

PROTESTS, INSURRECTION, AND THE SECOND AMENDMENT

BLM versus #BLM

The Dangers of the New Armed Rebellion Narrative

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PUBLISHED JUNE 2021

Introduction

Eight people dead in Atlanta. Ten people dead in Boulder. A violent insurrection at the U.S. Capitol. A plan to kidnap the governor of Michigan. A couple wielding guns outside their home during a Black Lives Matter (#BLM) protest. How should public officials, scholars, citizens, activists, and members of the press distinguish among political protest, crime, vigilantism, armed rebellion against the government, and personal self-defense?

Understanding the persistence of public gun violence and resistance to restrictions on firearms requires unmasking a pernicious armed rebellion narrative that masquerades as the “original intent” of the framers. Americans have been bombarded with this dangerous and distorted myth, developed over decades and promoted by the National Rifle Association (NRA), constitutional scholars of the Second Amendment, public officials, and the conservative press. The narrative insists that guns uphold freedom and rights, maintain order, and prevent tyranny. Framed as original intent and wrapped in symbols of the American Revolution, this narrative has been used to justify the January 6, 2021, insurrection, private-citizen policing during #BLM protests, and calls to kidnap or assassinate public officials as tyrants. It has seeped into our political discourse and distorted the meaning of the Second Amendment.

Insurrectionists (and the scholars who provide theoretical justification for them) often insist that foundational thinkers and English traditions support their cause, but this is a distortion of the origins of the U.S. Constitution. If we return to a 17th-century theorist who influenced the 18th-century American revolutionaries, John Locke’s writings clarify why individual gun rights threaten 21st-century American constitutional democracy. Locke’s ideas about individuals, the public, and the social contract — claimed by both violent insurrectionists and #BLM protesters — clarify the lies that perpetuate our gun-saturated politics. In this short article, I use Locke to identify elements of the armed rebellion narrative such that we can recognize its distortions, resist it, and replace it.

The Power of the Armed Citizen: Ammon Bundy, BLM, and January 6

Armed insurrectionists position themselves as the ultimate American patriots using what I’ll call the new armed rebellion narrative. Recalling the logic of the social contract, formulated by Locke and later deployed by the American revolutionaries and constitutional framers, insurrectionists insist that government must be opposed when it no longer serves the interests of “we the people,” and that individuals who own guns are best positioned to resist the government. They hold that guns — rather than speech, assembly, or press — limit the power of government and provide protection against tyranny.¹ The purchase of a gun transforms the individual into a privileged citizen (or “citizen protector”) with the right to police, judge who is a tyrant, or raise a private army against the government.² The American constitutional system collapses, according to this view, without citizens who arm themselves to defend against tyranny or provide police protection.

Supporters of this narrative graft this theoretical claim onto the American national origins story. Twenty-first-century gun owners are no different than the colonists who dumped tea into the harbor or the minutemen who opposed the British at Lexington and Concord. The names of their groups reflect their claimed revolutionary origins: Southern Oregon Constitutional Guard, Pacific Patriots Network, Citizens for Constitutional Freedom, Three Percenters, and Oath Keepers.³ To differing degrees, these groups maintain that they arm to uphold constitutional rights and the rule of law against domestic “enemies” of the people.

This logic pervades the speeches of candidates who suggest that assassinating other candidates or public officials for “tyranny” is patriotic and consistent with the Second Amendment. As a candidate, Donald Trump told a crowd that Hillary Clinton wanted to abolish the Second Amendment and that, if she picked Supreme Court justices, there would be “nothing you can do folks. Although the Second Amendment people, maybe there is, I dunno.”⁴ Trump’s comment was tame and indirect compared to Sharron Angle’s comments during her campaign for the U.S. Senate in 2010. The former state assembly member from Nevada said:

You know, our Founding Fathers, they put that Second Amendment in there for a good reason and that was for the people to protect themselves against a tyrannical government. . . . Thomas Jefferson said it’s good for a country to have a revolution every 20 years. I hope that’s not where we’re going, but, you know, if this Congress keeps going the way it is, people are really looking toward those Second Amendment remedies and saying my goodness what can we do to turn this country around? I’ll tell you the first thing we need to do is take Harry Reid out.⁵

Later, as president, Trump told the Proud Boys to “stand back and stand by” because “somebody’s got to do something about Antifa and the left.” Hate groups — many of them armed — heard this as a rallying cry.⁶

Only months after an insurrection at the U.S. Capitol and an attempted kidnapping of the “tyrant” governor of Michigan,⁷ it is clear that this rhetoric is not merely talk. In our recent political past, this narrative supported two armed standoffs against the federal government by Ammon Bundy that help us understand how we arrived at January 6. In Oregon, Bundy recruited people to seize and occupy the Malheur National Wildlife Refuge.⁸ In Nevada two years prior, he gathered 40–50 people (many armed) to take back his father’s cows that had been seized by the Bureau of Land Management (BLM) for failure to pay grazing fees.⁹ Bundy’s standoffs with the government clarify how the new armed rebellion narrative — especially its distortion of the Lockean social contract — supported the insurrection of January 6.

Bundy portrayed the federal government as tyrannical, and individuals and members of militia groups traveled hundreds of miles to support his cause. Stunning images of guns pointing at government officials were a backdrop for speeches, posters, and interviews that justified arming against the national government based on (specifically) defending property rights and (generally) opposing a tyrannical government. In response to the claimed tasing of Bundy, a former marine invoked the Constitution, the right to rebellion, and popular sovereignty: “to come in as a military force against your citizens like this, that’s when ‘we the people’ would say no that’s not what the Constitution stands for and we have to remind our Federal government that we are the power.”¹⁰ Fearing a standoff that might create martyrs (as had happened in Waco, Texas), the government backed down. In the courts, Bundy’s lawyers maintained that he was a patriotic protester using guns to speak truth to power and uphold constitutional rights rather than an armed conspirator. The courts dismissed all charges against Bundy and his co-conspirators.¹¹ We heard echoes of this around January 6: armed insurrectionists smashing windows as “patriots” initially presented as “protesters” in the media.

“We the People” and Arms: Three Distortions

Bundy, Trump, Angle, the January 6 insurrectionists, and some Second Amendment scholars rely on a cherry-picked version of Locke’s social contract to justify armed rebellion or assassination. Locke provided a logic to justify removing James II, which the American colonists deployed against George III. Locke feared tyrannical government (combining lawmaking and law enforcement) and insisted that an absolute and arbitrary

government operating outside the law leaves the people with a “Sword at their Breasts.” Given their inalienable right to “free themselves,” they may “resist the aggressor.”¹² Whether or not Americans can name Locke, they recognize the logic of “we the people” versus the tyrant — and the modern calls for private-citizen policing, armed insurrection, and even assassinations play on that familiarity. But the new armed rebellion narrative distorts the American/Lockean social contract logic in three dangerous ways.

First, Locke would require dissatisfied citizens to seek redress through all available institutions, particularly elections and courts of law.¹³ When damages may be “repaired by Appeal to the Law, there can be no pretense for force.”¹⁴ Before and after the November 2020 elections, Lockean “redress” included Trump supporters challenging election procedures with judges (and justices) adjudicating according to due process. The election, procedures for certification, and challenges to the certification by members of Congress all constitute Lockean redress. Rather than invite self-appointed armed insurrectionists, Lockean redress insists on due process of law.

A second — and the most dangerous — distortion is the failure to distinguish between individual rights and collective rights. Even when redress is exhausted, Locke never empowered armed individuals (like the January 6 insurrectionists or Bundy’s private army) to act against the government. Armed individuals do not have special rights; the majority does.¹⁵ The majority must distinguish a “long train of Abuses” affecting the *entire society* from the grievances of a few individuals; the “examples of an unfortunate man, moves them not.”¹⁶ For Locke, owning a gun had no political significance — convincing the majority that a long-standing problem justified rebellion against the government did. In this vein, the “people” is not a cabal of self-appointed armed individuals (like the domestic terrorists planning “Patriot Events” for January 6)¹⁷ but the collective action of the majority. This Lockean logic is reflected in the laws of all 50 states, which view unauthorized paramilitary force as unlawful, dangerous to the public, and threatening to law enforcement.¹⁸ Locke, following established rules for *individual* self-defense against another person under the common law, allowed individuals to defend themselves, but this right has nothing to do with the *collective* defense of the nation against a tyrant.¹⁹

Third, Locke had no patience for individuals with axes to grind. He would have feared people like Trump and members of domestic terrorist groups pursuing their own “ambition, revenge, covetousness, or any other irregular passion.” The cases of “private Men” cannot justify armed rebellion against an otherwise functioning government. He explicitly rejected armed rebellion to protect the rights of a “raving mad-man” or a “heady malcontent.”²⁰ The language Locke used seems ripped from 21st-century headlines because the American 2020 election cycle — with its questions about the peaceful transition of power, challenges to certification, etc. — departed from the very core of liberal democratic politics that Locke articulated: rule of law, due process, and the social contract.

Prior to January 6, Nicholas Fuentes (a far-right, white nationalist TV commentator and podcaster) claimed that “our Founding Fathers would get in the streets, and they would take this country back by force if necessary. And that is what we must be prepared to do.”²¹ But Fuentes and others who invoke the “Founding Fathers” to support radical gun rights or insurrection completely misrepresent Locke and the American Constitution that institutionalized his ideas. For example, James Madison and Alexander Hamilton repeatedly — and vociferously — declared against any mob’s right to insurrection. They used Locke’s language of redress, objected to “substituting VIOLENCE in place of LAW,” and specifically railed against any domestic violence or armed domestic insurrections (as they had just observed in Massachusetts and Pennsylvania).²² The new armed rebellion narrative dangerously substitutes the *individual* opinion of gun owners as “citizen protectors” for the *collective action* of the majority. This radical armed individualism was precisely what early constitutional democracy sought to *prevent*.

BLM v. #BLM: Locke, Race, and False Equivalences

Applying Lockean principles not only clarifies the distortions of the armed rebellion narrators but also the false equivalences that have been drawn between violent insurrection such as January 6, the Bureau of Land Management standoff, and the Black Lives Matter protests during the summer of 2020 following the killing of George Floyd. Blurring the lines between a political protest movement with some violence and armed insurrection distorts policy debates regarding guns in public spaces²³ and private-citizen policing.²⁴ When scholars like Robert Leider call for individuals to police “riots,” “massive destruction,” or “civil unrest,”²⁵ they unleash the vigilantism and prejudice of armed, private citizens against other citizens. The armed become police, judge, and jury.

#BLM protesters also invoke Locke, and it is helpful to look at the differences between Bundy’s attack on the BLM and the #BLM protests of summer 2020. Four days after Derek Chauvin murdered Floyd, *The Daily Show* host and political commentator Trevor Noah charged that the United States had not honored the social contract. The murder of Floyd (and other Black Americans) reveals how the application and enforcement of laws are not equal. Black Americans fear that their bodies are less protected by police and thus threatened by the state itself.²⁶ Blackness marked George Floyd as less valuable, less human, and easier to kill in public, prompting protesters to demand that “all men are created equal” apply to Black Americans.

Applying Locke’s logic here is tricky. Noah is correct that #BLM is a call for full and equal inclusion *in* the social contract rather than for breaking it. The #BLM summer 2020 protests functioned as Lockean redress: the largest collective public demonstration in U.S. history (according to polls and crowd-counting) with 15–26 million people claiming to have participated in a demonstration and 500,000 people turning out on a single day, June 6, 2020.²⁷ Lockean redress requires citizens to use available channels to ask for policy change, but Locke did not provide a developed theory of social protest. Scholars like Leider have charged that violence associated with #BLM protests justifies arming individuals to provide “public security” and a rejection of the state’s monopoly on violence.²⁸ This is a red herring. According to research from Princeton University, at least 93 percent of Black Lives Matter protests (7,000 protests in 2,000 locations) were peaceful.²⁹ Recently released studies of summer 2020 policing reveal the complex relationship between the small amounts of violence and police who were “poorly trained, heavily militarized and stunningly unprepared” for the historic crowds; the cause of the violence was not the state’s monopoly on violence and policing but miscalculations on the application of force.³⁰ In comparison, only 3,000–10,000³¹ people participated in the pro-Trump rally on January 6, and far fewer actually stormed the U.S. Capitol. As Cynthia Miller-Idriss, author of *Hate in the Homeland: The New Global Far Right*, sees it, the two events cannot be compared. Protest — even with some violence — is different from riot, sedition, insurrection, or siege, all of which constitute a “domestic terrorist attack.”³²

But Locke, like the American polity based on his ideas, sidesteps issues of race. Locke wrote about “the people,” but he did not elaborate on who was included, and his work does not confront how Western humanity has been defined by anti-Blackness or how Blackness reinforces whiteness, privilege, power, and freedom.³³ Locke understands *individual* self-interest and bias but not collective prejudice in political society or its institutions. In 2021, Americans need Locke to recognize that armed insurrectionists are not “the people,” to distinguish “heady malcontents” with guns from the majority of the citizenry or to clearly lay out the requirements of redress. But modern claims of self-appointed “citizen protectors” or calls for private-citizen policing cannot be understood without the lens of race. On the ground, the January 6 insurrectionists used the language of patriotism and “Founding Fathers,” but their version of the armed rebellion narrative was steeped in white

supremacy. It is the armed white man who claims to speak for insurrection on behalf of the whole.³⁴ The calls of “Take it back” and “Whose house? *Our* house!” permeated January 6.³⁵ In Lockean terms, Black Lives Matter protests and the January 6 insurrection insist on very different answers as to the question of who “the people” are. Locke and the founders can never provide clarity on race because they conceived their ideas within the framework of white supremacy. But race is fundamental to the new armed rebellion narrative’s often-unspoken assumption that racial privilege confers sovereignty or special police powers.

Conclusion

Public narratives shape our understanding of events, policy choices, and our political system. The new armed rebellion narrative distorts how the #BLM protests and the January 6 insurrection are presented to the public, voters, and younger citizens who will shape our future politics. But this dangerous (and increasingly powerful) lens must be resisted. First, Locke, the founders, and the “original understanding” of the Constitution cannot be misused to justify radical individual gun rights, private-citizen policing, and subversion of the government by individual citizens. Our foundational documents insist on redress through institutions, and they create high bars for armed insurrection. We must *hear* the sleight of hand — as the new armed rebellion narrative takes what is collective and replaces it with the radically individual — and we must resist and respond. Second, the same distorted lens should not be used to justify false equivalences between #BLM (a mass call for social change with some violence) and the January 6 insurrection or Bundy’s BLM standoff (armed insurrections with violence at their core).

Endnotes

¹ The Supreme Court indirectly supports this logic. In *Dist. of Columbia v. Heller*, 554 U.S. 570 (2008), Justice Antonin Scalia (writing for the majority) and Justice John Paul Stevens (writing one of two dissents) associated the Second Amendment with rebelling against tyranny. Scalia claimed that the amendment protects *individual* gun ownership that prevented tyranny and disarmament of the people. See *id.* at 595, 597. Stevens countered that the Second Amendment applied only to the ability of the states to muster militias that would defend against a tyrannical national government. See *id.* at 640–41 (Stevens, J., dissenting).

² JENNIFER CARLSON, *CITIZEN-PROTECTORS: THE EVERYDAY POLITICS OF GUNS IN AN AGE OF DECLINE* 19 (2015).

³ The Three Percenters pledge to resist the federal government if it infringes on the Constitution. They claim that only 3 percent of eighteenth-century Americans used arms to form militias and fight the British, but this number is generally discredited. See, e.g., ROBERT ALLISON, *THE AMERICAN REVOLUTION: A VERY SHORT INTRODUCTION* 79 (2011). For background on the militia movements, see generally KATHLEEN BELEW, *BRING THE WAR HOME: THE WHITE POWER MOVEMENT AND PARAMILITARY AMERICA* (2019); and ROBERT H. CHURCHILL, *TO SHAKE THEIR GUNS IN THE TYRANT'S FACE: LIBERTARIAN POLITICAL VIOLENCE AND THE ORIGINS OF THE MILITIA MOVEMENT* (2011).

⁴ *Trump's Second Amendment Comment: A Threat to Clinton?*, WSJ VIDEO (Aug. 9, 2016), <http://www.wsj.com/video/trumps-second-amendment-comment-a-threat-to-clinton/5F86E59A-020F-410F-B999-6767C51A8858.html>. The NRA supported Trump throughout his campaign. See Nick Corasaniti & Alexander Burns, *One Ally Remains Firmly Behind Donald Trump: The N.R.A.*, N.Y. TIMES (Aug. 10, 2016), <http://www.nytimes.com/2016/08/11/us/politics/donald-trump-second-amendment-nra.html>.

⁵ Greg Sargent, *Sharron Angle Floated Possibility of Armed Insurrection*, WASH. POST (June 15, 2010), http://voices.washingtonpost.com/plum-line/2010/06/sharron_angle_floated_possibil.html.

⁶ Sarah McCammon, *From Debate Stage, Trump Declines to Denounce White Supremacy*, NPR (Sept. 30, 2020), <https://www.npr.org/2020/09/30/918483794/from-debate-stage-trump-declines-to-denounce-white-supremacy>.

⁷ Bill Chappell, *Militia Members Plotted to Kidnap Michigan Gov. Whitmer, FBI Says*, NPR (Oct. 8, 2020), <https://www.npr.org/2020/10/08/921655143/militia-members-plotted-to-abduct-michigan-gov-whitmer-fbi-says>.

⁸ *41 Days: An OPB Documentary on the Oregon Occupation*, OR. PUB. BROAD. (Feb. 15, 2016), <https://www.opb.org/news/series/burns-oregon-standoff-bundy-militia-news-updates/oregon-standoff-occupation-malheur-41-days-opb-documentary>.

⁹ Andrew Prokop, *The 2014 Controversy over Nevada Rancher Cliven Bundy, Explained*, VOX (May 14, 2015), <https://www.vox.com/2014/8/14/18080508/nevada-rancher-cliven-bundy-explained>. As recently as January 2021, Bundy's father was pledging again to "walk toward [federal government] guns" and defy the BLM. See Jennifer Yachnin, *Bundy to Biden: Stay Away from My Cattle*, E&E NEWS (Jan. 15, 2021), <https://www.eenews.net/stories/1063722595>.

¹⁰ *American Patriot: Inside the Armed Uprising Against the Federal Government*, PBS FRONTLINE (May 16, 2017), <http://www.pbs.org/wgbh/frontline/film/american-patriot-inside-the-armed-uprising-against-the-federal-government>.

¹¹ David Neiwert, *Not Punishing the Bundys for the Nevada Standoff Led to the Occupation in Oregon*, WASH. POST (Jan. 7, 2016), <https://www.washingtonpost.com/posteverything/wp/2016/01/07/not-punishing-the-bundys-for-the-nevada-standoff-led-to-the-occupation-in-oregon>.

¹² JOHN LOCKE, *TWO TREATISES OF GOVERNMENT*, §§ 186, 232, 149, 192, 196 (Peter Laslett ed., Cambridge Univ. Press 1988) (1690); see also *id.* §§ 23, 137–38, 151, 153, 155, 171–72, 189, 200–02, 204–07, 210, 214, 216, 224, 230, 232, 235, 237, 239. On the rule of law, see §§ 137, 199, 200, 232.

¹³ *Id.* at §§ 136, 141, 203, 207–08, 222, 226.

¹⁴ *Id.* at § 207; see also *id.* at § 208.

¹⁵ *Id.* at §§ 14, 89, 94–95, 97, 99, 104, 110, 117–20, 141–42, 153–54, 156, 158, 164–68, 171, 188, 200, 205, 208–10, 215, 219–20, 222–27, 230, 233, 242.

¹⁶ *Id.* at § 230; see also *id.* at §§ 123, 131, 168, 210, 224–25.

¹⁷ Alan Feuer, *Stay Scattered and Avoid Police, Proud Boys Were Told Before Capitol Riot*, N.Y. TIMES (Mar. 19, 2021), <https://www.nytimes.com/2021/03/19/us/politics/proud-boys-indictment.html>.

¹⁸ *Guidance for Law Enforcement Officials Regarding Unauthorized Paramilitary Activity*, INST. FOR CONST. ADVOC. & PROT., <https://www.law.georgetown.edu/icap/wp-content/uploads/sites/32/2020/12/Law-Enforcement-Guidance-Paramilitary-Actors.pdf>.

¹⁹ See Susan Liebell, *Retreat from the Rule of Law: Locke and the Perils of Stand Your Ground*, 82 J. POL. 955, 955 (2020).

²⁰ LOCKE, *supra* note 12 at §§ 199–200, 208–09, 151, 164.

²¹ Luke Mogelson, *Among the Insurrectionists*, NEW YORKER (Jan. 15, 2021), <https://www.newyorker.com/magazine/2021/01/25/among-the-insurrectionists>.

²² THE FEDERALIST NOS. 8, 9, 16, 25, 26, 27, 28, 29, 34, 60, 74, 84, 85 (Alexander Hamilton), NOS. 10, 43 (James Madison), NOS. 19, 20 (Alexander Hamilton & James Madison) (emphasis in originals). This can also be seen throughout the deliberations in the Constitutional Convention with attention to internal violence and Shay's Rebellion.

²³ Joseph Blocher and Reva Siegel provide a strong case for how public arms inhibit the rights of free speech essential to political speech and debate. See Joseph Blocher & Reva Siegel, *Guns and Democracy*, BRENNAN CTR. FOR JUST. (2021).

²⁴ Robert Leider, *The State's Monopoly of Force and the Right to Bear Arms*, 116 NW. U. L. REV. (forthcoming 2021), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3711661.

²⁵ *Id.*

²⁶ The Daily Show with Trevor Noah, *George Floyd, Minneapolis Protests, Ahmaud Arbery & Amy Cooper*, YOUTUBE (May 29, 2020), https://youtu.be/v4amCfVbA_c. On the social contract, #BLM, and citizens fearing for their bodies, see Christopher N. Warren, *Leviathan and the Airway: Black Lives Matter and Hobbes with the History Put Back*, MEDIUM (June 26, 2020), <https://medium.com/the-sundial-acmrs/leviathan-and-the-airway-black-lives-matter-and-hobbes-with-the-history-put-back-3d2f809769c5>. Kimberly Jones's viral YouTube video also references the social contract to explain the looting of a Target: the denial of life, liberty, and material property. David Jones Media, *How Can We Win*, YOUTUBE (June 1, 2020), https://youtu.be/sb9_qGOa9Go.

²⁷ Larry Buchanan, Quoctrung Bui & Jugal K. Patel, *Black Lives Matter May Be the Largest Movement in U.S. History*, N.Y. TIMES (July 3, 2020), <https://www.nytimes.com/interactive/2020/07/03/us/george-floyd-protests-crowd-size.html>.

²⁸ Leider, *supra* note 24.

²⁹ Robin Young & Samantha Raphelson, *Look for Intent When Comparing the Capitol Mob to Black Lives Matter, Historian Says*, WBUR (Jan. 18, 2021), <https://www.wbur.org/hereandnow/2021/01/18/capitol-mob-black-lives-matter>.

³⁰ Kim Barker, Mike Baker & Ali Watkins, *In City After City, Police Mishandled Black Lives Matter Protests*, N.Y. TIMES (Mar. 20, 2021), <https://www.nytimes.com/2021/03/20/us/protests-policing-george-floyd.html>.

³¹ Stephen Doig, *It Is Difficult, If Not Impossible, to Estimate the Size of the Crowd That Stormed Capitol Hill*, CONVERSATION (Jan. 8, 2021), <https://theconversation.com/it-is-difficult-if-not-impossible-to-estimate-the-size-of-the-crowd-that-stormed-capitol-hill-152889>.

³² Kiara Brantley-Jones, *False Equivalency Between Black Lives Matter and Capitol Siege: Experts, Advocates*, ABCNEWS (Jan. 16, 2021), <https://abcnews.go.com/US/false-equivalency-black-lives-matter-capitol-siege-experts/story?id=75251279> (quoting Cynthia Miller-Idriss).

³³ Kihana Miraya Ross, *Call It What It Is: Anti-Blackness*, N.Y. TIMES (June 4, 2020), <https://www.nytimes.com/2020/06/04/opinion/george-floyd-anti-blackness.html>. See also Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1709, 1721–37, 1761–63 (1993); CHARLES W. MILLS, *THE RACIAL CONTRACT* 14–17, 31–32, 67–68, 72, 81–87, 96, 107, 123 (1997); and FRANK B. WILDERSON III, *AFROPESSIMISM* (2020).

³⁴ For a remarkable, on-the-ground measure of the influence of white supremacy, see Mogelson, *supra* note 21.

³⁵ *Id.* (emphasis in original).