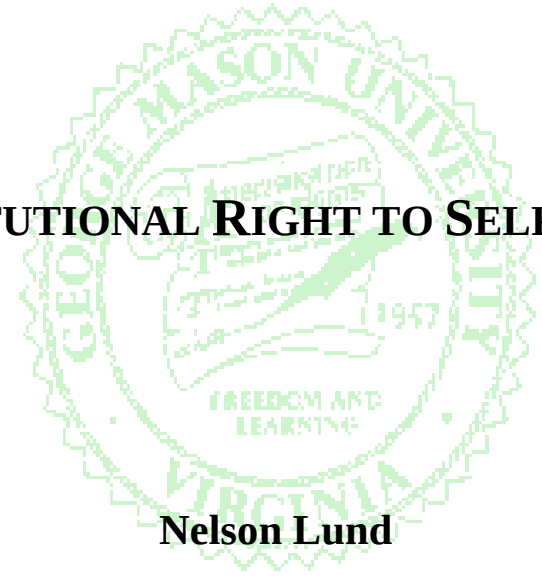

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A CONSTITUTIONAL RIGHT TO SELF DEFENSE?

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Nicholas J. Johnson's fascinating essay on the right of self defense[1] invites us to reflect on the relation between our Constitution and the presuppositions of our Constitution. Questions about that relation are as old and important as the manifest conflict between our founding political principles and the institution of slavery. They arose in constitutional law at least as early as the debate between Justices Chase and Iredell in *Calder v. Bull*.[2] And they are as contemporary as the legal and political controversies about gun control and abortion.

As I understand it, the central point of Professor Johnson's essay may be stated as follows. If there are any unenumerated rights under our Constitution—and there are—the right of self defense must be one of them. In support of this proposition, he offers three principal forms of evidence. First, he points to the Second Amendment, arguing that it implicitly recognizes a right to self defense. When one guarantees a right to the means of self defense, one would seem to imply that there is a right to use those means for the purpose of self defense. Second, he argues that the existence of a right to self defense may be implied by the right to abortion. Finally, he points to a variety of common law sources that seem to assign a special status to the right of self defense; the most interesting of these common law sources are antebellum cases that sometimes recognized a right of self defense even in slaves.

In light of this kind of evidence, one can hardly doubt that the right of self defense is a fundamental presupposition of our legal culture or legal tradition. Virtually any disinterested and intelligent lawyer would, at any time in American history, recoil from the suggestion that a free citizen living under a republican form of government could be forbidden by the law to defend his own life against violent attacks.

The reason for this revulsion may be captured, at least in part, by one of the quotations that Professor Johnson chose to use in his paper's epigraph. In a modern Fourth Circuit opinion, the court pointed to the absurdity of "abolish[ing] self defense altogether, thereby leaving one a Hobson's choice of almost certain death through violent attack now or statutorily

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1 Nicholas J. Johnson, *Self Defense?*, 2 J. L. ECON. & POL'Y 187 (2006).

2 Calder v. Bull, 3 U.S. 386 (1798).

mandated death through trial and conviction of murder later."[3] Note, however, that the court only claimed that it would be absurd to abolish the right of self defense "altogether." It might be objectionable, but it would not be absurd, if a state were to impose on the defendant in a murder case the burden of proving self defense as an affirmative defense. And what if the law required the defendant to prove that affirmative defense beyond a reasonable doubt? That might well be *highly* objectionable, for it would drain the right of self defense of much of its value as a practical matter. But it would not quite be absurd.

Consider another kind of exception or qualification that our legal system makes to the right of self defense. Notwithstanding our usual assumptions about that right, and notwithstanding the Thirteenth Amendment, we have long accepted the right of the government to conscript men into military service and to send them into battle. Nor, so far as I have been able to ascertain, has our Constitution been held to give conscripted personnel a right to fire back when attacked by the enemy, if the commanders judge that military or political considerations make deliberate passivity advantageous to the war effort.

It is true that current military doctrine imposes a vague obligation on commanders to take "all appropriate action" to defend their troops from hostile acts.[4] And there may be some kind of implicit norm, in what is called international law, forbidding governments to "compel what is tantamount to suicide."[5] But it is not difficult to imagine scenarios in which military commanders might reasonably order some troops not to fire back at the enemy, even if such restraint made the troops' survival extremely unlikely.[6] And it is very difficult indeed to imagine our courts finding that military personnel, whether volunteers or conscripts, have a constitutional right to disobey such orders.

In order to see how important the military example is, it's helpful to turn to Thomas Hobbes, the founder of modern liberal political theory.[7] Hobbes, of course, treats the right of self defense as the fundamental principle in his account of politics. In the state of nature, everyone has an equal right to do whatever he thinks will help him survive, including a right to

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[3] Griffin v. Martin, 785 F.2d 1172 (4th Cir. 1986), *opinion withdrawn and judgment affirmed by an equally divided en banc court*, 795 F.2d 22 (4th Cir. 1986).

[4] Joint Chiefs of Staff Instruction 3121.01, ¶ 5a, *quoted in* Dale Stephens, *Rules of Engagement and the Concept of Self Defense*, 45 NAVAL L. REV. 126, 141 (1998).

[5] *Id.* at 148.

[6] I'll pick just one. Suppose that some Iraqi insurgents, who are holding the Grand Ayatollah Sistani hostage, are firing at American troops who are in an exposed position but who have weaponry and firepower sufficient to crush the insurgents. If an American officer ordered his troops to hold their fire because responding would likely kill Sistani and thereby touch off a major eruption of violence against Americans by Sistani's followers, it would be hard to call such an order unreasonable.

[7] On Hobbes as the founder of liberalism, *see* LEO STRAUSS, NATURAL RIGHT AND HISTORY 165-202 (1953); HARVEY C. MANSFIELD, THE SPIRIT OF LIBERALISM 43-46 (1978).

preemptively kill other people who he fears might kill him. The exercise of this right leads to a war of all against all in which nobody's life is safe. Faced with this intolerable situation, everyone has an interest in agreeing to relinquish the right of preemptive attack and submit to a common sovereign, who has an interest in protecting everyone's life by imposing order and keeping the peace. This agreement is the social contract.[8]

But the motive for giving up the right to preemptive self defense implies that one retains an ultimate right to self defense. That means that there is a kind of residual space for mortal conflict between the citizen and the sovereign. The most important context in which such a conflict can arise involves military service. According to Hobbes:

> [A] man that is commanded as a Souldier to fight against the enemy, though his Soveraign have Right enough to punish his refusall with death, may nevertheless in many cases refuse, without Injustice: as when he substituteth a sufficient Souldier in his place: for in this case he deserteth not the service of the Common-wealth. And there is allowance to be made for naturall timorousnesse, not onely to women, (of whom no such dangerous duty is expected,) but also to men of feminine courage. When Armies fight, there is on one side, or both, a running away: yet when they do it not out of trechery, but fear, they are not esteemed to do it unjustly, but dishonourably. For the same reason, to avoyd battell, is not Injustice, but Cowardice. But he that inrowleth himselfe a Souldier, or taketh imprest mony, taketh away the excuse of a timorous nature; and is obliged, not only to go to the battell, but also not to run from it, without his Captaines leave. And when the Defence of the Common-wealth, requireth at once the help of all that are able to bear Arms, every one is obliged; because otherwise the Institution of the Common-wealth, which they have not the purpose, or courage to preserve, was in vain.[9]

As the rhetoric in this passage suggests, the theoretically most straightforward way to deal with military necessities in a liberal regime is through what we call a volunteer army. But the logic of Hobbes' basic argument about the centrality of self preservation implies a) that conscripts and volunteers are equally obliged to obey orders,[10] and b) that nobody is obliged to obey orders if his interest in self preservation dictates otherwise.[11]

Even if we granted—as the passage quoted above seems to say—that military volunteers relinquish their right to save themselves by running away from battle, and that civilians have an obligation to fight in the ex-

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[8] For a somewhat more detailed explanation of my reasons for summarizing Hobbes' position in this way, see Nelson Lund, *Rousseau and Direct Democracy (with a Note on the Supreme Court's Term Limits Decision)*, 13 J. CONTEMP. LEGAL ISSUES 459, 466-72 (2004).

[9] THOMAS HOBBES, LEVIATHAN 167-68 (Oxford University Press 1909) (1651).

[10] In addition to the cryptic references in this passage to finding a "substitute" and to taking "imprest mony," see LEVIATHAN, *supra* note 9, at 107, where Hobbes insists that a promise extorted from an individual by fear—such as an agreement, by a prisoner of war or a victim of kidnapping, to pay a ransom—is binding. Similarly, a military conscript agrees to serve in the military rather than be imprisoned or otherwise punished, and this agreement is binding under Hobbes' stated criteria.

[11] *See, e.g., id.*, where Hobbes says that a "Covenant not to defend my selfe from force, by force, is alwayes void." The reason for this conclusion is that the only purpose one can have in relinquishing any right is to avoid death, wounds, and imprisonment.

tremely rare circumstances that require the *immediate* assistance of *everyone* in battle, we would still have to wonder about the many intermediate cases, where the sovereign may find it more or less convenient to use a military draft rather than to hire soldiers. At the beginning of the passage quoted above, Hobbes seems to acknowledge that an individual will often have a natural right to evade battle at the same time that the sovereign has a legal right to order him to fight the enemy. That would mean that the social contract does not solve the underlying problem of the natural war of all against all nearly so cleanly as it may first appear to do in Hobbes' presentation.

I am confident that Hobbes was fully aware of this difficulty, and I suspect that he regarded it as intractable.[12] For my purposes here, the important point is that we should not overestimate what we've accomplished when we establish—as I think Professor Johnson does—that it would be outrageous for our governments to *completely* abolish the right of self defense. As a practical matter, it is probably going to be much more important, and much more difficult, to agree on the *scope* of the right to self defense.

- Against whom may I defend myself, and with how much force?
- How certain do I have to be that I will be attacked before I respond with preemptive violence, and how imminent must the threat be?
- May I defend myself only against lethal threats or also against threats of serious injury?
- May I use force to defend my honor, which I may value more highly than my life?

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[12] One sign of this is that Hobbes returns to the nagging problem of military service at the very end of this very long book. *Id.* at 548-49 (Review and Conclusion). This passage contains the following arresting statement:

> But if a man, besides the obligation of a Subject, hath taken upon him a new obligation of a Souldier, then he hath not the liberty to submit to a new Power, as long as the old one keeps the field, and giveth him means of subsistence, either in his Armies, or Garrisons: for in this case, *he cannot complain of want of Protection*, and means to live as a Souldier: But when that also failes, a Souldier also may seek his Protection wheresoever he has most hope to have it; and may lawfully submit himself to his new Master.

Id. at 549 (emphasis added). Armies whose soldiers were imbued with this kind of thinking would be the ones most likely *not* to "keep the field" and *not* to provide their members with the protection that comes with victory. Thus, the very kind of selfish focus on one's own safety that tends to preserve the commonwealth by making peaceable citizens is likely to undermine the commonwealth by making ineffective soldiers.

- May a woman use lethal force to defend herself against any rape, or only those in which she faces an imminent threat of death or maiming?

- Do I have a duty to retreat, or may I stand my ground against a criminal attack?

- After I kill someone, how much proof will I need that I exercised my right of self defense within whatever limits the law prescribes?

- Does the right of self-defense include the right to join with one's fellow citizens in order to resist with force the usurpations of a government turned tyrannical, as some have inferred from the Second Amendment?

Depending on how such questions are answered, the right of self defense could be anything from an important element in republican freedom to a useless memento of natural liberty.

That said, I agree with Professor Johnson that the case for recognizing some kind of meaningful common law right to self defense does seem to be very strong. But I'm afraid that I find it more difficult to identify such a right in the Constitution. I cannot offer a detailed discussion of all the arguments that Professor Johnson advances in his paper, but perhaps it will be useful to make a few remarks about what I think are his weakest and strongest arguments.

In my opinion, the weakest argument in the paper is based on the Ninth Amendment, which I gather is being interpreted to guarantee a right of self defense against infringement by both the federal and state governments. I believe this interpretation is untenable. The Ninth Amendment provides:

> The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people.

This provision says only that it is improper to infer from the recognition of certain rights that others do not exist. The Ninth Amendment does not say what those other rights might be or where they come from, and it certainly does not say how they are to be protected, or by whom. The Ninth Amendment is a companion to the Tenth Amendment, which provides:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

Just as the Tenth Amendment affirms that the enumeration of powers in the Constitution is exhaustive, so the Ninth Amendment affirms that the enu-

meration of rights in the Constitution is *not* exhaustive. This makes perfect sense because individual rights and governmental authorities are correlative: if a government does not have the authority to issue certain commands to its citizens, they have a right not be subjected to those commands by that government.

Thus, the Ninth and Tenth Amendments together serve as an emphatic reminder that the Constitution was designed so as to protect a vast number of unenumerated rights from infringement *by the federal government*, namely all those rights that the federal government is not authorized to abridge in the exercise of its enumerated powers. Some of them may be natural rights, some are positive rights established by state law, and some are political rights exercised in the course of establishing state law. The language of the Ninth Amendment does not give a privileged status to any one of these various kinds of rights, and nothing in the Ninth Amendment implies that the federal Constitution guarantees *any* unenumerated rights against infringement by the *state* governments. Indeed, one important right covered by the Ninth Amendment is the right of the people to make decisions about the scope of the right to self defense through their individual state constitutions and state governments.[13]

If reliance on the Ninth Amendment is Professor Johnson's weakest legal argument, his strongest is based on the doctrine of substantive due process, which the Supreme Court has used to protect a wide range of unenumerated rights over a long period of time. This source of unenumerated rights has the disadvantage of being a pure judicial invention, but it has the advantage of being an established part of constitutional law. One of those unenumerated but judicially recognized rights, of course, is the right to abortion, and Professor Johnson suggests that the best argument supporting *Roe v. Wade* and its progeny would be to derive the right to abortion from the more fundamental right to self defense.

This may be a plausible suggestion, though the scope of the right recognized in *Roe* at the very least tests the outer bounds of what could plausibly be thought to constitute self defense, and even the best argument for *Roe* may not be an adequate argument. In any event, the substantive due process argument for recognizing a constitutional right to self defense can be made even stronger if we look at the range of rights that the Court has recognized in this area. Some of them are even more directly derived from an underlying right of self defense than abortion is. Consider, for example the constitutionally protected interest in refusing unwanted medical treatment. At common law, providing medical treatment without consent would

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[13] For further commentary on the Ninth Amendment, from which much of the discussion here is drawn, see Nelson Lund & John O. McGinnis, Lawrence v. Texas *and Judicial Hubris*, 102 MICH. L. REV. 1555, 1590-93 (2004); Nelson Lund, *A Libertarian Constitution*, CLAREMONT REV. OF BOOKS, Vol. 5, No. 2 (Spring 2005), at 47.

have been a battery,[14] and the Court has repeatedly used substantive due process to require governments to provide a strong justification before they are permitted to override an individual's refusal to submit to medical procedures.[15]

More generally, even the Court's most conservative tests for recognizing a right under substantive due process would seem easily to include the right to self defense. Self defense must certainly be one of "those fundamental rights and liberties which are, objectively, 'deeply rooted in this Nation's history and tradition,' 'so rooted in the traditions and conscience of our people as to be ranked as fundamental' and 'implicit in the concept of ordered liberty,' such that 'neither liberty nor justice would exist if they were sacrificed.'"[16] Under that conglomeration of phrases, drawn from several Supreme Court opinions and strung together by the Court in one of its less elegant English sentences, a variety of rights that are, as a matter of historical tradition, manifestly less fundamental than the right of self defense have been recognized by the Supreme Court, such as the right to marry and have children.[17]

Under the Court's more adventurous right to privacy doctrines, it is even more clear that a right to self defense is logically entailed in substantive due process. In a famous (or notorious) passage in the *Casey* abortion opinion, for example, the Supreme Court announced that it is now protecting "the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life."[18] As Professor Johnson shrewdly points out, "[c]ertainly more basic than *'defining one's own concept of existence'* is *preserving one's existence* from wrongful physical threats."[19] Once again, the strength of his argument depends on assuming the validity of the Court's abortion jurisprudence, which is perfectly respectable way for a lawyer to proceed.

In the end, therefore, I'm pretty well persuaded that Professor Johnson is right to claim that there must be some kind of constitutional right to self

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14 Cruzan v. Dir., Mo. Dept. of Health, 497 U.S. 261, 269 (1990).

15 *E.g., id., see also* Jacobson v. Massachusetts, 197 U.S. 11, 24-30 (1905); Washington v. Harper, 494 U.S. 210, 221-22 (1990); Parham v. J.R., 442 U.S. 584, 600 (1979). *Cf.* Abigail Alliance v. Von Eschenbach, 445 F.3d 470 (D.C. Cir. 2006) (using the fundamental nature of the right to self defense as a basis for concluding that strict scrutiny should be applied to a government regulation forbidding terminally ill patients to have access to potentially life-saving drugs that have been found by the government to be sufficiently safe for expanded human trials).

16 Washington v. Glucksberg, 521 U.S. 702, 720-721 (1997) (citations omitted).

17 Loving v. Virginia, 388 U.S. 1 (1967) (marriage); Skinner v. Oklahoma ex rel. Williamson, 316 U.S. 535 (1942) (children).

18 Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 851 (1992). The Justices are apparently quite proud of this language, which the Court has since quoted with unabashed approval. *See* Lawrence v. Texas, 539 U.S. 558, 574 (2003). For an argument that the Court should be ashamed rather than proud, see Lund & McGinnis, *supra* note 13, at 1575-78.

19 Johnson, *supra* note 1.

defense. It just happens to be one of those constitutional rights—many of which are well-established in Supreme Court precedents and frequently found under the rubric of substantive due process—that come from somewhere other than the Constitution. But whatever the provenance of the right to self defense that is presupposed in a variety of legal contexts, the most important and difficult questions involve its scope rather than its existence.