Self-Defense and the Second Amendment

By **CHARLES C. W. COOKE** December 31, 2015 National Review

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Why would anyone want a firearm?

Of all the ill-considered tropes that are trotted out in anger during our ongoing debate over gun control, perhaps the most irritating is the claim that the Constitution may indeed protect firearms, but it says "nothing at all about bullets."

On its face, this is flatly incorrect. Quite deliberately, the Bill of Rights is worded so as to shield categories and not specifics, which is why the First Amendment protects the "press" and not "ink"; why the Fourth covers "papers" and "effects" instead of listing every item that might be worn about one's person; and why the Fifth insists broadly that one may not be deprived of "life, liberty, or property" and leaves the language there. The "right of the people" that is mentioned in the Second Amendment is not "to keep and bear guns" or "to keep and bear ammunition" but "to keep and bear *arms*," which, per *Black's Law Dictionary*, was understood in the 18th century to include the "musket and bayonet"; "sabre, holster pistols, and carbine"; an array of "side arms"; and any accoutrements necessary for their operation. To propose that a government could restrict access to ammunition without gutting the Second Amendment is akin to proposing that a government could ban churches without hollowing out the First. If a free people are to enjoy their liberties without encumbrance, the prerequisite tools must be let well alone.

Without doubt, the vast majority of those who offer up the "But bullets!" talking point are doing little more than repeating memes that they have encountered. Yet at the *root* of their provocation is a serious misconception that needs to be seriously reckoned with. In most of the world's countries, firearms are regulated in much the same way as are, say, cars, radios, and lawnmowers: as everyday tools whose utility can be evaluated without prejudice. In the United States, by contrast, the government's hands are tied tight. To those who are unfamiliar with the contours of Anglo-American history, this can be understandably confusing. "Why," we often hear it asked, "would the architects of the Constitution put

a *public policy* question into the national charter? Do we *really* have to stick with a regulatory scheme that originated before the invention of the light bulb?"

The answer to this question is a simple one: "Yes." Why? Because, our contemporary rhetorical habits notwithstanding, the right to keep and bear arms is not so much a right in and of itself as an auxiliary **mechanism that protects the real unalienable right underneath: that of self-defense.** By placing a prohibition on strict gun control into the Constitution, the Founders did not accidentally insert a matter of quotidian rulemaking into a statement of foundational law; rather, they sought to secure a fundamental liberty whose explicit recognition was the price of the state's construction. To understand this, I'd venture, is to understand immediately why the people of these United States remain so doggedly attached to their weapons. At bottom, the salient question during any gun-control debate is less "Do you think people should be allowed to have rifles?" and more "Do you think you should be permitted to take care of your own security?"

A five-foot-tall, 110-pound woman is in a certain sense "armed" if she has a kitchen knife or a baseball bat at her disposal. But if the six-foot-four, 250-pound man who has broken into her apartment has one, too, she is not likely to overwhelm him. If that same woman has a nine-millimeter Glock, however? Well, then there is a good chance of her walking out unharmed. From the perspective of our petite woman, there is really no way for the state to endorse her right to defend herself if it deprives her of the tools she needs for the job.

In the sixth century, the Byzantine emperor Justinian compiled the monumental *Digest of Roman Law*, cataloguing the laws that had developed over centuries of Roman jurisprudence — among which was this rule of thumb: "That which someone does for the safety of his body, let it be regarded as having been done legally." When it comes to the police and the armed forces, this principle is widely acknowledged, which is why most nations are happy to let their cops walk around with semi-automatic handguns and an array of advanced tactical gear. Within the *civilian* context, however, the same idea has become strangely controversial. Think of how often you hear Second Amendment advocates being asked with irritation why they "need" a particular firearm. Think, too, of how infrequently gun controllers focus on keeping weapons out of the hands of ne'er-

do-wells rather than on limiting the efficacy of those available to the good guys. This makes no sense whatsoever. If a 15-round magazine and a one-shot-per-trigger-pull sidearm are necessary to give a trained police officer a fighting chance against a man who wishes him harm, there is no good reason that my sister shouldn't have them, too.

As it happens, exactly this parity is presumed by America's founding documents. The Declaration of Independence establishes that all men are born in possession of **certain unchallengeable rights**, and that among them are "life, liberty, and the pursuit of happiness." This phrase, as with so many promulgated during the revolutionary era, is lightly adapted from **John Locke**, the English Enlightenment intellectual on whose philosophical presumptions the United States was in large part built. Inter alia, Locke held that every individual has a right to control and to defend his body, and that any government that attempted to deny that right was by necessity unjust. "Self defense," Locke wrote in his *Two Treatises of Government*, "is a part of the law of nature" and in consequence cannot be "denied the community, even against the king himself**." In Locke's view, this principle could be applied both on an individual level — against, say, intruders and other attackers — and on a collective level, against governments that turn tyrannical.** Crucially, unlike Rousseau, Locke and his ideological heirs did not consider the establishment of the state to be a justification for the restriction of this principle.

To peruse the explanatory strictures of the Founders' era is to discover just how seriously the right to protect oneself was taken in the early Anglo-American world. Writing in his 1768 *Commentaries on the Laws of England*, the great jurist William Blackstone contended that "self-defence" was "justly called the primary law of nature" and confirmed the Lockean contention that it could not be "taken away by the law of society." In most instances, Blackstone observed, injuries inflicted by one citizen on another could wait to be mediated by the "future process of law." But if those "injuries [are] accompanied with force . . . it is impossible to say, to what wanton lengths of rapine or cruelty outrages of this sort might be carried, unless it were permitted a man immediately to oppose one violence with another."

These conceptions were carried over wholesale into the American colonies and cherished long after independence had been won**. In *Federalist* No. 28, Alexander Hamilton affirmed the importance of the "original right of self-defense which is paramount to all positive forms of government" and conceded that, in extreme circumstances, it may even be asserted legitimately "against the usurpations of the national rulers."** This conceit was explicitly established in New Hampshire's constitution of 1784, which, astonishingly enough, included an enumerated right to revolution: "The doctrine of nonresistance against arbitrary power, and oppression," its signatories acknowledged, "is absurd, slavish, and destructive of the good and happiness of mankind." Similar statements were subsequently added to the charters of Kentucky, Pennsylvania, North Carolina, Texas, and Tennessee.

For almost all of American history, this idea remained uncontroversial. When, in the early 19th century, certain large cities took it upon themselves to establish police forces, they presented their initiatives as complementary to, not in lieu of, the status quo. Likewise, when the architects of Reconstruction wondered aloud how free blacks would defend themselves against the hostile white majority, their first instinct, to paraphrase Yale law professor Akhil Reed Amar, was to make minutemen out of freedmen. Today, the Supreme Court continues to affirm the right to defend oneself, refusing to hand that task over exclusively to the armed agents of the state, even in the age of the standing army and militarized police departments. Despite progressivism's endless march, the spirit of John Locke is alive and well.

But not, alas, omnipresent. Unfortunately, it has become commonplace over the last few decades to hear opponents of the right to keep and bear arms recite aggregate statistics as their case against individual liberties. A particularly egregious example of this came with Colorado's post-Aurora gun-control debate, during which a state legislator named Evie Hudak casually informed a female survivor of rape that, mathematically speaking, she was more likely to hurt herself with her concealed firearm than to forestall another attack. "Actually, statistics are not on your side even if you had a gun," Hudak told the stunned hearing. "Chances are that if you had had a gun, then he would have been able to get that from you and possibly use it against you."

COMMENTS

This approach is entirely inconsistent with America's founding ideals. If it is the case that free people have the right to defend themselves regardless of whether they are likely to prevail, then what their elected representatives think of their endeavors is irrelevant. To take any other approach is to strip from mankind what the great American jurist Henry St. George Tucker, echoing Blackstone, termed the "first law of nature," and to do so in the name of unwarranted superintendence.

That those who would engage in such supervision do so with good intentions is neither here nor there. When, in their infinite wisdom, the legislators of New Jersey passed the draconian permitting requirements that have led to their constituents' waiting months for the chance to buy a gun, they presumably believed that they were striking a strong blow for public safety. In truth, however, they were overstepping their legitimate bounds and condemning a handful of American citizens to ignominious death. One such citizen, a diminutive woman named Carol Bowne, found this out firsthand in June of this year, when, having waited long beyond the statutory processing window, she watched her stalker of an ex-boyfriend come into her driveway with a knife and stab her to death. "Who does not see that self-defense is a duty superior to every precept?" asked Montesquieu in his magisterial *Spirit of the Laws*. Judging by our present debate, the answer to this question is "Too many."

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