

The Natural Right of Self-Defense: Heller's Lesson for the World

By David B. Kopel¹

One of the most important elements of the *District of Columbia v. Heller* decision is the natural law. Analysis of natural law in *Heller* shows why Justice Stevens' dissent is clearly incorrect, and illuminates a crucial weakness in Justice Breyer's dissent. The constitutional recognition of the natural law right of self-defense has important implications for American law, and for foreign and international law.

I. The Natural Law in Right of Armed Defense

A. In the *Heller* Case

Heller reaffirms a point made in the 1876 *Cruikshank* case. The right to arms (unlike, say, the right to grand jury indictment) is *not* a right which is granted by the Constitution. It is a pre-existing natural right which is recognized and protected by the Constitution:

it has always been widely understood that the Second Amendment, like the First and Fourth Amendments, codified a *pre-existing* right. The very text of the Second Amendment implicitly recognizes the pre-existence of the right and declares only that it “shall not be infringed.” As we said in *United States v. Cruikshank*, 92 U. S. 542, 553 (1876), “[t]his is not a right granted by the Constitution. Neither is it in any manner dependent upon that instrument for its existence. The Second amendment declares that it shall not be infringed...”²

As *Heller* pointed out, the 1689 English Declaration of Right (informally known as the English Bill of Rights) was a “predecessor of our Second Amendment.”³ According to the Declaration: “[T]he subjects which are Protestants may have arms for their defense suitable to their conditions and as allowed by law.”⁴ The Convention Parliament which wrote the Declaration of Right stated that the right to arms for defense was a “true, ancient, and indubitable right.” Yet as Joyce Malcolm has detailed, 1689

¹ Research Director, Independence Institute, Golden, Colorado. Associate Policy Analyst, Cato Institute, Washington, D.C. J.D., University of Michigan, 1985. In *Heller*, Kopel wrote the amicus brief for the International Law Enforcement Educators & Trainers Association, and other law enforcement organizations and leaders; the brief was cited four times in Justice Breyer's opinion. Kopel was one of three lawyers who joined Alan Gura at the Supreme Court counsel table on March 18, 2008, to assist Gura in his presentation of the oral argument.

² *District of Columbia v. Heller*, 554 U.S.---, 128 S.Ct. 2783, 2797-98 (2008).

³ *Id.* at 2798.

⁴ 1 W. & M., c. 2, §7 (1689).

was the first time that the right to arms had been formally protected by a positive enactment of English law.⁵

The explanation is simple. The Convention Parliament did not believe that it was creating new rights, but simply recognizing established ones. Although previous Parliaments had not enacted a statute specifically to protect the right of armed self-defense, British case law since 1330 had long recognized an absolute right to use deadly force against home invaders.⁶ The right to self-defense itself, along with its necessary implication of the right to use appropriate arms for self-defense, was considered to be firmly established by natural law.

Thus, *Heller* quoted Blackstone's treatise (which was by far the most influential legal treatise in the Early American Republic⁷) explaining that the Declaration of Right protected "the natural right of resistance and self-preservation," which was effectuated by "the right of having and using arms for self-preservation and defence."⁸

Some other parts of the *Heller* opinion include citations to sources describing the right of armed self-defense as a "natural" or "inherent" right. The majority writes that "Justice James Wilson interpreted the Pennsylvania Constitution's arms bearing right, for example, as a recognition of the natural right of defense 'of one's person or house' — what he called the law of 'self preservation.'"⁹

Likewise quoted with approval is the 1846 Georgia Supreme Court decision *Nunn v. State*, which "construed the Second Amendment as protecting the 'natural right of self-defence'."¹⁰ Similarly, "A New York article of April 1769 said that '[i]t is a natural right which the people have reserved to themselves, confirmed by the Bill of Rights, to keep arms for their own defence."¹¹

Thus, the *Heller* opinion concludes: "As the quotations earlier in this opinion demonstrate, the inherent right of self-defense has been central to the Second Amendment right."¹² *Heller*'s recognition self-defense as a natural right was consistent

⁵ JOYCE MALCOLM, TO KEEP AND BEAR ARMS: THE ORIGINS OF AN ANGLO-AMERICAN RIGHT 117-18 (1994).

⁶ David Caplan & Susan Wimmershoff-Caplan, *Postmodernism and the Model Penal Code*, 73 UMKC L. REV. 1080 (2005).

⁷ "Blackstone, whose works, we have said, 'constituted the preeminent authority on English law for the founding generation,' *Alden v. Maine*, 527 U. S. 706, 715 (1999), cited the arms provision of the Bill of Rights as one of the fundamental rights of Englishmen." *Heller* at 2798.

⁸ Slip op. at 20, quoting 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *139-40 (1765); see also *Heller* at 2792, n. 7: "W. Duer, *Outlines of the Constitutional Jurisprudence of the United States* 31-32 (1833) (with reference to colonists' English rights: 'The right of every individual to keep arms for his defence, suitable to his condition and degree; which was the public allowance, under due restrictions of the natural right of resistance and self-preservation')."

⁹ *Heller* at 2793.

¹⁰ *Id.* at 2809.

¹¹ *Id.* at 2799, quoting *A Journal of the Times*: Mar. 17, *New York Journal*, Supp. 1, Apr. 13, 1769.

¹² *Id.* at 2817. The opinion includes other statements that self-defense is a right. *Id.* at 2820 ("It is inconceivable that this law would have been enforced against a person exercising his right to self-defense on New Year's Day against such drunken hooligans."), at 2801 ("JUSTICE BREYER's assertion that individual self-defense is merely a 'subsidiary interest' of the right to keep and bear arms, see post, at 36, is profoundly mistaken. He bases that assertion solely upon the prologue—but that can only show that self defense had little to do with the right's codification; it was the central component of the right itself.").

with the same view in *The Federalist*,¹³ in most state constitutions,¹⁴ and in case law from before the Civil War to modern times.¹⁵

¹³ THE FEDERALIST, no. 28 (Alexander Hamilton)(“that original right of self-defense which is paramount to all positive forms of government”);

¹⁴ David B. Kopel, Paul Gallant, & Joanne D. Eisen, *The Human Right of Self-Defense*, 22 BYU J. PUB. L. 43, 101-02, 128 (2008)(35 U.S. state constitutions affirm that human rights are inherent, natural, or created by God; 37 state constitutions affirm a right of self-defense, sometimes, but not always, articulated in the same clause as right to arms).

¹⁵ See, e.g., *People v. Young*, 825 P.2d 1004, 1007 (Colo. App., 1991)(citing the 1960 Colorado Supreme Court decision *Vigil v. People* that “self-defense is a natural right which is based on the law of self-preservation”); *Finch v. State*, 445 So. 2d 964, 966 (Ala. Crim. App., 1983)(“We agree with proposition expounded in *Blankenship*, supra, that: ‘Self-defense is a common instinct and a natural right, and, as we understand it, means standing one’s ground and repelling, as a means of self-protection, unprovoked force with force.”); *Miller v. State*, 119 N.W. 850, 857 (Wis. 1909)(“the divine right of self-defense”). *Hummel v. State*, 69 Okla. Crim. 38, 99 P.2d 91 (Okla. Crim. App., 1940)(“the law adopts the natural right of self-defense, because it considers the future process of law an inadequate remedy for present injuries accompanied with force.”); *National Life & Acc. Ins. Co. v. Turner*, 174 So. 646, (La. App., 1937)(“The right of self-defense is a natural right.”); *Allen v. Currie*, 8 La. App. 30 (La. App., 1928)(“even men of mature years will, in the exercise of their natural right of self-defense, meet or repulse any aggressor who may attempt to encroach on their rights. This is unquestionably true.”); *People v. Burns*, 300 Ill. 361, 366, 133 N.E. 263 (Ill. 1921)(“When a citizen exercises the right of self-defense, he is not taking the law into his own hands. He is simply exercising a natural right which the law recognizes and protects.”); *State v. Arnett*, 258 Mo. 253, 167 S.W. 526 (Mo., 1914)(If statute against exhibiting a weapon in an angry manner “was designed to abrogate the right of self-defense, and if its effect be to do so, it is then more than possible that its constitutional validity might well be questioned, for that it whittles away a part of that ‘natural right to life, liberty and the enjoyment of the gains of their own industry,’ which is vouchsafed to the citizen by the organic law. Section 4, art. 2, Const. Mo.”); *People v. Watson*, 165 Cal. 645, 133 P. 298 (1913)(“While defendant’s conduct with the woman was immoral, it did not take away from him the natural right of self-defense...”); *Railroad Commission of Ohio v. Hocking Valley R. Co.* 82 Ohio St. 25, 91 N.E. 865 (1910)(“By universal consent self-defense is recognized as a natural right of every individual and of every collection of individuals.”); *Robinson v. Territory*, 16 Okla. 241, 85 P. 451 (Indian Terr., 1905)(“The right of self-defense is founded upon the natural right of a man to protect himself against the unlawful assault upon him by another.”); *St. Louis Southwestern Ry. Co. v. Berger*, 64 Ark. 613, 44 S.W. 809 (1898)(Railroad cannot be sued because of an employee’s act of lawful self-defense. The employee’s self-defense is “not within any employment he may make, being a natural right which he can neither surrender, nor gratify by any contractual act...”); *Thornton v. Taylor*, 19 Ky. L. Rptr. 320, 39 S.W. 830 (Ky., 1897)(“The right of self-defense is a natural right...); *State v. McGonigle*, 14 Wash. 594, 45 P. 20 (1896)(“The plea of self-defense rests on the natural right.”); *Konigsberger v. Harvey*, 12 Or. 286, 7 P. 114 (1885)(“The law upon that subject is the same as it was 500 years ago. The right of self-defense is a natural right, inherent in mankind...”); *Isaacs v. State*, 25 Tex. 174, 177 (1860)(“ It is the necessity of the case, and that only which justifies a killing--on that necessity the right to kill rests, and when the necessity ceases, the right no longer exists. This limitation, which the law puts on the right of self-defense, is founded on the same law of nature and reason which gives the right of defense; and it does not restrain it, but protects it and prevents its abuse by those who would, under its color and the pretense of defense, seek to gratify revenge or an occasion to kill.”).

Even in the South on the eve of the Civil War, the natural right of self-defense guaranteed the right to a free black to use violence against a white law enforcement officer:

The conviction of the defendant may involve the proposition that a free negro is not justified, under any circumstances, in striking a white man. To this, we cannot yield our assent...

...

An officer of the town having a notice to serve on the defendant, without any authority whatever, arrests him and attempts to tie him!! Is not this gross oppression? For what

B. Roots of the Right

Although some modern scholars deny that natural law exists, there is no dispute that the Founders strongly believed in it.¹⁶ In a constitutional sense, the natural law basis

purpose was he to be tied? What degree of cruelty might not the defendant reasonably apprehend after he should be entirely in the power of one who had set upon him in so highhanded and lawless a manner? Was he to submit tamely?--Or, was he not excusable for resorting to the natural right of self-defense?

Upon the facts stated, we think his Honor ought to have instructed the jury to find the defendant not guilty. There is error. Venire de novo.

State v. Davis, 52 N.C. 52 (7 Jones) (1859).

A decision from a few decades earlier shows the connections with the English and American common law natural right:

the right of necessary defence, in the protection of a man's person or property, is derived to him from the law of nature, and should never be unnecessarily restrained by municipal regulation. However proper it may be for every well ordered community to be tender of the public peace, and careful of the lives of its citizens, there can be neither policy or propriety in extending this tenderness and care so far as to protect the robber, the burglar and the nocturnal thief, by an unnecessary restraint of the honest citizen's natural right of self-defence. Sir Matthew Hale, in speaking on this subject, says, "the right of self-defence in these cases is founded in the law of nature, and is not, nor can be superceded by the law of society. Before societies were formed, the right of self defence resided in individuals, and since, in cases of necessity, individuals incorporated into society, can not resort for protection to the law of society, that law with great propriety and strict justice considereth them as still, in that instance, under the protection of the law of nature."

Gray vs. Combs, 30 Ky. 478 (1832). Hale was Lord Chief Justice of England from 1671-76, and one of the most influential of all common law judges and treatise authors. The quote actually appears to be from MICHAEL FOSTER, CROWN CASES AND CROWN LAW 273-74 (1762). Foster was a judge of the Court of King's Bench from 1745 to 1763, and was much respected by Blackstone. The quote, with attribution to Foster, appears in the 1847 American annotated edition of MATTHEW HALE, 1 HISTORY OF THE PLEAS OF THE CROWN 478 n.1 (W.A. Stokes & A. Ingersoll eds., Phil., 1847)(1732)(note added by editor). Because the 1847 "first American edition" of Hale post-dates the 1832 Kentucky court decision, it seems probable that the Kentucky court was using an English edition of Hale which also included an editor's annotation with the Foster language.

To muddy the trail a little further, part of the quote appears in Parrish v. Commonwealth, 81 Va. 1 (1884), citing to Hale as quoted in "Rutherford Institutes"—which means THOMAS RUTHERFORTH, INSTITUTES OF NATURAL LAW: BEING THE SUBSTANCE OF A COURSE OF LECTURES ON GROTIUS DE JURE BELLI ET PACIS READ IN ST. JOHN'S COLLEGE, CAMBRIDGE ch. 16 (1st pub. 1754-56)(a series of English-language lectures on Grotius [*infra*] and natural law; Rutherford's treatise was very popular in the United States in the 18th and 19th centuries). Cf. Commonwealth v. Riley, Thacher's Crim. Cas. 471, 474-75 (Boston Mun.Ct., Mass., 1837)(citing Foster: "In the case of justifiable self-defence, the injured party may repel force by force in defence of his person, habitation, or property, against one who manifestly intendeth and endeavors by violence or surprise, to commit a known felony upon either. It is justly considered that the right in such case, is founded in the law of nature, and is not, nor can be superseded by any law of society. There being at the time no protection from society, the individual is remitted for protection to the law of nature.").

¹⁶ See, e.g., JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW (1980). Ely, who denies natural law, argues that judicial review should be limited to situations where the ordinary democratic process has failed to protect the rights of minorities. His theory would lead to same result in *Heller*. Every state legislature in the United States includes representatives from urban, suburban, and rural

of the right to armed self-defense is part of the original public meaning of the Second Amendment. That human rights were inherent, and not granted by government, was, after all, the basis on which the nation was created: “We hold these truths to be self-evident: that all men are endowed by their Creator with certain unalienable rights.”¹⁷

“Natural law” as a term of legal art was originally based on Catholic legal thought. In the twelfth century, Gratian’s “Treatise of the Discordant Canons” consolidated and synthesized disparate sources in various canon laws (church laws). He began with an explanation of natural law:

Natural law is common to all nations because it exists everywhere through natural instinct, not because of any enactment. It includes the union of men and women, the succession and rearing of children, the identical liberty of all in the acquisition of those things, which I omit, which are taken from the earth or at sea, the return of a thing deposited or of money entrusted, and the repelling of violence by force. This, and anything similar, is never regarded as unjust but is held to be natural and equitable.¹⁸

districts. The diversity of constituencies helps ensure that legislators have a diversity of life experiences, and makes it possible to legislators to explain to their colleagues aspects of daily life which may be unfamiliar. For example, a rural legislator may not understand from personal experience how big-city traffic jams waste so much time for suburban parents who are picking up children school or daycare, and shuttling them to sports or music lessons; but the rural legislator can learn about the problem by talking to her suburban colleagues. Similarly, an urban legislator may have no personal understanding of the traditional role of the shooting sports in American life, but a rural legislator can explain it to her. The District of Columbia, however, is a compact and densely-populated city. Its members represent only urban areas, so the Council necessarily suffers from a unique lack of intellectual and life-experience diversity, compared to state legislators. Moreover, the current Council’s predecessors worked to eradicate the culture of legitimate firearms usage within the District; zoning rules outlaw indoor shooting ranges throughout the District. Because of the urban-only structure of the District’s government, it is uniquely susceptible to bigotry and irrational prejudice against law-abiding gun owners. To cite but one example, the District was the only government in the United States which forbade legal firearms owners from using their guns for self-defense in the home.

¹⁷ United States, Declaration of Independence, para. 2 (1776).

¹⁸ GRATIAN, THE TREATISE ON LAWS (DECRETUM DD. 1-20) WITH THE ORDINARY GLOSS 6 (Augustine Thompson & James Gordley trans., Catholic U. Pr. of America, 1993)(approx. 1150)(Distinction One, case 7, § 2). In the original:

Ius naturale est commune omnium nationum, eo quod ubique instinctu naturae, non constitutione aliqua habetur, ut uiri et feminae coniunctio, liberorum successio et educatio, communis omnium possessio et omnium una libertas, acquisitio eorum, quae celo, terra marique capiuntur; item depositae rei uel commendatae pecuniae restitutio, uiolentiae per uim repulsio. Nam hoc, aut si quid huic simile est, numquam iniustum, sed naturale equumque habetur.

Like self-defense, the natural law right of marriage and child-raising is not enumerated in the United States Constitution, but is a constitutionally-protected fundamental right. *See, e.g., Zablocki v. Redhail* 434 U.S. 374 (1978)(marriage as fundamental right); *Meyer v. Nebraska*, 262 U.S. 390 (1923)(raising children).

Gratian's formulation of the natural right of "repelling violence by force" was similar to an expression of the same principle in Roman Law.¹⁹

In the five centuries from Gratian to the American Constitution, the concept of natural law, including natural rights, was developed by Catholic Scholars such as Thomas Aquinas, Francisco de Vitoria, Juan de Mariana, and Francisco Suárez (who called self-defense "the greatest of all rights"). From the personal right of self-defense against lone criminals, they derived the people's right of self-defense against criminal, tyrannical governments.²⁰

Few Americans were familiar with these Catholic scholars, except for Aquinas. The Anglo-Americans learned the language of natural rights, including the natural right of self-defense, from Protestant thinkers who had adopted the Catholic self-defense theories. The first of these writers were the persecuted Protestants of sixteenth-century France and England, including Theodore Beza, Peter Martyr Vermigli, and Christopher Goodman. For the Americans, the most influential were John Poynt, author of *A Shorte Treatise of Politike Power* (1556), and the pseudonymous Marcus Junius Brutus, who wrote *Vindiciae Contra Tyrannos* (Vindication Against Tyrants) in 1579.²¹ According to John Adams, *Vindiciae* was one of the leading books by which England's and America's "present liberties have been established."²² Adams wrote that there were three key periods in English history where scholars addressed the problems of tyranny and the proper structure of governments. The first of these, according to Adams, was the English reformation; next, when John Poynt put forth "all the essential principles of liberty, which were afterward dilated on by Sidney and Locke."²³

The Founders were also familiar with the great writers of international law, who based their entire system on the foundation of the natural right of self-defense. Hugo Grotius, the most important writer of all time in international law, built the laws of

¹⁹ The key Roman law rules for self-defense rule were "arms may be repelled by arms" and "it is permissible to repel force by force." DIG. 43.16.1.27 (Ulpian, Edict 69) ("Cassius writes that it is permissible to repel force by force, and this right is conferred by nature. From this it appears, he says, that arms may be repelled by arms.").

²⁰ See David B. Kopel, *The Catholic Second Amendment*, 29 HAMLINE L. REV. 519 (2006)(Aquinas and Mariana); David B. Kopel, Paul Gallant, & Joanne D. Eisen, *The Human Right of Self-Defense*, 22 BYU J. PUB. L. 43 (2008)(Vitoria and Suárez); see also David B. Kopel, *Self-defense in Asian Religions*, 2 LIBERTY L. REV. 79 (2007)(Hinduism, Sikhism, Confucianism, Taoism, and [in practice] Buddhism all respect self-defense as an inherent right; that the Asian religions have, in this regard, quite similar attitudes to Western religions provides an important data point in support of the theory that natural law is a real phenomenon).

²¹ See MARCUS JUNIUS BRUTUS, *VINDICIAE, CONTRA TYRANNOS: OR, CONCERNING THE LEGITIMATE POWER OF A PRINCE OVER THE PEOPLE, AND OF THE PEOPLE OVER A PRINCE* (George Garnett ed., 1994)(1st Pub. 1579); DOUGLAS F. KELLY, *THE EMERGENCE OF LIBERTY IN THE MODERN WORLD: THE INFLUENCE OF CALVIN ON FIVE GOVERNMENTS FROM THE 16TH THROUGH 18TH CENTURIES* 44 (1992) (explaining *Vindiciae*'s debt to Catholic thought); JOHN DALBERG ACTON, *THE HISTORY OF FREEDOM AND OTHER ESSAYS* 82 (1993)("the greater part of the political ideas" of John Milton and John Locke "may be found in the ponderous Latin of Jesuits who were subjects of the Spanish Crown," such as Mariana and Suárez).

²² JOHN ADAMS, 3 A DEFENCE OF THE CONSTITUTIONS OF THE UNITED STATES OF AMERICA 210-11 (Union, N.J.: The Lawbook Exchange, 2001)(1st pub. Philadelphia, 1797).

²³ *Id.*, at 210. Jefferson described John Locke, Algernon Sidney, Aristotle, and Cicero as the four major sources of the American consensus on rights and liberty, which Jefferson distilled into the Declaration of Independence. Thomas Jefferson, letter to Henry Lee, May 8, 1825.

international warfare by extrapolation from the natural right of personal defense.²⁴ Samuel von Puffendorf, who extended and elaborated Grotius's work on international law and political philosophy, called self-defense the foundation of civilized society.²⁵

The Declaration of Independence affirms that governments are created for the purpose of protecting natural rights.²⁶ Accordingly, a necessary feature of a legitimate government will be the protection of natural rights. As the Supreme Court explained in *Cruikshank*, the right to assemble and the right to keep and bear arms were, each, "found wherever civilization exists."²⁷ Although personal self-defense is not specifically mentioned in the Declaration of Independence, that natural right is the intellectual foundation, in Western philosophy, of the right of the people to defend all their natural rights by using force to overthrow a tyrant.²⁸

II. The Natural Right's Implications for the Heller Dissents

A. Natural Right and the Stevens Dissent

Justice Stevens' dissent does about as well as possible, given the facts available, on issues such as how much weight to give to the Second Amendment's preamble, and whether "bear arms" must necessarily mean the carrying of guns *only* while in military service. Throughout the opinion, he argues passionately for his interpretation, although

²⁴ HUGO GROTIUS, *THE RIGHTS OF WAR AND PEACE* (Liberty Fund 2005)(reprint of 1737 English translation by John Morrice of the 1724 annotated French translation by Jean Barbeyrac) (1625).

²⁵ SAMUEL PUFENDORF, *OF THE LAW OF NATURE AND NATIONS* (The Lawbook Exchange 2005) (reprint of 1726 London edition of the 1706–07 Barbeyrac French translation and annotation, with English translation by Mr. Carew) (1672).

²⁶ "That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed, --That whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or to abolish it, and to institute new Government, laying its foundation on such principles and organizing its powers in such form, as to them shall seem most likely to effect their Safety and Happiness." United States, Declaration of Independence, para. 2 (1776).

²⁷ The right to assemble, with which the right to arms was construed *in pari materia*:

existed long before the adoption of the Constitution of the United States. In fact, it is, and always has been, one of the attributes of citizenship under a free government. It "derives its source," to use the language of Chief Justice Marshall, in *Gibbons v. Ogden*, 9 Wheat. 211, "from those laws whose authority is acknowledged by civilized man throughout the world." It is found wherever civilization exists. It was not, therefore, a right granted to the people by the Constitution. The government of the United States when established found it in existence, with the obligation on the part of the States to afford it protection.

United States v. Cruikshank, 92 U.S. 542, 551-53 (1876)(including similar analysis regarding the "The right... of 'bearing arms for a lawful purpose.' This is not a right granted by the Constitution. Neither is it in any manner dependent upon that instrument for its existence.")

²⁸ Even if one claims that there is no such thing as natural law, the right of self-defense is so well-established in the common law and in long-standing American tradition that it is precisely the type of unenumerated right which requires constitutional recognition. *See, e.g.*, *Lawrence v. Texas*, 539 U.S. 558, 588 (2003) (Scalia, J., dissenting), *citing* *Washington v. Glucksberg*, 521 U.S. 702 (1997)(unenumerated rights should be constitutionally recognized if they are "deeply rooted in this Nation's history and tradition"); *Montana v. Egelhoff*, 518 U.S. 37, 56 (1996) (Scalia, J., plurality op.) ("the right to have a jury consider self-defense evidence" has strong support in the "historical record" and may be "fundamental"); Eugene Volokh, *State Constitutional Rights to Keep and Bear Arms*, 11 TEX. REV. L. & POL. 191 (2006)(many state right to arms provisions explicitly mention self-defense).

that interpretation requires the reader to view the evidence from very selectively; the dissent is like the argument that a sheet of paper has only one dimension, because if you look at it from just the right angle, it appears to be a straight line. Vast amounts of evidence have to be willfully ignored. For example, one treatise by Justice Story describes the Second Amendment in terms which are, at least arguably, not necessarily incompatible with Stevens' militia-only view.²⁹ But another treatise by Story, which quoted by the majority, describes the Second Amendment in terms which fit the *Heller* majority's view, and which are plainly contrary to the Stevens militia-only theory.³⁰ The majority opinion discusses both treatises,³¹ but Stevens writes at length about the first treatise, ignores the existence of the second treatise, and provides no explanation for having done so.³²

Justice Stevens dismisses the English Declaration of Right, and Blackstone's description thereof, by contending that they addressed issues which were not of concern to the Founders, who according to Stevens were only thinking about the state ratification debates involving state vs. federal powers over the militia.³³ Stevens' view is contrary to that of James Madison, the author of the Second Amendment. In Madison's notes for his speech introducing the Bill of Rights into the House of Representatives, he described arms rights amendment a remedying two crucial defects in the English Declaration of Right: that the right included only the Protestant population, and that the right was, as a statutory enactment, efficacious against the king, but not against the actions of later Parliaments.³⁴

But even without reference to Madison's notes, the Stevens theory that the Second Amendment does not include the right of self-defense simply collapses when one gets to the word "the".

The Second Amendment does not purport to grant a right, but instead declares that "the right...shall not be infringed." Thus, the Second Amendment guarantees a pre-existing right. The *Heller* majority says so,³⁵ and Stevens concedes the point.³⁶ What was that pre-existing right? There are only two possibilities. One, as explicated by Scalia

²⁹ 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1858 (1833)

³⁰ Joseph Story, A Familiar Exposition of the Constitution of the United States § 450 (1840)("One of the ordinary modes, by which tyrants accomplish their purposes without resistance, is, by disarming the people, and making it an offence to keep arms, and by substituting a regular army in the stead of a resort to the militia.").

³¹ *Heller*, at 2798, 2800, 2806-07

³² *Id.* at 2839-40 (Stevens, J., dissenting).

³³ *Id.* at 2837-38 (Stevens, J., dissenting).

³⁴ "They [the proposed Bill of Rights] relate 1st. to private rights-- . . . fallacy on both sides--espec[ially] as to English Decln. of Rts--1. mere act of parl[iamen]t. 2. no freedom of press--Conscience . . . attainders--arms to Protest[an]ts." James Madison, *Notes for Speech in Congress Supporting Amendments* (June 8, 1789), in 12 THE PAPERS OF JAMES MADISON 193-94 (Charles F. Hobson et. al. eds., 1979). One can only speculate about the *Heller* majority did not mention Madison's notes. The notes were certainly discussed in one of the most important amicus briefs. Brief of Academics for the Second Amendment, at 34-35, District of Columbia v. Heller, <http://www.gurapossessky.com/news/parker/documents/07-290bsacAcademicsforSecondAmendment.pdf>. Oral argument made it clear that, at least, Justice Kennedy had read that brief. Perhaps Justice Scalia was being absolutely faithful to the "original public meaning" theory of interpretation. That is, consider what the public thought the constitutional language meant; do not try to divine "original intent" two centuries later by looking at diaries of the Founders.

³⁵ *Heller*, at 2797-98.

³⁶ *Id.* at 2831 (Stevens, J., dissenting).

(consistent with Madison), is that the right is the English/Blackstone/natural right of arms for self-defense. Stevens, however, contends that “the” right is the right to serve in an armed militia. Only if he is correct about this point can his dissent as a whole be correct that the Second Amendment is purely about a right to have arms while in militia service.

There is not a shred of evidence from 1789, or from anytime before 1789, that militia service was a “right.” As Justice Scalia pointed out, the Stevens claim that “the” pre-existing right in the Second Amendment was a pre-existing right to service in the militia is unsupported by any evidence. There is simply no document or other source, from the 18th, 17th, or 16th centuries (or indeed from any century until the 21st, when the claim was invented as part of the *Heller* litigation) that the Second Amendment was preceded somewhere in Anglo-American law by a right to serve in the militia, or to have arms solely while in the militia. Rather, this novel theory appears in the *Heller* amicus brief filed by the Brady Center.³⁷ The brief too is unadorned by any citation for its claim.

B. Natural Right and the Breyer dissent

Most of the Breyer dissent lays out an interest-balancing test, in which Justice Breyer argues that there is *some* social science evidence in favor of the D.C. handgun ban, and therefore a judge cannot say as a matter of law that the ban is unconstitutional.³⁸ A crucial step in that interest-balancing test is the weight of the interest on each side. Justice Breyer points out that preservation of arms ownership for use in a citizen militia was a major concern of the Second Amendment.³⁹ Accordingly, he disputes the majority’s statement that the right of self-defense is “central” to the Second Amendment, and that the “core” of the Second Amendment is armed self-defense of the home.⁴⁰

Justice Scalia responded by explaining why interest-balancing was inappropriate for a core constitutional right, but he did not directly address Breyer’s question about why self-defense should be considered part of the core in the first place. However, the answer is fairly clear from the natural law perspective which is incorporated in the

³⁷ Amicus brief for the Brady Center to Prevent Gun Violence et al., 18 n. 6, *District of Columbia v. Heller*, <http://www.gurapossessky.com/news/parker/documents/07-290tsacBradyCenter.pdf> (pointing out that the state militia systems pre-dated the Constitution, but providing no evidence that militia service was a right). For history of militia litigation in the United States, and the near-total absence of the Second Amendment therefrom, see J. Norman Heath, *Exposing the Second Amendment: Federal Preemption of State Militia Legislation*, 79 U. DET. MERCY L. REV. 39 (2001).

³⁸ Justice Breyer supported the argument by pointing to gun restrictions in a few cities in early America. The centerpiece of the argument was a Massachusetts law which prevented taking loaded guns into buildings in Boston. *Heller*, at 2849 (Breyer, J., dissenting)(Providing a fine for any person who “shall take into any Dwelling-House, Stable, Barn, Out-house, Ware-house, Store, Shop, or other Building, within the Town of Boston, any . . . Fire-Arm, loaded with, or having Gun-Powder.”). Justice Breyer took the case as standing for the possibility constitutionality of bans on self-defense guns in the home: “Even assuming, as the majority does, see *ante*, at 59–60, that this law included an implicit self-defense exception, it would nevertheless have prevented a homeowner from keeping in his home a gun that he could immediately pick up and use against an intruder. Rather, the homeowner would have had to get the gunpowder and load it into the gun, an operation that would have taken a fair amount of time to perform.” Justice Breyer appears to have misread the statute, which only outlawed the *taking* of guns into buildings. The statute did *not* prohibit loading a gun within one’s own home or business, and keeping it loaded therein.

³⁹ The balancing test is offered *arguendo*, since Justice Breyer explains that he is also joining the Stevens dissent, which argues that there is an individual Second Amendment right, but that right has no application outside of militia service. *Heller*, at 2847-48 (Breyer, J., dissenting).

⁴⁰ *Heller*, at 2866 (Breyer, J., dissenting)(“at most a subsidiary interest”).

majority opinion. Blackstone describes the right to personal defensive arms (protected but not created by the 1689 English Declaration of Right) as a “natural” right. Other sources in the majority opinion make the same point that the Second Amendment protects a “natural” right.

Even if balancing were appropriate, Justice Breyer’s scales are inaccurate, because they underweight the importance of self-defense. Surely nothing could be more fundamental than a natural right. The Declaration of Independence, after all, did not begin with a statement of the importance of rights which were created by government (e.g., the right of a citizen to be assisted by his nation’s consular offices when he is traveling in a foreign country). Rather, the Declaration starts with natural, inherent rights, and states that the very purpose of government is to protect these rights. By the Declaration’s principles, the time that is most appropriate for rigorous judicial review is when a government infringes on one of the natural rights which the very government was established to protect.

From Grotius, Pufendorf, and many other sources, the Founders could see that self-defense had been protected under the laws of Ancient Rome and Ancient Greece, and from the very inception of the Hebrew nation.⁴¹ The historical episodes when the right of armed self-defense was endangered—the persecution of the disarmed Huguenots in France, the gun bans of the power-mad Stuarts monarchs in England, the 1775 confiscation of privately-owned arms from the people of Boston by General Gage’s army—were precisely the episodes of tyranny which the Founders aimed to ensure would never again take place in the United States of America. From the Founders’ perspective, the right to arms truly was found “wherever civilization exists.”

III. The Natural Right’s Implication for Future Legal Developments

A. Implications for American Law

Self-defense has generally been highly regarded by the American public, and Nicholas Johnson has persuasively argued that self-defense is the epitome of an unenumerated Ninth Amendment right.⁴² In contrast, some commentary has denigrated self-defense as a privilege, not a right.⁴³

Heller moves self-defense from the shadowy limbo of the Ninth Amendment into the bright uplands of the Second Amendment. It is now beyond dispute, in an American court, that self-defense is an inherent right, and that it is protected by the United States Constitution.

The constitutional history of the right of self-defense is similar to that of the right of association. The right of association is not formally stated in the Constitution. But it is

⁴¹ See Kopel, *The Human Right of Self-Defense*; see also David B. Kopel, *The Torah and Self-Defense*, 109 PENN STATE L. REV. 17 (2004); David B. Kopel, *The Religious Roots of the American Revolution and the Right to Keep and Bear Arms*, 17 J. FIREARMS & PUB. POL’Y 167 (2005)(early Americans’ views of ancient Israel as their role model).

⁴² See Nicholas J. Johnson, *Self-Defense?* 12 J. LAW, ECON. & POL’Y 187 (2006).

⁴³ E.g., Vera Bergelson, *Rights, Wrongs, and Comparative Justifications*. 28 CARDOZO L. REV. 2481, 2488 (2007)(“All public officials--a policeman performing a valid arrest, a sheriff taking possession of the debtor's property pursuant to a court judgment, or an executioner giving the prisoner a lethal injection in accordance with the execution order--act under the right to act that way. In contrast, people acting in self-defense, or pursuant to necessity or parental authority act merely under a privilege.”)

easy to see how if the right did not exist, many of the core purposes of the First Amendment might be defeated. For example, if people could not voluntarily associate in groups such as the NAACP, then their practical ability to petition the government for redress of grievances, to assemble, and to speak out effectively on issues of public importance would be greatly diminished. Thus, starting in 1958, the Supreme Court recognized a constitutional right of association, finding it rooted in the First and Fourteenth Amendments.⁴⁴ Over the subsequent half-century, the Court has fleshed out that right, and applied it in many contexts far distant from the original cases involving Jim Crow state governments attempting to suppress the NAACP.

In a series of cases in the late nineteenth and early twentieth centuries, the Supreme Court strongly defended the right of self-defense—holding, for example, that carrying a gun for lawful protection was not evidence of murderous intent, and that a crime victim was not required to retreat or to avoid any place where he had a right to be before he could exercise his right to use deadly force in self-defense.⁴⁵ Likewise, the defensive actions of crime-victims should not be subjected to judicial second-guessing; as Justice Holmes memorably put it: “Detached reflection cannot be demanded in the presence of an uplifted knife.”⁴⁶

These cases were decided as matters of federal common law, most of them arising out of death sentences improperly imposed on people in the Indian Territory of Oklahoma for use of a gun in self-defense.⁴⁷ Now that *Heller* has made it clear that self-defense is part of the Constitution, and not just part of federal common law, there may be plausible arguments that the rules of the Self-Defense Cases are likewise required as a matter of constitutional law.

Should the Second Amendment be incorporated against the states, a few jurisdictions might have to change hostile procedural rules against self-defense. For example, until recently, Arizona required that a defendant asserting self-defense must carry the burden of proof.⁴⁸ The few states which require retreat by a crime victim in her own home might lose constitutional challenges to those laws. If a judge prohibited a criminal defense lawyer during voir dire from asking potential jurors about whether they had moral objections to self-defense, a criminal conviction from such a jury might be invalid.⁴⁹

B. Implications for Foreign Law

Heller of course only applies as binding law within the jurisdiction of the United States. However, American constitutional law has a long record of infiltrating into other civilized nations. American protection for freedom of speech and freedom of the press, as well as American anti-discrimination laws, have had significant influence in our fellow democracies. Sometimes that influence is direct, with foreign courts citing American

⁴⁴ NAACP v. Alabama ex rel. Patterson, 357 U.S. 449 (1958).

⁴⁵ See David B. Kopel, *The Self-Defense Cases: How the United States Supreme Court Confronted a Hanging Judge in the Nineteenth Century and Taught Some Lessons for Jurisprudence in the Twenty-first*, 27 AM. J. CRIM. L. 293 (2000).

⁴⁶ Brown v. United States, 256 U.S. 335, 343 (1921)(also declaring there is no duty to retreat).

⁴⁷ Kopel, *The Self-Defense Cases*, *supra*.

⁴⁸ E.g., State v. Farley, 199 Ariz. 542, 544-545, 19 P.3d 1258, 1260-1261 (Ariz. App. 2001)(upholding statutory requirement that criminal defendant prove self-defense by preponderance of evidence).

⁴⁹ Black v. State, 829 N.E.2d 607 (Ind. App., 2005)(based on self-defense right in Indiana Constitution).

precedents. But more important, in the long run, is the effect that the American example has on the rights-consciousness of the public in those nations.

The right to arms has already shown that it travels. In 2006, the people of Brazil overwhelmingly rejected a referendum to ban gun ownership, and proponents of the referendum noted with dismay the success of anti-referendum advertising which urged Brazilians not to surrender their rights.⁵⁰

For the last decade, the United Nations has led a concerted global campaign against citizen gun ownership. The global prohibitionists have, to the extent they have acknowledged any American interest in protecting American laws, claimed that the Second Amendment protects no individual right of gun ownership, but is only a “collective” right which no individual has a right to exercise. All nine Justices in *Heller* rejected that claim, and affirmed that the Second Amendment guarantees an individual right. As a fallback position, some advocates have stated that the American Second Amendment is unique, and that its very absence shows the permissibility of gun prohibition in other nations.⁵¹

The latter argument was never really correct as a matter of constitutional law. Three nations besides the United States have a constitutional right to arms, and twenty nations have a formal constitutional recognition of self-defense.⁵²

Heller's natural law explication of the inherent right of armed self-defense teaches another very relevant lesson. The right of self-defense is *not* culturally contingent, and it does not depend on national law. The right of self-defense is a universal, fundamental, natural and inherent human right.

Of course there will be many governments which have ignored that right, and will continue to do so. For example, in the United Kingdom and the Netherlands, the principle

⁵⁰ See David Morton, *Gunning For the World: The National Rifle Association has found that its message -- loving freedom means loving guns -- translates into almost every language*, FOR. POL., July 5, 2006:

If you asked people in Bosnia, Botswana, or, for that matter, Brazil, what the Second Amendment of the U.S. Constitution stands for, most of them would probably have no idea. But the unexpected defeat of Brazil's proposed gun prohibition suggests that, when properly packaged, the “right to keep and bear arms” message strikes a chord with people of very different backgrounds, experiences, and cultures, even when that culture has historically been anti-gun. In fact, the Second Amendment may be a more readily exportable commodity than gun control advocates are willing to accept, especially in countries with fresh memories of dictatorship. When it is coupled with a public's fear of crime -- a pressing concern in most of the developing world -- the message is tailored for mass consumption.

⁵¹ Accord Thomas Gabor, *Firearms and Self-Defence: A Comparison of Canada and the United States*, Working Document, Dept. of Just., Canada, July 1997, at 20, http://www.cfc-cafc.gc.ca/pol-leg/res-eval/publications/reports/1997/pdfs/selfdef_en.pdf.

⁵² Kopel, *The Human Right of Self-defense*, at 138-41. Self-defense is in the constitutions of Antigua & Barbuda, the Bahamas, Barbados, Belize, Cyprus, Grenada, Guyana, Haiti, Honduras, Jamaica, Malta, Mexico, Nigeria, Peru, Samoa, St. Kitts & Nevis, Saint Lucia, Saint Vincent and the Grenadines, Slovakia, and Zimbabwe. The right to arms is explicit in the Constitutions of Guatemala, Haiti, Mexico, and the United States. *Id.*

that there is a right even of *unarmed* self-defense has been in grave danger—at least among the judiciary and the rest of the governing elites.⁵³

Yet because *Heller* was not written solely in terms of positive American law, but rather which explicit recognition of pre-existing natural rights, the case may play a role in reminding the people of the world that they too have “the natural right of resistance and self-preservation,” a right which is necessarily effectuated by “the right of having and using arms for self-preservation and defence.”⁵⁴

On the one side of the debate are the Kenyans who say that the central government, which is manifestly unable and unwilling to protect the tribespeople, should rescind its prohibition on their possession of arms.⁵⁵ On the other side is the United Nations, which claims that self-defense is not a right, but is a violation of the right of the criminal attacker, which seeks to outlaw all defensive ownership of firearms, and which has declared that laws in the United States and other nations which allow use of deadly force against rapists and other violent predators are a human rights violation.⁵⁶

Heller points to a resolution of the conflict. Long before there was a United Nations, or a United States of America, there were inherent natural rights. The recognition of those rights is as old as civilization itself. Perhaps one of the greatest

⁵³ Following years of public pressure, the government of the U.K. in July 2008 amended the self-defense law to clarify and protect some self-defense rights for the victims of home invasions. *See* Criminal Justice and Immigration Act 2008, 2008 ch. 4, § 76: reasonableness use of the force is to be judged according to the circumstances as the defender perceived them; and must consider “(a) that a person acting for a legitimate purpose may not be able to weigh to a nicety the exact measure of any necessary action; and (b) that evidence of a person’s having only done what the person honestly and instinctively thought was necessary for a legitimate purpose constitutes strong evidence that only reasonable action was taken by that person for that purpose.”; *see also* Richard Edwards, Crime Correspondent and Chris Hope, “*Have-a-go heroes*” get legal right to defend themselves, THE TELEGRAPH (London), July 16, 2008.

⁵⁴ A right of self-defense without a right to at least some defensive arms would be a right of little practical utility. It is arms—especially, firearms—which allow a weaker person to defend herself against a stronger attacker or group of attacker. It is the firearm which best makes a deterrent threat of self-defense, while allowing the victim to remain beyond the grasping distance of the stronger assailant(s).

⁵⁵ Paul Letiwa, *Why Herders Won't Surrender Their Firearms Just Yet*, THE NATION (Kenya), April 30, 2008

<http://allafrica.com/stories/200804300138.html> (“‘How can the Government ask us to surrender our guns when we know very well that there is no security for us? If we give out our firearms, say today, who will protect us when the neighbouring tribes strike? How about our stolen livestock? Who is going to return them to us?’ Mr Lengilikwai talks with bitterness.”); Ng’ang’a Mbugua, *Law Should Be Changed to Free Guns*, THE NATION (Nairobi), Apr. 25, 2008, <http://allafrica.com/stories/printable/200804251276.html> (Noting success of armed defense program of the people of the Keiro Valley, “In the past, critics of liberalising access to firearms have argued that they would put ordinary people’s lives in peril because even squabbles in the streets or the bedroom would be resolved by bullets. Incidentally, such incidents are few and far between in the Kerio Valley despite the easy accessibility of AK- 47s as well as the relatively low levels of education and social sophistication....If Kenya is to achieve long-lasting stability, it ought to borrow a leaf from the US, whose constitution gives the people the right to bear arms and form militias for their own defence should the armed forces fail them, as happened in Kenya after the December elections.”). *See generally* David B. Kopel, Paul Gallant & Joanne D. Eisen, *Human Rights and Gun Confiscation*, 26 QUINNIPIAC L. REV. 383 (2008)(describing gun policies in Kenya, Uganda, and South Africa).

⁵⁶ 6. *See* U.N. Human Rights Council, Sub-Comm’n on the Promotion and Prot. of Human Rights, 58th Sess., *Adoption of the Report on the Fifty-eighth Session to the Human Rights Council*, U.N. Doc. A/HRC/Sub.1/58/L.11/Add.1 (Aug. 24, 2006), available at <http://hrp.cla.umn.edu/documents/A.HRC.Sub.1.58.L.11.Add.1.pdf>. The United Nations report on self-defense is analyzed in detail in Kopel, *The Human Right of Self-Defense*, *supra*.

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influences of *Heller* (and, I hope, its progeny) will be in other nations, where the explicit affirmation of the natural right of self-defense by the most influential court in the world will bolster our global brothers and sisters in their efforts to preserve and strengthen their own natural right of resistance and self-preservation.