

HELLER'S SELF-DEFENSE

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This article reflects on District of Columbia v. Heller and proposes a new footing and limit to the right to bear arms: a person's inalienable right to self-defense. Self-defense is a natural right embedded in personhood and is antecedent to the social contract that sets up a state. This right consequently remains with the person following the establishment of the state and allows her to use proportional force necessary for resisting aggression. The right to bear arms derives from the constitutional right to self-defense, which merits protection under both the Ninth and Fourteenth Amendments. This instrumental nexus calls for a dynamic determination of the scope of the right to bear arms under the Second Amendment, along Heller's lines. The scope of the right to bear arms should be defined by an ordinary citizen's necessity to use arms in defending herself proportionally against criminals. This criterion will allow courts to deliver both predictable and balanced decisions that align with originalism.

INTRODUCTION

1. General

The recent landmark decision by the U.S. Supreme Court in *District of Columbia v. Heller*¹ addresses the citizen's Second Amendment right to keep and bear arms vis-à-vis the state's authority to limit this right. For the most part, *Heller* provides an interpretation of the Second Amendment

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1. 554 U.S. ____ (2008), 128 S. Ct. 2783.

within an historical context. This article offers a different perspective from those presented in *Heller* as well as in the vast academic literature dealing with the right to keep and bear arms.² The view proposed in the current article approaches this issue from the perspective of self-defense theory. Before I propose a new theory and analysis of the subject, I will present the main points of *Heller*.

2. *Heller*

Heller deals with an interpretation of the Second Amendment to the U.S. Constitution, which states: “A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.”³

The opinion of the Court, delivered by Justice Scalia,⁴ held that: (1) the Second Amendment protects the right of the individual to possess a firearm unrelated to service in a militia, and to use this firearm for lawful purposes, such as self-defense within the home;⁵ (2) similar to most rights, this Second Amendment right is not unlimited, and the citizen does not have

2. See, e.g.: Robert Dowlut, *The Right to Keep and Bear Arms: A Right to Self-Defense Against Criminals and Despots*, 8 *Stan. L. & Pol’y Rev.* 25 (1997); Gary Kleck, *Armed Resistance to Crime: The Prevalence and Nature of Self-Defense with a Gun*, 86 *J. Crim. L. & Criminology* 150 (1995); David Hemenway, *Policy and Perspective: Survey Research and Self-Defense Gun Use: An Explanation of Extreme Overestimates*, 87 *J. Crim. L. & Criminology* 1430 (1997); John R. Lott Jr., *Guns and Violence: Does Allowing Law-Abiding Citizens to Carry Concealed Handguns Save Lives?*, 31 *Val. U. L. Rev.* 355 (1997); Ian Ayres & John J. Donohue III, *Shooting Down the “More Guns, Less Crime” Hypothesis*, 55 *Stan. L. Rev.* 1193 (2003); Frank Espohl, *The Right to Carry Concealed Weapons for Self-Defense*, 22 *S. Ill. U. L.J.* 151 (1997); Tod Barnett, *Gun “Control” Laws Violate the Second Amendment and May Lead to Higher Crime Rates*, 63 *Mo. L. Rev.* 155 (1998); Joyce Lee Malcolm, *To Keep and Bear Arms: The Origins of an Anglo-American Right* (1994); Nelson Lund, *The Past and Future of the Individual’s Right to Arms*, 31 *Ga. L. Rev.* 1 (1996); Adam Winkler, *Scrutinizing the Second Amendment*, 105 *Mich. L. Rev.* 683 (2007); Calvin Massey, *Guns, Extremists, and the Constitution*, 57 *Wash. & Lee L. Rev.* 1095 (2000); William Van Alstyne, *The Second Amendment and the Personal Right to Arms*, 43 *Duke L.J.* 1236 (1994); Nicholas J. Johnson, *A Second Amendment Moment: The Constitutional Politics of Gun Control*, 71 *Brooklyn L. Rev.* 715 (2005); Randy E. Barnett & Don B. Kates, *Under Fire: The New Consensus on the Second Amendment*, 45 *Emory L.J.* 1139 (1996).

3. U.S. Const. amend II.

4. *District of Columbia v. Heller*, 554 U.S. ____ (2008), 128 S. Ct. 2783, at 2787–822 (joined by Roberts, C.J., and Kennedy, Thomas, and Alito, JJ.).

5. *Id.* at 2788–816.

a right to keep and bear any weapon, in any manner, and for any purpose whatsoever;⁶ (3) the state is limited in its ability to place restrictions on the right to keep and bear arms, and therefore, the District of Columbia law in question, which imposed a total ban on handgun possession in the home and a requirement that any lawful firearm in the home be disassembled or bound by a trigger lock, is unconstitutional.⁷

Justice Stevens, in his dissenting opinion,⁸ stated that “there is no indication that the Framers of the Amendment intended to enshrine the common-law right of self-defense in the Constitution,”⁹ which means that there is no constitutional barrier that precludes the state from restricting the right to keep and bear arms.

Justice Breyer, in a separate dissenting opinion,¹⁰ expressed his belief that the majority’s conclusion was wrong for two independent reasons: (1) that the Second Amendment protects militia-related, not self-defense-related, interests;¹¹ and (2) that the protection provided by the Second Amendment is not absolute and the government is permitted to regulate the interests that it protects.¹² However, while focusing on the second reason, and assuming for the sake of discussion that the Second Amendment does protect a separate right of self-defense unrelated to service in a militia, Justice Breyer still concludes that the restrictive legislation in the case at hand is consistent with the Second Amendment, since it focuses on the presence of handguns in high-crime urban areas and is therefore a permissible legislative response to a serious, life-threatening problem.¹³

3. The Present Article

Indeed, self-defense is mentioned dozens of times in *Heller*, but the judgment does not truly delve into its theory, rationale, or requirements.¹⁴ Whereas, in

6. *Id.* at 2816–17.

7. *Id.* at 2817–22.

8. *Id.* at 2822–47 (joined by Souter, Ginsburg, and Breyer, JJ.).

9. *Id.* at 2822.

10. *Id.* 2847–70 (joined by Stevens, Souter, and Ginsburg, JJ.).

11. *Id.* at 2847.

12. *Id.*

13. *Id.*

14. See, e.g., Michael Steven Green, *Why Protect Private Arms Possession? Nine Theories of the Second Amendment*, 84 *Notre Dame L. Rev.* 131, 132–33 (2008) (stating that Justice Scalia’s opinion is “peppered with references to the ‘natural’ or ‘inherent’ right of self-defense.

the American constitutional context, the usual question is whether or not the Second Amendment establishes an individual right to keep and bear arms for the purpose of self-defense, I wish to ask a different question: whether or not a natural and fundamental right to self-defense infers a derivative, secondary right to keep and bear arms, and how the former right should influence the interpretation of the Constitution.

Unlike *Heller*, this article addresses, inter alia, the source of the state's moral and political authority (as opposed to its formal authority) to limit the right to keep and bear arms and, consequently, the right to self-defense as well. An examination of this question will also lead to a delineation of the boundaries of this authority and thus offer a criterion that provides different answers from those given in *Heller*—if any¹⁵—regarding justifiable limitations on the right to keep and bear arms.

Before proceeding to a discussion of *Heller*, the Second Amendment, and the right to keep and bear arms, it is essential for us to understand better the significance of the natural, fundamental right to self-defense and the right of the citizen vis-à-vis the state to resist aggression, from which—as I will show—the secondary right to keep and bear arms derives.

The right to self-defense¹⁶ is a natural right that preceded the establishment of the state and its laws. The formation of the state within the framework of the social contract did not deprive the individual of this fundamental right. The citizen also has a right (vis-à-vis the state) to resist aggression. These two rights engender a third right to keep and bear arms. However, this last right is not unlimited. Therefore, it is important to identify and examine the proper criteria for its possible restriction.

Mr. Smith purchases a tank and places it in his front-yard for the purpose of defending himself and his family against potential burglars. Most, if not all, of us would agree that, notwithstanding the fundamental, natural right to self-defense, and despite the right to keep and bear arms, the state has the authority—not only formally, but also morally—to forbid citizens from arming themselves in this extreme manner. What unites us in our willingness to allow the state to prevent Mr. Smith from arming himself

But he does not say why the natural right to self-defense exists or how it grounds a right to bear arms.”).

15. In my opinion, in this regard alone, Justice Breyer's criticism of the majority's view is correct; for his position, see *Heller*, 128 S. Ct. at 2868–70.

16. See Boaz Sangero, *Self-Defence in Criminal Law* (2006); Boaz Sangero, *A New Defense for Self-Defense*, 9 *Buff. Crim. L. Rev.* 475 (2006).

in this way for the purpose of self-defense? My answer is that the means chosen by Mr. Smith in this example is unnecessary for the purpose of defending himself and his family against potential burglars, and it is certainly out of all proportion to the specific danger posed.

An examination of self-defense theory and its rationale leads us to its conditions, which primarily include the requirements of *necessity* and *proportionality*.¹⁷ Therefore, even if we were to allow a private citizen to arm himself in such a drastic manner and he uses the tank to defend himself against a burglar—or any other conceivable danger posed to him and his family—then, based on these two fundamental requirements, he would still not be justified in doing so for the purpose of self-defense.

Therefore, forbidding a citizen to arm himself in such an excessive manner is in no way an infringement of the basic right of self-defense. However, the possession of a handgun for the purpose of self-defense is an entirely different matter. In a world where criminals are frequently armed, a prohibition against handguns is liable to render the right to self-defense meaningless. Such a prohibition infringes the right of the citizen, *vis-à-vis* the state, to resist aggression.

Parts I, II, and III of this article propose a universal theory of self-defense, which is not dependent on any particular constitution and establishes a natural right that has always existed in all societies and all cultures. It first existed in a state of nature and was preserved in the social contract, at which point it was joined by the citizen's right *vis-à-vis* the state to resist aggression. These two rights also infer a right to keep and bear arms, which is essential to exercise the right to self-defense, and its scope derives from the latter right.

In a certain sense, part IV is the heart of this article, since it returns us to *Heller* and examines this landmark decision in light of the general, universal theory of self-defense presented here. Based on this theory, three new insights are proposed with respect to *Heller*, in particular, and the Second Amendment and the right to keep and bear arms, in general.

The first insight¹⁸ reinforces the relationships among the natural right to self-defense, the derivative right to keep and bear arms, and the Second Amendment, based, *inter alia*, on the right *vis-à-vis* the state to resist aggression. A proper, dynamic interpretation of the Constitution should

17. Sangero, *Self-Defence in Criminal Law*, *supra* note 16, at 143–50, 166–92.

18. *Infra* part IV.A.

be faithful not only to its language but also to the principles that it embodies. The principle established in the Second Amendment preserves a natural right to self-defense (and the derivative right to keep and bear arms), which complements the institutional protection that the state provides to its citizens.

Although the modern police force and army are better developed than they were at the time of the Constitution's drafting, the institutional protection provided to citizens by the state is still not perfect, since law enforcement is incapable of being in all places at all times. Therefore, it appears that a complementary right to self-defense will always exist, and this right can only be realized with a derivative right to keep and bear arms.

The second insight¹⁹ proposed in this article is that the determination in *Heller* that the Second Amendment establishes a right to keep and bear arms for the purpose of self-defense—contrary to the critique, for example, of Judge Wilkinson—does not leave us without any acceptable criteria for determining the scope of the right. Therefore, it does not lead to a state of uncertainty resulting from judicial rulings based on the personal outlook of judges. The first part of the article proposes such criteria: the scope of the secondary right to keep and bear arms can and should be derived from the primary right to self-defense.

The third insight²⁰ proposed in this article complements the argument raised by Amar, who uses the Ninth and Fourteenth Amendments as a means for interpreting the Second Amendment, thus reading into the Constitution a right to keep and bear arms for the purpose of self-defense. In my estimation, such an argument will only persuade those who are already convinced of the existence of such a right. Instead, it is preferable to use the Ninth and Fourteenth Amendments to read into the U.S. Constitution the natural and more fundamental right, recognized throughout history, the right to self-defense. Although it may be argued that the secondary right to keep and bear arms does not actually need to appear in the Constitution, it is hard to accept a position whereby the primary right to self-defense has no place there. Following this, two options are proposed: (1) to return to the Second Amendment in light of the right to self-defense, which leads to the conclusion that it indeed establishes a right to keep and bear arms for this purpose; or (2) to suffice with a constitutional right to

19. *Infra* part IV.B.

20. *Infra* part IV.C.

self-defense that, in any case, must lead to a right to keep and bear arms. My preference for the first option is explained in this article.

I. SELF-DEFENSE

A. The Natural, Inalienable Right to Self-Defense

Self-defense implies the use of essential and reasonable defensive force against an aggressor who is perpetrating an illegitimate attack for the purpose of repelling this attack and thus protecting a legitimate interest.²¹ Self-defense is clearly justificatory in nature. The defender is considered devoid of any moral flaw.²² Both in the past and in the present, the right to self-defense is undisputed.²³ Since ancient times, Jewish religious law has recognized the rule: “If someone comes to kill you, kill him first.”²⁴ The right to self-defense has often been taken for granted. Cicero said that self-defense is not a law that was created by man, but a law enacted by nature itself (*Oration in Defense of Milo*). It has also been said, “Self-defense is the clearest of all laws; and for this reason—the lawyers didn’t make it.”²⁵

The accepted view of self-defense as a natural right that preceded the social contract is based on the writings of a long line of thinkers.²⁶ Even major philosophers, like Hobbes and Locke, who have written about both self-defense and the social contract, perceived self-defense not as a right against the state deriving from the social contract, but rather, as an independent right that already existed in a state of nature and was merely preserved after the establishment of the state.²⁷

21. See Sangero, *Self-Defence in Criminal Law*, supra note 16, at 2.

22. See Sangero, *A New Defense for Self-Defense*, supra note 16, at 478.

23. Sangero, *Self-Defence in Criminal Law*, supra note 16, at 6; Albin Eser, *Justification and Excuse*, 24 *Am. J. Comp. L.* 621, 631 (1976).

24. Babylonian Talmud, Sanhedrin 72a.

25. Douglas William Jerrold, as quoted in Glanville Williams, *Textbook of Criminal Law* 501 (2d ed., 1983).

26. See, e.g., Suzanne Uniacke, *Permissible Killing: The Self-Defence Justification of Homicide* 57–91 (1994).

27. Kimberly Kessler Ferzan, *Self-Defense and the State*, 5 *Ohio St. J. Crim. L.* 449, 457 (2008). On the subject of self-defense, Locke has written, inter alia, that “by the fundamental law of nature, man being to be preserved as much as possible, when all cannot be preserved, the safety of the innocent is to be preferred”; John Locke, *Second Treatise of Government* 14 (C.B. Macpherson ed., Hackett Pub. Co., Inc. 1980) (1690). Hobbes has written that, in the

B. Rationalizing Self-Defense

What makes self-defense a justification? Why does society, through the self-defense exception, justify actions normally prohibited and defined as criminal offenses, such as assault, battery, or even murder?

In my book, *Self-Defence in Criminal Law*, I have emphasized the importance, when balancing the relevant interests, of taking into consideration not only the physical harms caused or expected to both parties, but also three abstract factors, none of which is sufficient on its own to justify self-defense: the *autonomy* of the person attacked, the *guilt* of the aggressor, and the *social-legal order*.²⁸ Self-defense simultaneously protects both the autonomy of the person attacked and the social-legal order by means of essential and reasonable defensive force against an aggressor who is criminally responsible for his attack.²⁹

It is the three aforesaid, cumulative factors that basically make self-defense an act that is strongly *justified*—that is, morally, as well as legally—rather than an act that is merely *excusable* because we understand the coercive nature of the situation in which the actor has found herself, and thus forgive her. Another, secondary, factor that must be considered is the right of the attacked person, *vis-à-vis* the state, to resist aggression. The existence of such a right counters the argument that the establishment of the state, through the social contract, significantly weakens the right of an individual to defend her autonomy on her own. As we shall see below, this last factor, discussed extensively by Kadish,³⁰ is secondary when talking about the rationale for self-defense, but it becomes a central factor when discussing the right to keep and bear arms for the purpose of self-defense.

C. Doctrinal Requirements

Indeed, there is much disagreement—in philosophical and legal literature, as well as in different approaches emerging from a comparison of

state of nature, “every man has right to every thing . . . no action can be unjust”; Thomas Hobbes, *Leviathan* 189–90, 202 (C.B. Macpherson ed., Penguin Books 1985) (1651).

28. Sangero, *Self-Defence in Criminal Law*, *supra* note 16, at 93–106.

29. *Id.* at 99.

30. Sanford H. Kadish, *Respect for Life and Regard for Rights in the Criminal Law*, 64 *Cal. L. Rev.* 871 (1976). See also: Sangero, *Self-Defence in Criminal Law*, *supra* note 16, at 77–81; Ferzan, *supra* note 27.

the legislation and case law of various legal systems—regarding some of the requirements of self-defense and their different variations. However, it is still possible, at least for the purposes of the present article, to summarize briefly the basic requirements of self-defense as follows: the attack that is defended against must be an *unlawful attack by a culpable aggressor who is responsible for his attack*.³¹ The two most important requirements that are essential for the use of defensive force to be considered justifiable are *necessity* and *proportionality*. The defensive force that is used must be necessary to achieve a legitimate goal, which is to defend oneself³² or to defend another person.³³ Thus, for example, if it is sufficient to use one's hands to fend off a weak attacker (e.g., to push him away or to strike him lightly), then it is unnecessary and therefore unjustified to shoot and kill him. The defender should only use the minimum force required to achieve the defensive goal.

However, even when the requirement of necessity is met, not all force is justified: it must also be proportionate to the danger posed by the attack. When the aggressor carries out a lethal attack in an attempt to kill someone, it is obvious that the use of considerable, even lethal, defensive force is justified. And even when the attacked person is not in danger of being killed or seriously injured, but rather of being raped, the use of lethal defensive force is justified if this is what is necessary to fend off the rapist. However, in the case of a less drastic form of attack—for example, when it is clear that the aggressor is merely trying to shove the attacked person out of the way in order to get onto a bus—then even if lethal force (or even excessive, non-lethal force, such as breaking the arm of the aggressor) is the only way to protect the right of the attacked person in the face of the unlawful action (e.g., because the aggressor is physically stronger), the use of deadly (or even less excessive) force would not be justified. In some cases, an attacked person must waive his rights if the cost of protecting them is too high. Defensive force that is out of all proportion to the danger posed harms the social-legal order and is therefore unjustified.³⁴

31. For more detail, see Sangero, *Self-Defence in Criminal Law*, supra note 16, at 128–39. Indeed, some scholars believe it is unnecessary that the aggressor be guilty and criminally liable for the attack, but all agree that the attack must be unlawful.

32. *Id.* at 143–50.

33. *Id.* at 240–52.

34. *Id.* at 166–92. Indeed, some legal systems do not have a general requirement of proportionality, but instead suffice with a distinction between lethal defensive force and nonlethal

The requirement of necessity also leads to another condition, that the danger posed be *imminent* or that the use of defensive force is *immediately* necessary.³⁵ The two basic requirements, necessity and proportionality, also lead to *a duty of safe retreat prior to the use of lethal defensive force*.³⁶ Finally, as we know, it is necessary to prove a given state of mind, usually awareness (*mens rea*), to establish that a criminal offense has been committed. This is also required to establish a criminal law defense; that is, it must be proven that the defender was *aware of the circumstances* justifying the use of defensive force, and it should also be required that he had *a positive objective, that is, to defend himself or another person*.³⁷

We shall see below that the basic requirements of self-defense, necessity and proportionality, are also very important in delineating the boundaries of the derivative right to keep and bear arms.

II. DISARMING SELF-DEFENSE

A. Are Arms Necessary?

Assuming that self-defense is a fundamental, natural right that has always existed, already in the state of nature, and has not been taken away by the social contract, the question arises of whether or not it leads to an additional, secondary right: the right to keep and bear arms. At this stage, I am not discussing this matter within the context of existing American law (in particular, the Second Amendment), but rather as a philosophical, moral, theoretical question—that is, what is the desirable law?

Undoubtedly, the right to keep and bear arms reinforces the right to self-defense. Defense is easier and more effective with a weapon than without one, and is often impossible without a weapon. This is obvious. The more

defensive force; see, e.g., Model Penal Code Sec. 3.04(2)(b). However, this too, of course, is an expression (although partial) of the principle of proportionality.

35. *Id.* at 150–66.

36. *Id.* at 192–217. Indeed, some jurisdictions allow a defender to stand his ground even if he may retreat safely. However, the choice of *lethal* defensive force over the possibility of a safe retreat would be viewed by most legal systems as a breach of the requirement of necessity and/or proportionality. This would certainly be the case if the original attack is nonlethal.

37. *Id.* at 217–37.

difficult question to answer is, what effect does the right to self-defense have on the indispensability of a right to keep and bear arms.

In *Heller*, the Court was presented with considerable research, including empirical evidence, regarding the current use of firearms in the United States. One thing is undisputed: present-day offenders routinely use firearms while perpetrating their crimes. Therefore, the right to self-defense is rendered virtually meaningless if a law-abiding citizen is forbidden from bearing arms. In such a case, this citizen is given a double message by the state, through the criminal law. On the one hand, she is told, "You have a right to defend yourself and to use all necessary and proportional force against a culpable aggressor;" whereas on the other hand, she is told, "You are forbidden to keep arms," or "You may keep arms, but not bear them," or "You may keep arms in your home, but they must be inoperable." This double message makes a mockery of the right to self-defense.

How is an unarmed person to defend herself against an armed aggressor, or against several unarmed aggressors acting in concert, or against a violent aggressor who is much stronger than her? Undoubtedly, there are many situations in which self-defense is only possible with a weapon, and not necessarily by even using the weapon; it is often enough to just threaten an aggressor by brandishing a gun, or by firing a warning shot into the air. As Hobbes has written, "Because it is in vain for a man to have a right to the End, if the right to the necessary means be denied him, it follows, that since every man hath a right to preserve himself, he must also be allowed a right to use all the means, and to do all the actions, without which he cannot preserve himself."³⁸

However, it is possible to say, as Justice Breyer does in *Heller*, that "a self-defense assumption is the *beginning*, rather than the *end*"³⁹ of any discussion of the right to keep and bear arms. That is to say, notwithstanding the right to self-defense, there are still other weighty considerations (e.g., the desire to reduce the number of weapons in the hands of the public in order to reduce the number of accidents and the number of incidents of weapons abuse) that could justify restrictions imposed by the authorities, or at least

38. Thomas Hobbes, *Man and Citizen (De Homine and De Cive)* 116 (Berand Gert ed., Charles T. Wood, T.S.K. Scott-Craig, & Bergnard Gert Trans., Hackett, 1991) (De Cive, 1647).

39. *District of Columbia v. Heller*, 554 U.S. ____ (2008), 128 S. Ct. 2783, at 2850 (emphasis added).

make such limitations reasonable. Therefore, this is indeed a serious argument that must be addressed, and part III of this article will be devoted to this question. However, to prepare the groundwork for such a discussion, I believe that we must first take a look at the possible effect on this subject of the citizen's right vis-à-vis the state to resist aggression.

B. The Right to Resist Aggression as Incorporating the Right to Bear Arms

Kadish has proposed the right of the individual—against the state—to resist aggression as a theory that, in his opinion, explains the rationale of self-defense.⁴⁰ According to this approach, the freedom of the attacked person to kill his attacker derives from a right that he has vis-à-vis the state. This right, to which every individual is entitled, is a right to the protection by law against the lethal threats of others. To give substantial content to this right, it is necessary to establish a legal freedom to oppose deadly threats by all necessary means, including the freedom to kill an aggressor. In Kadish's opinion, there is nothing new in such a freedom; its source is the fundamental right of the individual to resist aggression, a right that he was not deprived of upon the establishment of the state. This liberty is dictated by most theories regarding the legitimacy of the state, whereby the individual's submission to the prerogative of the state carries with it a right to greater protection against aggressors than that which existed prior to the founding of the state.

There are those who view the right to resist aggression as the logical outcome of the following idea: since the state is responsible for the protection of the individual, and since it is not always able to perform this role, it grants the individual the right to protect his own life against attack in those cases where it has failed to do so. According to this approach, the grant of this right involves practical considerations: it derives from the ineffectiveness of society and its laws in certain situations.⁴¹ Others have expressed the opinion that this is a natural right that is not only *not* revoked with the establishment of the state, but that cannot be denied under any

40. Kadish, *supra* note 30.

41. See: A.J. Ashworth, *Self-Defence and the Right to Life*, 34 *Cambridge L.J.* 282, 282 (1975); Nancy M. Omichinski, *Applying the Theories of Justifiable Homicide to Conflicts in the Doctrine of Self-Defense*, 33 *Wayne L. Rev.* 1447, 1451 (1987). See also George P. Fletcher, *Rethinking Criminal Law* 867 (1978).

circumstances.⁴² In the words of Blackstone, “Self defence therefore, as it is justly called the primary law of nature, so it is not, neither can it be in fact, taken away by law of society.”⁴³

Enker has leveled an in-depth criticism at the right to resist aggression as the rationale for private defense.⁴⁴ His main, and convincing, argument is as follows: the right presented by Kadish is in effect a right vis-à-vis the state alone, and it is difficult to accept the idea that such a right would allow the attacked person to kill another person.⁴⁵

In my opinion, whereas the right to resist aggression should not be accepted as a rationale for self-defense, this factor, which nearly converges with the factor of the attacked person’s autonomy, indeed has a certain influence on the proper rationale for self-defense. Thus, under the assumption that the factor of autonomy has a central place in the self-defense justification, the individual’s right against the state to resist aggression acts to reinforce the autonomy factor, or at least to negate the claim that it has been greatly weakened with the establishment of the state.⁴⁶

For the purposes of this article, enough has been said about the relationship between the right vis-à-vis the state to resist aggression and the right to self-defense. Now I would like to make the connection between the right to resist aggression and the right to bear arms.

Ferzan has recently written about the theory proposed by Kadish, and has shown that, contrary to Kadish’s belief, it does not constitute a rationale for self-defense. The rationale for justifying self-defense must be found mainly in the relationship between the defender and the aggressor, and not in the relationship between the defender and the state.⁴⁷ As Kadish has astutely observed:

The individual does not surrender his fundamental freedom to preserve himself against aggression by the establishment of state authority; this freedom is required by most theories of state legitimacy, whether Hobbesian,

42. See, e.g., George P. Fletcher, *The Right and the Reasonable*, 98 *Harv. L. Rev.* 949 (1985).

43. See William Blackstone, *Commentaries on the Laws of England*, vol. 4, at 4 (reprint of 1st ed. with supplement, London, 1966).

44. Arnold N. Enker, *Duress and Necessity in the Criminal Law* 235–39 (1977) [in Hebrew].

45. *Id.* at 237.

46. For more detail, see Sangero, *Self-Defence in Criminal Law*, *supra* note 16, at 77–81.

47. Ferzan, *supra* note 27.

Lockean or Rawlsian, according to which the individual's surrender of prerogative to the state yields a quid pro quo of greater, not lesser, protection against aggression than he had before.⁴⁸

Ferzan agrees with Kadish, however, in her opinion, "the import of this claim . . . is not that we can understand self-defense through the prism of the state, but rather, that we can understand the state's legitimacy through the prism of self-defense."⁴⁹

In this regard, I agree with both Kadish and Ferzan. On the basis of both of their analyses, I would like to go one step further with Kadish's theory and propose the following: Kadish's view of the individual's right vis-à-vis the state to resist aggression indeed does not provide us with a rationale for self-defense as a justification. This is because his theory only deals with the relationship between the individual and the state, whereas self-defense, as a natural right that is not derived from the existence of the state, is based on the relationship between individuals—the attacked person and the aggressor.

However, Kadish's explanation is perfectly compatible with the subject of this article—the right to keep and bear arms for the purpose of self-defense—and should be adopted, because we are not concerned here with the relationship between individuals (as in the case of self-defense), but rather, we are clearly discussing the relationship between the individual and the state.

In the state of nature, potential aggressors could arm themselves and endanger you with weapons.⁵⁰ At the same time, you could also arm yourself, so that, if necessary, you could defend yourself. Once the state was established, it took upon itself the role to protect you. However, since the state cannot be—through its relevant representatives, and primarily the police—in all places at all times, the option of protecting yourself remains in your own hands, within the framework of self-defense. In a situation where the potential aggressors—the criminals—are armed, if the state forbids you from arming yourself, and assuming that it is unable to protect

48. Kadish, *supra* note 30, at 885.

49. Ferzan, *supra* note 27, at 47.

50. Of course, in the historical period prior to the establishment of the state, there were no firearms, but there were other types of weapons. Moreover, this is not an historical, but rather a philosophical and moral argument. Therefore, it is also valid for the possibility of a return, in our times, to the state of nature—the absence of a state and its powers.

you in all places and at all times, the result is that the state is essentially preventing you from defending yourself, thus rendering the right to self-defense meaningless.⁵¹

Therefore, the right vis-à-vis the state to resist aggression does not explain self-defense, but given a natural right of self-defense, which has a strong justification (based on the guilt of the aggressor, the autonomy of the attacked person, and the social-legal order), the right to resist aggression not only preserves your right to self-defense, but also places a duty on the state not to forbid you from keeping and bearing arms, if this is necessary for the purpose of self-defense. Only in this way will the individual receive protection—partially by the state and partially through self-defense—that is no less than that which he had prior to the establishment of the state. And, indeed, an increase in the protection received by the citizen is the cornerstone in the justification for establishing the state.⁵²

C. Unlawful Possession of Weapons

A clear distinction should be made between the offense of unlawful possession of a weapon and the actual use of such a weapon in self-defense.⁵³ These are two separate issues. The essence of self-defense is the actual use of force against an aggressor. The rationale of self-defense—based on the guilt of the aggressor, the autonomy of the attacked person, and the social-legal order—has no bearing on the question of unlawful possession. It is a typical mistake to assume that the very fact of unlawful possession (e.g., carrying an unlicensed firearm) precludes someone from using a weapon in self-defense. It is also a mistake to assume that if we want to allow a person

51. Huemer compares this to the following situation: A murderer enters the room of the victim with the intent to stab him to death. A third person grabs the victim's gun from his bedside and runs away with it, depriving the victim of the ability to defend himself. The murderer then stabs the defenseless victim to death. See Michael Huemer, *Is There a Right to Own a Gun?* 29 Soc. Theory & Prac. 297, 307–08 (2003).

52. For another interesting analysis, whereby, based on Lockean values of autonomy and individualism, there is a right to bear arms in the state of nature, which was not alienated upon entering the social contract, see Green, *supra* note 14, at 154–66. And see Huemer, *supra* note 51, at 299 (“I claim that the right to own a gun is both fundamental and derivative; however, it is in its *derivative* aspect—as derived from the right of self-defense—that it is most important.”).

53. For an in-depth discussion of this subject, see Sango, *Self-Defence in Criminal Law*, *supra* note 16, at 117–21.

to defend herself, and she uses an unlicensed firearm to do so, then we must exempt her from a charge of unlawful possession. It is very possible that the use of such a weapon would be considered justified within the framework of self-defense. In such a case the actor would only be held responsible for the offense of unlawfully possessing a weapon. It is also possible that she would not bear any responsibility at all, if possession of the weapon were within the bounds of a necessity defense (e.g., if severe and immediate injury was to be expected to the defender, and possessing a weapon would be the reasonable way to deal with it). Furthermore, it may even be the case that the act would be considered justified, and not merely excusable, as part of a lesser evils defense. However, by its very definition (which derives from its substance), self-defense does not include such cases, since they do not involve the use of defensive force against an aggressor.

On the other hand, illegal possession of a weapon, in and of itself, does not negate a claim of self-defense when such a weapon is used for this purpose, just as the self-defense exception itself (as opposed to a necessity defense or a lesser evils defense) does not negate criminal responsibility for an offense of unlawful possession.⁵⁴ However, the possession of a weapon may, in some cases, influence the right to self-defense, if under the circumstances, the actor is viewed as someone who, by her own fault and while foreseeing later events, caused the situation in which she was forced to defend herself.⁵⁵

III. GUN CONTROL OPTIONS

A. The State's Power to Control Arms

As noted, Justice Breyer's approach in *Heller* is to assume, for the sake of discussion, that the Second Amendment entails an independent right to self-defense unrelated to service in a militia.⁵⁶ However, he goes on to conclude that the state does have the authority to restrict the right to keep

54. For similar opinions, see Rollin M. Perkins & Ronald N. Boyce, *Criminal Law* 1131 (3d ed., 1982); Wayne R. La Fave & Austin W. Scott Jr., *Substantive Criminal Law*, Vol. 1, 650, n.2 (1986). For a relatively detailed discussion of this issue, see Seth Diamond, *Criminal Law: The Justification of Self-Defense*, 1987 *Ann. Surv. Am. L.* 693.

55. However, this particular issue deviates from the subject of our present discussion; see Sangero, *Self-Defence in Criminal Law*, *supra* note 16, at 310–39.

56. 554 U.S. ____ (2008), 128 S. Ct. 2783, at 2850 (Breyer, J., dissenting).

and bear of arms and that the regulation in question, which is designed to address the prevalence of handguns in high-crime urban areas, is a legitimate legislative response to a serious, life-threatening problem.⁵⁷ The main dangers that Justice Breyer refers to are the accidents that result from the possession of handguns and the abuse of such weapons by criminals.⁵⁸

As I will demonstrate below, this approach has two main disadvantages. First, it leads to a significant limitation of the right to self-defense that is hard, if not impossible, to justify. Second, it is very vague: it is difficult to see how it would be possible to determine adequate limitations on the right to keep and bear arms that would properly balance the conflicting interests, to wit, the right to self-defense and the desire to reduce accidents and weapons abuse.⁵⁹

Instead, I would like to propose an approach whereby the proper restrictions placed on the right to keep and bear arms must derive directly from the underlying rationale and requirements of the right to self-defense. As I will show, such an approach would provide a clear solution that would preserve, and not erode, the right to self-defense.

Identifying the exact source of the state's authority to restrict the right to keep and bear arms is important because of the need to determine the boundaries of this authority. Therefore, we will now move on to a discussion of these boundaries.

B. Tying the Right to Bear Arms to Self-Defense

As we have seen, self-defense is a natural, fundamental right that existed prior to the establishment of the state. Therefore, it does not derive from the social contract, but rather continues to exist also within the framework of the state. The right to keep and bear arms stems from both the right to self-defense and the right of the individual vis-à-vis the state to resist aggression. This is because, in a world where potential aggressors—criminals—are armed, there is not much practical meaning to a right to

57. *Id.* at 2847.

58. *Id.*

59. This difficulty is illustrated by the disagreement between the majority and dissenting justices with regard to the specific law in question. It is interesting to note that Justice Breyer himself criticizes Justice Scalia's position because it creates a vague legal situation; *id.* at 2868–70.

self-defense without an accompanying right to keep and bear arms for the purpose of self-defense. If the state does not allow the individual to bear arms, then in effect it deprives him of the right to resist aggression.

However, we can agree that the right to keep and bear arms is not an absolute right. This is illustrated by our previous example of the law-abiding citizen who wishes to purchase a tank for the purpose of protecting his home and family against trespassers and burglars. Why is it so obvious to us that the state is justified in forbidding citizens from owning tanks?⁶⁰

The answer is that such a restriction does not erode the right to self-defense, but instead, it directly derives from the rationale of self-defense and its basic requirements. As we have seen above, the rationale of self-defense dictates several conditions, central among them the requirements of necessity and proportionality. Defending the home against a potential aggressor (e.g., a trespasser or a burglar) does not require the use of a tank, and therefore, such use would not meet the requirement of necessity.⁶¹ Furthermore, even if it were possible to imagine an extraordinary situation where the use of such a weapon was necessary for citizens to defend themselves against one another (as opposed to self-defense between states), it would still not meet the additional and independent requirement of proportionality: it would be out of all proportion to the danger posed to the attacked person.⁶²

It is a very different case that concerns the possession of firearms, in general, and handguns, in particular. In the face of serious danger to the life of the attacked person or his bodily integrity or the severe violation of his freedom (e.g., kidnapping) or the danger of rape, even lethal defensive force is justified.⁶³ If lethal defensive force is necessary to fend off such

60. It is interesting to note that, based on part of the reasoning for restricting the possession of handguns in the District of Columbia, repeated in the dissenting opinions in *Heller*—i.e., the desire to reduce the number of accidents and the scope of crime in urban areas—it is very possible that we would reach the conclusion that a tank poses relatively little danger in this regard. However, we would still agree that it is clearly proper and justified that the state forbids citizens from keeping tanks in their yards.

61. It may also be said that a tank is not a very practical, nor an efficient, means for defending against individual trespassers and burglars.

62. Thus, for example, if the actor uses a tank to protect his home from a burglar, the firepower of the tank will be out of all proportion to the danger, and he could be expected to injure the residents of adjacent homes as well as pedestrians.

63. See Sangero, *Self-Defence in Criminal Law*, supra note 16, at 166–92 (chapter on “The Proportionality Requirement”).

grave dangers, then it is considered proportional. Therefore, a total ban on the possession of any firearm would severely infringe the citizen's right to self-defense.⁶⁴

Still, it is possible to make a distinction here between less drastic firearms such as handguns, and more powerful firearms such as rifles and shotguns, and certainly automatic weapons such as machine guns. Since handguns are sufficient for defending against the potential dangers that we have mentioned above, it is possible to consider a prohibition against, for example, machine guns. Such a restriction is consistent with both the requirement of necessity (since a handgun is sufficient) and the requirement of proportionality (since the firepower of a machine gun is too great). This distinction is proposed here not with the objective of delving too deeply into the different types of firearms, but rather to point out the somewhat absurd outcome of the dissenting approach in *Heller*, whereby the restrictions enacted in the District of Columbia are reasonable in that they only prohibit handguns and not rifles or shotguns.⁶⁵ Indeed, this view was based on the fact that a handgun is easier to carry and use, and easier to steal, but this argument is unconvincing given the fact that a handgun is a more moderate firearm than a rifle. It is hard to accept the logic of a prohibition that forbids handguns but permits rifles and shotguns. This is especially so if acceptable and logical criteria are adopted for examining possible restrictions, that is, based on the requirements of self-defense. We shall therefore move on to an examination of the alternative approach, as proposed in Justice Breyer's dissent in *Heller*, whereby it is possible to justify restrictions on the right to keep and bear arms based on considerations external to self-defense.

It should be noted that in the majority opinion in *Heller*, as well, no significant or logical criterion was proposed for assessing the legitimacy of legislative restrictions. In this matter, Justice Breyer's criticism of the majority approach is correct. As he says, although the majority holds that

64. It should be noted that, apart from the normal context in which self-defense is discussed, i.e., with respect to the dangers of crime, in some countries—such as Israel—an armed public has proven an effective method for stopping a terror attack in its early stages. For example, in the recent extended terror attacks in Mumbai, armed citizens might have been able to effectively hinder, or even stop, the terrorists until security forces could respond. In a post-September 11 world, it would appear that this consideration could also be relevant in the American context.

65. 128 S. Ct. at 2847, 2857, 2862–63, 2865–66 (Breyer, J., dissenting).

the Second Amendment also protects an interest in armed self-defense, it does not precisely identify that interest, and just how it would decide *which* loaded weapons a person may keep in his home is unclear.⁶⁶ Thus, for example, when discussing the restriction on handguns enacted in the District of Columbia, Justice Scalia says:

The American people have considered the handgun to be the quintessential self-defense weapon. There are many reasons that a citizen may prefer a handgun for home defense. . . . Whatever the reason, handguns are the most popular weapon chosen by Americans for self-defense in the home, and a complete prohibition of their use is invalid.⁶⁷

However, what would we say if, in a given society during a particular time, the most popular weapon among the wider public were machine-guns or even tanks? Popularity is not the proper criterion for deciding whether or not the public should be allowed to keep and bear a particular type of weapon. The proper criterion is whether or not the use of such a weapon meets the main requirements for self-defense—which are necessity and proportionality.⁶⁸

Before we move on, I should briefly discuss the new essay by Robinson, “A Right to Bear Firearms but Not to Use Them? Defensive Force Rules and the Increasing Effectiveness of Non-Lethal Weapons.”⁶⁹ In Robinson’s opinion, given recent developments in nonlethal weapons—particularly the Taser, “a high-voltage stun gun”⁷⁰ that a defender can use to apply an electrical shock to the attacker, causing a muscle spasm—we may expect the use of firearms to become unnecessary⁷¹ and for *Heller* to lose its significance, since it only deals with the right to possess a firearm.⁷²

66. *Id.* at 2869. See also Green, *supra* note 14, at 134–35.

67. *Id.* at 2818.

68. The majority’s treatment of the District of Columbia’s trigger-lock requirement demonstrates—correctly, in my opinion—that self-defense is a much more relevant consideration to the issue under discussion: “We must also address the District’s requirement (as applied to respondent’s handgun) that firearms in the home be rendered and kept inoperable at all times. This makes it impossible for citizens to use them for the core lawful purpose of self-defense and is hence unconstitutional” (*id.*).

69. 89 B.U. L. Rev. 251 (2009).

70. *Id.* at n.8.

71. *Id.* at 256–57, 259.

72. *Id.* at 259, 264.

I would like to note my agreement with Robinson's analytic method, but I disagree with his far-reaching conclusions. The basis for his approach is similar to my own: an analysis of the right to bear arms from the perspective of self-defense, particularly the requirements of necessity and proportionality, which Robinson properly distinguishes.⁷³ However, the conclusions that the use of firearms is unnecessary or disproportionate and that the Taser overcomes *Heller* are hasty. First, Robinson himself says that nonlethal weapons, including the Taser, are insufficiently developed and still not effective as a replacement for firearms. Thus, for instance, their range is very short, requiring the defender to endanger herself, and they do not have a second-shot capability if the first shot misses its target.⁷⁴ Robinson is indeed optimistic about the future development of nonlethal weapons, but it seems that, at least in the meantime, firearms are still very necessary for self-defense against armed attackers, and given the significant dangers faced by citizens (to life and limb, and from rape), their use is certainly proportional.

Second, the use of nonlethal weapons is still uncommon, and in the overwhelming majority of future cases of self-defense, the defender (or a person coming to her aid) will not have a Taser, but only a handgun, making its use necessary and proportional.

Third, Robinson proposes, under the heading "Creating the Conditions that Cause the Need for Excessive Force: The T₁-T₂ Analysis,"⁷⁵ the following argument in the form of the familiar doctrine of *actio libera in causa*: even though, during the time of the attack and defense (T₂), the defender had to use a gun because she had no nonlethal weapon, the law should not ignore the fact that, at an earlier time (T₁), she chose to purchase a lethal gun rather than a nonlethal weapon. In my opinion, this method of analysis is overly harsh with the citizen and sends her conflicting messages: "You may carry a gun, but you are forbidden from using it." If we were indeed to behave according to Robinson's proposal, then it would already be necessary today to impose liability (for murder!) on a defender

73. *Id.* at 253.

74. *Id.* at 254–57. See also Huemer, *supra* note 51, at 309 ("Unfortunately, statistics from the National Crime Victimization Survey indicate that such alternative means of self-protection would be relatively ineffective—individuals who defend themselves with a gun are less likely to be injured and far less likely to have the crime completed against them than are persons who take any other measures.").

75. *Id.* at 259–60 (Part C).

who, given an immediate danger of death created by an aggressor, used a gun defensively—a use that, up until the development of the Taser, was definitely considered necessary and proportional, since she armed herself during T1 with a 0.9 caliber gun instead of a 0.22 or a 7.65 caliber gun. And perhaps even a person arming herself with a 0.22 caliber gun should be held liable because she did not suffice with a knife?

Fourth, even if nonlethal weapons are developed to the extent that they will be sufficiently effective in stopping armed attackers, there would still be no need to alter the *Heller* ruling, just as there would be no need to revise the requirements for self-defense. If nonlethal weapons are, indeed, very effective and widely used, then perhaps the possession of firearms will be unnecessary for the purpose of self-defense, as Robinson foresees. However, the Second Amendment does not specifically mention firearms, but merely “arms.” A constitution is not supposed to deal with any particular type of technology, but rather with general principles. Accordingly, even the logic of *Heller*, which establishes a right to bear arms for the purpose of self-defense, would meet the test of time and adapt to the use of Tasers, just as it has met the test of time and adapted to the disappearance of the militia.

C. Decoupling the Right to Bear Arms from Self-Defense

As we have seen, if the approach that I am proposing is adopted, whereby the source of the state’s authority to restrict the right of the individual to keep and bear arms for the purpose of self-defense is based on the rationale and requirements of self-defense itself—and, primarily, necessity and proportionality—then we have a clear enough criterion for examining and assessing possible restrictions.

However, there is another approach, clearly expressed in Justice Breyer’s dissent, whereby the source of the state’s authority to restrict the right to keep and bear arms is unrelated to self-defense, but rather stems from other policy considerations. According to this approach, even if the starting point of the discussion must be the existence of a constitutional right to keep and bear arms for the purpose of self-defense, it is still possible that restrictions imposed by the state would be reasonable, given the existence of other weighty policy considerations.⁷⁶

76. *District of Columbia v. Heller*, 554 U.S. ____ (2008), 128 S. Ct. 2783, at 2850.

What are these considerations? The first is the protection of the lives of citizens (for instance, against accidents or suicides), and the second is a reduction in the amount of violent crime.⁷⁷ In his dissenting opinion, Justice Breyer refers to studies indicating that handguns are the cause of many accidents,⁷⁸ that many crimes are committed with handguns,⁷⁹ that many murders are committed by persons previous thought to be law-abiding,⁸⁰ that many suicides are committed with handguns,⁸¹ and that handguns are frequently stolen.⁸² Therefore, in his view, the desire of the state to improve public safety by restricting the right to keep and bear arms is not unreasonable.⁸³

On the other hand, other studies were presented to the Court indicating that: in many cases, firearm possession does have a beneficial self-defense effect, and that this is often accomplished by merely brandishing a weapon to scare off an intruder, without causing any physical harm whatsoever;⁸⁴ an unarmed victim has a greater chance of being injured while resisting a robbery or an assault than an armed victim;⁸⁵ burglars are deterred from committing crimes if they know that a potential victim is likely to have a gun;⁸⁶ the more weapons in the hands of the public, the fewer the number of violent crimes;⁸⁷ criminalizing gun possession would only have the effect

77. *Id.* at 2851, 2854.

78. *Id.* at 2854–55 (citing: Hearing and Disposition before the House Committee on the District of Columbia, 94th Cong., 2d Sess., on H. Con. Res. 694, Ser. No. 94-24, p. 25 (1976)).

79. *Id.*

80. *Id.* at 2855.

81. *Id.* at 2856; Marianne W. Zawitz & Kevin J. Strom, U.S. Department of Justice, Firearm Injury and Death from Crime, 1993–97, 2 (Oct. 2000), <http://www.ojp.usdoj.gov/bjs/pub/pdf/fidc9397.pdf>.

82. *Heller*, 128 S. Ct. at 2857; Marianne W. Zawitz, U.S. Department of Justice, Guns Used in Crime 3 (July 1995), <http://www.ojp.usdoj.gov/bjs/pub/pdf/guic.pdf>.

83. *Heller*, 128 S. Ct. at 2851–52, 2861.

84. *Id.* at 2858. See also Gary Kleck & Marc Gertz, Armed Resistance to Crime: The Prevalence and Nature of Self-Defense With a Gun, 86 *J. Crim. L. & Criminology* 150, 164 (1995).

85. *Heller*, 128 S. Ct. at 2858. See also Barnett & Kates, *supra* note 2, at 1243–44.

86. *Heller*, 128 S. Ct. at 2858; Gary Kleck, Crime Control Through the Private Use of Armed Force, 35 *Soc. Probs.* 1, 15 (1988).

87. *Heller*, 128 S. Ct. at 2859–60. See also John R. Lott Jr., More Guns, Less Crime (2d ed., 2000); and, on the other hand, see Mark Duggan, More Guns, More Crime, 109 *J. Pol. Econ.* 1086 (2001).

of restricting law-abiding citizens, whereas criminals would continue to acquire guns (in my opinion, a very logical assumption);⁸⁸ a reduction in the number of guns does not lead to a reduction in violent crime;⁸⁹ and even that the number of crimes involving the use of handguns actually increased after the enactment of the restrictions in the District of Columbia.⁹⁰

In referring to the disagreement among the experts themselves, Justice Breyer's own words are instructive:

These empirically based arguments may have proved strong enough to convince many legislatures, as a matter of legislative policy, not to adopt total handgun bans. But the question here is whether they are strong enough to destroy judicial confidence in the reasonableness of a legislature that rejects them. And that they are not. For one thing, they can lead us more deeply into the uncertainties that surround any effort to reduce crime, but they cannot prove either that handgun possession diminishes crime or that handgun bans are ineffective. The statistics do show a soaring District crime rate. And the District's crime rate went up after the District adopted its handgun ban. But, as students of elementary logic know, *after it* does not mean *because of it*. What would the District crime rate have looked like without the ban? Higher? Lower? The same? *Experts differ; and we, as judges, cannot say.*⁹¹

The disagreement among the various researchers is so huge that one article dealing with this subject had the provocative title "More Statistics, Less Persuasion."⁹² What should the Supreme Court do, given such disagreement among the experts? For some reason, Justice Breyer starts from the assumption that it is enough that the state's decision to lay down such restrictions on the right to keep and bear arms is not unreasonable.⁹³ In effect, he assumes that the onus is on someone claiming that the restrictive law is undesirable. Furthermore, he believes that the right to bear arms for the purpose of self-defense—if it exists—should be balanced against the interests and objectives that the state wishes to achieve through such

88. *Heller*, 128 S. Ct. at 2858–59. See also: Huemer, *supra* note 51, at 316, 324; Green, *supra* note 14, at 138.

89. *Heller*, 128 S. Ct. at 2858.

90. *Id.* at 2857–58, 2859.

91. *Id.* at 2859 (emphasis added).

92. Donald Braman & Dan M. Kahan, *More Statistics, Less Persuasion: A Cultural Theory of Gun-Risk Perceptions*, 151 U. Pa. L. Rev. 1291 (2002).

93. *Heller*, 128 S. Ct. at 2847, 2851–52, 2860.

restrictions.⁹⁴ In contrast, the majority opinion starts from the opposite assumption: since the right to keep and bear arms for self-defense is anchored in the Constitution, judges are not authorized to perform such a balance.⁹⁵

While performing the balancing that he deems proper, Breyer notes, *inter alia*, that the restriction in question is only on handguns and not rifles,⁹⁶ and that it “only” applies to urban areas.⁹⁷ The argument regarding the distinction between a handgun and a rifle has already been discussed and critiqued above.⁹⁸ As to the urban argument, this is somewhat strange considering the fact that most of the population of the United States resides in urban areas. In effect, the statute under discussion, which required lawfully owned firearms to be kept unloaded and disassembled or bound by a lock of some sort, meant that a person attacked in his own home would have to ask the intruder to wait patiently and not do anything until he could release the lock and load his weapon. Since self-defense is only justified in a situation of constraint—where the danger is imminent, or at least where the defensive force is immediately necessary to fend off the attack—such restrictions clearly make it impossible to use the weapon immediately. It is obvious that this renders the right to self-defense virtually meaningless.

Instead of the two approaches taken in *Heller*, I would like to propose a third approach. Its starting assumptions are the natural right of self-defense and the right *vis-à-vis* the state to resist aggression. In a world where potential aggressors carry and use arms, these two rights engender the right of the law-abiding citizen to keep and bear arms as well.

The right to keep and bear arms for the purpose of self-defense could be restricted on the basis of two sets of considerations. The first is internal and the second is external. The internal considerations are the requirements for self-defense, which derive from the rationale for its justification. Thus, force that is not necessary for the purpose of defense, or that it is out of all proportion to the danger that the aggressor poses to the attacked person, is not justified by self-defense. Therefore, self-defense also does not engender a right to keep and bear arms (such as a tank) that would enable excessive

94. *Id.* at 2852.

95. *Id.* at 2821.

96. *Id.* at 2848, 2855–57, 2863–66.

97. See *id.* at 2847–48, 2855, 2857, 2865–68 (regarding the distinction between urban and rural areas).

98. See *supra* text accompanying note 65.

defensive force. This is a restriction on the right to keep and bear arms that does not erode the right to self-defense, but rather is very consistent with it and essentially stems from its definition, from its rationale, and from its requirements.

The second set of considerations that could lead to a restriction of the right to keep and bear arms are external to self-defense. Such possible considerations are the desire to reduce the number of firearms in the hands of the public with the aim of reducing the number of accidents, the abuse of weapons, and the scope of crime. However, regarding considerations that are external to self-defense, such a restriction—which does not derive from the requirements of self-defense—is also a restriction on the right to self-defense.

Is it legitimate—not only from the formal-constitutional perspective, but also from the moral-political perspective—that the state will thus directly restrict the right to keep and bear arms while also indirectly restricting the right to self-defense? Given the natural, fundamental right to self-defense, and given the individual's right vis-à-vis the state to resist aggression, the government bears a very heavy burden to prove that gun control is expected to significantly achieve its objectives: the reduction of crime and a decrease in gun-related deaths and injuries.⁹⁹ As the judgment in *Heller* demonstrates, the state is very far from meeting this heavy burden. Moreover, even proof by a preponderance of the evidence cannot be based on the empirical research presented before the Court on this subject. Even the dissenting justices wrote that “experts differ; and we, as judges, cannot say.”¹⁰⁰ The government's duty toward its citizens is so great that conjecture, even if it is very reasonable, is not enough: only if it could be proven unequivocally that the prevalence of weapons in the hands of the public leads to serious dangers, and that legislative restrictions would achieve positive results, only then is it appropriate to search for the proper balance between the right to bear arms for the purpose of self-defense and such considerations.¹⁰¹

99. And see the interesting moral discussion by Huemer under the heading, “Why a Gun Ban Must Have Much Greater Benefits than Harms to Be Justified”; Huemer, *supra* note 51, at 317–19.

100. *Heller*, 128 S. Ct. at 2859.

101. As we have seen, the restrictions enacted in the District of Columbia do not constitute the proper balance.

IV. HELLER'S VIRTUES

A. The Second Amendment's Original Meaning

Delivering the opinion of the Court in *Heller*, Justice Scalia writes, “There seems to us no doubt, on the basis of both text and history, that the Second Amendment conferred an individual right to keep and bear arms,”¹⁰² and that “the inherent right of self-defense has been central to the *Second Amendment* right.”¹⁰³ He also writes that the preexisting right to keep and bear arms, also recognized in the Second Amendment, is not limited to the specific context of a militia.¹⁰⁴

Major scholars, even from the liberal left—among them, Tribe,¹⁰⁵ Levinson,¹⁰⁶ and Amar¹⁰⁷—have reached the same conclusion as the majority justices in *Heller*: that the Second Amendment states an individual right to keep and bear arm for the purpose of self-defense. Nevertheless, Justice Scalia has been accused, in a highly critical article by Judge Wilkinson, of “an absence of a commitment to textualism.”¹⁰⁸

As reflected in *Heller*, there are two basic ways to interpret the Second Amendment. One is to interpret it as recognizing a right to keep and bear arms for the purpose of self-defense that is not just limited to the context of a militia. For those who accept this possible interpretation, Justice Scalia's opinion is certainly not viewed as a lack of commitment to the wording of the Constitution. The other way is to interpret the Second Amendment as inferring a strong connection between the context of a militia in its prefatory clause and the right to keep and bear arms in its operative clause.

102. *Heller*, 128 S. Ct. at 2799.

103. *Id.* at 2817 (emphasis in original).

104. See, e.g., *id.* at 2793–94, 2798, 2805, 2808.

105. Laurence H. Tribe, *American Constitutional Law* 895 n.204 (3d ed., 2000).

106. Sanford Levinson, *The Embarrassing Second Amendment*, 99 *Yale L.J.* 637 (1989). See also Sanford Levinson, *Arms and Constitutional Design: An Essay for Laurence Tribe*, 42 *Tulsa L. Rev.* 883 (2007).

107. Akhil Reed Amar, *The Second Amendment: A Case Study in Constitutional Interpretation*, 2001 *Utah L. Rev.* 889 (2001). See also Akhil Reed Amar, *Heller, HLR, and Holistic Legal Reasoning*, 122 *Harv. L. Rev.* 145 (2008).

108. J. Harvie Wilkinson III, *Of Guns, Abortions, and the Unraveling Rule of Law*, 95 *Va. L. Rev.* 253 (2009), <http://ssrn.com/abstract=1265118>. See also Richard A. Posner, *In Defense of Looseness: The Supreme Court and Gun Control*, *New Republic*, Aug. 27, 2008, <http://www.tnr.com/article/books/defense-looseness>.

This is Justice Stevens's interpretation in his dissenting opinion.¹⁰⁹ As I will next show, even if this is an acceptable interpretation, the majority opinion should not be viewed as a lack of fidelity to the Constitution, but rather as fidelity to its principles.

Based on my analysis of the natural right to self-defense, the right vis-à-vis the state to resist aggression, and the derivative right to keep and bear arms, I would like to clarify and reinforce the connection between these rights and the Second Amendment. As Balkin writes:

[F]idelity to the Constitution requires fidelity to the original meaning of the constitutional text and to its underlying principles . . . each generation makes the Constitution their constitution by calling upon its text and principles and arguing about what they mean in their own time . . . the Constitution is ours if we are able to have faith that over time it will come to respect our rights and our values. The Constitution is ours if we can trust in its future and in what future generations will do to realize its promises. The Constitution is ours if we can believe in its redemption.¹¹⁰

As I have shown above,¹¹¹ the right to self-defense is a natural right preceding the social contract, society, the state, and its laws (and even, of course, the U.S. Constitution). The right to keep and bear arms is a secondary right derived from the right to self-defense (and the right vis-à-vis the state to resist aggression) and is necessary for its realization. The scope of the right to keep and bear arms is based on the rationale for the right to self-defense, in general, and on the requirements of necessity and proportionality, in particular. Once the state has been established, it acts to protect its citizens, inter alia, through the police. However, as we know, the protection of the state is not perfect, for the police cannot be in all places at all times. The right to self-defense, which allows the individual to protect herself when she fails to obtain the immediate help of the state, complements the protection that the state is unable to provide.

What part in protecting the individual will the state play, and what part will the individual herself play? The answer varies from society to society

109. *District of Columbia v. Heller*, 554 U.S. ____ (2008), 128 S. Ct. 2783, at 2831; see also Justice Breyer's dissenting opinion, *id.* at 2847.

110. Jack M. Balkin, *Original Meaning and Constitutional Redemption*, 24 *Const. Comment.* 427, 531 (2007). See also Jack M. Balkin, *Abortion and Original Meaning*, 24 *Const. Comment.* 291 (2007).

111. *Supra* Parts I and II.

and, within a given society, from time to time. When the U.S. Constitution was ratified, the police did not operate in an organized fashion as they do today,¹¹² and this was true for the army as well. For this reason, *inter alia*,¹¹³ the issue was discussed two hundred years ago in terms of a militia.¹¹⁴ The Framers of the Constitution could not have precisely anticipated present-day circumstances. There is no reason for us to inherit from the Framers a right to keep and bears arms solely limited to their archaic concept of a militia. Perhaps such an interpretation is consistent with the wording of the Constitution, but not with its principles, and in the end it degrades the Constitution and renders the Second Amendment completely meaningless. Respect for the U.S. Constitution demands that we ascertain the underlying principle of the Second Amendment, in accordance with Balkin's aforesaid model.

The principle that I propose to learn from the Second Amendment is recognition of the fact that, even after the establishment of the state, the

112. Louis Michael Seidman, Akhil Amar and the (Premature?) Demise of Criminal Procedure Liberalism, 107 *Yale L.J.* 2281, 2293 (1998) (book review) ("The late eighteenth century was a world not only without organized crime, but also without an organized police force."); Steven Penney, *Theories of Confession Admissibility: A Historical View*, 25 *Am. J. Crim. L.* 309, 314 (1998) ("Large-scale professional police forces did not exist prior to the latter half of the nineteenth century.").

113. "Inter alia" because the other proposed rationale for the Second Amendment is the right of the public to keep and bear arms as a counterweight to the possibility of a despotic government that harms its own citizens (which, of course, seems to be a far-fetched possibility in modern-day American reality): see Levinson (1989), *supra* note 106, at 656–57; Levinson (2007), *supra* note 106, at 886–87; Amar (2001), *supra* note 107, at 896; Green, *supra* note 14, at 185; Heller, 128 *S. Ct.* at 2801.

114. Amar (2008), *supra* note 107, at 164 ("Before the emergence of professional police in the nineteenth century, the militia served various law enforcement functions. . . . In the Founders' world, individual self-protection and community defense were not wholly separate spheres."). And see Amar (2001), *supra* note 107, at 898 ("But is there nothing to be said for the strong libertarian view of guns put forth by the NRA? In fact, there is a great deal to be said on behalf of an individual right to keep a gun in one's home for self-defense, as even Harvard Law School's Laurence Tribe—no pawn of the NRA—has publicly acknowledged of late. But the best constitutional arguments for this view come not from the Founding but from the Reconstruction some fourscore years later. Even with regard to the Founding, it's simplistic to deny any link between collective security and individual self-defense. Lawyer and legal scholar Don Kates reminds us that somewhat like standing armies, roving bands of thugs and pirates posed a threat to law-abiding citizens, and trusty weapons in private homes were indeed part of a system of community policing against predators.").

natural right to self-defense remains valid, as well as the right to keep and bear arms for the purpose of realizing the right to self-defense. And, if today, given the development of a professional police force, the state plays a greater role than in the past to protect the individual, then perhaps self-defense will be unnecessary in more situations than in the past. However, whenever there is a need, proportional force exercised by the individual for the purpose of self-defense is justified.

How can the right to self-defense be realized in our times? Today, we no longer have a need for a right to organize in militias. We have police. We have an army. But, still, as long as potential criminals are armed and as long as the police are unable to provide us with hermetic protection, we must retain a right to keep and bear arms as a necessary means for exercising the right to self-defense. Without a right to keep and bear arms, the right to self-defense is meaningless. In my opinion, this is the right that the Second Amendment is designed to protect. *Fidelity to the principle of the Constitution requires a dynamic interpretation that adapts the Second Amendment to modern times. The proportion between institutional protection and self-defense changes from time to time, but self-defense always exists, and it complements institutional protection. The Second Amendment has got to be dynamic.*

Such an understanding, both of the right to self-defense and of the constitutional principle established in the Second Amendment, leads to the conclusion that the criticism whereby Justice Scalia's approach represents extreme judicial activism¹¹⁵ is incorrect. Scalia's reasoning is not innovative, but rather it is faithful to the principle laid down in the Second Amendment, which basically preserves a right to self-defense that has existed in all societies and at all times.

B. *Wilkinson v. Scalia*

In a sharp criticism of Justice Scalia's opinion in *Heller*, Judge J. Harvie Wilkinson III accuses him of a lack of judicial restraint and of preferring his own personal view to the rule of law and the separation of powers.¹¹⁶ In principle, Judge Wilkinson does find convincing the reasoning of both Justice Scalia's majority opinion, whereby the Second Amendment grants an

115. See, e.g., *Wilkinson*, supra note 108; see also Posner, supra note 108.

116. *Wilkinson*, supra note 108, at 75 (and the conclusion).

individual right to keep and bear arms for the purpose of self-defense, and Justice Stevens's dissenting opinion, which states the opposite. However, in his view, the majority justices should not have intervened in this matter, but instead should have left firearm regulation to local legislatures, who, he believes, have better tools for this purpose. According to Judge Wilkinson, "The Court has invited future challenges by not defining the scope of the right to bear arms, by not providing a standard of review for firearms regulation, and by creating a list of exceptions to the new-found personal Second Amendment right."¹¹⁷ In a similar manner, Schragger has recently written:

To make the leap from the historical principle that the Second Amendment encompasses a right to bear arms for self-defense to its application to a modern handgun ban requires judgment about present day circumstances. This judgment is present when the majority indicates that most gun control laws will survive despite the expansive right to self-defense it adopts in *Heller*. But why are laws regulating concealed weapons, machine guns, tanks, bazookas and other "unusual weapons," . . . all outside the paradigmatic core? Scalia moves very quickly to embrace these common regulations, implying that they are historically warranted—though without much evidence at all, historical or otherwise.¹¹⁸

That is to say, a major argument against *Heller* is that it recognizes the right to keep and bear arms for the purpose of self-defense and leaves us without an acceptable criterion for determining the precise scope of the right. According to the critics, this is liable to lead, in the best-case scenario, to uncertainty and increased litigation and, in the worst-case scenario, to each judge essentially deciding based on his or her own personal views.

First of all, it seems to me that this is the case with each and every right enumerated in the Constitution: the Constitution naturally enumerates basic rights without regulating them in detail. Secondly, I would like to propose, in response to Wilkinson and Schragger, that, in fact, there is an acceptable criterion (or, at least, a criterion that can and should be accepted) for determining the scope of the right to keep and bear arms for

117. *Id.* at 29 (text immediately following note 124). Similarly, Judge Wilkinson accuses the majority opinion in *Heller* of "a willingness to embark on a complex endeavor that will require fine-tuning over many years of litigation" (*id.* at 1).

118. Richard Schragger, "The Last Progressive: Justice Breyer, *Heller*, and 'Judicial Judgment,'" 59 *Syracuse L. Rev.* 283, at 8 (text accompanying note 43) (2008).

the purpose of self-defense. As I have shown above,¹¹⁹ the scope of the secondary right to keep and bear arms should be determined by the scope of the primary right from which it stems, the right to self-defense. Thus, for example, we can easily respond to Schragger's question regarding "machine guns, tanks, bazookas and other 'unusual weapons,'" on the basis of the rationale for self-defense and its accepted requirements, which are, primarily, necessity and proportionality. The answer is that, as a rule, citizens do not need heavy arms to defend themselves against criminals—a handgun is usually sufficient—and even in the rare case where a heavier weapon might be necessary, its use would almost certainly not meet the requirement of proportionality.¹²⁰ Therefore, not only does such a restriction *not* contradict the right to self-defense, but it actually stems from its rationale and its accepted requirements.

C. The Import of the Ninth and Fourteenth Amendments

In a detailed and instructive analysis published seven years prior to the Heller ruling, Amar has shown that, taken together with the Ninth and Fourteenth Amendments, it is proper and correct to interpret the Second Amendment as stating "[a]n individual right to have a gun in one's home for self-protection."¹²¹ I wish to develop and reinforce Amar's argument further.

The Ninth Amendment states, "The enumeration in the Constitution, of certain rights shall not be construed to deny or disparage others retained by the people."¹²² As Amar writes, "the Ninth is better at telling us what to do than at providing detailed guidance about where, how, and why to find nontextual rights."¹²³ From here, he turns to the relevant provision in the Fourteenth Amendment, which is also worded in general terms and does not mention any specific rights: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States."¹²⁴ As Amar asks and answers, in a recent article analyzing the Heller ruling:

119. *Supra* part III.B.

120. See *supra* note 62.

121. Amar (2001), *supra* note 107, at 908.

122. U.S. Const. amend. IX.

123. Amar (2001), *supra* note 107, at 905.

124. U.S. Const. amend. XIV, § 1.

But where should judges—or the rest of us, for that matter—look for non-textual constitutional rights? Under one attractive reading of the Ninth Amendment, unenumerated constitutional rights retained by the people encompass, among other things, those basic rights that the people at large in fact believe that they have and should have under the Constitution.¹²⁵

Perhaps. But it is doubtful just how much a vague criterion like this would also persuade those who are not convinced from the start of the existence of the right. In my estimation, it is not advisable to base the right to keep and bear arms for the purpose of self-defense on the fact that people believe that they have such a right. And the very fact that there is disagreement, not only between the five majority justices and four dissenting justices in *Heller* but also in American society at large, proves that there are different beliefs in this matter.

Instead of the argument offered by Amar, I propose to use the Ninth and Fourteenth Amendments to read into the Constitution the more basic and undeniable right—the right to self-defense. As I have shown above,¹²⁶ this is a natural right, accepted by all philosophers as having existed in all societies and at all times. In effect, this right preceded society, the state, and its laws, and the social contract did not negate it. Just the opposite is true:

125. Amar (2008), *supra* note 107, at 162. In a previous article, in which he establishes his argument that the Fourteenth Amendment supports a constitutional right to keep and bear arms, Amar has written that “the framers of the Fourteenth Amendment strongly believed in an individual right to own and keep guns in one’s home for self-protection. Most obviously, blacks and Unionists down South could not always count on the local police to keep white night-riders at bay. When guns were outlawed, only Klansmen would have guns. Thus, the Reconstruction Congress made quite clear that a right to keep a gun at home for self-protection was indeed a constitutional right—a true ‘privilege’ or ‘immunity’ of citizens” (Amar (2001), *supra* note 107, at 899). He goes on to say: “History, however, does provide some support for a broad libertarian reading of the right to ‘keep and bear arms,’ but the best historical argument for libertarians comes not from the Founding but from Reconstruction. The Fourteenth Amendment’s framers emphatically proclaimed their intent to make the Bill of Rights applicable against states. In effect, they readopted the Bill, glossing it with their own understandings. Although the Founders fused together arms-bearing with militias, the Reconstruction statute that I have quoted drove a wedge between the two, severing the idea of individual gun ownership for self-protection from militia service. Concretely: the Fourteenth Amendment affirmed the civil right of black men—and of black women and white women, for that matter—to have a gun for self-protection even though these persons did not (yet) enjoy the distinct political right to be part of the militia” (id. at 907).

126. *Supra* part I.

as part of the social contract, we have maintained for ourselves a right to self-defense for those same situations in which the state will not adequately protect us, and we have maintained for ourselves the right vis-à-vis the state to resist aggression. Since this is a natural and universal right, recognized worldwide, by all of humanity and throughout history, it exists even if it is not expressly mentioned in the U.S. Constitution. Of course, it would have been desirable, in my view, to have expressly mentioned this right in the Constitution. But even without explicit mention, there is no doubt that it exists, and it is even recognized in the U.S. Constitution through the Ninth and Fourteenth Amendments.

As I have shown above, the secondary right to keep and bear arms derives from the natural, fundamental right to self-defense. The latter, primary right also leads to the legitimate restrictions that may be placed on the secondary right to keep and bear arms for the purpose of self-defense. This leaves us with two possibilities. One option: Following the inference of a constitutional right to self-defense from a combined reading of the Ninth and Fourteenth Amendments, we may return to the Second Amendment and, in view of this right, conclude that it establishes an individual right to keep and bear arms for the purpose of realizing the right to self-defense.

The second option—proposed here as a line of retreat for those who are not persuaded of the correctness of the first option—is to suffice with a constitutional right to self-defense recognized by the Ninth and Fourteenth Amendments. As I have shown, such a right demands, so that it is not rendered meaningless, that we also recognize a right to keep and bear arms for the purpose of self-defense. This latter right does not need to be entrenched in the Constitution. Serious consideration of a natural and constitutional right to self-defense would in any case also require serious consideration of a right to keep and bear arms. To reject the derivative right would be almost the same as rejecting the primary right. Those who wish to limit the right to keep and bear arms carry the heavy burden of proof to demonstrate that such restriction would not harm the right to self-defense. With a correct view of the right to self-defense the outcome of this second option should be similar to the outcome of the first option, whereby the right to keep and bear arms for the purpose of self-defense is explicitly recognized in the Constitution's Second Amendment.

The advantage of the first option is that it specifically recognizes a right to self-defense in the Constitution (together with the right to keep and

bear arms), and does not suffice with the place left for it by the Ninth and Fourteenth Amendments. Indeed, it is hard to understand how such an admirable constitution, like the U.S. Constitution, would ignore the natural right to self-defense, which no major philosopher or moral thinker throughout the ages, including social contract theorists, has ignored.

CONCLUSION

Before one examines the Second Amendment, the *Heller* decision, and the right to keep and bear arms for the purpose of self-defense, it is first necessary to understand the significance of the natural and fundamental right to self-defense, as well as the right vis-à-vis the state to resist aggression, from which the secondary right to keep and bear arms derives. Such an understanding, based on a solid theoretical foundation, leads to several insights.

First of all, Justice Scalia's ruling in *Heller*, whereby the Second Amendment establishes a right to keep and bear arms for the purpose of self-defense, may certainly be viewed as fidelity to the basic principle established in the Second Amendment. A dynamic interpretation of the Second Amendment should not remain stuck on its reference to a militia, and this reference should not be viewed as a principle. Instead, the Second Amendment should be viewed as the reflection of a true time-tested, durable principle: that the individual cannot be deprived of the natural right to self-defense, which is designed to complement the institutional protection of the state and which requires a right to keep and bear arms for its realization.

Second, contrary to the sharp criticism of the *Heller* judgment, which claims to recognize a right to keep and bear arms without laying down any acceptable criteria whatsoever for determining its scope, this article proposes that the most suitable criteria already exist—that is, the accepted rationale and requirements (primarily, necessity and proportionality) for the fundamental right of self-defense, from which it derives.

Thirdly, the Constitution can and should be interpreted, through the Ninth and Fourteenth Amendments, as including a right to self-defense. The preferable option is that recognition of a constitutional right to self-defense leads to an interpretation of the Second Amendment as enumerating a right to keep and bear arms for the purpose of self-defense. The

second option is to infer a right to keep and bear arms from a constitutional right to self-defense found in the Ninth and Fourteenth Amendments, without resort to the Second Amendment at all. As stated, the first option is preferable, since it does not leave an admirable document like the U.S. Constitution silent regarding a natural and fundamental right like self-defense.