

**Mark Tunick, “John Locke and the right to bear arms”**  
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**[50]** I. Introduction: Does Locke defend a right to bear arms?

John Locke is frequently pointed to as a defender of an individual’s natural right to bear arms for self defense.<sup>1</sup> In the United States Locke has been cited in defense of the view that this right is so fundamental that no government may restrict it without compelling justification, a view which now seems to have been adopted by that nation’s highest court.<sup>2</sup> According to this understanding, Locke believes individuals have a right to bear arms so that they can defend themselves against aggressors such as thieves;<sup>3</sup> and so that they can **[51]** defend against tyranny.<sup>4</sup> I argue that in neither case does Locke think that individuals retain a natural right to bear arms. His position is that government may restrict access to guns or other arms through laws that are duly enacted and serve the public good.

Those who take the contrary view do not pull it out of thin air. Locke says three times in the *Second Treatise* that a man attacked by a thief in circumstances in which the man has no recourse to the law may kill the aggressor, ‘because the aggressor allows not time to appeal to our common judge, nor the decision of the law.’<sup>5</sup> Locke also recognizes that there may be extraordinary times of political instability when government faces dissolution and a people need to defend themselves against tyranny, and he does not think they must wait until they are in chains before they prepare to fight back.<sup>6</sup> Locke writes, for example, that in a state of war, ‘every one has a right to defend himself, and to resist the aggressor’ (§232). He ‘must be allowed to strike,’ with a ‘sword in his hand’ (§235).<sup>7</sup>

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<sup>1</sup> S. Wheeler, ‘Right to Self Defense’, in Gregg Lee Carter, ed. *Guns in American Society* (Santa Barbara, 2002), pp. 500-5; M.S. Green, ‘Why Protect Private Arms Possession? Nine Theories of the 2<sup>nd</sup> Amendment’, *Notre Dame Law Review*, 84(1)(2008) pp. 131-89; M.S. Green, ‘The Paradox of Auxiliary Rights: The Privilege against Self-Incrimination and the Right to Keep and Bear Arms’, *Duke Law Journal*, 52(1)(2002) pp. 113-78; A.R. Amar, *The Bill of Rights* (New Haven, 1988); A.R. Amar and A. Hirsch, *For the People: What the Constitution Really Says about Your Rights* (New York, 1998), p. 171; S. Halbrook, *A Right To Bear Arms* (Westport, 1989); D. Kates, ‘The 2<sup>nd</sup> Amendment and the Ideology of Self-Protection’, *Constitutional Commentary*, 9 (1992) pp. 87-104; N. Lund, ‘The 2<sup>nd</sup> Amendment, Political Liberty, and the Right of Self-Preservation’, *Alabama Law Review*, 39 (1987) pp. 103-130; S. Herbst, *Politics at the Margin* (New York, 1994), p. 139.

<sup>2</sup> See *Nordyke v. King*, 563 F. 3d 439 (2009), invoking Locke at 453 n.13; *D.C. v. Heller*, 554 U.S. 570 (2008), in which the ‘individual right’ view was adopted, as distinct from the ‘collective right’ view that the right to bear arms applies to individuals only in their capacity as members of local militias; and *McDonald v. Chicago*, 561 U.S. 3025 (2010), in which this right is deemed so fundamental that no state may violate it without sufficient justification.

<sup>3</sup> Halbrook, p. 44.

<sup>4</sup> Amar and Hirsch, p. 47.

<sup>5</sup> John Locke, *Two Treatises of Government*, ed. Peter Laslett (Cambridge, 1988; orig. 1690), §19; cf. §§182, 207. Locke’s position diverges from the ancient English common law requirement that one in fear of death or great harm ‘retreat to the wall’ before resorting to deadly force; see F. Baum and J. Baum, *Law of Self-Defense* (Dobbs Ferry, 1970), pp. 3-9; R.M. Brown, *No Duty to Retreat* (Norman, 1991), pp. 3-5; and *Nordyke v. King*, Appellees’ Supplemental Brief, p. 11.

<sup>6</sup> See Section V, below. Those who do not give sufficient attention to this point include G. Parry, *John Locke* (London, 1998), p. 143; H. Wilson, *Guns, Gun Control, and Elections* (Lanham, 2007), p. 20; and D. Hemenway, *Private Guns, Public Health* (Ann Arbor, 2004), p. 153.

<sup>7</sup> Locke refers to ‘arms’ twice in *Second Treatise* (§§175, 237) and never to ‘guns’, ‘weapons’, or ‘firearms’ (a word which first appears in the 1680s, see the *Oxford English Dictionary*). He mostly uses the phrase ‘sword in his

Another reason Locke is widely seen as defending a right to bear arms, apart from what he says in the above passages, is that he is understood, correctly, to be a classical liberal who views government as an instrument to preserve individual lives and property. How could Locke, then, think that the government may deny me the means to protect myself and my loved ones if I am threatened by an aggressor or oppressed by a tyrant?<sup>8</sup> But given what I shall refer to as an essential feature of Locke's political theory, the [52] prevailing view must be rejected. Locke does think that in a state of nature prior to our entering into political society we have a natural right to preserve ourselves as we see fit. But for Locke, when we leave the state of nature and enter political society our natural right of self-defense is transformed. An essential feature of Locke's political theory is that once we join political society, the preservation of society takes precedence over the preservation of individuals. In political society, regulations of the means of personal self defense may be enacted by a duly constituted legislative power if thought to be for the public good.

## II. The appropriateness of turning to Locke

One might think that the mistake made by those who employ Locke in contemporary arguments about whether government may restrict the possession and use of arms is the mistake of anachronism. John Dunn once wrote, 'I simply cannot conceive of constructing an analysis of any issue in contemporary political theory around the affirmation or negation of anything which Locke says about political matters.'<sup>9</sup> According to this position, we shouldn't expect the views Locke developed in response to particular political questions he faced in England in the mid and late 1600s to apply to other circumstances. I want to respond to this objection before I turn to a detailed examination of Locke's text.

Locke is thought to have written the *Two Treatises* prior to the Glorious Revolution as a tract in favor of excluding James from succeeding Charles II.<sup>10</sup> Some of the political tension in the decades leading up to the Exclusion controversy was related in no small measure to debates about the extent to which individuals should be able to keep or use firearms for their own individual use or for the common defense. The answer to that question would help determine the relative power of the people, Parliament, and Crown. There was no standing army in England until the 17<sup>th</sup> century, and no professional police force until the 19<sup>th</sup> century, and Englishmen were expected to possess arms to defend oneself and one's village or town.<sup>11</sup> But in the 17<sup>th</sup> century various factions had reasons for restricting access to arms. The Crown had an interest in developing its own standing army and controlling access to weapons rather than relying on militias that might not support unpopular causes, while the people feared a standing army controlled by the [53] king.<sup>12</sup> Wealthy landowners had an interest in enforcing game laws.<sup>13</sup> Fear of armed rioters among the lower-classes and fear of armed

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hand' to refer to any weapon that might be used to fight back; these would include guns or rifles, the regulation of which was debated in his day.

<sup>8</sup> See Green, 'Paradox', pp. 171-2 (suggesting that Locke defends a right to bear arms on the ground that we have a right to take whatever means necessary to defend ourselves and our family).

<sup>9</sup> J. Dunn, *The Political Thought of Locke* (New York, 1969), p. x. Dunn later reevaluated this position, see J. Dunn, 'Measuring Locke's Shadow', in Locke, *Two Treatises of Government*, ed. Shapiro (New Haven, 2003), pp. 258-60; and J. Dunn, *Interpreting Political Responsibility* (Princeton, 1990), p. 9.

<sup>10</sup> Peter Laslett, 'Introduction', in Locke, *Two Treatises of Government*.

<sup>11</sup> J.L. Malcolm, *To Keep and Bear Arms: The Origins of an Anglo-American Right* (Cambridge, Massachusetts, 1994), pp. 3-4.

<sup>12</sup> L.G. Schwoerer, *'No Standing Armies!': The Antiarmy Ideology in Seventeenth-Century England* (Baltimore, 1974).

<sup>13</sup> P.B. Munsche, *Gentlemen and Poachers: The English Game Laws 1671-1831* (New York, 1981).

Catholics were motives for taking arms out of their hands.<sup>14</sup> From the time of the Civil War to the 1689 Declaration of Rights, a number of restrictions on access to arms were proposed: the king took measures to seize arms and initiate firearm registration; Parliament enacted the Game Act of 1671 that denied arms to any person who did not own land that earned at least 100 pounds per year.<sup>15</sup>

Locke surely was aware of this history. Yet the *Two Treatises* does not discuss specific attempts to regulate arms. This is not surprising: Locke surely had the Exclusion controversy in mind in writing the *Two Treatises* but he does not directly address it, either.<sup>16</sup> Locke instead focuses on general questions. Peter Steinberger argues that theorists such as Locke and Hobbes consciously wrote about revolution, rights, and the limits of legitimate authority in abstract terms.<sup>17</sup> To those who do not think we should employ texts of classic political theorists to address issues they could not have had in mind, Steinberger replies that Locke's use of abstract and general language indicates that to address substantive controversies beyond the particular issues of his day was precisely Locke's intention. Locke would have been familiar with debates about whether England should preserve itself by maintaining a standing army or by relying on citizen militias, or about the propriety of seizing weapons following civil unrest or conspiracies. But in the *Second Treatise* he focuses not on specific policies but on questions of right; not on whether the Game Act was good legislation, but on whether natural rights such as the right of self defense can legitimately be regulated in political society.

There obviously are substantial differences in the debates concerning gun regulations that take place in 17<sup>th</sup> century England and in 21<sup>st</sup> century America. For example, arms in the hands of the people were more needed for personal protection in England when there was no professional police; and the arms suitable for dealing with foreign threats have changed dramatically. But Locke's discussion of general questions of political philosophy is relevant to both sets of debates. An issue distinct to American debates is whether the 2<sup>nd</sup> Amendment right to keep and bear arms is so fundamental, or 'of the very essence of a scheme of ordered liberty', that it should be [54] immune to state regulations that lack compelling justification.<sup>18</sup> In approaching that issue there are distinct reasons one might think it appropriate to consult Locke. One might think Locke's position is relevant to an historical inquiry into whether the right was regarded as essential by the framers or ratifiers of the Bill of Rights. Americans in the late eighteenth century certainly found Locke's work of interest and cited it frequently.<sup>19</sup> But since the framers and ratifiers might have misunderstood Locke's position, and were unlikely simply to defer to his authority by holding that 'whatever Locke's position is will be our position', it is hard to see how closely examining his texts will yield greater insight into their attitudes on a right to bear arms.<sup>20</sup> But

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<sup>14</sup> Malcolm, pp. 14-15, 56-7, ch. 4; cf. ch.6.

<sup>15</sup> Malcolm, chs. 3, 6.

<sup>16</sup> Cf. Dunn, *Political Thought of Locke*, pp. 52-3 (If the *Second Treatise* is 'an Exclusion tract, it is often a notably ham-fisted one').

<sup>17</sup> Peter Steinberger, 'Analysis and History of Political Thought', *American Political Science Review*, 103(1) (2009) pp. 135-46, p. 141.

<sup>18</sup> *Palko v. Connecticut*, 302 U.S. 319 (1937), 325 (defining a 'fundamental right'); and *McDonald v. Chicago*, 561 U.S. 3025 (2010), raising the issue of whether the right to bear arms for self-defense is one of the 'privileges and immunities' of all citizens.

<sup>19</sup> By one count, revolutionary writers in America from 1760-1775 invoked Locke more than any other non-biblical source, see S. Dworetz, *The Unvarnished Doctrine: Locke, Liberalism, and the American Revolution* (Durham, 1990), pp. 43-44; cf. Donald Lutz, 'The Relative Influence of European Writers on Late Eighteenth-Century American Political Thought', *American Political Science Review*, 78(1)(1984) pp. 189-97; and note 52, below.

<sup>20</sup> Moreover, it is the views not of late eighteenth century Americans but of the framers and ratifiers of the 14<sup>th</sup> Amendment (1868) that may be most relevant to whether the right to bear arms was regarded as so fundamental that it cannot be infringed by *states* as opposed to the national government.

another reason one might consult Locke is that he offers insight into whether a right to bear arms ought to be regarded as so essential to a scheme of ordered liberty that no government may infringe on that right. This question of political philosophy is one which Locke does help us address. It is a question that is relevant to debates both in 17<sup>th</sup> century England and 21<sup>st</sup> century America. The mistake made by those who find in Locke support for an individual's natural right to bear arms for self defense is not, I think, with the very project of drawing on Locke. It is with their understanding of Locke's theory.

### III. The structure of Locke's political theory

To understand Locke's view on whether individuals have a natural right to bear arms, we must understand the structure of Locke's political theory, which consists of stages: a state of nature, a compact to join society, the establishment of a constitution selected by the majority, and the setting up of a government.

#### State of Nature

Locke says in the early part of the *Second Treatise* that in the state of nature, where there are no positive laws (§20), we all have the right to punish [55] aggressors (§§8, 10). Anyone declaring a design upon my life puts himself in a state of war with me, and I, 'or any one that joins' with me in my defence, 'have a right to destroy' he who threatens me with destruction, based on the fundamental law of nature that man is to be preserved as much as possible (§16).

This natural right to self-preservation is not unbounded even in a state of nature. For example, I may not, as a precautionary measure, kill every stranger who might conceivably pose a future threat to me.<sup>21</sup> This is clear when Locke notes that in a state of nature each person must preserve others when doing so does not compete with his own preservation (§6). The right of self-preservation, for Locke, derives from the fundamental law that mankind is to be preserved as much as possible, mankind being 'all the workmanship of one omnipotent, and infinitely wise maker' and who are 'made to last during his, not one another's pleasure.'<sup>22</sup> A right to bear arms is, in a state of nature, consistent with an unregulated, though not unbounded, right to preserve oneself.

#### From state of nature to political society

On Locke's view, we leave the state of nature because it is dangerous (§123) and we need to preserve our property (§§82, 124), to which we have a natural right by mixing our labor with what we remove from the common state of nature (§27). We lack the means in a state of nature to resolve conflicts that can prevent us from enjoying our rights and preserving our property; we lack a posited law and an indifferent judge (§125), and the power effectively to execute the punishment we have the right to mete out (§§124-6). Though in a state of nature 'every one has a right to punish' transgressors of the law of nature (§7), we may lack the ability to enforce this right if transgressors are stronger than us. And so we join in a political or civil society (§127).

The transition from a state of nature to a society governed by the rule of law occurs when people consent to give up their natural power to judge and punish (§§87-88) and enter a compact 'to unite into one political society' (§99). Upon consenting, each person is bound by whatever constitution is 'concluded by the majority,' 'it being necessary to that which is one body to move one way' (§96; cf. §97). Locke insists that everyone must obey the resulting laws, *if* the laws are duly enacted and serve

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<sup>21</sup> A point noted in J. Kilcullen, 'Locke on Political Obligation', *Review of Politics*, 45(3) (1983) pp. 323-44, pp. 327-8.

<sup>22</sup> §6. On the theological underpinnings of Locke's political theory, see Dworetz; J. Dunn, *Political Thought of Locke*; and J. Waldron, *God, Locke, and Equality: Christian Foundations in Locke's Political Thought* (Cambridge, 2002).

the public good (§§90, 91, 94), an important caveat to which I will return.

Everyone living within the jurisdiction of a political society gives up their natural power to judge and punish (cf. §119). But only those who expressly [56] consent are 'members' of the commonwealth, a member being defined by Locke at one point as 'a perpetual subject of that common-wealth' (§122). Only members make up the constituent power that creates the constitution and so only they have a role in creating the process for making laws, umpiring controversies, and meting out punishment (§§153, 154-55, 158, 212, 226).<sup>23</sup>

The constitution the people set up will establish a government, or constituted power, that includes a legislative power to enact laws and an executive power with the prerogative to bend or even act contrary to the law if needed for the common good (§§134, 159-68). The form of government will be as the majority think good, be it a democracy, oligarchy, or hereditary or elective monarchy (§132). Locke emphasizes that the common-wealth need not be a democracy.<sup>24</sup> He is open to a monarchic or oligarchic government if that is what the constituent power chooses, though he prefers vesting legislative power in an assembly of diverse persons.<sup>25</sup> We must remember that to be legitimate, even a monarch must adhere to the constitutional principles adopted by the majority of the members of the commonwealth. But that Locke is open to a monarchy, even an hereditary monarchy, indicates that while he is a consent theorist, he does not think that we all must consent to each law under which we live. If we constitute the legislative power as an hereditary monarchy, we will be bound to the laws the monarch imposes, so long as those laws comply with constitutional and other limits on government; although the members of the commonwealth may later place the legislative power in another form of government (§132).

#### The status of natural rights in political society

What becomes of the rights we had in a state of nature once we enter civil society? On Locke's view some rights are inalienable and not subject to regulation: a right of conscience cannot be touched.<sup>26</sup> But we voluntarily subject [57] other of our natural rights to restrictive regulations, including our rights to property and to self-preservation; and we 'wholly' give up the power to punish (§130).

Locke says we 'willingly give up every one his single power of punishing, to be exercised by such alone [referring to the legislative and executive powers], as shall be appointed to it amongst them; and by such rules as the community, or those authorized by them to that purpose, shall agree on' (§127; cf. §§ 87-91, 129, 207).<sup>27</sup> Rather than ourselves punishing, we leave punishment in the hands of the government. Private punishment may be prompted by 'ill nature, passion and revenge', leading to injustice, and one reason we enter society is that in a state of nature there is no institutional means to

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<sup>23</sup> On the difference between members and resident aliens in Locke's theory, see P. Josephson, *The Great Art of Government: Locke's Use of Consent* (Kansas, 2004), pp. 155-70.

<sup>24</sup> §133. Cf. Kilcullen, pp. 331, 334; John Dunn, 'The Politics of Locke in England and America in the Eighteenth Century', in John Yolton, ed., *John Locke: Problems and Perspectives* (London, 1969), n. 38; L. Ward, 'Locke on Executive Power and Liberal Constitutionalism', *Canadian Journal of Political Science*, 38(3)(2005) pp. 719-44, p. 726. But see B. Kleinerman, 'Can the Prince Really be Tamed? Executive Prerogative, Popular Apathy, and the Constitutional Frame in Locke's Second Treatise', *American Political Science Review*, 101(2)(2007) pp. 209-22, p. 219 (arguing that Locke's use of the word 'Legislative' suggests it must consist of 'several persons').

<sup>25</sup> §143; cf. J. Waldron, *The Dignity of Legislation* (Cambridge, 1999), p. 80 (Locke thinks there is an 'overwhelming case for vesting [legislative power] in an assembly' preferably of representatives 'who are not professional politicians').

<sup>26</sup> John Locke, *Letter on Toleration*, ed. James Tully (New York, 1983), p. 27.

<sup>27</sup> I take 'it' to refer to the task of punishing, and the first 'them' to be a redundant reference to the members of the community.

prevent such injustices (§13). One might think that once we enter society it might be possible to regulate private punishment without prohibiting it. But there are a few reasons why Locke may think a right to punish in the hands of individuals, even if regulated by society, cannot coexist with a system of legal punishment. Private punishment might fail to serve punishment's function of expressing an authoritative public judgment;<sup>28</sup> and it may undercut the state's effectiveness in punishing, for there could be no assurance that the right amount of punishment is meted out unless there is a coordinated response. While Locke does not explicitly make these points, he does note that giving up our right to punish is just since other members of society 'do the like' (§127).

While he thinks we wholly give up the right to punish when joining society, Locke does not think we wholly give up our right of self-defense. He thinks the people retain a right to defend themselves against tyranny, and individuals retain a right to ward off injury. But—and this is the crucial point—while a right to self-defense remains, it cannot be exercised in any way one chooses.

When we enter society the right of self-defense is transformed. One no longer has the power of 'doing whatsoever he thought for the preservation of himself, and the rest of mankind'; one retains only a power 'regulated by laws made by the society' for his and its preservation. These laws 'confine the liberty he had by the law of nature' (§129). One example we know Locke gives of this is that we no longer may inflict punishment ourselves: in enforcing the laws we may employ our 'natural force' only 'to assist the executive power' (§130). When it comes to warding off injury, or responding to tyranny, we cannot be denied the right to defend ourselves in some way. But we may not employ means duly prohibited by society. Unlike the right to punish, the right of self defense need not be completely taken out of the hands of individuals when they join society. Whereas permitting private individuals to punish is [58] incompatible with an efficient system of legal punishment, permitting a private individual to defend himself will not necessarily interfere with a general system of policing. But in some circumstances it surely could. The implication of Locke's view that we give up the right to defend ourselves in any way we choose is that the state may prohibit vigilante groups, or arms in the hands of individuals, or other means of self defense that could undermine efficient and effective systems of internal and external defense that are thought to promote the public good. The state may regulate but not abolish the right of self-defense.

#### Shift in priority: from preserving individuals to preserving society

Once we enter political society, we are still bound, as we were in the state of nature, by a duty of self-preservation. But in political society that duty takes a very different form. Whereas in a state of nature the priority is for an individual to preserve his or her own life and only then the lives of the rest of mankind (§6), once we enter society the preservation of society takes priority. I refer to this as an essential feature of Locke's political theory. Once we enter society, Locke says, the natural law requires 'the preservation of the society, and (as far as will consist with the public good) of every person in it' (§134); an individual parts with as much natural liberty in providing for himself 'as the good, prosperity, and safety of the society shall require' (§130). Locke illustrates this point by noting that a sergeant can justly command a soldier to 'march up the mouth of a cannon...where he is almost sure to perish,' in order to preserve the whole commonwealth (§139).

In saying that the preservation of society takes priority over the preservation of an individual, Locke does not mean that when we join political society our individual interests are of no account. For Locke, to preserve society is to secure every one's life, liberty and estate (§131). Nor does Locke mean that once we enter society our natural rights to property and self-defense can be violated arbitrarily. Locke makes this clear when noting that the sergeant who can justly send a soldier to his death to preserve the common-wealth cannot command the soldier to give him one penny of his money (§139).

But with exceptions, such as the liberty of conscience, the liberties we had in a state of nature

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<sup>28</sup> A. Harel, 'Why Only the State May Inflict Criminal Sanctions', *Legal Theory*, 14 (2008) pp. 113-33.

that remain in society can rightly be restricted through appropriate lawmaking procedures that a people consent to when they form a constitution. For example, in a state of nature we have the right to acquire property, but when we enter civil society that property can be taxed and regulated if this is provided for in the constitution adopted by the majority (§§140, 139; cf. §138). Locke explains that the legislative can 'never have a power to take to themselves the whole, or any part of the subjects property, without their own consent' (§139). But by 'their own consent' Locke does not mean each must individually agree to each regulation or tax; he means the 'consent [59] of the majority' is necessary (§140; cf. §§97-99).<sup>29</sup> Regulations of arms, or taxes on property--unlike the sergeant's taking of his soldier's money--are duly enacted by authorized agents of the government that we consent to live under and are valid so long as they comply with constitutional or other constraints on the government's power. When we enter political society we agree to subordinate individual to collective interests and be governed by the laws duly enacted according to the constitution adopted by the majority, even if we disagree with the laws or believe them to be ineffective at preserving mankind. If the constitution establishes a non-democratic form of government, then we agree to abide by laws a majority may disagree with, so long as those laws were enacted according to constitutional procedures of which a majority approve.

This conclusion will trouble those adhering to what has been called the 'individualist' as opposed to the 'collectivist' view of Locke. On the individualist view, since for Locke the chief purpose of entering political society is to preserve our rights to life, liberty, and property, these rights are not given up to the collective control of the majority. Individuals decide for themselves how best to preserve oneself and one's property, or whether resistance to government is warranted.<sup>30</sup> Those taking the individualist view may wonder why Locke bothers discussing rights in a state of nature at all if he thinks we give them up upon joining civil society.

Of course with the exception of the right to punish, Locke does not argue that we give up our natural rights. The natural rights to property and to self-defense remain, and still constrain all people, including the legislature (§135). But the natural law must be specified, and known penalties attached. 'For the law of nature being unwritten' (§136), 'natural right answers' to questions of how to specify what the rights of self defense and property entail in practice are not anywhere to be found but in collective determinations by the legislature.<sup>31</sup> This does not mean Locke does not value the rights of individuals, or that he is not really a classical liberal. It means that on his view individuals must yield to the majority's [60] process for determining what policies will best preserve individuals on the whole.

#### Limits on government

One might think that with the view of Locke given so far, we are left with an incoherent political theory in that on the one hand Locke argues that 'the great and chief end' of our forming political society is to preserve our life, liberty, and estate (§§124, 87), yet on the other hand he takes our ability to protect ourselves out of our hands by subjecting the right of self defense we had in a state of nature to the whims of the majority. But Locke would vigorously deny that individual rights become subject to the whims of a majority. He thinks there are extra-constitutional limits on the constituent power.

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<sup>29</sup> Cf. J. Dunn, 'Consent in the Political Theory of John Locke', *The Historical Journal*, 10(2)(1967) pp. 153-82, p. 171.

<sup>30</sup> For a review of the debate, see Josephson; for the individualist view see Green, 'Paradox of Auxiliary Rights'; Richard Ashcraft, *Revolutionary Politics and Locke's Two Treatises of Government* (Princeton, 1986), pp. 305-8; Kilcullen, pp. 335-8, 344. Those taking the collectivist view include W. Kendall, *John Locke and the Doctrine of Majority Rule* (Urbana, 1941); R.C. Grady, 'Obligation, Consent, and Locke's Right to Revolution: Who is to Judge?' *Canadian Journal of Political Science*, 9(2) (1976) pp. 277-92; and J. Stevens, 'The Reasonableness of John Locke's Majority', *Political Theory*, 24(3)(1996) pp. 423-63.

<sup>31</sup> Cf. Waldron, *Dignity of Legislation*, pp. 66-70; and pp. 79-80: 'there is no way we can tell if we go wrong as legislators, as majority-voters, by checking the result of our vote against natural law'.

Unlike Hobbes, Locke thinks we would be better off in a state of nature than under an absolute monarch who could act arbitrarily (§§13, 93, 137). Government avoids being arbitrary by adhering to the rule of law, which requires operating with ‘stated rules’ or ‘standing laws’ and ‘indifferent and upright judges’ (§§136-7, 131, 200, 202). To govern by the rule of law is not merely to invoke the form or facade of law; if that were the case, tyrants might comply simply by posting their arbitrary edicts. Locke recognizes that to be duly enacted a law must satisfy substantive and not merely procedural requirements: ‘where-ever violence is used, and injury done, though by hands appointed to administer justice, it is still violence and injury, however coloured with the name, pretences, or forms of law’ (§20). To attempt to rule through the mere form of law is a ‘perverting of justice’ (§20).

How do we determine which of the declared laws are arbitrary? In a footnote to §136 Locke cites Hooker, who suggests that a law is ‘ill-made’ if it contradicts general laws of nature or positive laws of scripture. Locke agrees that no standing law may go against the natural law that we preserve mankind (cf. §135). But, as we’ve seen, for Locke there is no written natural law to guide us in determining whether this is the case. To avoid having every one be his own judge of what the unwritten laws of nature require and possibly misapply that law, he argues, we place lawmaking power ‘into such hands as’ we ‘think fit’ (§136). We do so, however, with the trust that it will be employed for the public or common good (§171). The distinguishing feature of nonarbitrary laws is that they aim for the public good; arbitrary laws, in contrast, depend on the ruler’s good pleasure (§156). Throughout the *Second Treatise* Locke criticizes despotic power for failing to place the interests of the commonwealth above the personal interests of the despot and not doing what the public good requires (§§89, 110, 131, 143, 156, 159, 163, 164-7, 239).<sup>32</sup> That laws must aim for the public good follows from what I earlier referred to as an [61] essential feature of Locke’s political theory: once we enter society its preservation takes priority over the preservation of particular individuals.

The requirements that government must adhere to the rule of law and act for the public good are, for Locke, natural dictates; they are not principles a people adhere to only because they mutually agree to them. They are extra-constitutional constraints on government that derive from our duty to God to preserve ourselves and mankind (§6).<sup>33</sup> If we ask Locke why government can’t be arbitrary, his answer is not merely that we would not have consented to such a government; it is that God forbids this.

While defending the rule of law, Locke does recognize the need for discretion in the law. In his discussion of prerogative he says the executive power might justifiably order an innocent man’s house pulled down to stop the spread of a fire even though doing so would diverge from a ‘rigid observation of the laws’ (§159). But whoever exercises discretion must be authorized to use prerogative, and the use of discretion cannot be arbitrary; it must be for the public good.

Recall the concern with the collectivist view: transferring our natural right of self-defense to the constituent power collectively for them to regulate, potentially leaves us at the mercy of arbitrary rulers. Locke’s response—that these regulations can’t be arbitrary and must serve the common good—may not be entirely satisfying. Who decides whether the government’s assessment that its laws serve the public good is accurate? Suppose the legislature implemented gun restrictions on the premise that reducing access to guns would promote public safety, but there was compelling empirical evidence that restrictions on arms increased violent crime and made society less secure?<sup>34</sup> When Locke says that the legislative power ‘is limited to the public good of the society’ (§135), does he mean that if these

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<sup>32</sup> Cf. Locke, *Letter on Toleration*, pp. 39, 42, 48; and R. Faulkner, ‘The First Liberal Democrat: Locke’s Popular Government’, *Review of Politics*, 63(1) (2001) pp. 5-39, pp. 22-3.

<sup>33</sup> See Dworetz, pp. 30, 131, 150-54.

<sup>34</sup> Such empirical evidence has been introduced in contemporary debates about gun laws, e.g., J. Lott, *More Guns, Less Crime* (Chicago, 1998), though conflicting studies suggest the evidence is not yet compelling.



restrictions do not *in fact* serve the public good they are invalid and may be resisted?

Locke recognizes that there will be disagreement about what will in fact serve the public good (§98), and therefore about how best to comply with the natural law that remains in place in political society and that requires that we preserve the peace (§135). His answer is that we place our trust in the lawmakers to decide (§136). We rely on whatever judgment results from the political process established by the constituent power, so long as it aims for the preservation of society. Perhaps a better position for Locke to have taken would have been to subject the lawmakers' judgment to scrutiny by an independent judiciary that could examine whether any regulations that restrict natural rights served an important or compelling purpose and were reasonably or nar-[62]rowly tailored to achieve that purpose. But Locke offers no such account.<sup>35</sup> Nor should we expect Locke to have anticipated theories of judicial review that were not fully developed until almost three centuries after his death. It may not have been unreasonable of Locke to think it better to defer to the legislator's ability to discern the public good rather than leaving this judgment to each individual (§98). But whether we agree with him or not, it is Locke's position.<sup>36</sup>

#### IV. Applying Locke's framework: the right to bear arms in political society

In the previous section I argued that Locke's political theory is incompatible with the view that individuals in political society retain a natural, extra-constitutional right to keep and bear arms. The natural right to self defense remains in political society; but it is a general right to use force, not a right to a particular method of defense. In civil society, considerations of what best preserves society dictate how that natural right is to be exercised. In the introductory section we saw that Locke says, three times, that we may rightly kill a thief who attacks us on a remote highway when there is no time to appeal to the protective forces of the government (§§19, 182, 207). That claim might now seem disingenuous: we have the right to kill the thief but not the arms that might be necessary to do so? But for Locke there is a greater concern than the challenge an unarmed individual might face in warding off a thief on a remote highway. If the people or their authorized agents decide that restricting access to guns makes society more secure and better fulfills the duty we have to God to preserve mankind as much as we can (§§16, 6), then gun laws would be legitimate even if they leave an individual with only his fists to fend off the thief. In political society, the preservation of society takes precedence over the preservation of any individual.

While Locke does not discuss the possibility, the constituent power or its legislative agents could expressly stipulate that government shall not disarm the people, if it thought this would best preserve society.<sup>37</sup> If it did so, Locke would surely agree there would be a right to bear arms in that society. But it would be a constitutional or statutory and not a natural right. That distinction is crucial. For Locke, if there were an individual right to bear arms in political society, it would be a right created by and not imposed upon the people.

[63]The question of who, on Locke's view, should decide what means of defense should be available in political society is separate from the question of whether Locke himself would think individuals should have access to arms. On the first question, Locke's theoretical framework requires the matter to be settled by a collective decision of the people or its legislative representatives based on their judgment of what will best preserve society. The right to bear arms under Locke's political theory has a similar status as under the English Declaration of Rights of 1689: people may possess arms so far

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<sup>35</sup> Cf. Waldron, *Dignity of Legislation*, p. 85 (noting that Locke said very little about the idea of judicial review).

<sup>36</sup> Locke returns to the question of who decides if the government has acted legitimately in his later discussion of rebellion, which I consider in Section V.

<sup>37</sup> Locke says little about the process of drafting a constitution--see Ward, pp. 738-40 (suggesting this may be a damaging lacuna in Locke's thought).

as is allowed by the law.<sup>38</sup> As to the second question, Locke does not say whether the members of the constituent assembly ought to enshrine an individual right to bear arms. He thinks it is their decision to make, but I know of no evidence that would let us clearly discern what Locke would have argued had he participated in such an assembly.<sup>39</sup> While Locke did know people on the committee drafting the English Declaration of Rights, and Schwoerer infers that he arranged publication of the *Two Treatises* to reinforce interest in a Bill of Rights, there is little evidence that Locke played a role in the drafting of the Declaration, and no indication of Locke's specific views on its provision on arms.<sup>40</sup> As I discussed in Section II, in the *Second Treatise* Locke addresses not the pros and cons of gun restrictions but the question of political philosophy: is it within the legitimate powers of government to regulate arms?

#### V. The right to bear arms at extraordinary moments

Even if those who adopt the prevailing view that Locke defends a natural right to bear arms were to concede that some of our natural rights are subject to regulation by the constituent power once we enter society, they may object that at extraordinary moments, as when the government is thought to be [64] illegitimate and individuals have cause to rebel, or a people confront a foreign conqueror, laws, or at least laws that restrict access to arms, are no longer binding. They might understand the passage in which Locke writes that every one has a right to defend against tyranny and that in doing so he must be allowed 'to strike,' with a 'sword in his hand' (§235), to indicate a loophole Locke means to devise that allows each individual to bear arms in anticipation of such extraordinary times. Locke allows that we may rebel against tyrants, just as an innocent and honest man may oppose robbers, and in facing a tyrant, he writes, a man must not be a 'lamb, without resistance,' that 'yields his throat to be torn by the imperious wolf' (§228). The tyrant who 'lays the foundation for overturning the constitution and frame of any just government' (§230) puts himself in a state of war with his people and Locke says that in a state of war, 'every one has a right to defend himself, and to resist the aggressor' (§232). I now turn to this objection.

We should first distinguish different types of extraordinary situations. For Locke, the creation of a political society through a compact, and the simultaneous formation of a constituent power, logically occurs prior to the adoption of a constitution and the ensuing establishment of a government. Not only can a government dissolve while the constitution remains intact, but the constitutional system can collapse without the people reverting to a state of nature. A people can remain a political society bound by compact, and a constituent power, even without a constitution. And so there are distinct sorts of political instabilities: a usurping branch of government within a functioning constitutional system in which courts are accessible; a breakdown of the constitutional system; and a dissolution not merely of government and the constitutional system, but of political society itself, which amounts to a return to a

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<sup>38</sup> The text is: 'the subjects which are Protestants may have arms for their defence suitable to their conditions and as allowed by law'; reprinted and discussed in L. Schwoerer, *The Declaration of Rights, 1689* (Baltimore, 1981), p. 74; also at [http://avalon.law.yale.edu/17th\\_century/england.asp](http://avalon.law.yale.edu/17th_century/england.asp). The proviso 'so far as is allowed by law' distinguishes the right declared here from a constitutional right that restricts what laws may be enacted.

<sup>39</sup> One might point to §106 of 'The Fundamental Constitutions of Carolina', in Locke, *Political Essays*, ed. Goldie (New York, 1997), p. 181: 'All inhabitants and freemen of Carolina above seventeen years of age and under sixty shall be bound to bear arms and serve as soldiers whenever the grand council shall find it necessary.' But this establishes not an individual right to bear arms but a collective duty to serve in the military. Nor should this work be read as Locke's ideal constitution. Only a small part of the text is in Locke's hand (*Ibid.*, p. 160), and the Constitution is unlikely to have originated with Locke—he was acting as secretary to the lords proprietors of Carolina—though he may have played a significant role in revising it, see D. Armitage, 'John Locke, Carolina, and the "Two Treatises of Government"', *Political Theory*, 32(5)(2004) pp. 602-27.

<sup>40</sup> See L. Schwoerer, 'Locke, Lockean Ideas, and the Glorious Revolution', *Journal of the History of Ideas*, 51(4)(1990) pp. 531-48.

state of nature.

When the constitutional system is intact, bearing arms and violently resisting need not and should not be the strategy of first resort for a malcontent who perceives the government as a usurper. Someone might believe their liberty or property has been wrongly taken and that they have fallen into a state of war and must defend themselves, but they may be mistaken. In modern republics, if the government is thought to act arbitrarily or oppressively, people have recourse to the courts or to elections, which may resolve disputes peacefully. This point was emphasized in an English Parliamentary debate in 1920 concerning a bill regulating firearms that passed by a wide margin and marked a significant turn in England towards disarming the people.<sup>41</sup> Responding to opponents of gun restrictions who claimed that the people need arms to resist tyrannical government, Major Barnes declared that the time for resorting to armed resistance is past: 'We have in our methods of election, in our access to Parliament, and in other ways, means of redress against the action of the State...Whenever the Executive tends to aggression, whether it be against **[65]** life and liberty or against property...the subject should have free appeal to the Courts.'<sup>42</sup> Locke does not explicitly mention judicial checks against tyrannical government, offering only an implicit reference to a 'judicature on earth' in §241,<sup>43</sup> but he says that when a controversy arises as to 'whether the prince or legislative act contrary to their trust', 'the body of the people' will judge (§242).<sup>44</sup> In forming the constitution the people can establish institutions to umpire such disputes.

One might think that on Locke's view, once the people, through whatever process of adjudication they adopt, have judged that a malcontent does not have right on his side, then this individual has no right to rebel and therefore no basis to claim a natural right to arms for self-defense. But Locke's view is not so straightforward. He recognizes that a person's or group's grievance may get no due hearing from the prince, or 'whoever they be in the administration' (§242); or the judgment may be a perverting of justice and 'wresting of law' (§20; cf. §168). He also foresees the possibility which I consider shortly, that a usurping power may decline to submit to be judged through the process consented to by the people, in which case there is a breakdown of the constitutional system. In the former cases, Locke says, a further appeal can be made 'to heaven,' in which case 'the injured party must judge for himself when he will think fit to make use of that appeal, and put himself upon it' (§242; cf. §§ 20, 168, 241). What Locke means by this is not entirely clear. He might mean merely that one may choose to submit and be put in a bad light before God, or disobey and take the punishment. But he may mean one has a right to rebel. In 'A Letter Concerning Toleration,' his plea to end religious persecution, published in 1689, Locke argues that a magistrate has no power to enjoin individuals to do something against their conscience, such as to embrace a strange religion. He thinks this will 'seldom happen,' but if it does, he argues, 'obedience is due in the first place to God, and afterwards to the Laws.' If the law is for the public good, one is obligated to obey it and if one doesn't, one must undergo the lawful punishment.<sup>45</sup> But if the law exceeds the **[66]** magistrate's authority, one is not obligated to comply.<sup>46</sup> Who judges whether a law is within the magistrate's authority? 'God alone.' 'What shall be done in the

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<sup>41</sup> Malcolm, pp. 165-76.

<sup>42</sup> Speech of Major Barnes, The Parliamentary Debates (official report). [House of Commons]. 5th Series, vol. 130 (1920), pp. 670-1; cf. Malcolm, pp. 174-5.

<sup>43</sup> See Waldron, *God, Locke, and Equality*, pp. 131, 133 (Locke doesn't offer a counter-majoritarian alternative such as judicial review, in part because he doesn't think there are moral experts who can better judge than the people when government acts illegitimately).

<sup>44</sup> Cf. §240: 'Who shall be judge, whether the prince or legislative act contrary to their trust?' 'To this I reply, The People shall be judge'. Cf. §243; Dunn, *Political Thought of Locke*, pp. 180-2.

<sup>45</sup> Locke, *Letter on Toleration*, p. 48: 'For the private judgment of any Person concerning' a valid law 'does not take away the Obligation of that law'; cf. Dworetz, pp. 31, 174-8.

<sup>46</sup> Locke, *Letter on Toleration*, pp. 48-9.

meanwhile?’ Each should care foremost for their own soul, and only next, for the public peace. Locke notes, as he does in the *Second Treatise*, that the magistrate may have his will, being stronger, and carry his point ‘without doubt’; but, he adds, that does not settle the question of right.<sup>47</sup>

Locke is not always sympathetic to those who claim to suffer an injustice at the hands of a usurping government. In the *Second Treatise*, Locke gives as an example the case where a magistrate acts unlawfully and injures persons in ‘private men’s cases’; here the injured parties ‘have a right to defend themselves, and to recover by force what by unlawful force is taken from them’ (§208; cf. §202). But Locke belittles some of these disgruntled men as ‘raving mad-men, or heady mal-content’. They are unlikely to succeed unless the body of the people sympathize with their cause, and obtaining popular support will be difficult. Individuals may be abused without the body of people thinking themselves concerned (§208). Or there may be ‘slips of human frailty’ on the part of government, even occasional ‘great mistakes,’ which ‘will be born by the people without mutiny or murmur’ (§225). But particularly in cases where the magistrate requires an individual to do something against their conscience, Locke is open to an individual’s judging for himself whether government has usurped its power and put him in a state of war. In one’s personal decision, preserving one’s soul takes precedence over considerations of the public good.

However, that an individual may rightfully rebel does not entitle him to possess arms for that eventuality. Locke is understood by some to defend an individual’s right to resist;<sup>48</sup> others take him to hold that the right to resist resides in the body of the people.<sup>49</sup> But on neither interpretation would the individual have a natural right to bear arms. Even were there an individual right to resist, the individual is still constrained by a collective decision about what arms are available in fighting back. Religious dissenters may have the right to rebel against a tyrant, and they have a right of self-defense, but not a right to bear arms in the face of the majority’s judgment that society is best off with an unarmed people, or with arms confined to regulated local militias and a standing army. They must know they will get killed if they rebel without significant support from their countrymen. Lawmakers could reasonably think that putting arms in the hands of individuals, while helpful to a person who is [67] wronged, may put the peace of society at risk, and in political society it is the preservation of society that matters most.<sup>50</sup>

Suppose that the political instability a people face is not merely a branch of government committing injustices, but the breakdown of the constitutional system of government, courts included. Consider the extraordinary moment novelist Sinclair Lewis imagines: the chief executive of the United States builds up his own private troops, abolishes judicial review, declares martial law, arrests and imprisons members of Congress, and creates a corporatist one-party state, using his troops to prevent the people from organizing or communicating.<sup>51</sup> Here the question isn’t whether government abused its trust; clearly it has. The question is, how are the people to fight back?

Assuming the people still are bound together as a political society by a social compact (§99), they remain a constituent power, and the authority to enact laws or a new constitution still resides in them and does not revert to each individual (§243). Locke believes a tyrant rarely if ever returns us to a state of nature; in §211 he says the ‘almost only way’ that happens is by being conquered by a foreign force, and he offers no instance of any other way, though in §§212-220 he points to several ways

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<sup>47</sup> *Ibid.*, p. 49.

<sup>48</sup> Aschraft, p. 308; Kilcullen, pp. 335-8.

<sup>49</sup> Stevens, pp. 443-7; Dunn, *Political Thought of Locke*, pp. 181-2.

<sup>50</sup> Failure to recognize this point is on my view a flaw in Green’s position that Locke’s defense of a right to bear arms generates conflicting conclusions: the ‘anarchic’ conclusion that individuals may bear arms when they judge government is illegitimate; and the ‘totalitarian’ conclusion that the government has authority over civil disobedients (Green, ‘The Paradox of Auxiliary Rights’, pp. 116-18). Locke does not say that individuals may choose for themselves the means of self-defense.

<sup>51</sup> Sinclair Lewis, *It Can’t Happen Here* (New York, 1993)(originally 1935).

government, as opposed to political society, may be dissolved from within.

But what does the authority of the people as a constituent power amount to if they are unable to act? The people may no longer be bound to obey existing laws restricting the possession or use of firearms. But what if it is too late? If a people are temporarily without the protection of laws or the ability to reform a government, and if the laws previously in effect forbade them arms even for local militias, then the people, weaponless, may be as helpless as Juvenal's pauper who, beaten by a drunken bully, could only beg to be allowed to leave with a few teeth left (§235, citing Juvenal, *Satires*, III). Facing an illegitimate tyrant who controls a standing army and the means for suppressing resistance, would not an individual right to bear arms be necessary in times of peace so that a people could exercise the right of self-defense at such extraordinary moments? Locke explicitly says that we must be prepared for a potential tyrant even when our present government respects the rule of law: 'men can never be secure from tyranny, if there be no means to escape it till they are perfectly under it' (§220).<sup>52</sup> He also says, in §137, that we are worse off exposed to the arbitrary power of one man who commands 100,000, than to [68] the arbitrary power of 100,000 single men, and the people should not be supposed to have disarmed themselves, and armed him.

But Locke's point in §137 is not that government must allow each individual to be armed; it is that we would be worse off living under a ruling power that is arbitrary, and so that power 'ought to govern by declared and received laws.' On Locke's view, the constituent power might determine that arms only in the hands of members of well-regulated militias is a better means of keeping our duty to God of preserving society than relying on unorganized individuals to fight a standing army that served a tyrant.<sup>53</sup> And in preventing foreign conquest, the people might plausibly determine that a standing army or organized militias are more effective than armed individuals. They might, for example, decide not to permit individuals to possess anti-aircraft weapons even though these may be helpful in fighting foreign invaders or a domestic tyrant, because on the whole having such weapons in the hands of the people would subvert the peace.

The moment for deciding how to cope with extraordinary moments is well in advance of the threat, and it is the decision ultimately of the constituent power, who must determine, one hopes with foresight, how we are to preserve the peace and avoid a return to the state of nature based on its assessment of the relative threats posed by, for example, potentially tyrannical governments and gun wielding citizens. Locke takes this position also in 'A Letter Concerning Toleration.' He notes there that men may be deprived of their property and well-being either by (1) rapine and fraud of fellow-citizens, or by (2) hostile violence of foreigners. The remedy of (2) is 'arms, riches, and multitude of citizens'; the remedy of (1) is 'laws.' While this might be taken to mean that individuals need arms to hold off foreign conquerors, Locke goes on to say here that 'the Care of all things relating both to the one and the other, is committed by the Society to the Civil Magistrate [or Legislative]' (48).

Suppose that a constituent power had taken arms out of the hands of individuals, believing that this would prevent conflict and violence and best preserve society, but they were wrong, and the people were returned by an overbearing tyrant to a state of nature in which the right of self defense falls unregulated into the hands of each individual. Locke would think this unfortunate, just as he'd think it unfortunate if a society returned to a state of nature as a result of permitting individuals to bear arms. But in leaving individuals unarmed in this new state of nature, did the constituent power violate their natural rights?

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<sup>52</sup> This passage was cited in the American colonies. In one sermon, Stephen Johnson argued that the people have a natural right to defend themselves with the power God gave them, and can do so 'before the doors of the dungeon swings shut'—in 'Some Important Observations Occasioned by...the Public Fast' (Dec. 15, 1765), cited in Dworetz, p. 165.

<sup>53</sup> See Green, 'Paradox of Auxiliary Rights', p. 158.

[69] Locke's answer must be no. The right to defend oneself in a state of nature is not a right to use a particular means of defense, or a right to succeed in one's own defense. It is a general right to use force. The right of self defense a man had in a state of nature was to do 'whatsoever he thought for the preservation of himself, and the rest of mankind' (§129). It was not a right to have means of defense that are beyond one's reach. The constituent power violates no natural law in implementing restrictions of arms intended to preserve society but not succeeding, even if those restrictions leave us, upon reverting to a state of nature, only with sticks, stones, and fists.

## VI. Conclusion

Locke theorizes about general questions in abstract terms, enabling his theory to be drawn on in a variety of contexts (see Section II). He would, of course, be mystified by specific arguments about anti-aircraft weapons, but not by the general principle that it is up to the constituent assembly ultimately to assess what preserves the peace. Whether individuals have a right to arms for self defense hinges on whether that right is necessary to preserve the commonwealth, and for Locke that determination is put in the hands of the body of the people and not in each individual to decide for themselves. As a collectivist, Locke argues that individuals subordinate their judgment to the people as a whole: the consent of the majority shall 'conclude every individual' (§98). Locke does not think society would last very long if governed by the individualist view according to which each person reserves for themselves the right to decide how the society is to keep the peace, given the 'variety of opinions, and contrariety of interests' that are unavoidable in any society (§98).

Locke recognizes a liberty of conscience and allows a space for individuals to disobey acts of government they believe are an abuse of power: that is a decision for the person and their God. But that he leaves this space should not confuse us into thinking that for Locke, individuals in society decide for themselves how best to defend themselves. Part of the bargain we agree to in entering a social compact is to live under a constitution concluded by the majority and any subsequent rules duly enacted, including rules concerning how we secure our safety or topple tyrants.

If the constituent power concludes that individuals should have their own arms for the purpose of self defense, Locke would agree they could adopt a constitutional right to bear arms. But we fundamentally misconceive Locke's political theory if we take him to hold that an individual right to bear arms is a natural right that no government may deny.

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