

STATE CONSTITUTIONAL RIGHTS OF SELF-DEFENSE
AND DEFENSE OF PROPERTY

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I. INTRODUCTION

“[D]efending life and liberty” and “protecting property,” twenty-one state constitutions expressly tell us, are constitutional rights, generally “inalienable” though in some constitutions merely “inherent” or “natural” and God-given. Yet they are also almost entirely undiscussed constitutional rights. The leading treatise on state constitutional law doesn’t mention them.¹ An excellent forthcoming article on a federal constitutional right to self-defense doesn’t discuss the state rights.² I could find no law review articles that discussed the rights in depth.

This silence may stem precisely from the broad acceptance of self-defense (and defense of property, at least with force that is not lethal to humans) as a criminal law doctrine. If states never deny people the right of self-defense, then there’s little occasion to explore constitutional limits on such denials.

Nonetheless, the constitutional status of self-defense may matter; it may, for instance, influence courts’ judgments about:

- the boundaries of self-defense or defense-of-property doctrine, such as proposed self-defense exceptions to felon-in-possession statutes,³ or when someone forfeits his right to self-defense against fellow criminals by engaging in a drug transaction;⁴
- tort liability based on acts of self-defense or defense of property, such as when a store’s employee defends himself against a criminal and in the process inadvertently jeopardizes a third party;⁵
- limits on private employers’ ability to fire employees for violent acts in the workplace when the acts were

1. See JENNIFER FRIESEN, *STATE CONSTITUTIONAL LAW: LITIGATING INDIVIDUAL RIGHTS, CLAIMS AND DEFENSES* (4th ed. 2006).

2. See Nicholas H. Johnson, *Self-Defense?* (forthcoming 2007). This is so even though 44 of the 50 state constitutions secure either a right to defend life or a right to bear arms in defense of self; this strongly supports the proposition that a constitutional right to self-defense is firmly established in American legal traditions.

3. See *infra* note 37 and accompanying text.

4. See *Perkins v. State*, 576 So. 2d 1310, 1314 (Fla. 1991) (Kogan, J., joined by Barkett, J., specially concurring) (concluding that the Florida Constitution’s right to “defend life” limits the state’s power to create such forfeiture rules).

5. See *infra* Part III.C.

defensive;⁶

- attempts to defend life against nonhuman threats, such as attempts to defend life against terminal disease using drugs that haven't yet been fully tested, or to defend life against organ failure by paying for organs to be transplanted;⁷ or
- the permissibility of bans on nonlethal weapons such as tasers (even setting aside the gun control debate).⁸

And, more broadly, thinking about a right that many constitution-drafters found important enough to expressly secure may provide a broader perspective on American constitutionalism.

This article isn't meant to resolve these issues, or even provide a theoretical framework for resolving them. It simply aims to help others discuss the questions by collecting the chief sources—mainly constitutional provisions and cases interpreting them—that are relevant to the subject. Having found the sources myself in writing an article about an unusual sort of self-defense,⁹ I thought it would be helpful to spare others the same effort.

Part II collects the texts of the state constitutional provisions. Part III cites and synthesizes the lower court cases on the subject, and establishes that there is a substantial tradition of treating the right as judicially enforceable and not just hortatory. Part IV points to those state constitutional right-to-bear-arms provisions that implicitly support a right to self-defense, and to cases so interpreting those provisions. Part V reaches beyond state constitutions to summarize the cases discussing whether the federal Constitution's Due Process Clause or Ninth Amendment protects a right to self-defense.

II. STATE CONSTITUTIONAL "RIGHT TO DEFEND LIFE" PROVISIONS

Arkansas: "All men are created equally free and independent, and have certain inherent and inalienable rights; amongst which are those of enjoying and defending life and liberty; of

6. See *infra* Part III.D.

7. See Eugene Volokh, *Medical Self-Defense, Prohibited Experimental Therapies, and Payment for Organs*, 120 HARV. L. REV. (forthcoming 2007).

8. See Deirdre P. Lanning, *Non-Lethal Weapons, the Right to Bear Arms, and the Right to Self-Defense: A New Approach* (draft available from author).

9. See Volokh, *supra* note 7.

acquiring, possessing and protecting property, and reputation; and of pursuing their own happiness. To secure these rights governments are instituted among men, deriving their just powers from the consent of the governed.”¹⁰

California: “All people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness, and privacy.”¹¹

Colorado: “All persons have certain natural, essential and inalienable rights, among which may be reckoned the right of enjoying and defending their lives and liberties; of acquiring, possessing and protecting property; and of seeking and obtaining their safety and happiness.”¹²

Delaware: “Through divine goodness, all people have by nature, the rights of worshipping and serving their Creator according to the dictates of their consciences, of enjoying and defending life and liberty, of acquiring and protecting reputation and property, and in general of obtaining objects suitable to their condition, without injury by one to another; and as these rights are essential to their welfare, for due exercise thereof, power is inherent in them; and therefore all just authority in the institutions of political society is derived from the people, and established with their consent, to advance their happiness; and they may for this end, as circumstances require, from time to time alter their Constitution of government.”¹³

10. ARK. CONST. art. II, § 2 (originally enacted in 1836 in art. II, §1 as “That all freemen, when they form a social compact, are equal, and have certain inherent and indefeasible rights, among which are those of enjoying and defending life and liberty; of acquiring, possessing and protecting property and reputation; and of pursuing their own happiness.”).

11. CAL. CONST. art. I, § 1 (originally enacted in 1849 as “All men are by nature free and independent, and have certain inalienable rights, among which are those of enjoying and defending life and liberty; acquiring, possessing and protecting property, and pursuing and obtaining safety and happiness.”).

12. COLO. CONST. art. II, § 3.

13. DEL. CONST. pmbl. (originally enacted in 1792 as “Through divine goodness all men have by nature, the rights of worshipping and serving their Creator according to the dictates of their consciences, of enjoying and defending life and liberty, of acquiring and protecting reputation and property, and, in general, of attaining objects suitable to their condition, without injury by one to another; and as these rights are essential to their

Florida: “All natural persons, female and male alike, are equal before the law and have inalienable rights, among which are the right to enjoy and defend life and liberty, to pursue happiness, to be rewarded for industry, and to acquire, possess and protect property; except that the ownership, inheritance, disposition and possession of real property by aliens ineligible for citizenship may be regulated or prohibited by law. No person shall be deprived of any right because of race, religion, national origin, or physical disability.”¹⁴

Idaho: “All men are by nature free and equal, and have certain inalienable rights, among which are enjoying and defending life and liberty; acquiring, possessing and protecting property; pursuing happiness and securing safety.”¹⁵

Iowa: “All men and women are, by nature, free and equal, and have certain inalienable rights among which are those of enjoying and defending life and liberty, acquiring, possessing and protecting property, and pursuing and obtaining safety and happiness.”¹⁶

Kentucky: “All men are, by nature, free and equal, and have certain inherent and inalienable rights, among which may be reckoned: First: The right of enjoying and defending their lives and liberties. Second: The right of worshipping Almighty God according to the dictates of their consciences. Third: The right of seeking and pursuing their safety and happiness. Fourth: The right of freely communicating their thoughts and opinions. Fifth: The right of acquiring and protecting property. Sixth: The right of assembling together in a peaceable manner for their

welfare, for the due exercise thereof, power is inherent in them; and, therefore, all just authority in the institutions of political society is derived from the people, and established by their consent, to advance their happiness; and they may, for this end, as circumstances require, from time to time alter their constitution of government.”).

14. FLA. CONST. art. I, § 2 (originally enacted in 1838 in art. I § 1 stating “That all freemen, when they form a social compact, are equal, and have certain inherent and inalienable rights, among which are those of enjoying and defending life and liberty; of acquiring, possessing, and protecting property and reputation, and of pursuing their own happiness,” and changed in various ways in 1865, 1868, 1885, 1968, 1974, and 1998).

15. IDAHO CONST. art. I, § 1.

16. IOWA CONST. art. I, § 1 (originally enacted in 1846 with “men” instead of “men and women” and with immaterial punctuation differences).

common good, and of applying to those invested with the power of government for redress of grievances or other proper purposes, by petition, address or remonstrance. Seventh: The right to bear arms in defense of themselves and of the State, subject to the power of the General Assembly to enact laws to prevent persons from carrying concealed weapons.”¹⁷

Maine: “All people are born equally free and independent, and have certain natural, inherent and unalienable rights, among which are those of enjoying and defending life and liberty, acquiring, possessing and protecting property, and of pursuing and obtaining safety and happiness.”¹⁸

Massachusetts: “All people are born free and equal and have certain natural, essential and unalienable rights; among which may be reckoned the right of enjoying and defending their lives and liberties; that of acquiring, possessing and protecting property; in fine, that of seeking and obtaining their safety and happiness. Equality under the law shall not be denied or abridged because of sex, race, color, creed or national origin.”¹⁹

Montana: “All persons are born free and have certain inalienable rights. They include the right to a clean and healthful environment and the rights of pursuing life’s basic necessities, enjoying and defending their lives and liberties, acquiring, possessing and protecting property, and seeking their safety, health and happiness in all lawful ways. In enjoying these rights, all persons recognize corresponding responsibilities.”²⁰

17. KY. CONST. § 1 (originally enacted in 1890).

18. ME. CONST. art. I, § 1 (originally enacted in 1819, with “men” instead of “people”).

19. MASS. CONST. pt. I, art. I, § 1 (originally enacted in 1780, as “All men are born free and equal, and have certain natural, essential, and unalienable rights; among which may be reckoned the right of enjoying and defending their lives and liberties; that of acquiring, possessing, and protecting property; in fine, that of seeking and obtaining their safety and happiness.”).

20. MONT. CONST. art. II, § 3 (originally enacted in 1889 as article III section 3, as “All persons are born equally free, and have certain natural, essential and inalienable rights, among which may be reckoned the right of enjoying and defending their lives and liberties, of acquiring, possessing and protecting property, and of seeking and obtaining their safety and happiness in all lawful ways.”).

Nevada: “All men are by Nature free and equal and have certain inalienable rights among which are those of enjoying and defending life and liberty; Acquiring, Possessing and Protecting property and pursuing and obtaining safety and happiness[.]”²¹

New Hampshire: “All men have certain natural, essential, and inherent rights—among which are, the enjoying and defending life and liberty; acquiring, possessing, and protecting, property; and, in a word, of seeking and obtaining happiness. Equality of rights under the law shall not be denied or abridged by this state on account of race, creed, color, sex or national origin.”²²

New Jersey: “All persons are by nature free and independent, and have certain natural and unalienable rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing, and protecting property, and of pursuing and obtaining safety and happiness.”²³

New Mexico: “All persons are born equally free, and have certain natural, inherent and inalienable rights, among which are the rights of enjoying and defending life and liberty, of acquiring, possessing and protecting property, and of seeking and obtaining safety and happiness.”²⁴

North Dakota: “All individuals are by nature equally free and independent and have certain inalienable rights, among which are those of enjoying and defending life and liberty; acquiring, possessing and protecting property and reputation; pursuing and obtaining safety and happiness; and to keep and bear arms for the defense of their person, family, property, and the state,

21. NEV. CONST. art. I, § 1.

22. N.H. CONST. pt. I, art. II (first sentence enacted in 1784 with minor punctuation differences).

23. N.J. CONST. art. I, § 1 (enacted in 1844 as “All men are by nature free and independent, and have certain natural and unalienable rights, among which are those of enjoying and defending life and liberty, acquiring, possessing, and protecting property, and of pursuing and obtaining safety and happiness.”) (not present in the original 1776 constitution).

24. N.M. CONST. art. II, § 4.

and for lawful hunting, recreational, and other lawful purposes, which shall not be infringed.”²⁵

Ohio: “All men are, by nature, free and independent, and have certain inalienable rights, among which are those of enjoying and defending life and liberty, acquiring, possessing, and protecting property, and seeking and obtaining happiness and safety.”²⁶

Pennsylvania: “All men are born equally free and independent, and have certain inherent and inalienable rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing and protecting property and reputation, and of pursuing their own happiness.”²⁷

South Dakota: “All men are born equally free and independent, and have certain inherent rights, among which are those of enjoying and defending life and liberty, of acquiring and protecting property and the pursuit of happiness. To secure these rights governments are instituted among men, deriving their just powers from the consent of the governed.”²⁸

Utah: “All men have the inherent and inalienable right to enjoy and defend their lives and liberties; to acquire, possess and protect property; to worship according to the dictates of their consciences; to assemble peaceably, protest against wrongs, and petition for redress of grievances; to communicate freely their

25. N.D. CONST. art. I, § 1 (originally enacted in 1889 as “All men are by nature equally free and independent and have certain inalienable rights, among which are those of enjoying and defending life and liberty; acquiring, possessing and protecting property and reputation; and pursuing and obtaining safety and happiness.”).

26. OHIO CONST. art. I, § 1 (originally enacted in 1802 in article VIII section 1 as “That all men are born equally free and independent, and have certain natural, inherent, and unalienable rights, among which are the enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining happiness and safety; and every free republican government being founded on their sole authority, and organized for the purpose of protecting their liberties and securing their independence; to effect these ends, they have at all times a complete power to alter, reform, or abolish their government, whenever they may deem it necessary.”).

27. PA. CONST. art. I, § 1 (originally enacted in 1776 as “That all men are born equally free and independent, and have certain natural, inherent and unalienable rights, amongst which are, the enjoying and defending life and liberty, acquiring, possessing and protecting property, and pursuing and obtaining happiness and safety,” amended in 1790 to nearly its current wording as article IX section 1).

28. S.D. CONST. art. VI, § 1.

thoughts and opinions, being responsible for the abuse of that right.”²⁹

Vermont: “That all persons are born equally free and independent, and have certain natural, inherent, and unalienable rights, amongst which are the enjoying and defending life and liberty, acquiring, possessing and protecting property, and pursuing and obtaining happiness and safety; therefore no person born in this country, or brought from over sea, ought to be holden by law, to serve any person as a servant, slave or apprentice, after arriving to the age of twenty-one years, unless bound by the person’s own consent, after arriving to such age, or bound by law for the payment of debts, damages, fines, costs, or the like.”³⁰

* * *

These formulations go back at least to Samuel Adams’ *The Rights of the Colonists: The Report of the Committee of Correspondence to the Boston Town Meeting*, Nov. 20, 1772, which began with very similar language, characterized by Adams as self-evidently true:

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.³¹

III. CASES INTERPRETING THE PROVISIONS

A. *The Property Defense Cases*

The defense-of-life/property provisions have most clearly and most often made a difference in cases where a person claimed a right to kill wild animals to “protect[] property.” These cases have read the right to “protect[] property” as a judicially enforceable constitutional right that could trump statutes. It follows that the coordinate right to “defend life”—a right that

29. UTAH CONST. art. I, § 1.

30. VT. CONST. ch. I, art. I.

31. SAMUEL ADAMS, *THE RIGHTS OF COLONISTS: THE REPORT OF THE COMMITTEE OF CORRESPONDENCE TO THE BOSTON TOWN MEETING, NOV. 20, 1772 (1772)*, <http://history.hanover.edu/texts/adamss.htm>.

the common law historically saw as even broader than the right to protect property—would likewise be seen as an enforceable right.

The longest line of such precedents comes from Pennsylvania, where cases from 1917 to 2000 hold that the constitutional right to protect property entitles landowners and their agents to kill wild animals that are threatening the landowner's crops, and that it is unconstitutional for state game laws barring the killing of wild animals to be applied in such situations.³² Cases from Iowa, Kentucky, Montana, New Hampshire, and Ohio take the same view.³³ Cases from Alabama, South Carolina, Washington, and Wyoming take this view even though the states do not have express defending life/protecting property provisions.³⁴

32. For cases holding unconstitutional the application of such laws, see *Commonwealth v. Hagan*, 44 Pa. D. & C.4th 516 (Ct. Com. Pl. 2000) (law barring people from killing game except when the person is a commercial farmer and the animal is caught in the act of destroying crops); *Commonwealth v. Grove*, 43 Pa. D. & C.2d 428, 432–35 (Ct. Quar. Sess. 1967) (law barring people from killing female deer even when it was destroying crops); *Commonwealth v. Stütler*, 22 Pa. D. & C.2d 240, 247 (Ct. Com. Pl. 1960) (law requiring people to kill deer only using .25 caliber rifles); *Commonwealth v. Bloom*, 21 Pa. D. & C.2d 139 (Ct. Quar. Sess. 1959) (law barring people from killing female deer even when it was destroying lawn and plantings unless property owner cultivates land as a means of gaining livelihood); *Commonwealth v. McGowan*, 9 Pa. D. & C.2d 398 (Ct. Quar. Sess. 1956) (law barring people from killing homing pigeons, with no exceptions for cases where the pigeons' dropping contaminated the property owner's water); *Commonwealth v. Braun*, 88 Pa. D. & C. 257, 260 (Ct. Quar. Sess. 1954) (law allowing only owners to kill game in defense of property, and barring them from delegating the task to others); *Commonwealth v. Riggles*, 39 Pa. D. & C. 188, 193 (Ct. Quar. Sess. 1940) (law barring people from killing deer except when the person is a commercial farmer and the deer is caught in the act of destroying crops); *Commonwealth v. Gilbert*, 5 Pa. D. & C. 443, 444, 446 (Ct. Quar. Sess. 1924) (law barring people from killing female deer except when the deer is caught in the act of destroying crops); *Commonwealth v. Carbaugh*, 45 Pa. C. C. 65, *3 (Ct. Quar. Sess. 1917) (law barring the killing of a female deer at any time); *cf.* *Commonwealth v. Haugh*, 12 Pa. D. & C. 795, 796–98 (Ct. Quar. Sess. 1929) (upholding requirement that people report killing of deer, on the grounds that the law was a reasonable regulation, and didn't interfere with a property owner's "indefeasible right to destroy a deer when necessary to protect his crop").

33. *State v. Ward*, 152 N.W. 501, 502 (Iowa 1915); *Commonwealth v. Masden*, 175 S.W.2d 1004, 1008 (Ky. App. 1943); *State v. Rathbone*, 100 P.2d 86, 92 (Mont. 1940); *Aldrich v. Wright*, 53 N.H. 398 (1873); *State v. Troyer*, 1997 WL 760954 (Ohio Ct. App. Nov. 19, 1997); *State v. Brinkman*, 33 Ohio Law Abs. 362, 363 (1941); *Meyers v. State*, 29 Ohio N.P. (n.s.) 330 (1931). *But see* *State v. Carruth*, 81 A. 922, 923 (Vt. 1911) (rejecting a constitutional protection-of-property defense to a game law on the grounds that the right is not judicially enforceable).

34. *Cotton v. State*, 17 So. 2d 590, 591–92 (Ala. Ct. App. 1944); *Cook v. State*, 74 P.2d 199, 203 (Wash. 1937); *State v. Burk*, 195 P. 16, 18 (Wash. 1921); *Cross v. State*, 370 P.2d 371, 375–76 (Wyo. 1962) ("It is unbelievable that the inherent and inalienable right to protect property, as well as life and liberty, recognized long before the Declaration of Independence, was ignored or omitted from our Constitution or is nullified thereby."); *see also* *State v. Thompson*, 563 S.E.2d 325, 327–28 (S.C. 2002) (recognizing a "property owner's right to protect her property" and treating it as a constitutional right, though

The common law has generally seen protecting property as an inadequate justification for using force that is deadly to humans;³⁵ the constitutional right likely doesn't extend beyond this common-law tradition. But when the law tries to interfere with the use of even nonlethal force against humans, the right to protect property may intervene: Consider *In re Reilly*, which held that a ban on hiring security guards during a strike unless the guard "shall first have been empowered to act such special guard by the director of public safety" violated the state constitutional right to "protect[] property."³⁶

B. *Self-Defense in Criminal Cases*

A few cases have used state constitutional self-defense rights as guides for determining the scope of permissible self-defense.

For instance, Ohio courts relied on the Ohio "defending life" provision to recognize an exception to bans on felons' possession of firearms when the felon picks up a gun to stave off an imminent threat.³⁷ Likewise, a California court relied on the California provision to clarify the longstanding principle that self-defense is unavailable when the defender is the one who started a deadly fight, a principle that has sometimes been imprecisely cast as an exception for cases of "mortal combat."³⁸ The jury had been instructed—in the language of the applicable statute—that "a person claiming [self-defense] if he were the assailant or engaged in mortal combat, must really and in good faith have endeavored to decline any further struggle before the homicide was committed"; the court concluded that this instruction was unconstitutional:

The right to defend life is one of the inalienable rights guaranteed by the constitution of the state. It is plain that if a

upholding restriction on trapping of fur-bearing animals as reasonable regulation because the restriction allowed property owners to get special permit when animals were threatening property owner's agricultural products).

35. See 4 WILLIAM BLACKSTONE, COMMENTARIES *180; 2 PAUL H. ROBINSON, CRIMINAL LAW DEFENSES § 134 (1984).

36. 31 Ohio Dec. 365, 368 (Ct. Com. Pl. 1919).

37. See *State v. Hardy*, 397 N.E.2d 773, 775–76 (Ohio Ct. App. 1978); *State v. Jordan*, 1985 WL 7616, at *1 (Ohio Ct. App. Sept. 27, 1985); see also *State v. Fryer*, 627 N.E.2d 1065, 1070 (Ohio Ct. App. 1993) (explaining limits of the exception).

38. *People v. McDonnell*, 163 P. 1046, 1051 (Cal. Dist. Ct. App. 1917); see also *People v. Rich*, 2002 WL 1609058 (Cal. Ct. App. July 22, 2002) (dictum) ("[P]erfect self-defense is a constitutional right, applicable to any crime.") (citing CAL. CONST. art. 1 §1), *depublished without opinion*.

person without fault is assailed by another and a mortal combat is precipitated, to require the former to attempt to withdraw before killing his adversary is to require the very thing that may prevent him from defending himself at all. The instruction is quite capable of the interpretation that although the defendant was without fault and the deceased was the aggressor, yet, if they were engaged in a mortal combat, it was the duty of the defendant to endeavor to withdraw before killing his adversary, although he had reason to believe, and did believe, his life was in imminent danger, and that to attempt to decline further struggle would increase his peril and probably enable his adversary to kill him. Such, of course, was not the intention of the learned trial judge in giving the instruction nor, probably, of the legislature in enacting the law, but it is capable of such interpretation and may have been so interpreted by the jury.³⁹

Similarly, a 1913 Colorado decision relied on the constitutional status of the right to defend one's home in rejecting a husband's claimed right to enter another's house to bring back his estranged wife.⁴⁰ Bailey's sister had fled her abusive husband and came to stay at Bailey's house.⁴¹ The husband came to Bailey's house; Bailey demanded that he not come in; the husband came in, and Bailey shot him.⁴² Bailey was convicted of murder, in a trial at which the court instructed the jury that a husband

had a right to enter, in a lawful manner, the house . . . of any person . . . for the purpose of talking with and procuring his said wife to leave the said house, and had a right to use such reasonable force and persuasion as was necessary to induce her to . . . come back to her home with him; and no person . . . had a right to interfere with him in the exercise of such reasonable force or persuasion.⁴³

The Colorado Supreme Court reversed the conviction partly because this instruction "would destroy the moral, constitutional, statutory and common law right of defense of habitation."⁴⁴

39. *McDonnell*, 163 P. at 1051.

40. *Bailey v. People*, 130 P. 832, 834–35 (Colo. 1913).

41. *Id.* at 833.

42. *Id.* at 834.

43. *Id.*

44. *Id.* at 835.

C. *Self-Defense/Defense of Property and Civil Liability*

One case, *Kentucky Fried Chicken of California v. Superior Court*,⁴⁵ relied on a state constitutional right to defend property to hold that a shopkeeper's agents have "no duty to comply with a robber's unlawful demand for the surrender of property," even when the robber is threatening a patron's life.⁴⁶

D. *Self-Defense and Private Employer Actions*

Several cases have relied on state constitutional self-defense rights in concluding that an employer may not fire employees for acting violently when the violence was committed in reasonable self-defense.⁴⁷ In the course of deciding whether firing an employee for his actions constitutes tortious "discharge against public policy," courts often look to whether the state or federal constitutions protect that conduct against

45. 927 P.2d 1260, 1269–70 (Cal. 1997).

46. For other opinions on this question, though ones that focus on nonconstitutional self-defense or defense-of-property principles rather than a constitutional guarantee, see *Munford, Inc. v. Lay*, 216 S.E.2d 123, 125 (Ga. Ct. App. 1975), *rev'd*, 219 S.E.2d 416 (Ga. 1975); *Berly v. D & L Sec. Servs. & Investigations, Inc.*, 876 S.W.2d 179 (Tex. App.—Dallas 1994, writ denied); *Genovay v. Fox*, 143 A.2d 229 (N.J. Super. Ct. App. Div. 1958), *rev'd on other grounds*, 149 A.2d 212 (N.J. 1959); *Helms v. Harris*, 281 S.W.2d 770, 771–72 (Tex. Civ. App.—Fort Worth 1955, writ *ref'd n.r.e.*).

47. See *Cocchi v. Circuit City Stores*, 2006 WL 870736, at *6 (N.D. Cal. Apr. 3, 2006) (recognizing a right not to be fired based on one's exercise of self-defense, and relying in part on the California Constitution's self-defense provisions); *Feliciano v. 7-Eleven, Inc.*, 559 S.E.2d 713, 718–19 (W. Va. 2001) (recognizing such a right, and relying in part on the West Virginia Constitution's right to bear arms for self-defense, *see infra* note 57); *see also Escalante v. Wilson's Art Studio, Inc.*, 135 Cal. Rptr. 2d 187, 192–93 (Ct. App. 2003) (quoting the California Constitution's self-defense provisions and suggesting that "if an employee were backed into a corner by his attacker, with no means of escape, we might agree that the general policy favoring the preservation of human life would prevent his employer from firing him for fighting back in self-defense," but holding that employers may impose a duty to retreat when possible before using self-defense), *depublished by the California Supreme Court*. For decisions on the subject that don't discuss a constitutional right to self-defense, compare *Gardner v. Loomis Armored Inc.*, 913 P.2d 377 (Wash. 1996) (recognizing such a right with no discussion of the state constitution, though where defense of others rather than of self was involved), with *Davis v. Stock Bldg. Supply W., Inc.*, 2005 WL 1828735 (D. Utah July 29, 2005) (rejecting such a right, with no discussion of the state constitution), *Bagwell v. Peninsula Reg'l Med. Ctr.*, 665 A.2d 297, 312 (Md. App. 1995) (same), *McLaughlin v. Barclays Amn. Corp.*, 382 S.E.2d 836, 840 (N.C. Ct. App. 1989) (same), and *Scott v. Extracorporeal, Inc.*, 545 A.2d 334, 341 (Pa. Super. Ct. 1988) (same).

Usually the employer will have concluded that the employee wasn't acting in self-defense, was using excessive force, or was defending himself against a minor assault when the employer would have preferred that the employee simply complained to his superiors. But the employee may argue that he was indeed acting in necessary self-defense, and may want to persuade a jury that this was so, and that the employer thus lacked adequate basis for firing him.

governmental retaliation.⁴⁸ Such constitutional protection is not necessary or sufficient for the tort to be recognized, but it is relevant to the decision.

E. *Limitations*

None of this, of course, means the rights to defend life and protect property are unlimited. Self-defense rights, like many other constitutionally secured rights, have a long history in the common law. It is fair to assume that the drafters meant to secure these rights as they have traditionally been understood, incorporating their traditional limitations.⁴⁹

Thus, for instance, the common-law right to protect property has long generally excluded the right to use force deadly to humans.⁵⁰ The constitutional right likely embodies the same restriction. Likewise, consider the “duty to retreat,” under which the right to use lethal force in defense of life applies only when the defender either cannot safely retreat, or is in his own home.⁵¹ Some states recognize such a duty. Others do not. But the constitutional right likely does not dispose of the matter, at least if the common law of the state has recognized such a duty throughout the state’s history.

This may also help explain why the rights to defend life and to protect property are generally seen as judicially enforceable, while the right to pursue happiness—often mentioned alongside these rights—may not be. Self-defense and defense of property are long-recognized legal doctrines, traditionally protected by the common law.⁵² It thus makes sense to read a constitutional provision securing such rights as constitutionalizing these preexisting legal doctrines. The right to pursue happiness or safety has generally been a general moral principle with no fixed legal meaning, intended as a guide to moral judgment and legislative thinking. It makes sense to read such a provision as

48. See, e.g., *Stevenson v. Superior Court*, 16 Cal. 4th 880, 887, 889–90, 892 (1997).

49. Cf., e.g., *Crawford v. Washington*, 541 U.S. 36, 43 (2004) (interpreting Confrontation Clause in light of its common-law antecedents); *Wilson v. Arkansas*, 514 U.S. 927, 931 (1995) (likewise as to the Fourth Amendment).

50. See *supra* note 35.

51. See 2 ROBINSON, *supra* note 35, § 131(c)(4), at 79–81.

52. But see *State v. Carruth*, 81 A. 922 (Vt. 1911) (rejecting a constitutional protection-of-property defense to a game law on the grounds that the right is not judicially enforceable).

hortatory, rather than as an attempt to constitutionalize something that had never even been a common-law rule.⁵³

Like other rights, the right to self-defense might also be subject to various regulations, so long as they do not substantially interfere with the ability to defend oneself.⁵⁴ This offers another argument for the constitutionality of the duty to retreat (even to those who might think the duty is bad policy): Given that the duty generally requires retreat before using force only when a *safe* retreat is possible,⁵⁵ the duty does not—assuming the factfinder’s judgments about safety are correct—materially interfere with the ability to defend life. One is simply required to defend life by retreating without using lethal force

53. See, for instance, *State v. Williams*, which rejects a general liberty/pursuit of happiness challenge to various restraints on released sex offenders, and concludes—citing similar decisions from other courts—that article I, section one of the Ohio Constitution is not self-executing because it lacks “a precise standard subject to judicial enforcement.” 728 N.E.2d 342, 354 (Ohio 2000). *Williams* speaks broadly enough to cover the defending life/property language of the provision as well; but given the substantial line of Ohio cases applying that provision in cases of self-defense and defense of property, see *State v. Hardy*, 397 N.E.2d 773, 775–76 (Ohio 1978); *State v. Brinkman*, 33 Ohio Law Abs. 362, 363 (1941); *State v. Troyer*, 1997 WL 760954 (Ohio App. Nov. 19, 1997); *State v. Hussing*, 1994 WL 24289 (Ohio App. Jan. 27, 1994); *State v. Jordan*, 1985 WL 7616 (Ohio App. Sept. 27, 1985); *State v. Foster*, 1983 WL 6710 (Ohio App. Sept. 15, 1983); *Meyers v. State*, 29 Ohio N.P. (n.s.) 330 (1931); *In re Reilly*, 31 Ohio Dec. 364 (Ct. Com. Pl. 1919), and the easy availability of traditionally grounded “precise standard[s] subject to judicial enforcement” of self-defense and defense-of-property rights (as opposed to general liberty or pursuit-of-happiness rights), *Williams* is most reasonably read as focused on the issue involved in that case, which specifically dealt with a claimed right to liberty and pursuit of happiness. See also *Sepe v. Daneker*, 68 A.2d 101, 105 (R.I. 1949) (concluding, in my view correctly, that a provision that “[a]ll free governments are instituted for the protection, safety and happiness of the people,” and that “[a]ll laws, therefore, should be made for the good of the whole; and the burdens of the state ought to be fairly distributed among its citizens,” is purely hortatory). But see *Reed v. State ex rel. Ortiz*, 947 P.2d 86, 107 (N.M. 1997) (treating the state constitution’s right of “seeking and obtaining safety” as judicially enforceable, and holding that it precludes extradition of fugitives “who were threatened with death or great bodily harm by government officials of another state, and who had no recourse or remedy within that threatening state”), *rev’d on other grounds*, 524 U.S. 151 (1998); *Gibb v. Hansen*, 286 N.W.2d 180, 186–88 (Iowa 1979) (treating the state constitution’s right of “pursuing and obtaining safety” as judicially enforceable, and suggesting that it might under some circumstances preclude the government from forcing people to testify when the testimony could expose them to criminal retaliation).

54. See, e.g., *State v. Thompson*, 563 S.E.2d 325, 328 (S.C. 2002) (concluding that regulatory scheme allowing a property owner to get “a special permit . . . to lawfully avoid depredation [by killing an otherwise protected fur-bearing animal]” did “not unreasonably restrict a property owner’s right to protect her property”); *Commonwealth v. Haugh*, 12 Pa. D. & C. 795, 796–98 (Pa. Quar. Sess. 1929) (upholding requirement that people report killing of deer, on the grounds that the law was a reasonable regulation, and didn’t interfere with a property owner’s “indefeasible right to destroy a deer when necessary to protect his crop”).

55. See 2 ROBINSON, *supra* note 35, § 131(c)(4), at 79–81.

when that is safe, and is free to defend life using lethal force when no safe retreat is available.

Finally, the right, like some other rights, might be restrictable when necessary to serve sufficiently important government interests.⁵⁶ Recognizing a constitutional right does not mean that the right categorically preempts all regulations that relate to the right. But recognizing the right should mean that sufficiently serious burdens on the traditionally recognized core of the right are presumptively unconstitutional, absent something that rebuts the presumption.

IV. THE RIGHT TO SELF-DEFENSE UNDER STATE CONSTITUTIONAL RIGHTS TO BEAR ARMS

Forty-four state constitutions, dating from 1776 to 1998, secure a right to keep and bear arms;⁵⁷ 40 of these clearly secure an individual right to keep and bear arms in self-defense, though they may also secure a right to keep and bear arms for other purposes. Of these, 22 say this expressly, using provisions such as “every citizen has a right to bear arms in defense of himself and the state”; 17 have been read by courts as securing an individual right to keep and bear arms in self-defense; in one more state, Alaska, the expressly individual right was enacted in 1994, when the supporters of an individual right to bear arms treated the right as aimed at least in part at self-defense.

Any “right [of a citizen] to bear arms in defense of himself” necessarily presupposes some right to use force, including lethal force, in self-defense. A few court decisions say so expressly,⁵⁸ but

56. See, e.g., Volokh, *supra* note 7.

57. For all the items mentioned in this paragraph, see Eugene Volokh, *State Constitutional Rights to Keep and Bear Arms*, 11 TEX. REV. L. & POL. 192 (2006).

58. See, e.g., *State v. Buckner*, 377 S.E.2d 139, 144 (W. Va. 1988) (holding that a West Virginia law prohibiting “carrying of weapons for defense of self, family, home and state without a license or statutory authorization . . . impermissibly infringe[s] upon . . . constitutionally protected right to bear arms for defensive purpose”); *Webb v. State*, 439 S.W.2d 342, 343 (Tex. Crim. App. 1969) (holding that the Texas Constitution secured “[t]he right . . . to arm [one]self in self-defense”); *McKellar v. Mason*, 159 So. 2d 700, 702 (La. Ct. App. 1964) (“The Constitutions of the United States and Louisiana give us the right to keep and bear arms. It follows, logically, that to keep and bear arms gives us the right to use the arms for the intended purpose for which they were manufactured.”); see also *People v. McNeese*, 892 P.2d 304, 317 (Colo. 1995) (Scott, J., dissenting) (“The [statute that allows the use of physical force by a homeowner against an intruder who enters with the intent of causing bodily harm to the homeowner] was most certainly intended to immunize homeowners who exercise their constitutional right to bear arms in self-defense of person and home.”). *But see Walker v. State*, 2007 WL 895826 (Tex. Civ. App.—Houston [14th Dist.] Mar. 27, 2007, no pet. h.) (rejecting a

the conclusion flows clearly from the text of the right-to-bear-arms provision.

The ten states that lack an individual right to bear arms aimed partly at self-defense are California, Iowa, Maryland, Minnesota, New Jersey, and New York, which have no right-to-bear-arms provision; Kansas and Massachusetts, in which the provisions have been read as securing only a collective right; and Hawaii and Virginia, in which the provisions do not expressly set forth the right as individual, and in which state courts have not decided whether the right is individual.⁵⁹ Of these, California, Iowa, Massachusetts, and New Jersey expressly secure in their constitutions a right to defend life. Thus, 44 of the 50 state constitutions secure an individual right to self-defense in some way, 4 only through a right to defend life, 23 only through a right to bear arms in self-defense, and 17 through both.

It is not clear, though, that these provisions presuppose a right to use force in defense of property rather than in defense of life or in resistance to serious infringements on liberty, such as attempted rape or kidnapping. American law has generally not allowed the use of deadly force in defense of property (with some important exceptions), so a right to bear arms, which generally refers to deadly weapons, is more logically seen as focusing on self-defense rather than defense of property. In fact, only 8 of the right-to-bear-arms provisions mention defense of property, though 3 more mention defense of home but not of property generally.⁶⁰

V. IS THERE A FEDERAL CONSTITUTIONAL RIGHT TO SELF-DEFENSE?

Others have written about whether the federal Constitution should be interpreted to secure a right to self-defense, whether through the Due Process Clause or the Ninth Amendment. My goal in this Article is not to repeat that scholarship, but to supplement it: *Washington v. Glucksberg* says a tradition of nationwide protection is relevant to determining that an

felon's challenge to a law banning felons, including nonviolent felons, from possessing body armor, and in the process seemingly concluding that "the right to keep and bear arms in the lawful defense of himself" secured by the Texas Constitution doesn't implicitly secure a "fundamental right to defend one's self").

59. All this is laid out in detail in Volokh, *supra* note 57, at 205–07.

60. *See id.* at 193–204.

unenumerated federal constitutional right exists, and the body of state constitutional law that I describe may help show such a tradition.⁶¹ Still, it might also be helpful to briefly gather the chief caselaw and historically significant commentary on the unenumerated constitutional right itself.⁶²

A. *Leading Early Commentators*

Blackstone wrote of the right to prevent “any forcible and atrocious crime,” even with lethal force, as “justifiable by the law of nature.”⁶³ St. George Tucker, a leading early American commentator,⁶⁴ described “[t]he right of self defence” as “the first law of nature.”⁶⁵ Thomas Cooley, the leading American constitutional law commentator of the late 1800s, wrote that “liberty” in the Due Process Clause protected “the right of self-defence against unlawful violence.”⁶⁶

B. *Cases*

Several lower court opinions have said that there is an unenumerated right to self-defense (presumably stemming from substantive due process or the Ninth Amendment).⁶⁷ A recent four-Justice plurality opinion authored by Justice Scalia—usually no friend of unenumerated constitutional rights—suggested the same.⁶⁸

61. 521 U.S. 702, 720–21 (1997).

62. Much of this section is borrowed from Volokh, *supra* note 7.

63. 4 WILLIAM BLACKSTONE, COMMENTARIES *180.

64. *See, e.g.*, N.Y. Times Co. v. Sullivan, 376 U.S. 254, 296 n.2 (1964) (Black, J., concurring).

65. 1 ST. GEORGE TUCKER, BLACKSTONE’S COMMENTARIES app. at 300 (1803).

66. 2 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION § 1950, at 668 (Thomas Cooley ed., 4th ed. 1873).

67. *See, e.g.*, Taylor v. Withrow, 288 F.3d 846, 851–53 (6th Cir. 2002); State v. Hardy, 397 N.E.2d 773, 776 (Ohio Ct. App. 1978); *see also* Griffin v. Martin, 785 F.2d 1172, 1186 n.37 (4th Cir. 1986), *withdrawn*, 795 F.2d 22 (4th Cir. 1986); Isaac v. Engle, 646 F.2d 1129, 1140 (6th Cir. 1980) (Merritt, J., dissenting), *rev’d on other grounds*, 456 U.S. 107 (1982); State v. Buckner, 377 S.E.2d 139, 142–43 (W. Va. 1988) (adhering to State v. Workman, 14 S.E. 9, 10–11 (W. Va. 1891), and characterizing it as finding both a federal and state constitutional right to self-defense); State v. Heck, 307 So.2d 332, 335 (La. 1975) (Barham, J., dissenting); opinions cited *infra* note 70.

68. Montana v. Egelhoff, 518 U.S. 37, 56 (1996) (plurality) (dictum) (suggesting that “the right to have a jury consider self-defense evidence” may be “fundamental”). If a legislature could constitutionally outlaw self-defense, then a defendant couldn’t have a fundamental right to have a jury consider self-defense evidence, which would often be irrelevant.

Two courts of appeals decisions have rejected a constitutional right to self-defense, but with little analysis, and in upholding rules that may be permissible even if the constitutional right is recognized. One decision upheld prison disciplinary rules that categorically rejected prisoner self-defense claims;⁶⁹ but even if prisoners ought to lack a constitutional right to self-defense,⁷⁰ this says little about the right outside prison—prisoners are subject to far greater constraints on most of their constitutional rights than are nonprisoners.⁷¹ The other decision upheld the rare⁷² state rules requiring defendants to prove self-defense by a preponderance of the evidence,⁷³ but one can have a constitutional right and yet bear the burden of proving that the conditions for its exercise are satisfied.⁷⁴ When the Supreme Court upheld laws placing the burden of proving self-defense on the defendant,⁷⁵ it did so without opining on whether there's a constitutional right to self-defense.

One more court of appeals decision has rejected a constitutional right to defend one's property by killing a member of an endangered species that is threatening one's

69. *Rowe v. DeBruyn*, 17 F.3d 1047, 1052–53 (7th Cir. 1994).

70. *See id.* at 1054–56 (Ripple, J., dissenting) (concluding that even prisoners have a constitutional right to self-defense); *DeCamp v. N.J. Dep't of Corrections*, 902 A.2d 357, 362–63 (N.J. Super. Ct. App. Div. 2006) (endorsing Judge Ripple's position, and concluding that prisoners have self-defense rights, though without explicitly deciding whether those are federal constitutional rights or only state law rights).

71. *See, e.g., Thornburgh v. Abbott*, 490 U.S. 401 (1989) (holding that regulations affecting sending of publications to prisoners are valid if reasonably related to legitimate penological interests); *see also MacMillan v. Pontesso*, 73 Fed. Appx. 213, 214 (9th Cir. 2003) (declining to decide whether there is a general "constitutional right to assert self-defense," and holding only that no such right can be asserted in prison disciplinary proceedings); *Sack v. Canino*, 1995 U.S. Dist. LEXIS 12093, at *3 (E.D. Pa. 1995) (citing *Rowe* only for the rule that a prisoner "had no constitutional right to assert a claim of self-defense within the context of a prison disciplinary hearing").

72. This used to be the common-law rule, 4 WILLIAM BLACKSTONE, COMMENTARIES *201, but it is now adhered to by only one state. *See Martin v. Ohio*, 480 U.S. 228, 236 (1987) (noting that in 1987, only Ohio and South Carolina had such a rule); *State v. Bellamy*, 359 S.E.2d 63, 64–64 (S.C. 1987), *overruled on other grounds by State v. Torrence*, 406 S.E.2d 315 (1991) (*Bellamy* retreated from the rule requiring preponderance of the evidence).

73. *White v. Arn*, 788 F.2d 338, 347 (6th Cir. 1986).

74. *See, e.g., Strickland v. Washington*, 466 U.S. 668, 689 (1984) (stating that defendant bears burden of proving denial of Sixth Amendment right to effective assistance of counsel); *Caston v. State*, 823 So. 2d 473, 504 (Miss. 2002) (stating that defendant bears burden of showing that his Due Process Clause rights were violated by prejudicial pre-indictment delay).

75. *Martin*, 480 U.S. 228.

livestock.⁷⁶ The Endangered Species Act, however, specifically allows such killings in defense of human life,⁷⁷ so the court had no occasion to consider the existence of a constitutional right to self-defense.

C. *Second Amendment*

Finally, if the Second Amendment secures an individual right aimed partly at self-defense, a view expressed by Congress, by the U.S. Department of Justice Office of Legal Counsel, and by appellate courts in several states but only by two federal circuit courts,⁷⁸ then some right to self-defense might be inherently protected through the Second Amendment.

VI. CONCLUSION

I hope this helps begin the investigation of the state constitutional rights to defend life and property, and thus to advance the investigation of the rights to self-defense and defense of property more broadly. I leave it to others to analyze in detail the questions I flag here. For now, I am happy just to flag them and to offer my research as a foundation for others' efforts.

76. *Christy v. Hodel*, 857 F.2d 1324, 1329–30 (9th Cir. 1988); *United States v. Winnett*, 2003 WL 21488645, *2 (D. Mass. June 23, 2003) (following *Christy* as to migratory birds); *see also* *United States v. Darst*, 726 F. Supp. 286, 288 (D. Kan. 1989) (rejecting the view that there is an “unconditional or absolute” right to kill animals—there, migratory birds—in defense of property, and concluding that “regulations requir[ing] landowner[s] to seek the assistance of a governmental official who can be expected to act in the public interest . . . rather than permitting landowners alone to decide whether a killing of protected wildlife is necessary” did not “constitute an unreasonable restraint” on any right to defend property that might exist).

77. 16 U.S.C. §§ 1540(a)(3), (b)(3) (2000).

78. *See* Protection of Lawful Commerce in Arms Act, 15 U.S.C.A. § 7901(a)(2) (West Supp. 2006); Firearms Owners' Protection Act, Pub. L. No. 99-308, § 1(b), 100 Stat. 449, 449 (1986), *reprinted in* 18 U.S.C. § 921 note (Congressional Findings and Declarations) (2000); Freedmen's Bureau Act, ch. 200, § 14, 14 Stat. 173, 176 (1866); *Parker v. District of Columbia*, 478 F.3d 370, 380 (D.C. Cir. 2007) (collecting court cases and citing Office of Legal Counsel opinion).