHN RAWLS 117, 121–28 (Samuel Freeman ed., 1999).

government will be unwilling to spend the resources necessary to provide its citizens with a minimal level of security from violence, the solution would apparently not be a constitutional right to bear arms, but a constitutional right to police protection.

But perhaps the government can anticipate that it will be unable to provide citizens with the requisite level of protection. The court of appeals in *Heller* suggested that this might have been true of the United States at the time of the Founding: “[M]ost Americans lacked a professional police force until the middle of the nineteenth century and . . . many Americans lived in backcountry such as the Northwest Territory.”¹²⁴ The Founders, recognizing that these citizens were in the state of nature to an extent, might have concluded that they regained their natural right to bear arms.¹²⁵

Notice that the Founders could have concluded that these citizens were in the state of nature only in *some* respects. Indeed, it is unlikely that they would consider these citizens to be in the state of nature as far as the adjudication of rights violations was concerned, since they must have thought they were offering citizens adequate lawmakers and courts.¹²⁶ Once a citizen apprehended a suspected violator of the law, he would be obligated to turn the suspect over to the government to try and punish.

But they might have concluded that citizens were in the state of nature concerning many of the activities now provided by a police force. In particular, citizens would have to rely on themselves for protection against lawless violence and for apprehending suspected violators of the law. Since they were in the state of nature in these areas, they might regain their natural right to bear arms.

It is worth emphasizing once again that under this justification the right to bear arms is not a limit on governmental authority. A government may permissibly disarm its citizens if it is providing sufficient police protection. And one problem with the fifth justification is that our current government appears to be providing such protection. No one currently lives in conditions similar to the backcountry at the time of the Founding. Although police protection is not what we

124 *Parker v. District of Columbia*, 478 F.3d 370, 383 n.9 (D.C. Cir. 2007) (citation omitted).

125 Of course, the fact that individuals in the backcountry are without police protection might also suggest that the first justification applies. Under such circumstances, the government could not credibly claim to be able to disarm criminals. For this reason, a system of disarmament might make the public less safe, because its effect would primarily be on the law-abiding.

126 See U.S. CONST. arts. I, III.

might hope it would be, it is hard to argue that it is so inadequate that we have returned to the state of nature.

Another problem with the fifth justification is the scope of the Second Amendment. If the government's failure to provide sufficient security returns to individuals their entire right to bear arms, the Second Amendment would protect machine guns. Furthermore, the Amendment would appear to extend beyond arms possession to other rights that would be possessed by those in the backcountry at the time of the Founding, such as the right to identify and detain suspected violators of the law (provided that these suspects were turned over for adjudication to the government). The Second Amendment would protect a right to form a posse.

2. State-of-Nature Pockets

Another less plausible version of the fifth justification does not assume that the government is doing a bad job providing security. It is instead based on the idea that we are released from the authority of the government when faced with imminent violence—that is, in circumstances where we are threatened and the government cannot come to our aid. No matter how many resources are devoted to law enforcement, such situations will arise. Since imminent violence releases us from governmental authority, we regain our natural right to bear arms.

The argument, once again, is not that we have a right to bear arms because they make us safer in these state-of-nature pockets. A system of private arms possession, we can assume, makes us less safe by increasing the likelihood that aggressors will be armed. Rather, we have a right to bear arms—with any reduction in safety that results—because we return to the state of nature when faced with imminent violence.

Many Second Amendment advocates appear to endorse this theory given the frequency with which they quote the following passage from Locke's *Second Treatise*.

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 Nature¹²⁷

Since, they argue, we are in the state of nature in such cases, the government cannot forbid us from bearing arms for our defense.¹²⁸

One problem with this justification is that the mere fact that citizens might find themselves in a state-of-nature pocket does not mean that the government is obligated to allow them to bear arms now, when they are not in a pocket. They might have a right to bear arms within the pocket—a right that would allow them, like MacGyver, to fashion arms on the spot to deal with the threat. But it is unclear why the government has to provide them with a right to bear arms in anticipation that they might find themselves in a pocket.¹²⁹

More fundamentally, Locke was wrong to conclude that citizens confronted with imminent violence return to the state of nature. Locke came to this conclusion because they were apparently able to exercise the executive right that they had alienated upon entering into the social contract. They could take the enforcement of their rights into their own hands. This made it look as if they had returned to the state of nature. But individuals have a right to self-defense when confronted with imminent violence, not because the government has lost authority over them in these cases, but because if the government wishes to retain its authority over them, it must allow them to engage in certain acts of self-defense.

As we have seen, there are plausible arguments that the government must allow individuals to engage in self-defense in cases of imminent violence. One reason is excuse. Because we would engage in self-defense even if it were prohibited, we may not permissibly be punished by the government for defending ourselves.¹³⁰ Another is that laws permitting self-defense manifestly promote public safety.¹³¹ But these arguments do not presume that individuals reenter the state of nature in cases of imminent violence and so regain all or some of their natural rights. They merely claim that certain acts of self-defense must be permitted by the government if it is to remain within its authority. This is no different from other arguments that the gov-

127 LOCKE, *supra* note 23, § 19, at 16–17.

128 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.talon.site.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), http://www.firearmsandliberty.com/militia_.htm.

129 See Heyman, *supra* note 101, at 245–46.

130 See *supra* Part I.B.

131 See *supra* Part I.A.2.

ernment must respect citizens' fundamental interests. No one would claim, for example, that individuals are in the state of nature when speaking simply because the government must respect their fundamental interest in free speech.

Indeed, Locke could not have really believed that one reenters the state of nature when confronted with imminent violence, for he insisted that self-defense may be "regulated by laws made by the society."¹³² The fact that Locke thought that the government may apply its laws to someone confronted with imminent violence and adjudicate after the event whether his actions conformed to those laws is incompatible with the belief that these situations occur in the state of nature.

II. JUSTIFICATIONS BASED ON REVOLUTION AGAINST TYRANNY

Up to this point we have considered arguments for the Second Amendment, of various degrees of plausibility, that look to the use of arms in personal self-defense. That the Second Amendment protects bearing arms for this purpose was essential to Scalia's opinion in *Heller*.¹³³ But he also acknowledged that the Founders contemplated that private arms possession would be beneficial because an armed citizenry can rise up against a tyrant.¹³⁴ The sixth through the eighth justifications concern this idea.

A. Discouraging Tyrannical Minorities

Under the previous five justifications, the Second Amendment protects an interest that individuals have against the majority. Under the sixth justification, in contrast, the Second Amendment protects the will of the majority, by increasing its power to revolt if a tyrannical minority should arise.¹³⁵ In a sense, this justification treats the Second Amendment as a "collective," not an "individual," right. To be sure, the Second Amendment does not protect state governments' interest in arming organized militias. It gives each person a right to bear arms. But the right is collective in the sense that it exists to protect

132 See LOCKE, *supra* note 23, § 129, at 71.

133 See *District of Columbia v. Heller*, 128 S. Ct. 2783, 2817–22 (2008).

134 See *id.* at 2806–07.

135 AKHIL REED AMAR, *THE BILL OF RIGHTS* 47–49 (1998); Levinson, *supra* note 4, at 649; Brent J. McIntosh, *The Revolutionary Second Amendment*, 51 ALA. L. REV. 673, 679–81 (2000); Jacob G. Hornberger, *The Future of Freedom Found., The Revolutionary Second Amendment* (July 2000), <http://www.fhf.org/freedom/0700a.asp> ("[T]he right to bear arms protected by the Second Amendment is the best insurance policy that the American people could have against tyranny.").

the majority's power, rather than to protect interests that individuals have *against* the majority. The Second Amendment is like the right to vote, protecting and enabling democracy, rather than limiting the power of democratic institutions.¹³⁶

The sixth justification is able to explain the feeling that private arms possession has value even if it increases violence. Security against tyranny may be worth that cost. But is it able to generate a story about why this value should be constitutionally protected? If private arms possession is in the majority's interest, why protect it with a countermajoritarian constitutional right, that is, a right that is able to strike down democratically enacted legislation? That the Fourth and Eighth Amendments should be countermajoritarian in their legal effect makes sense, given that they protect interests that individuals have against the majority, and we have reason to believe that the majority might sacrifice these interests improperly. But if the Second Amendment is meant to benefit the majority, why should it constrain the majority's will? If the majority wants to sacrifice its own interests by disarming the population, why shouldn't it be able to?

One possibility is that the majority's authority is limited by an obligation not to create an excessive risk of losing its power to a tyrant. If so, the Second Amendment would enforce this limit against the temptations that the majority would have to disarm the population in the interest of public safety.

The idea that it is beyond the majority's authority to endanger its own power is not inconceivable. Locke, however, appeared to believe that there were no limits on the type of government to which the majority can entrust its authority.¹³⁷ It could entrust its powers to a

136 To say that the right to vote exists to protect democracy does not mean that one cannot also understand it as protecting individuals' autonomy interests in political participation. See Adam Winkler, Note, *Expressive Voting*, 68 N.Y.U. L. REV. 330, 336 n.24 (1993).

Under some interpretations, the Free Speech Clause of the First Amendment protects democracy as well. To be sure, some understand the Clause as protecting individuals' autonomy interest in expressing their ideas, an interest that they possess against the majority. See, e.g., Richards, *Obscenity Law*, *supra* note 50, at 61–67; Richards, *Toleration*, *supra* note 50, at 331, 334. But some see the Clause as preventing a captured government from subverting the will of the majority by limiting the information available to voters. The Clause addresses this problem by allowing citizens to expose the government's misdeeds and by giving voters the information they need to come to informed decisions. See ALEXANDER MEIKLEJOHN, *POLITICAL FREEDOM* 54–60 (Greenwood Press 1979); Vincent Blasi, *The Checking Value in First Amendment Theory*, 1977 AM. B. FOUND. RES. J. 521, 554–67.

137 Provided that the government does not violate the reserved rights of individuals.

monarchy,¹³⁸ for example, even though he recognized that, in so doing, the majority exposed itself to a serious risk of tyranny.¹³⁹ It would appear, therefore, that for Locke the majority is free to accept the risk of tyranny that results from a disarmed population.

But even if the choice to disarm is within the majority's authority, the Second Amendment could be understood as an act of prudential self-limitation on the majority's part. Because private arms possession makes us more vulnerable to violence, at some time in the future the majority may imprudently disarm the population, wrongly privileging public safety over protection against tyranny. The Second Amendment helps keep this from happening.

Another possibility is that the Second Amendment exists not to keep the majority from making imprudent sacrifices, but to keep a nascent tyrant—acting through a captured legislature—from disarming the population in order to secure his power.¹⁴⁰ Indeed, since the passage of laws disarming the population could be a sign that capture is occurring, the Second Amendment might also play an evidentiary role. The violation of Second Amendment rights will indicate to the majority that it needs to exercise greater control over the government.

In addition to being able to generate a plausible story about why the value of private arms possession would need to be protected by a constitutional right, the empirical premises standing behind the sixth justification are relatively plausible and stable.¹⁴¹ The relationship between an armed population and a successful popular revolution is fairly straightforward. Since the tyrannical government will be armed, allowing private arms possession clearly increases the power of the majority compared to the government and makes the majority better

138 LOCKE, *supra* note 23, §§ 132–33, at 72–73; *see also* RUTH W. GRANT, JOHN LOCKE'S LIBERALISM 117–19 (1987) (“[In Locke's view] the majority . . . may decide that fewer than a majority, even one man and his heirs forever, will rule that community.”); THOMAS, *supra* note 80, at 27 (stating that in Locke's view, constitutional monarchy is an acceptable form of government to which the people can entrust power).

139 *See* LOCKE, *supra* note 23, § 94, at 53–54.

140 *See* Stephen Holmes, *Precommitment and the Paradox of Democracy*, in CONSTITUTIONALISM AND DEMOCRACY 195, 230–38 (Jon Elster & Rune Slagstad eds., 1988).

141 This is not to say that its empirical premises cannot be criticized. One might argue, for example, that if a tyrant does arise, small arms of the sort that would be allowed under any acceptable reading of the scope of the Amendment would provide insufficient powers of resistance (although they would surely increase the cost of tyranny to some extent). *See, e.g.*, Wendy Brown, *Guns, Cowboys, Philadelphia Mayors, and Civic Republicanism: On Sanford Levinson's The Embarrassing Second Amendment*, 99 YALE L.J. 661, 665 (1989). One could also argue that the likelihood that a tyrannical regime will arise is too small to justify the costs of widespread arms possession. *See* Bellesiles, *supra* note 103, at 250.

able to enforce its will. Furthermore, this fact does not depend significantly on the current legal regulation of arms. One problem with the first justification, it will be remembered, was that if private arms possession made us safer, it was only in the context of a particular legal system that was largely effective (or utterly ineffective) at keeping arms out of the hands of criminals.¹⁴² But arms can discourage tyranny no matter how they are legally regulated, provided that they are in the hands of a sufficiently large number of people. Legal regulation is irrelevant to this beneficial effect because the use of arms to overthrow tyranny occurs outside of the legal system, during a revolution.

But under the sixth justification, the Second Amendment's scope would be determined by the majority's interest in avoiding tyranny. And this would make it much narrower than most Second Amendment advocates would wish.¹⁴³ Apparently only three acts would be protected: (1) ownership of arms (such that they will be available in the event of a revolution); (2) sufficient practice with them to make one reasonably effective should a revolution arise; and (3) use of arms in an actual revolution against a tyrant.¹⁴⁴

Most significantly, under the sixth justification, the use of arms for private self-defense would not be protected. For this reason, the law requiring all firearms to be trigger-locked, which was struck down in *Heller*, would be constitutional. There is nothing about such a law that would keep us from unlocking our guns in the event of a revolution. Furthermore, since the law in *Heller* allowed guns to be used for "lawful recreational purposes,"¹⁴⁵ citizens would be able to develop sufficient facility with them to be effective revolutionaries.

Scalia recognized the possibility of "a sort of middle position, whereby citizens were permitted to carry arms openly, unconnected with any service in a formal militia, but were given the right to use them only for the military purpose of banding together to oppose tyranny."¹⁴⁶ But, in addition to rejecting this reading of the Second

142 See *supra* Part I.A.1.

143 Cf. Akhil Reed Amar, *Foreword: The Document and the Doctrine*, 114 HARV. L. REV. 26, 126–29 (2000) (arguing that the Second Amendment refers to a collective right of the people to render military service and that nothing in the Amendment prohibits the kinds of "reasonable gun control measures now on the national agenda").

144 Furthermore, a court is unlikely to find that an individual is engaged in the third type of act, since that would mean admitting that the government of the United States is tyrannical.

145 D.C. CODE § 7-2507.02 (2001), *invalidated by* District of Columbia v. Heller, 128 S. Ct. 2783 (2008).

146 *Heller*, 128 S. Ct. at 2809.

Amendment as "odd," he noted that that it was not one offered by the District of Columbia, which insisted that the Second Amendment extended only to the use of arms in an organized state militia.¹⁴⁷ (One wonders whether the District would have had greater success if it had argued for this middle position.)

Which weapons would be protected under the sixth justification is uncertain. As we have seen, Scalia answered this question through the *Miller* test, which gives individuals a constitutionally protected interest only in arms "typically possessed by law-abiding citizens for lawful purposes."¹⁴⁸ Although this excludes machine guns, it also divorces the scope of the Second Amendment from its underlying purposes. After all, machine guns would be useful in a revolution against a tyrannical regime, since the tyrant is likely to employ machine guns himself. A more principled solution to this problem would be to accept that individuals have a Second Amendment interest in possessing machine guns, but to uphold laws prohibiting their possession through an application of the standard of review.

It is worth noting that in certain respects the sixth justification could put *greater* burdens on the government, for it might have an affirmative obligation to create the conditions for individuals to join together as a popular armed force. This is similar to the difference between a right to vote and a right to express one's views about the government. In one sense the right to vote is stronger, for it puts an obligation on the government to hold elections. The government has not respected this right simply by not interfering when people express their views about who should run the government. But the fact remains that under the sixth justification the Second Amendment would be weaker in a way that is unsatisfactory to Scalia and most Second Amendment advocates, in not protecting individuals' interest in the private use of arms for self-defense.¹⁴⁹

B. Discouraging Tyrannical Majorities

Sometimes Second Amendment advocates argue not that an armed citizenry helps protect the majority against a tyrannical minority, but that it helps ensure that the majority will respect the funda-

147 *Id.*

148 *Id.* at 2816.

149 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 4, at 31 n.72.

mental rights of individuals or minorities.¹⁵⁰ This theory does not assume that arms possession is justified because the majority is actually violating the limits on its authority. Private arms possession is valuable because it makes the violation of these limits less likely. This point is important because there is an independent argument for a right to bear arms if the government is actually violating fundamental rights. According to that argument, for example, Jews in Nazi Germany, unlike German citizens whose fundamental interests were respected, would have a right to bear arms—although not one that would likely have been recognized by the Nazi government. We shall explore such an argument later. Our current theory, in contrast, is that citizens should be allowed arms, even though their fundamental rights are not actually being violated, because arms make it less likely that their fundamental rights will be violated.

Those who offer such arguments do not always make it clear whether arms possession is itself a fundamental right of individuals. It would be a fundamental right only if individuals do not merely have primary fundamental rights, but also a secondary fundamental right to a certain level of protection against the risk of governmental violations of their primary rights. But it is unclear that there is such a right or that it would be strong enough to demand, not merely constitutional rights (like the Fourth or Eighth Amendment) that directly protect primary fundamental rights, but also a constitutional right to arms possession as a further inducement to the majority to respect primary rights.¹⁵¹

Like the sixth justification, the seventh is able to explain why private arms possession is valuable even if public safety is decreased. Encouraging the majority to stay within the limits of its authority may be worth an increase in gun violence between citizens. But the seventh justification has weaknesses to which the sixth is not subject.

One problem is that it is not clear that arming the population would make an individual better off when faced with a hostile major-

150 See, e.g., Robert J. Cottrol & Raymond T. Diamond, *The Second Amendment: Toward an Afro-Americanist Reconsideration*, 80 GEO. L.J. 309, 349–58 (1991); Daniel D. Polsby & Don B. Kates, Jr., *Of Holocausts and Gun Control*, 75 WASH. U. L.Q. 1237 (1997).

151 Even if there is no fundamental right to private arms possession, the counter-majoritarian legal effect of the Second Amendment could be explained as a strategy of precommitment on the part of the majority. Because private arms possession increases the level and cost of violence between citizens, the majority will be inclined to disarm the population, even though this will increase its own tendency to violate the fundamental rights of individuals and minorities. The Second Amendment keeps the majority from making this imprudent choice.

ity. It is true that his powers of resistance against the government would be strengthened. An armed individual has greater powers of resistance against an armed government than an unarmed individual does. But since we are assuming that the government is acting with the blessing of the majority, arming the population will create a new oppressor—an armed majority of private citizens.¹⁵²

1. Will Allowing Individuals to Vindicate Their Visions of Reserved Rights Make It More Likely That Reserved Rights Are Respected?

The seventh justification is suspect for another reason. There is no assurance that when an individual uses arms to resist the majority his resistance is justified. Arming him allows him to resist the majority even when no fundamental right has in fact been violated. The seventh justification appears to presume that allowing individuals to use arms to enforce their vision of the limits of the majority's authority will increase the likelihood that the *actual* limits will be respected.

This presumption is not merely questionable, it is also contrary to a core intuition of Lockean political theory (a serious problem to the extent that we are relying on such a theory to justify the Second Amendment). Individuals are motivated to join the social contract because of the "inconveniences" of the state of nature.¹⁵³ Because we are fallible judges about whether natural rights have been violated—and particularly because we tend to interpret our own rights and the rights of our kin too broadly¹⁵⁴—we can make mistakes, particularly in our application of the principles of natural law to the facts.¹⁵⁵ As a result, the state of nature can devolve into a state of war.

If this Lockean intuition is correct, an individual's views about the limits of the majority's authority would also be biased in his favor. There is no reason, therefore, to assume that empowering the individ-

152 See Carl T. Bogus, *Race, Riots, and Guns*, 66 S. CAL. L. REV. 1365, 1373–74 (1993); David C. Williams, *Constitutional Tales of Violence: Populists, Outgroups, and the Multicultural Landscape of the Second Amendment*, 74 TUL. L. REV. 387, 463 (1999) ("[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.").

153 LOCKE, *supra* note 23, §§ 124–27, at 70–71.

154 *Id.* § 13, at 13, § 125, at 70.

155 *Id.* § 124, at 70 ("[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, at 76 ("[T]he law of Nature being unwritten, and so nowhere to be found but in the minds of men . . . who, through passion or interest, shall miscite or misapply it . . .").

ual to enforce his views about the limits of the majority's authority will make it more likely that the actual limits will be respected. Indeed, because an individual's views will be biased in his favor, his views will diverge from other individuals' just as much as they will diverge from the majority's. Some individuals may think that a graduated income tax is outside the government's authority. Others may think a flat tax is. Empowering individuals to enforce their diverging views about the limits of governmental authority will simply recreate the chaos of the state of nature.

What is more, if the assumption of the seventh justification were correct, there would apparently be no reason for individuals to leave the state of nature and enter into the social contract in the first place. The problem with the state of nature is that individuals are empowered to enforce their diverging views about natural rights, resulting in feuding. If their views are likely to be correct, they will not diverge.

Our skepticism about the seventh justification is supported by Locke's own statements about individuals' resistance against a majority that they believe has violated their reserved rights. Locke accepted that individuals whose reserved rights are actually violated by the majority have a right of resistance.¹⁵⁶ They return to the state of nature and may exercise their natural right to defend their rights. He was sensitive, however, to the problem of individuals wrongly resisting the majority or its government. But he argued that the general recognition of a right of individual resistance will not create serious disorder, since aggrieved individuals (whose resistance may or may not be justified) cannot overcome the coercive power of the majority as a whole.¹⁵⁷ Implicit in this argument, however, is the recognition that giving individuals greater powers of resistance by arming them could

156 At times Locke suggests that an individual may not legitimately resist the government at all. See *id.* §§ 87–88, at 49–50. Only the majority as a whole can. See *id.* § 149, at 82–83, § 240, at 131, § 243, at 132; see also SIMMONS, *supra* note 36, at 172–74 (“The standard reading of the text seems to be that Locke’s right of resistance can be held only by the body of people, its proper exercise to be determined only by the majority of the body politic.”); THOMAS, *supra* note 80, at 70 (noting that according to Locke, “no one has a right to resist unless this single instance [of an individual’s rights being violated] has persuaded the majority to withdraw its consent”). But Locke’s considered view appears to be that individuals may engage in legitimate resistance even against a majority: “And where the body of the people, or any single man, are deprived of their right, or are under the exercise of a power without right, having no appeal on earth they have a liberty to appeal to Heaven, whenever they judge the cause of sufficient moment.” LOCKE, *supra* note 23, § 168, at 93 (emphasis added); see SIMMONS, *supra* note 36, at 174–77.

157 See LOCKE, *supra* note 23, § 208, at 112–13, § 230, at 123–24.

create serious disorder, with no increased chance that reserved rights will actually be respected.¹⁵⁸

2. Blackstone on Auxiliary Rights

The seventh justification appears to be supported by a frequently cited passage from William Blackstone's *Commentaries on the Laws of England*, where he described the right to bear arms as an "auxiliary right," that is, a "barrier[] to protect and maintain inviolate . . . primary rights."¹⁵⁹ But any reliance on Blackstone for the seventh justification is misplaced, because he rejected the very idea of individual resistance to a majoritarian government.¹⁶⁰ For Blackstone, anyone who entered into the social contract (and so accepted the authority of the majority) was bound by its decisions. The majority's will, as expressed in the legislature, had an "absolute despotic power."¹⁶¹ The only legitimate resistance to the government is by a majority as a whole.¹⁶² Blackstone came to this conclusion precisely because of worries about the consequences of recognizing broader rights of individual resistance.

158 Locke may also have thought individual rights of resistance would not result in anarchy because disputes about the limits of the majority's authority would be far less frequent than were disputes about rights in the state of nature. Individuals are motivated to enter into the social contract because of uncertainty about the scope of natural rights. This means that the social contract can be effective only if it is easier to determine one's rights and duties after having entered into the contract. A condition for the social contract, therefore, is that any limits on the authority of the majority must be matters of general (although not absolutely universal) agreement. And that suggests that the state of nature will not be reintroduced if individuals have rights of resistance. For there will be less disagreement about such matters than there were in the state of nature.

This does not support the seventh justification, however. First of all, if the limits of the authority of the majority are something about which there is generally agreement, the probability that the majority will fail to recognize these limits is lowered, making an armed citizenry less necessary. Second, even if disagreement about reserved rights is less frequent than disagreement about rights in the state of nature, the fact remains that when there is disagreement, there is no reason to believe that an individual's views will not be biased in his favor. As a result, there is still no good argument for empowering him to enforce this vision by giving him arms.

159 1 BLACKSTONE, *supra* note 8, at *141, *143; *see also* JOYCE LEE MALCOLM, TO KEEP AND BEAR ARMS 130 (1994) ("Blackstone's comments on [the need for citizens to be armed] are of the utmost importance since his work immediately became *the* great authority on English common law in both England and America."); Cottrol & Diamond, *supra* note 150, at 322-23; McIntosh, *supra* note 135, at 690.

160 1 BLACKSTONE, *supra* note 8, at *251.

161 *See id.* at *260.

162 *See id.* at *244.

To be sure, Blackstone spoke of personal security, personal liberty, and private property as “absolute” constitutional rights, which suggests that he believed that the majority’s authority is limited.¹⁶³ But he rejected the idea that violations of an individual’s life, liberty, or property allow her to resist the majority. Unlike Locke, Blackstone worried that giving “every individual the right of . . . employing private force to resist even private oppression” would be “productive of anarchy.”¹⁶⁴ Since he denied that individuals have rights against the majority, he could not have believed that private arms possession was a means of protecting such rights.¹⁶⁵ He must have understood the right to bear arms as facilitating majoritarian revolutions, along the lines envisioned by the sixth justification.

Of course, one need not accept Blackstone’s conclusion that the majority has no limits on its authority. One can accept that a majoritarian government can act beyond its authority by violating reserved rights of individuals. In such cases, they will be justified in resisting, including by force of arms. But our question at this point is not the rights of those whose reserved rights are violated (that, as we shall see, is the eighth justification). Our question is which system is best designed to ensure that these rights are not violated. And we have as yet no good reason to think that empowering individuals to enforce their diverging visions of their reserved rights will do the job.

But let us assume that the seventh justification is correct. The scope of the Second Amendment would be limited by its purpose. Private arms possession would be protected only to the extent that it enables individuals to defend the limits of governmental authority. And this would make the scope of the Second Amendment very similar to its scope under the sixth justification. In particular, the class of protected acts would include only: (1) private possession of certain weapons, (2) practice sufficient to allow for facility in their use, and (3) actual use when a reserved right is violated. A law that required all guns to be trigger-locked, which was struck down in *Heller*, would surely be constitutional, since nothing about that law keeps guns from being unlocked in the event that reserved rights are violated.

C. Anarchism

Rather than arguing, as the seventh justification does, that private arms possession makes it less likely that the reserved rights of individu-

163 *Id.* at *129.

164 *Id.* at *251.

165 See Green, *Paradox*, *supra* note 117, at 128–32; Heyman, *supra* note 101, at 252–60.

als will be violated, the eighth works on the assumption that these rights are being violated by the government right now. One advantage of this justification is that it is conceivable that an individual whose reserved rights are violated by the government has a right to use arms when resisting the government, even when laws prohibiting arms possession promote public safety. Had the government retained its authority over her, it could compel her to disarm as a means of reducing violence between citizens. But because the government has violated her reserved rights (for example, in privacy, free expression, or freedom of religious belief), she is no longer obligated to participate in the creation of this public good.

Notice it would not matter under the eighth justification—the way it did under the seventh—that private arms possession is not a good method of ensuring that reserved rights are respected. The eighth justification does not give individuals arms because they make it more likely that their reserved rights will be respected. It gives them arms because their reserved rights have in fact been violated. It may be true that when individuals are armed, disagreement about the scope of our rights will simply recreate the conflict that existed in the state of nature. But the point of the eighth justification is that citizens are in the state of nature. The government has returned them to the state of nature by violating their reserved rights.¹⁶⁶ The eighth justification, like the fifth, is anarchistic. Individuals regain their natural right to bear arms, even though they might be worse off as a result, because they stand outside the government's authority. But the eighth justification, unlike the fifth, emphasizes individuals' natural right to use arms in resistance against the government, rather than in private self-defense.

It is questionable, however, that governmental violation of a reserved right frees one of *all* obligations to the government, even under a Lockean theory of governmental authority. Assume, for example, that the government arbitrarily appropriates your property. Locke believed that this would violate your reserved rights.¹⁶⁷ And he

166 To say that an individual has a right of armed resistance does not mean that he can shoot government officials at will. Locke insists that even those in the state of nature are subject to proportionality restrictions when their rights are violated. 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 dictate, what is proportionate to his transgression." LOCKE, *supra* note 23, § 8, at 10. The point is merely that, having returned to the state of nature, they would no longer be subject to laws prohibiting arms possession, even if these laws help bring about public safety.

167 *Id.* § 138, at 77–78.

would certainly think that you would return to the state of nature with respect to that governmental action, and so—to some extent—would regain your executive right to defend your rights. You could resist the appropriation. But would you reenter the state of nature entirely? Could you, for example, refuse to respect the government's resolution of an unrelated contract suit?¹⁶⁸ If you do remain bound by the contract judgment, you might also still be subject to a law, enacted by the government for public safety reasons, that disarmed the population. You could resist the appropriation of your property, but not by force of arms.

But even if some violations of reserved rights would not allow one to bear arms, it seems clear that violation of reserved rights could eventually become so severe that one's resistance could be by force of arms. Once again, this would be true despite the fact that disarmament makes us safer from violence at the hands of our fellow citizens.

This could be accepted even by those who reject consent theories of political authority. Because they too take political authority to be limited, they would surely consider violation of these limits to justify resistance to some extent. And when the violation becomes significant enough, it could presumably be by force of arms.

But because of its anarchistic premises, the eighth justification is implausible. The government may indeed be illegitimate. But it is unlikely that its illegitimacy would be accepted by those creating constitutional rights.¹⁶⁹ If the Founders were worried that the govern-

168 This question would presumably have to be answered by reference to your obligations in the state of nature when another party to an agreement has committed a minor breach. Does the breach release you of all obligations under the agreement or can you still be bound to an extent?

169 I offer an argument that a Lockean would have to recognize that all citizens are potentially in the state of nature in Green, *Paradox*, *supra* note 117, at 119–28, 168–73. My argument there considers who has authority to decide disagreements between the majority and individuals about whether the majority is acting within its authority. If the majority has the authority to decide such disagreements, then all limits on its authority evaporate. For even if it did not have authority, it would nevertheless have authority if it decided it had authority. For this reason, I argued that an individual can reenter the state of nature, and regain his right to bear arms, simply by challenging the authority of the majority, even if the individual is in fact subject to the social contract. Although at the time I found the argument persuasive, I admitted that its anarchistic consequences made it more a *reductio ad absurdum* of Lockean political theory than an argument for the Second Amendment.

I no longer believe, however, that an individual escapes the political authority of the majority simply by challenging its authority. It is true that the individual and the majority are in the state of nature *with respect to the question of the majority's authority*. But the majority is forced to recognize that they are in the state of nature only with respect to that issue. It does not follow that it must give the individual all the rights

ment will violate certain reserved rights, the proper response, surely, would be to create constitutional rights protecting them—not constitutional rights that protect the powers individuals would have if those reserved rights were violated.

Furthermore, the scope of the Amendment under the eighth justification would be absurdly broad. If it is really true that the government is acting outside its authority, why don't individuals have the right to machine guns or nerve gas? After all, violation of reserved rights could be imagined that would free individuals even of their obligations to obey laws prohibiting these weapons.

III. JUSTIFICATIONS BASED ON HUNTING

There is a final justification to consider. Private arms possession might be valuable because arms can be used in hunting, which is itself valuable not merely because it provides food for one's family, but also because it is an important form of recreation and the expression of a particular conception of the good life. Scalia himself mentions this possibility.¹⁷⁰

Once again, such a justification is able to explain why guns have value despite associated social costs. Individuals' interest in hunting might be worth protecting despite an increase in gun violence between citizens. But the justification is unlikely to explain the intuitions of many Second Amendment advocates that it protects a fundamental interest that limits the authority of the government. For it is difficult to see how it would be beyond the government's authority to outlaw hunting entirely.

In any event, the scope of the Second Amendment under this justification would be narrow. The protected weapons (rifles and the like) and protected acts (hunting and practicing with arms sufficiently to be an effective hunter) would be much narrower than most Second Amendment advocates demand and would be insufficient to strike down the laws at issue in *Heller*.¹⁷¹

CONCLUSION

My goal in this Article has been to identify nine possible justifications for constitutionally protecting private arms possession, as a foundation for principled reasoning about the Second Amendment.

he would have if he were in the state of nature. I hope to explore these questions, with which I also struggled in Green, *Last Stand*, *supra* note 117, at 698–99, later. (I am indebted to Matthew Adler for prodding me to reconsider my earlier argument.)

170 *District of Columbia v. Heller*, 128 S. Ct. 2783, 2810 (2008).

171 *Id.* at 2863 (Breyer, J., dissenting).

Discussions of the Amendment, by advocates and detractors alike, have been insufficiently sensitive to the differences between these justifications. I'd like to end by briefly summing up how these justifications can illuminate Scalia's opinion in *Heller* and suggesting how they might answer some unresolved questions of the Second Amendment's scope.

In his opinion, Justice Scalia noted that one benefit of the Second Amendment contemplated by the Founders was that it allows citizens to "resist tyranny."¹⁷² As we have seen, however, this justification is ambiguous. We might understand the Second Amendment as giving to citizens the full natural right to bear arms that they would have if the government actually *were* tyrannical. (This is the eighth justification.) On the other hand, the Second Amendment might protect private arms possession only to the extent that it makes tyranny less likely. Furthermore, we might understand the tyranny that is discouraged as a minority that ignores the will of the majority (the sixth justification) or as a majority that violates the reserved rights of individuals (the seventh justification). Since it is the most plausible of the three, my guess is that Scalia (and the Founders) had something like the sixth justification in mind.

In any event, if we seek to explain the decision in *Heller*, we cannot look to these three justifications, since they do not concern individuals' interest in using arms to defend themselves against fellow citizens.¹⁷³ Although Scalia believed that protection against tyranny was the reason for the creation of the Second Amendment, he argues that the Amendment also protects the interest in the use of arms for self-defense.¹⁷⁴

The justification from hunting (our ninth) need not detain us, of course, since it too cannot justify the result in *Heller*. This leaves us with the first five justifications. There is an important distinction here between the first justification, which appeals to the public safety benefits of private arms possession, and the remaining four, which seek to identify an autonomy interest in bearing arms that would exist even if private arms possession made us less safe.

It is likely that Scalia, and the Founders, were not thinking of the third justification, since it is very implausible. It is not clear that the physically disadvantaged have *any* interest in the equalizing character of arms possession, much less an interest that is strong enough to jus-

172 *Id.* at 2801 (majority opinion).

173 *See supra* Parts II.A–C, III.

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

tify a constitutional right that could limit the government's ability to protect citizens from armed violence.¹⁷⁵

The second justification is also implausible. This justification, it will be remembered, seeks to tie the right to bear arms to the excuse of self-defense. We should be excused for engaging in self-defense, because the desire to defend ourselves in cases of imminent violence is very strong—so strong that we would not be able to abide by a law prohibiting self-defense. It is therefore beyond the authority of the government to make self-defense illegal. But excuse cannot justify a right to bear arms. Individuals simply do not have an impulse to bear arms that is so strong that they could not abide by a law requiring them to disarm. Excuse gives us no reason, therefore, to think that it is not within the government's authority to disarm the population.

The failure of the second justification is important because Scalia insisted that "the inherent right of self-defense [is] central to the Second Amendment right."¹⁷⁶ To the extent that the right to self-defense is based on excuse, no connection between it and the right to bear arms can be found.

That leaves us with the first, fourth, and fifth justifications. The first justification grounds the Second Amendment in citizens' interest in safety from violence, and it depends upon the empirical judgment that a system of private arms possession makes them safer than a policy of disarmament.¹⁷⁷ But even if this judgment is true, the question remains why the authority of the government is thereby limited. We are commonly thought obligated to abide by governmental decisions that are mistaken, even if the decisions make us less safe.

To be sure, a decision may be beyond the government's authority if it *manifestly* fails to promote public safety or if it results in the government's failure to provide even the minimal level of security that is every citizen's right. Indeed, a right of self-defense, different from the right based on excuse, might be justified on just these grounds. A law prohibiting self-defense would manifestly fail to promote public safety, so much so that any citizen who abided by such a law would likely be less safe than in the state of nature.

But one cannot use the same reasoning to justify a right to bear arms. Even if it is true that disarmament makes people less safe, it is not *manifestly* true. Reasonable people disagree on the matter. Nor is there any reason to believe that a government that compromises its citizens' safety through disarmament could not still provide them with

175 See *supra* Part I.C.

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

177 See *supra* Part I.A.1.

the minimal level of safety that is their right.¹⁷⁸ Once again, we have failed to find the connection Scalia insists upon between the right to bear arms and the right of self-defense.

In any event, if the first justification does stand behind the Second Amendment, the arguments for a strict scrutiny standard of review and for incorporation into the Fourteenth Amendment would likely be weak. Although the Second Amendment seeks to protect individuals' powerful interest in safety, its strength cannot be identified with the strength of this interest. After all, those who seek to disarm the population are largely motivated by a desire to protect this same powerful interest. They believe that disarmament is the best means of making people safe. According to the first justification, the Second Amendment constitutionalizes the empirical judgment that those who recommend disarmament are wrong. The strength of the right to bear arms should be tied therefore to the strength of this empirical judgment.

The more plausible justifications are the fourth and fifth. These also see a connection between the right to bear arms and a right of self-defense. But the relevant right of self-defense is the natural executive right—that is, the right that each person possesses in the state of nature to enforce natural rights as she sees fit (and face the consequences if she is wrong). For the Lockean, individuals possess such a right in the state of nature, even though their tendency to make mistakes results in feuding and an increase in natural rights violations.

A natural right to bear arms can be derived from this right of self-defense, because arms allow us to more effectively exercise our executive right. Insofar as they seek to derive the right to bear arms from the natural executive right, therefore, the fourth and fifth justifications can explain the connection that Scalia sees between the Second Amendment and a natural right of self-defense.

The problem each must face, however, is that the very purpose of governmental authority is to end individuals' power of private rights enforcement. Just as one alienates the executive right upon entering the social contract, so, it seems, one would alienate the natural right to bear arms. We have as yet no explanation of why the natural right to bear arms would limit the authority of the government.

The fifth justification solves this problem by arguing that the natural right to bear arms has been returned to us because the government has failed to abide by its obligation to provide us with sufficient personal security. In short, the justification is anarchistic. The Sec-

178 See *supra* Part I.A.2.

ond Amendment exists because the government recognizes that we are (partially) in the state of nature.

One problem with the fifth justification is this anarchistic premise. Even if it was true at the time of the Founding that many citizens were within the state of nature, this is unlikely to be true now. Furthermore, insofar as the fifth justification apparently returns to individuals their entire natural right to bear arms, it would have problematic consequences for the Second Amendment's scope. Possession of machine guns would be protected.

But if the fifth justification is correct, individuals' interests in arms possession would probably be significant enough to justify incorporation into the Fourteenth Amendment. What is more, laws that infringe upon Second Amendment interests would require strict scrutiny. Indeed, it is not clear why such laws would not simply be *per se* invalid. Given that individuals have a right to bear arms because they have *escaped* governmental authority, it is hard to see how the government could have any power to compromise this right, even if the governmental interest at issue were compelling and the law narrowly tailored to serve this interest.

In the end, I find the fourth justification to be the most plausible account of the right to bear arms identified by Scalia in *Heller*. This justification does not assume that we have a natural right to bear arms because we have escaped the authority of the government. Instead, it argues that individuals retained *part* of the natural right to bear arms upon entering into the social contract, out of respect for Lockean values of autonomy and individualism. The Second Amendment is like those other limitations on governmental authority—such as participatory rights at trial—that protect part of the natural executive right, while carefully delineating the reserved right's scope in order to avoid a descent into the chaos of the state of nature.

One benefit of the fourth justification is that it can explain Scalia's claim that the scope of the Second Amendment is limited to arms "typically possessed by law-abiding citizens for lawful purposes."¹⁷⁹ Under the fourth justification, the scope of the right to bear arms depends upon symbolic considerations. In nations where arms possession is uncommon, simply retaining the capacity to use one's fists or a knife might be a sufficient expression of Lockean values. In the United States, however, guns take on an important expressive role. But this expressive role would not be played by arms, like machine guns, that are not typically possessed.

179 *Heller*, 128 S. Ct. at 2816.

As a final matter, how might the fourth justification answer the important questions of incorporation and the appropriate standard of review? On the one hand, the analogy between the right to bear arms and participatory rights at trial might argue in favor of incorporation and a rigorous standard of review. My guess, however, is that since the scope of the Second Amendment would substantially depend upon symbolic considerations under the fourth justification, the arguments for a strict scrutiny standard of review or for incorporation would be weak.