

## Constitutional Corner - The Right of Self Preservation

In 1775, Alexander Hamilton wrote:

*"The sacred rights of mankind are not to be rummaged for, among old parchments, or musty records. They are written, as with a sun beam, in the whole volume of human nature, by the hand of the divinity itself; and can never be erased or obscured by mortal power."*<sup>1</sup>

We should not seek out our rights in "musty old" Constitutions, we should look for them in the world around us; as an expression of natural law they are "written on our hearts."<sup>2</sup> But what is their source, who wrote them there?

John Dickinson represented Pennsylvania in the Second Continental Congress in 1776, although he refused to sign the Declaration of Independence. Eleven years later he represented Delaware at the Constitutional Convention (where he did sign the document). He answers the question:

*"Kings or parliaments could not give the rights essential to happiness... We claim them from a higher source - from the King of kings, and Lord of all the earth. They are not annexed to us by parchments and seals. They are created in us by the decrees of Providence, which establish the laws of our nature. They are born with us; exist with us; and cannot be taken from us by any human power without taking our lives. In short they are founded on the immutable maxims of reason and justice."*<sup>3</sup>

Who would deny that each human being has a natural right to preserve their own life? Self-preservation is an almost universal, natural response of living organisms. Upon recognizing a threat to its life, nearly any aware creature will move away from the perceived threat or, if movement is impossible, do whatever is possible to neutralize or minimize the threat to its life. It seems as if this response is hardwired into us. Might this be because it is both a natural response and a natural right?

All the great natural rights philosophers recognized a right of self-preservation. Thomas Hobbes put the right of self-preservation at the top of his catalog of laws of nature that constitute the "true moral philosophy."<sup>4</sup> He wrote in "*Leviathan*:"

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<sup>1</sup> Alexander Hamilton, *The Farmer Refuted*, 1775.

<sup>2</sup> Romans 2:15.

<sup>3</sup> John Dickinson, *An Address to the Committee of Correspondence in Barbados*, 1766.

<sup>4</sup> *Leviathan*, xv, ¶140.

*“The Right Of Nature , which Writers commonly call Jus Naturale , is the Liberty each man hath, to use his own power, as he will himself, for the preservation of his own Nature; that is to say, of his own Life; and consequently, of doing any thing, which in his own Judgement, and Reason, he shall conceive to be the aptest means thereunto.”* (Emphasis added)

John Locke took it a step further; not only could we defend ourselves, we could wreak havoc on whomsoever or whatever threatens us:

*“Self-preservation [is] a duty to God...I should have a right to destroy that which threatens me with destruction: for, by the fundamental law of nature, man being to be preserved as much as possible, when all cannot be preserved, the safety of the innocent is to be preferred: and one may destroy a man who makes war upon him, or has discovered an enmity to his being, for the same reason that he may kill a wolf or a lion.”<sup>5</sup>*

Notice that to Locke (and others, as we'll soon see) we have a *duty* to preserve ourselves; but the duty is owed not to ourselves but to our Creator. Do we have a similar duty to protect the lives of others?

*“Every one, as he is bound to preserve himself... so by the like reason, when his own preservation comes not in competition, ought he, as much as he can, to preserve the rest of mankind, and may not, unless it be to do justice on an offender, take away, or impair the life, or what tends to the preservation of the life, the liberty, health, limb, or goods of another.”*

Jean-Jacques Burlamaqui, the great French philosopher, wrote:<sup>6</sup>

*“God is therefore willing, that everyone should labor for his own preservation and perfection, in order to acquire all the happiness, of which he is capable according to his nature and state...”*

*“For, man being directly and primarily charged with the care of his own preservation and happiness, it follows therefore that, in a case of entire inequality, the care of ourselves ought to prevail over that of others...”*

*“If a particular manner of acting appears to me evidently fitter than any other for my preservation and perfection, fitter to procure my bodily health and the*

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<sup>5</sup> *Second Treatise on Government*, Section 16.

<sup>6</sup> Jean-Jacques Burlamaqui, *The Principles of Natural And Politic Law*, 1748.

*welfare of my soul; this motive alone obliges me to act in conformity to it.*  
(Emphasis added)

The Founders took a similar view:

*“Among the natural rights of the Colonists are these: First, a right to life; Secondly, to liberty; Thirdly, to property; together with the right to support and defend them in the best manner they can. These are evident branches of, rather than deductions from, the duty of self-preservation, commonly called the first law of nature.”<sup>7</sup>*

*“In the human body the head only sustains and governs all the members, directing them, with admirable harmony, to the same object, which is self-preservation and happiness.”<sup>8</sup>*

*“Self-preservation is the first principle of our nature. When our lives and properties are at stake, it would be foolish and unnatural to refrain from such measures as might preserve them because they would be detrimental to others.”<sup>9</sup>*

*“The right of self defense is the first law of nature.”<sup>10</sup> (Emphasis added in all)*

Since natural law and revealed law (the Bible) have the same source, we should find them in harmony. But the Bible takes a more nuanced view, especially when we encounter the New Testament. But first the Old:

“Thou shalt not murder” makes it clear that we can have an expectation that no one should threaten our life. But does this give us the right to actively defend our life?

In Psalm 82:4, we find an obligation to protect all who are in danger:

*“Rescue the weak and needy; Deliver them out of the hand of the wicked.”*

In Ezekiel 33 we encounter an obligation to warn others of approaching danger, and if we do not, any harm that comes to them will be our responsibility:

*“...’But if the watchman sees the sword coming and does not blow the trumpet, and the people are not warned, and a sword comes and takes a person from*

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<sup>7</sup> Samuel Adams, *The Rights of the Colonists, The Report of the Committee of Correspondence to the Boston Town Meeting*. November 20, 1772.

<sup>8</sup> John Dickinson, *A Speech Against Independence*, 1776.

<sup>9</sup> Alexander Hamilton, *A Full Vindication*, December 15, 1774.

<sup>10</sup> Henry St. George Tucker (in Blackstone's Commentaries).

*them, he is taken away in his iniquity; but his blood I will require from the watchman's hand."*

Numerous verses<sup>11</sup> demonstrate that murdering another person results in the forfeiture of the life of the murderer. Does it not follow that to prevent someone from forfeiting their life we should do what we can to prevent or neutralize their attack on our person?

For what are we preserving by doing so? Yes, our life; but to whom do we own our life? Are we not God's "property?" Is it not God's property we are ultimately protecting?

*"Or know ye not that your body is a temple of the Holy Spirit which is in you, which ye have from God? and ye are not your own; for ye were bought with a price: glorify God therefore in your body."<sup>12</sup>*

Returning to "Thou shalt not murder;" can we justify taking the life of an attacker in defending our self? Jesus' command to "turn the other cheek" certainly presents us with a challenge. Must we "turn the other cheek" when our life, and something more than a slap on the face, is in the bargain? In John 15:13, we are shown it is an act of love to lay down our own life for a friend. Sacrificing one's self when others are imperiled, subordinating our right of self-preservation to the preservation of someone else, is the ultimate act of love. We honor those who choose this path; but it remains a choice.

Yet, Jesus confirms there is still a time and place for weapons of defense: "he who has no sword, let him sell his garment and buy one."<sup>13</sup> When Peter imprudently cuts off the ear of the high priest's servant while trying to protect Jesus, Peter is told to put his sword back in its sheath, not discard it.<sup>14</sup>

So if the Right of Self-Preservation was universally recognized by moral philosophers and the Founders, subordinating that right counted as the ultimate sacrifice, why was this right not enumerated in the Constitution?

Perhaps one reason has to do with the limits of language. Madison noted that:

*"[T]here is great reason to fear that a positive declaration of some of the most essential rights could not be obtained in the requisite latitude. I am sure that the*

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<sup>11</sup> Exodus 21:14, Deuteronomy 19:11, Numbers 35:16.

<sup>12</sup> 1Corinthians 6:19-20, American Standard Version.

<sup>13</sup> Luke 22:36.

<sup>14</sup> John 18:11.

*rights of conscience in particular, if submitted to public definition would be narrowed much more than they are likely ever to be by an assumed power.”<sup>15</sup>*

Translation: if you do not describe the right you are trying to secure with “the requisite latitude,” that is, precisely enough, there is danger that it will not be secured correctly or adequately. And if the public is allowed to define the right, they will likely do so in an even narrower sense than the government might.

Considering Madison’s example: how would you describe the Right of Conscience? To what beliefs would it extend – anything and everything, or only religiously-focused beliefs? If you believe it is morally wrong to kill animals should you be able to enunciate and act upon that belief? Of course, but not to the point that your actions infringe on the right of others to eat meat if they choose (PETA take note).

How would you describe the Right of Self-Preservation in a short sentence or paragraph so that it would be appropriately protected by your government? The “Stand Your Ground Laws” found in several states are a step in that direction, but do they cover all circumstances where self-preservation comes into play? Certainly not. Does a terminally ill patient have a right to take experimental drugs or therapies not yet approved by the FDA if doing so offers a chance of preserving their life? So called “Right to Take” legislation is attempting to secure precisely that right.<sup>16</sup> Would you have included that in your description of the Right of Self-Preservation? I would probably have overlooked it.

While Madison chose not to enumerate a Right to Self-Preservation, most likely because the right went without saying, he did provide for it. In arguing for the Bill of Rights on the floor of Congress, Madison said:

*“It has been objected also against a bill of rights, that, by enumerating particular exceptions to the grant of power, it would disparage those rights which were not placed in that enumeration, and it might follow by implication, that those rights which were not singled out, were intended to be assigned into the hands of the general government, and were consequently insecure. This is one of the most plausible arguments I have ever heard urged against the admission of a bill of rights into this system; but, I conceive, that may be guarded against. I have attempted it, as gentlemen may see by turning to (what would later become the Ninth Amendment).”*

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<sup>15</sup> Annals of Congress, 8 June 1789.

<sup>16</sup> <https://www.usnews.com/news/articles/2014/11/18/right-to-try-laws-allowing-patients-to-try-experimental-drugs-bypass-fda>.

“The Ninth Amendment is the repository for natural rights,” writes Leonard W. Levy in *Origins of the Bill of Rights*.<sup>17</sup> But, Levy cautions: “no evidence exists to prove that the Framers intended the Ninth Amendment to protect any particular natural rights...we can only guess what the Framers had in mind.”

The problem with the Ninth Amendment is that the rights it is to protect must be “teased out of it.” And who should do the “teasing:” five lawyers in black robes, or the rightful owners of the Constitution, i.e., the people? Clearly the people are the ultimate authority over what the Constitution says and means; in my view they are the only rightful agency with the authority to identify new rights which are to be protected by the Ninth Amendment. “To say that the Framers did not intend the Court to act as a constitutional convention or to shape public policies by interpreting the Constitution is...to assert historical truth.”<sup>18</sup>

As Levy points out, until 1965, the Ninth Amendment was considered an indecipherable mystery by the court, akin to an “ink blot.” In 1965, the five lawyers “teased out” a right to privacy over the use of contraceptives;<sup>19</sup> eight years later they extended this newly discovered privacy right to the killing of babies in the womb. In the 2015 case of *Obergefell v. Hodges*, while the Court claimed to discover a right to homosexual “marriage” in the Fourteenth Amendment’s Due Process Clause, they could just as easily have discovered this “right” in the Ninth. “Within fifteen years [after *Griswold*] the Ninth Amendment...was invoked in more than twelve hundred state and federal cases in the most astonishing variety of matters.”<sup>20</sup>

Let us presume then that a Right of Self-Preservation is a natural right deserving of protection by the government; by what means is this right to be acted upon? Is it logical that a right to preserve one’s life when confronted by some armed with a weapon should involve the use of a weapon at least equal in lethality? I think so.

Locke reminds us that: “*The state of nature has a law of nature to govern it, which obliges every one: and reason, which is that law, teaches all mankind, who will but consult it, that being all equal and independent, no one ought to harm another in his life, health, liberty, or possessions.*”<sup>21</sup> (Emphasis added)

No one *ought* to wish to harm us, but some do. Some people have no compulsion against killing their fellow man and even inflicting great pain in the act. Paraphrasing Jesus: like the poor, given the fallen nature of man, we will always have such people with us.

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<sup>17</sup> Leonard Levy, *Origins of the Bill of Rights*, Yale University Press, 1999, p. 254.

<sup>18</sup> Ibid, p. 243.

<sup>19</sup> *Griswold v. Connecticut*, 381 U.S. 479 (1965),

<sup>20</sup> Levy, p. 242.

<sup>21</sup> John Locke, *Second Treatise on Government*, Chapter 1, Section 6.

As I noted earlier, Locke states: *"I should have a right to destroy that which threatens me with destruction: for, by the fundamental law of nature, man being to be preserved as much as possible, when all cannot be preserved, the safety of the innocent is to be preferred: and one may destroy a man who makes war upon him, or has discovered an enmity to his being, for the same reason that he may kill a wolf or a lion."*

Defending yourself against someone who threatens to take your life with a gun logically requires a gun of your own. And the Founders would agree:

*"The right of the citizens to bear arms in the defense of themselves shall not be questioned."*

James Wilson

*"Arms in the hands of individual citizens may be used at individual discretion for the defence of the country, the over-throw of tyranny, or in private self-defense."* John Adams

*"...[T]he people have a right to bear arms for the defense of themselves and their own State, or the United States... and no law shall be passed for disarming the people or any of them, unless for crimes committed, or real danger of public injury from individuals."* Pennsylvania Ratifying Convention

In Thomas Jefferson's Commonplace Book we find him quoting Cesare Beccaria's book, *On Crimes and Punishment*.<sup>22</sup> Jefferson found this quote of Beccaria worth remembering: *"Laws that forbid the carrying of arms ... disarm only those who are neither inclined nor determined to commit crimes... Such laws make things worse for the assaulted and better for the assailants; they serve rather to encourage than to prevent homicides, for an unarmed man may be attacked with greater confidence than an armed man."*

In 1859, a court, albeit a state court, finally proclaimed forthrightly what everyone, certainly everyone of the time, knew to be true: *"The right of a citizen to bear arms, in lawful defense of himself or the State, is absolute. He does not derive it from the State government. It is one of the "high powers" delegated directly to the citizen, and is excepted out of the general powers of government.' A law cannot be passed to infringe upon or impair it, because it is above the law, and independent of the lawmaking power."*<sup>23</sup>

Turning to the Second Amendment, much has been made of its prefatory clause which can be read to imply that keeping and bearing arms is only permitted for militia duty. This is clearly an important reason for having arms, but I hope you see by now that it is not the only reason.

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<sup>22</sup> [http://www.constitution.org/cb/crim\\_pun.htm](http://www.constitution.org/cb/crim_pun.htm).

<sup>23</sup> *Cockrum v. State*, 24 Tex. 394, at 401-402.

As Robert Natelson explains in *The Founders and the 2nd Amendment*:<sup>24</sup>

*“History makes it clear that the Second Amendment is designed to serve four principal purposes.*

*First, it guarantees the states militia power of their own to balance the military power of the federal government;*

*Second, it promotes the God-given right of personal self defense;*

*Third, it enables the citizenry to repel foreign invasion; and*

*Fourth, it enables the citizenry to overthrow domestic tyrants and intimidate or discipline those who otherwise would be tyrants.”*

Each of these purposes deserves more elaboration, but space this day does not permit it.

Let us be clear: the second Amendment grants no rights, it only protects a preexisting right from government infringement (and the infringement that has been allowed thus far is also a story for another time). The Supreme Court’s decision in *Heller v. District of Columbia*,<sup>25</sup> although decried by Progressives, demonstrated conclusively that a right of individual self-defense/preservation is appropriately exercised by keeping and bearing arms.

There are those who will insist, however, that an individual gives up his natural right of self-preservation when entering into a social contract; i.e., the government assumes responsibility for our protection. This brings to mind the meme: “when seconds count, the police are only minutes away.” It should also come as no surprise that police have no responsibility to protect individual citizens from harm.<sup>26</sup> So then there’s that.

To conclude: the Right of Self-Preservation is a natural right with a long pedigree. The ability to use appropriate weapons, including guns, when exercising that right should be as protected as the right itself. The right to keep and bear arms does not hinge exclusively or even predominately on duty in a militia.

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<sup>24</sup> <http://tenthamentcenter.com/2013/04/01/the-founders-and-the-2nd-amendment/>.

<sup>25</sup> *District of Columbia v. Heller*, 554 U.S. 570 (2008).

<sup>26</sup> *Castle Rock v. Gonzales*, 545 U.S. 748 (2005).