

The Breakfast Club

Constitutional Minute for 5 April 2022

The Right of Self Preservation, Part 2, the Right to Keep and Bear Arms

Last week I established, I hope convincingly, that we each enjoy a Right of Self-Preservation. It was the first of several natural laws identified by Thomas Hobbes and nearly every philosopher since Hobbes has agreed. The fact that, constitutionally, the right remains “hidden” in the obscurity of the Ninth Amendment is troubling; and that should and could be fixed with an amendment.

There are some who will no doubt contend that a right of self-defense was elucidated in *Heller v. District of Columbia*, and I will grant you that Justice Scalia certainly cleared up any misconception that “keeping and bearing” firearms was linked only to militia duty. But the finding in *Heller* was surprisingly narrow: *“But the enshrinement of constitutional rights necessarily takes certain policy choices off the table. These include the absolute prohibition of handguns held and used for self-defense in the home.”* (emphasis added)

Justice Breyer, in dissent, argued that an opinion this narrow would force future Courts to continually have to decide on whether the right extends outside the home or in other discreet locations. Scalia replies that *“since this case represents this Court’s first in-depth examination of the Second Amendment, one should not expect it to clarify the entire field.”*

So does that mean I have a right to carry a firearm for self-defense outside the home? Not based on *Heller*, it doesn’t.

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 robbers, carjackers, home invaders seldom limit themselves to weapons less lethal than guns. Besides, a baseball bat or knife is just as likely to kill you as a firearm.

Clubs and knives were certainly available weapons in the founding era, yet the Founders did not limit the right of self-defense to weapons comparable to those a person might face:

"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*.ⁱ 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."*ⁱⁱ

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).

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 preserving our life. 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 legal responsibility to protect individual citizens from harm.ⁱⁱⁱ Surprised to learn 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.

Prepared by: Gary R. Porter, Executive Director, Constitution Leadership Initiative, Inc. for The Breakfast Club.
Contact: gary@constitutionleadership.org; 757-817-1216

ⁱ http://www.constitution.org/cb/crim_pun.htm.

ⁱⁱ *Cockrum v. State*, 24 Tex. 394, at 401-402.

ⁱⁱⁱ *Castle Rock v. Gonzales*, 545 U.S. 748 (2005).