

THE RIGHT OF SELF-PRESERVATION AND  
RESISTANCE: A TRUE LEGAL AND  
HISTORICAL UNDERSTANDING OF THE  
ANGLO-AMERICAN RIGHT TO ARMS

*Patrick J. Charles\**

IN *DISTRICT OF COLUMBIA V. HELLER* BOTH THE SUPREME COURT majority<sup>1</sup> and Justice Stevens' dissent<sup>2</sup> used history to determine the Second Amendment's meaning and protective scope. In the end, the Individual Right Scholars' interpretation of this history prevailed in a slim 5-4 decision, in which the Court held that armed individual self-defense was the "central component" of the Second Amendment and the District of Columbia's "prohibition against rendering any lawful firearm in the home operable for the purpose of immediate self-defense" to be unconstitutional.<sup>3</sup> Despite this victory for Individual Right Scholars and supporters, the *Heller* decision did not bind the States.<sup>4</sup>

Justice Scalia's majority opinion goes to great lengths to assert that

---

\* Patrick J. Charles is the author of the article "*Arms for Their Defense*?": *An Historical, Legal, and Textual Analysis of the English Right to Have Arms and Whether the Second Amendment Should be Incorporated in McDonald v. City of Chicago*, 57 CLEV. ST. L. REV. 351 (2009), and the books *THE SECOND AMENDMENT: THE INTENT AND ITS INTERPRETATION BY THE STATES AND THE SUPREME COURT* (2009); *IRRECONCILABLE GRIEVANCES: THE EVENTS THAT SHAPED THE DECLARATION OF INDEPENDENCE* (2008), and *WASHINGTON'S DECISION: THE STORY OF GEORGE WASHINGTON'S DECISION TO REACCEPT BLACK ENLISTMENTS IN THE CONTINENTAL ARMY, DECEMBER 31, 1775* (2006). The recipient of the 2008 Judge John R. Brown Award for his research on the Second Amendment and States' "bear arms" provisions, Patrick received his J.D. from Cleveland-Marshall School of Law. He is currently a legal analyst for the Immigration Reform Law Institute (IRLI) in Washington, DC. Patrick would like to thank Erin Kidwell, Saul Cornell, and Kristen R. Brown for their assistance with this article.

1 *District of Columbia v. Heller*, 128 S. Ct. 2783, 2783–822 (2008).

2 *Id.* at 2822–47.

3 *Id.* at 2801, 2822.

4 PATRICK J. CHARLES, *THE SECOND AMENDMENT: THE INTENT AND ITS INTERPRETATION BY THE STATES AND THE SUPREME COURT* 10 (2009) [hereinafter CHARLES, *THE SECOND AMENDMENT*].

the District Courts should incorporate the Second Amendment through the Fourteenth Amendment's Due Process Clause.<sup>5</sup> However, except for the Ninth Circuit's vacated judgment in *Nordyke v. King*,<sup>6</sup> none of the other Circuit Courts have decided to incorporate the Second Amendment.<sup>7</sup> Instead, these courts reiterated footnote twenty-three of the *Heller* opinion, which upheld the Supreme Court's late nineteenth century decisions "that the Second Amendment applies only to the Federal Government."<sup>8</sup>

This brings us to the issues that will be before the Supreme Court in *McDonald v. City of Chicago*.<sup>9</sup> The issues presented are twofold. The first is whether the Second Amendment is incorporated through the Fourteenth Amendment's Due Process Clause. In order for the petitioners to be successful in their claim they will have to show armed individual self-defense in the home is "fundamental to the American scheme of justice."<sup>10</sup> In conducting this constitutional standard the Court has traditionally examined the Anglo-American tradition of the right being asserted, tracing its history to Greek and Roman times, to the Magna Charta, through the English Declaration of Rights, and to the colonies.<sup>11</sup> In addition to this history, the Court also examines the frequency by which the asserted right appears in the Founding Era's State constitutions.<sup>12</sup>

The second issue before the Court is whether the Second Amendment is one of the "privileges and immunities of the citizens of the United States."<sup>13</sup> This issue is primarily significant because the petitioners are arguing that the ruling in the *Slaughter-House Cases*<sup>14</sup> should be overruled and the Bill of Rights should be incorporated

---

<sup>5</sup> "[N]or shall any State deprive any person of life, liberty, or property, without due process of law[.]" U.S. CONST. amend. XIV.

<sup>6</sup> *Nordyke v. King*, 563 F.3d 439 (9th Cir.), *vacated en banc*, 575 F.3d 890 (9th Cir. 2009).

<sup>7</sup> *Maloney v. Cuomo*, 554 F.3d 56, 58 (2d Cir. 2009); *Nat'l Rifle Ass'n of Am., Inc. v. City of Chicago*, 567 F.3d 856 (7th Cir. 2009), *cert. granted sub nom. McDonald v. City of Chicago*, 130 S. Ct. 48 (2009).

<sup>8</sup> *Heller*, 128 S. Ct. at 2813 fn.23; *see also* *Presser v. Illinois*, 116 U.S. 252, 265 (1886); *Miller v. Texas*, 153 U.S. 535, 538 (1894); *United States v. Cruikshank*, 92 U.S. 542, 553 (1876).

<sup>9</sup> *Nat'l Rifle Ass'n of Am., Inc.*, 567 F.3d 856, *cert. granted sub nom. McDonald v. City of Chicago*, 130 S. Ct. 48 (2009).

<sup>10</sup> *Duncan v. Louisiana*, 391 U.S. 145, 149 (1968).

<sup>11</sup> *Id.* at 151–52.

<sup>12</sup> "The constitutions adopted by the original States guaranteed jury trial. Also, the constitution of every State entering the Union thereafter in one form or another protected the right to jury trial in criminal cases." *Id.* at 153.

<sup>13</sup> "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States[.]" U.S. CONST. amend. XIV.

<sup>14</sup> 83 U.S. (16 Wall.) 36 (1873).

through the Fourteenth Amendment's Privileges or Immunities Clause. Due to nearly one hundred forty years of settled Supreme Court precedent, this argument would seem doomed to fail. However, the fact that a multitude of historical and legal scholarship has called for the *Slaughter-House Cases* to be overturned may influence the Court to consider doing so, thereby incorporating the entire Bill of Rights. In fact, Justice Clarence Thomas has gone on record stating he "would be open to reevaluating its meaning in an appropriate case."<sup>15</sup>

Certainly, in order for the *Slaughter-House Cases* to be overturned the Supreme Court will have to delve into the history of the Fourteenth Amendment's ratifying debates, the journal of the Joint-Committee on Reconstruction, and the debates of the early Civil Rights Acts. This is history that the Supreme Court has addressed in numerous cases, and one would argue is settled as a matter of law. However, the Supreme Court does not need to adhere to its past historical precedents. It is well-established that the Court, at any time, may reexamine the historical basis of its past constitutional decisions.<sup>16</sup>

This precedent is particularly significant because not only are the petitioners requesting the Court to reexamine the history and precedent of the Fourteenth Amendment's Privileges or Immunities Clause,<sup>17</sup> but petitioners argue that the Court should ignore recent scholarship proving the *Heller* decision to be historically controversial.<sup>18</sup> To be more precise, the petitioners want the Court to exercise its historical discretion in support of their arguments and ignore any recent scholarship or history that disproves it. One cannot have it both ways.

This article argues this exact point, and addresses *Heller's* misinterpretation of the 1689 Declaration of Rights "have arms" provision. While I agree with the petitioners that the Supreme Court

---

<sup>15</sup> *Saenz v. Roe*, 526 U.S. 489, 528 (1999) (Thomas, J., dissenting).

<sup>16</sup> *U.S. Term Limits v. Thornton*, 514 U.S. 779, 788 (1995); *City of Akron v. Akron Ctr. for Reprod. Health*, 462 U.S. 416, 458–59 (1983); *Smith v. Allwright*, 321 U.S. 649, 665–66, 665 nn.9, 10 (1944); *South Carolina v. Gathers*, 490 U.S. 805, 825 (1989) (Scalia, J., dissenting); *Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 574–75 (1985) (Souter, J., concurring in part).

<sup>17</sup> See *supra* note 13.

<sup>18</sup> See generally CHARLES, *supra* note 4; Patrick J. Charles, "Arms for Their Defense"?: An Historical, Legal, and Textual Analysis of the English Right to Have Arms and Whether the Second Amendment Should Be Incorporated in *McDonald v. City of Chicago*, 57 CLEV. ST. L. REV. 351 (2009) [hereinafter Charles, *Arms for Their Defense?*]; Saul Cornell, *Heller, New Originalism, and Law Office History: "Meet the New Boss, Same as the Old Boss,"* 56 UCLA L. REV. 1095 (2009); Dennis A. Henigan, *The Heller Paradox*, 56 UCLA L. REV. 1171 (2009); David Thomas Konig, *Why the Second Amendment Has a Preamble: Original Public Meaning and the Political Culture of Written Constitutions in Revolutionary America*, 56 UCLA L. REV. 1295 (2009).

should reexamine its constitutional history, I disagree with the petitioners that only the history of the Fourteenth Amendment should be addressed. If the Court sees fit to reexamine the long established precedent of the *Slaughter-House Cases*, then it should equally hear all historical arguments, for recent scholarship on the Second Amendment has shown the *Heller* majority selectively included and misinterpreted the history of the “right to keep and bear arms.”

One may argue, because the *Heller* decision was recently decided, that another look into this history would be a waste of judicial resources. Interestingly enough, neither the Ninth Circuit nor the Seventh Circuit thought so. The Ninth Circuit opened the door for refutation of the *Heller* majority’s historical findings. The court stated, “[Santa Clara] County does little to refute [the] powerful evidence that the right to bear arms is deeply rooted in the history and tradition of the Republic, a right Americans considered fundamental at the Founding and thereafter.”<sup>19</sup> Similarly, the Seventh Circuit reexamined the history of *Blackstone’s Commentaries*, holding against the *Heller* majority’s interpretation,<sup>20</sup> stating “Blackstone discussed arms-bearing as a political rather than a constitutional right.”<sup>21</sup>

In addition to this article briefly addressing whether the Supreme Court should reexamine the Second Amendment’s history this article provides an examination of the Anglo-American allowance to “have arms,” which shows armed individual self-defense is not “fundamental to the American scheme of justice.”<sup>22</sup> While there is no denying it is every individual’s natural right to defend their person should they be assailed, Individual Right Scholars inaccurately claim individuals have a right to own modern weaponry to accomplish it. To prove my claim this article will address (1) what Blackstone truly meant by the “natural right of resistance and self-preservation,” and (2) how this “self-preservation” principle relates to the Anglo-American protection the allowance to “have arms” affords. In the end, the historical and legal evidence will show that the *Heller* decision was based on faulty assumptions that do not comport with the true meaning and

---

<sup>19</sup> *Nordyke v. King*, 563 F.3d 439, 456 (9th Cir. 2009).

<sup>20</sup> The *Heller* majority stated Blackstone’s “description of [the arms provision] cannot possibly be thought to tie it to militia or military service. It was, he said, ‘the natural right of resistance and self-preservation . . . and defence.’” *District of Columbia v. Heller*, 128 S. Ct. 2783, 2798 (2008).

<sup>21</sup> *Nat’l Rifle Ass’n of Am., Inc. v. City of Chicago*, 567 F.3d 856, 859 (7th Cir. 2009).

<sup>22</sup> Charles, *Arms for Their Defense?*, *supra* note 18, *passim*.

understanding of an ancient Anglo American right to “keep and bear arms.”

## I. CONSTITUTIONAL HISTORY AND SUPREME COURT PRECEDENT

On July 7, 2008, speaking before the City Club of Cleveland, Alan Gura spoke confidently about his recent victory in *Heller*. Following his speech he took questions in which one audience member inquired about the doctrine of *stare decisis* and the possibility that the *Heller* decision could be overturned. Gura answered that *stare decisis* should be honored to “some extent” to give “predicted value.” However, he was sure to state, “That does not mean a really terrible decision needs to stand the test of time.”<sup>23</sup>

Few will disagree with Gura that terrible decisions should be overturned. In fact, many view the *Heller* decision as qualifying in this regard because the Court’s analysis of the Anglo-American tradition is wrought with historical errors. Gura, of course, would prefer to move past the historical debate, for he is acutely aware that the Supreme Court may overturn its constitutional history at its discretion. In *Smith v. Allwright* the Supreme Court affirmed this long established precedent of reviewing its own constitutional history and using recent scholarship to reconsider past decisions. Writing the opinion of the Court, Justice Reed delivered the following:

[W]hen convinced of former error, this Court has never felt constrained to follow precedent. In constitutional questions, where correction depends upon amendment and not upon legislative action this Court throughout its history has freely exercised its power to reexamine the basis of its constitutional decisions. This has long been accepted practice, and this practice has continued to this day. This is particularly true when the decision believed erroneous in the application of a constitutional principle rather than an interpretation of the Constitution to extract the principle itself.<sup>24</sup>

To support this holding, Justice Reed cited over thirty constitutional precedents the Court has overturned.<sup>25</sup> Since then,

---

<sup>23</sup> Podcast: Presentation by Alan Gura, Esq., Partner, Gura and Possessky, P.L.L.C. to The City Club of Cleveland (July 7, 2009) [hereinafter Alan Gura Presentation Podcast], available at [www.cityclub.org/mediacenter/cityclubpodcast/PodcastListing/tabid/194/Default.aspx](http://www.cityclub.org/mediacenter/cityclubpodcast/PodcastListing/tabid/194/Default.aspx).

<sup>24</sup> *Smith v. Allwright*, 321 U.S. 649, 665–66 (1944).

<sup>25</sup> *Id.* at 665 nn.9, 10.

Justice Reed's dictum has been quoted verbatim by Supreme Court justices twice. In *City of Akron v. Akron Center for Reproductive Health*, Justice Powell quoted *Smith*,<sup>26</sup> but more importantly, Justice Scalia quoted this dictum in a dissenting opinion.<sup>27</sup> Interestingly enough, it was also Justice Scalia that issued the opinion in *Heller*. Certainly if recent scholarship has pointed to historical and applicable<sup>28</sup> problems with *Heller*, Justice Scalia should be open to examining it.

After *Smith v. Allwright*, the Court has illuminated the precedent that it may consider recent scholarship in examining the constitutional history settled in past cases. For example in *Church of Lukumi Babalu Aye v. City of Hialeah*, regarding the Court's interpretation of the Free Exercise Clause, Justice Souter stated "when the opportunity to reexamine [a case] presents itself, we may consider recent scholarship raising serious questions[.]"<sup>29</sup> Meanwhile in *United States Term Limits v. Thornton* the Court stated when there is "obvious importance of the [constitutional] issue" as there was in *Powell v. McCormack*,<sup>30</sup> "review of the history and meaning of the relevant constitutional text [should be] especially thorough."<sup>31</sup>

These case decisions make it clear that it is more than plausible that the Supreme Court could readdress much of the history litigated in *Heller*. Most importantly, it gives the Court the opportunity to correct one of the most perplexing historical interpretations of a constitutional amendment.<sup>32</sup> In deciding *Heller*, one would think that the Court would have given deference to the historical experts regarding the meaning and protective scope of the Second Amendment.<sup>33</sup> This did

---

<sup>26</sup> *City of Akron v. Akron Ctr. for Reprod. Health*, 462 U.S. 416, 458–59 (1983).

<sup>27</sup> *South Carolina v. Gathers*, 490 U.S. 805, 825 (1989) (Scalia, J., dissenting).

<sup>28</sup> For applicability and interpretational problems with the *Heller* decision see Michael Steven Green, *Why Protect Private Arms Possession? Nine Theories of the Second Amendment*, 84 NOTRE DAME L. REV. 131 (2009); Lawrence Rosenthal, *Second Amendment Plumbing After Heller: Of Standards of Scrutiny, Incorporation, Well-Regulated Militias, and Criminal Street Gangs*, 41 URB. LAW. 1 (2009); Reva B. Siegel, *Dead or Alive: Originalism as Popular Constitutionalism in Heller*, 122 HARV. L. REV. 191 (2008); Cass R. Sunstein, *Second Amendment Minimalism: Heller as Griswold*, 122 HARV. L. REV. 246 (2008); J. Harvie Wilkinson III, *Of Guns, Abortions, and the Unraveling Rule of Law*, 95 VA. L. REV. 253 (2009); Richard A. Posner, *In Defense of Looseness: The Supreme Court and Gun Control*, NEW REPUBLIC, Aug. 27, 2008, at 32.

<sup>29</sup> *Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 575 (1993).

<sup>30</sup> 395 U.S. 486 (1969).

<sup>31</sup> *U.S. Term Limits v. Thornton*, 514 U.S. 779, 788 (1995).

<sup>32</sup> Charles, *Arms for Their Defense?*, *supra* note 18, at 354–55, 455; CHARLES, THE SECOND AMENDMENT, *supra* note 4, at 9–10.

<sup>33</sup> Some of the histories available to the Supreme Court at the time the *Heller* case was litigated included: SAUL CORNELL, A WELL-REGULATED MILITIA: THE FOUNDING FATHERS AND THE ORIGINS OF GUN CONTROL IN AMERICA (2006); SAUL CORNELL, WHOSE RIGHT TO BEAR ARMS DID THE SECOND AMENDMENT PROTECT? (2000);

not happen. Instead, five members of the Court embraced an interpretation that not only mischaracterized the original popular understanding<sup>34</sup> of “the right to keep and bear arms” in the eighteenth century,<sup>35</sup> but also examined history selectively and out of context.

## II. UNDERSTANDING THE ANGLO-AMERICAN RIGHT TO “HAVE ARMS” THROUGH BLACKSTONE’S RIGHTS OF “SELF-PRESERVATION” AND “RESISTANCE”

It has been less than two years since the history and philosophical origins of the Second Amendment were heavily litigated in *Heller*. Just as pre-*Heller* scholarship definitively showed the Second Amendment did not protect a right to armed individual self-defense,<sup>36</sup> post-*Heller* scholarship affirms this to be true.<sup>37</sup> Although *Heller* has found isolated defenders, the historical problems with the decision have been catalogued in great detail,<sup>38</sup> for the evidence used by Individual Right Scholars is frequently used out of context or from a minority voice.<sup>39</sup> As

---

H. RICHARD UVILLER & WILLIAM G. MERKEL, THE MILITIA AND THE RIGHT TO ARMS, OR, HOW THE SECOND AMENDMENT FELL SILENT (2002); THE SECOND AMENDMENT IN LAW AND HISTORY: HISTORIANS AND CONSTITUTIONAL SCHOLARS ON THE RIGHT TO BEAR ARMS (Carl T. Bogus ed., 2000); Carl T. Bogus, *The Hidden History of the Second Amendment*, 31 U.C. DAVIS L. REV. 309 (1998); David Thomas Konig, *The Second Amendment: A Missing Transatlantic Context for the Historical Meaning of “the Right of the People to Keep and Bear Arms,”* 22 LAW & HIST. REV. 119 (2004); H. Richard Uviller & William G. Merkel, *Scottish Factors and the Origins of the Second Amendment*, 22 LAW & HIST. REV. 119 (2004).

<sup>34</sup> The phrases “keep arms” and “bear arms” only appeared in colonial statutes concerning the militia. These statutes qualify as the “popular understanding” of the Second Amendment because such statutes had to be known by all the colonists and were well distributed. Not in one instance did this phrase appear in laws concerning self-defense, hunting, or gun laws. CHARLES, THE SECOND AMENDMENT, *supra* note 4, at 17–34.

<sup>35</sup> The Constitution was drafted by America’s greatest legal minds and it is undisputed that the Founding Fathers understood how “keep arms,” “bear arms,” and “well regulated militia” were incorporated in each colony’s statutes. An exhaustive look at all the colonies laws shows there is not one instance of “keep arms” or “bear arms” being used in any law besides militia laws. *Id.*

<sup>36</sup> *See supra* note 34.

<sup>37</sup> *See supra* note 28.

<sup>38</sup> For example, it was absurd for historians and legal scholars to claim the Second Amendment does not possess an individual component. CHARLES, THE SECOND AMENDMENT, *supra* note 4, at 17. Although the people could only exercise the right as a collective fighting force, the Second Amendment prevented the federal government from excluding classes of people from participation in defending the nation and their liberties. *Id.* at 43, 89–94. This right was secured during the Glorious Revolution, proclaimed by Samuel Adams during the occupation of Boston, and affirmed in the states militia laws, respective constitutions, and in the United States Constitution with the adoption of the Second Amendment. Charles, *Arms for Their Defense?*, *supra* note 18, at 421–55.

<sup>39</sup> If one is to look at only the history of the “right to keep and bear arms” prior to and contemporaneous with the adoption of the Constitution, the strength of the Individual Right Scholars’ argument hinges on the Pennsylvania Minority Dissent, and a failed hunting law

of today, Individual Right Scholars still have not provided anything of substance. Instead they continue to turn history on its head, take historical events out of context, and make historical assumptions that support a predetermined conclusion. The truth of the matter is that the origins, history, and evidence overwhelmingly suggests that the Second Amendment protects the limited right of individuals to take part in defending the nation and their liberties in the process.

If there is ever any doubt about the limited protective scope of the Second Amendment one need to look no further than the history of its English predecessor in the 1689 Declaration of Rights, which was later codified in statute as the English Bill of Rights. The Declaration states, “That the subjects which are Protestants may have arms for their defence suitable to their conditions and as allowed by law.” Individual Right Scholars claim the phrase “have arms for their defence” protects an individual’s right to possess arms for their personal defense. The strength of their claim rests on three historical assumptions. The first assumption is the Declaration makes no mention of a “well organized militia,” therefore the “have arms” provision protects a right separate and distinct from service in the military or militia.<sup>40</sup> The second assumption is based upon the historical work of Joyce Lee Malcolm<sup>41</sup> which claims dissatisfaction with the game laws, coupled with the Stuart monarchy’s disarming of Protestants, led Parliament to draft a protection that ensured Protestants would have a codified right to “have

---

proposed by James Madison and Thomas Jefferson that reads, “shall bear a gun out of his inclosed ground, unless whilst performing militia duty.” Neither argument has merit examining the history of the Second Amendment in its proper context nor under the logic of the *Heller* majority. CHARLES, THE SECOND AMENDMENT, *supra* note 4, at 20–21, 39–43.

<sup>40</sup> JOYCE LEE MALCOLM, *TO KEEP AND BEAR ARMS: THE ORIGINS OF AN ANGLO-AMERICAN RIGHT* (1994); David T. Hardy, *Armed Citizens, Citizen Armies: Toward a Jurisprudence of the Second Amendment*, 9 HARV. J.L. & PUB. POL’Y 559 *passim* (1986).

<sup>41</sup> See generally MALCOLM, *supra* note 40. In this symposium, David T. Hardy describes Malcolm’s work as “magisterial” and as proving Lois G. Schwoerer mischaracterized the limited right the “have arms” provision protects. David T. Hardy, *Ducking the Bullet: District of Columbia v. Heller and the Stevens Dissent*, 31 CARDOZO L. REV. DE NOVO 61, 74 (2010). However, Malcolm’s work has not been well received by the historical community, and makes too many assumptions without providing adequate historical evidence. David T. Hardy fails to mention that Lois G. Schwoerer has refuted his and Malcolm’s claims, and that the consensus among English historians is Malcolm’s work is heavily flawed and mischaracterizes the “have arms” provision. See Lois G. Schwoerer, *To Hold and Bear Arms: The English Perspective*, in THE SECOND AMENDMENT IN LAW AND HISTORY: HISTORIANS AND CONSTITUTIONAL SCHOLARS ON THE RIGHT TO BEAR ARMS 207, 207–21 (Carl T. Bogus ed., 2000) [hereinafter Schwoerer, *To Hold and Bear Arms*]; TIM HARRIS, *REVOLUTION: THE GREAT CRISIS OF THE BRITISH MONARCHY, 1685-1720*, at 343 (2006); Konig, *supra* note 33, at 119–60; Charles, *Arms for Their Defense?*, *supra* note 18, *passim*.

arms” for personal self-defense.<sup>42</sup>

Both of these assumptions have been meticulously refuted by a variety of scholars, and show how the “individual right” argument intentionally and persistently takes history out of context.<sup>43</sup> This brings us to the Individual Right Scholars’ third assumption. It is believed that William Blackstone’s interpretation of the English “have arms” provision as ensuring the “natural right of resistance and self-preservation”<sup>44</sup> proves that Blackstone and the Founding Fathers viewed the “have arms” provision as protecting a right to individual armed defense of one’s home, person, or property. Similar to their other assumptive claims, the Individual Right Scholars’ understanding of *Blackstone’s Commentaries* is without merit.

#### A. *Blackstone’s Natural Right of Resistance and Self-Preservation*

When the Seventh Circuit Court of Appeals heard *McDonald v. City of Chicago*, it correctly determined that *Blackstone’s Commentaries* only discusses “arms-bearing as a political rather than a constitutional right.”<sup>45</sup> An interpretation that is in direct conflict with *Heller’s* dictum, for the Supreme Court stated that Blackstone’s “description of [the arms provision] cannot possibly be thought to tie it to militia or military service.”<sup>46</sup> The historical inconsistencies with the *Heller* majority’s interpretation of Blackstone are numerous,<sup>47</sup> but for our purposes this section will primarily focus on correcting the Court’s interpretation of *Blackstone’s Commentaries* and what was meant by the “natural right of resistance and self-preservation.”

The doctrines of “resistance” and “self-preservation” existed well prior to the 1689 Declaration of Rights to which Blackstone refers.<sup>48</sup> However, it was through the 1688-1689 Glorious Revolution and the 1642 English Civil War that the “resistance” and “self-preservation” doctrines flourished. Not to mention, it was these philosophical doctrines which served as the ideological justification for the American

---

<sup>42</sup> MALCOLM, *supra* note 40, at 116–31.

<sup>43</sup> Charles, *Arms for Their Defense?*, *supra* note 18.

<sup>44</sup> 1 WILLIAM BLACKSTONE, COMMENTARIES \*139.

<sup>45</sup> Nat’l Rifle Ass’n of Am., Inc. v. City of Chicago, 567 F.3d 856, 859 (7th Cir. 2009).

<sup>46</sup> District of Columbia v. Heller, 128 S. Ct. 2783, 2798 (2008).

<sup>47</sup> Charles, *Arms for Their Defense?*, *supra* note 18, at 414–18.

<sup>48</sup> See HUGO GROTIUS, DE IURE BELLI AC PACIS LIBRI TRES, at bk. 1, ch. 4 (Paris, n. pub. 1625) (discussing “War Made by Subjects Against Their Superiors”).

Revolution.<sup>49</sup> Regarding the 1642 English Civil War, the doctrines of “self-preservation” and “resistance” surfaced due to the struggle between the king and Parliament over a multitude of governmental powers, with much of the tension resting over control of the militia and the political propaganda that Charles I was maintaining a standing army, which he was not.<sup>50</sup> Centering on these issues, the political pamphlets of that era and the subsequent Cromwellian Protectorate, show that the doctrine of “self-preservation” referred to the philosophical principle that Parliament may forcibly resist with arms to restore the Constitution should the king violate the laws, liberties, religion, and estates of the realm.

For instance in *A Vindication of Psalme 105.15*, William Prynne defended Parliament exercising the right of “self-preservation” because “it is more unlawfull for Kings to plunder and make War upon their Subject[s] by way of offence, then for the Subjects to take up Armes against Kings in such cases by way of defence.”<sup>51</sup> Prynne justified such

---

<sup>49</sup> PATRICK J. CHARLES, *IRRECONCILABLE GRIEVANCES: THE EVENTS THAT SHAPED THE DECLARATION OF INDEPENDENCE* 55–64 (2008) [hereinafter CHARLES, *IRRECONCILABLE GRIEVANCES*]. Self-preservation was a broader political principle that was often referred to as justification for resistance or rebellion. In 1774 John Cartwright wrote that it was the American principles of “self-preservation and free-will” that the British crown will never be able to eradicate. JOHN CARTWRIGHT, *AMERICAN INDEPENDENCE, THE INTEREST AND GLORY OF GREAT BRITAIN* (Philadelphia, Robert Bell 1776), reprinted in *ENGLISH DEFENDERS OF AMERICAN FREEDOMS 1774-1778*, at 131, 157 (Paul H. Smith ed., 1972) [hereinafter CARTWRIGHT, *AMERICAN INDEPENDENCE*, reprinted in *ENGLISH DEFENDERS OF AMERICAN FREEDOMS*]. Cartwright also stated that the “principles of *self-interest* and *self-preservation*” would cause them to want to enter into a treaty with Great Britain. *Id.* at 187. In 1777 Willoughby Bertie, Earl of Abingdon, wrote the tract *Thoughts on the Letters of Edmund Burke*. He wrote it was the English government’s “putting America out of the protection of its laws, forced it, for self-preservation sake, into that state of Independency.” WILLOUGHBY BERTIE IV, *THOUGHTS ON THE LETTER OF EDMUND BURKE, ESQ; TO THE SHERIFFS OF BRISTOL, ON THE AFFAIRS OF AMERICA* (Oxford, n. pub. 1778), reprinted in *ENGLISH DEFENDERS OF AMERICAN FREEDOMS 1774-1778*, *supra*, at 197, 226. John Trenchard discussed the right of “self-preservation” in *Cato’s Letter No. 12*, stating: “The great Principal of Self-Preservation, which is the first and fundamental Law of Nature, calls for this Procedure [of trial and committal of treasonous persons]: The Security of Commonwealths depends upon it; the very Being of Government makes it necessary; and whatever is necessary to the Publick Safety, is just.” JOHN TRENCHARD, *Of Treason: All Treasons not to be found in Statutes.—The Right of the Legislature to declare Treasons (Jan. 14, 1720, No. 12)*, in 1 *CATO’S LETTERS* 74, 75 (London, W. Wilkins, T. Woodward, J. Walthoe & J. Peele, 3d ed. 1733).

<sup>50</sup> LOIS SCHWOERER, “NO STANDING ARMIES!”: THE ANTIARMY IDEOLOGY IN SEVENTEENTH-CENTURY ENGLAND 33–50 (1974) [hereinafter SCHWOERER, *NO STANDING ARMIES!*].

<sup>51</sup> WILLIAM PRYNNE, *A VINDICATION OF PSALME 105.15*, at 1 (n.p., n. pub. 1642). In 1643, Prynne made a similar statement when he explained that Parliament must “defend their owne and the Subjects Liberties, persons, privileges, [etcetera] against his Majesties offensive Armies which invade them.” WILLIAM PRYNNE, *THE THIRD PART OF THE SOVERAIGNE POWER OF PARLIAMENTS AND KINGDOMES* 3 (London, n. pub. 1643). The power to engage in such rebellion was “agreeable to the very Law of nature and reason,” and, therefore, Prynne

action because he viewed the sovereign's power as a social contract. Just as the people take an "oath of allegiance . . . to their Kings, to honour and defend their persons," Prynne believed a similar pledge protected the people when a sovereign took the coronation oath.<sup>52</sup> He described the sovereign's oath as protecting the people's "rights and persons, goods, estates, lives, lawes, and liberties, from all violence and injustice."<sup>53</sup> Furthermore it prevented sovereigns from "wag[ing] war against their Subjects, nor to oppresse or offer violence . . . [and] not to rebel against them."<sup>54</sup> However, should the sovereign violate this compact "his Majesties faithful subjects, may not upon as good or better grounds of conscience, take up armes to defend and preserve their persons, wives, houses, goods, [and] estates," for such a "defensive war" was protected by "the principles of nature."<sup>55</sup>

In a 1643 pamphlet entitled *A Plea for Defensive Armes*, Stephen Marshall addressed whether "a people, especially the representative body of a State, may (after all humble Remonstrances) defend themselves against the unlawfull violence of the Supr[eme] Magistrate . . . Endeavoring . . . to deprive them of their lawfull Liberites."<sup>56</sup> Marshall certainly thought so. He wrote when the "end of government" fails to "provide for their common safety" that the people may "by the law of nature defend themselves against injury[.]"<sup>57</sup> In order to exercise this defense it was paramount that it be lawful for Parliament to call upon the militia. Marshall was aware that the statutes of the realm placed the arraying of the militia in the hands of the sovereign. However, in times of danger he argued that Parliament could array the militia to "take up these Defensive arms" for the "benefit of preservation[.]"<sup>58</sup>

This rhetoric of "self-preservation" and "defense of themselves" was not limited to the political pamphlets of the era. During the papist

---

explained it was "lawfull to take up Armes for their Defence when it was needfull." *Id.* at 4.

<sup>52</sup> PRYNNE, *A VINDICATION OF PSALME 105.15*, *supra* note 51, at 6.

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

<sup>55</sup> *Id.* at 6.

<sup>56</sup> STEPHEN MARSHALL, *A PLEA FOR DEFENSIVE ARMES*, at 3 (London, n. pub. 1643).

<sup>57</sup> *Id.* at 7–8.

<sup>58</sup> *Id.* at 25. To justify the removal of James II during the Glorious Revolution Heneage Finch would make a similar statement. See John Somers, *Notes of the Debates in the House of Commons the 28th of Januaray 1688-9*, in 2 MISCELLANEOUS STATE PAPERS, FROM 1501 TO 1726, at 401, 410 (Hon. Anchitell Grey, Esq. ed., London, n. pub. 1778) [hereinafter Somers, *Notes of the Debates*, in 2 MISCELLANEOUS STATE PAPERS]; 9 DEBATES OF THE HOUSE OF COMMONS, FROM THE YEAR 1667 TO THE YEAR 1694, at 18 (London, n. pub. 1769).

scare of 1643 Parliament repeatedly justified calling upon the county militias using similar language. For instance, Parliament arrayed the County of Hertfordshire's militia "for the Defence of themselves, their families, and Estates, and the true Protestant Religion[.]" The County of Warwick's militia was arrayed "in the mutual Preservation and Defence of themselves, and the Peace of the said Cities and Counties from all Rapine, Plundering, and Spoilings of said Papists, and ill-affected Persons."

In the case of Warwick County, Parliament appealed to those that might "murmur and complain" about being arrayed. Such qualified subjects were reminded that the array was "required of them for their own Preservation, as well as for the publick Safety." When the county of Lincoln was arrayed it was done to "assist one another in the mutual Preservation and Defence of themselves, and the Peace[.]" Meanwhile, the city of London was instructed by the king to "defend the known Laws of the Land . . . by defending themselves, and maintaining their own Rights, Liberties, and Interests[.]"<sup>59</sup>

The use of terms such as "own preservation" and "defence of themselves" in these examples denote a principle much different than the right that Individual Right Scholars claim Blackstone was referring to—the right of lawful resistance to restore government and to take up arms in defense of the nation. This repetitive use of "defence of themselves" clearly references defending the realm, and gives great insight into possibly understanding early state constitutions' "bear arms" provisions that used similar language.<sup>60</sup> Individual Right Scholars have always claimed such early state constitutional provisions support a right to armed individual defense of the home, person, and property. However, they make their assumption without examining the phrase "defence of themselves" in the Founding Era and often without any substantiated historical evidence other than personal surmise. It would make much more historical and judicial sense that every one of these early constitutions be examined and interpreted individually, for each state's constitution should be given its own deference based upon its respective "statutory provisions, legal history, drafting debates, and other legislative history[.]"<sup>61</sup>

---

<sup>59</sup> 5 JOHN RUSHWORTH, HISTORICAL COLLECTIONS OF PRIVATE PASSAGES OF STATE 102–27 (London, n. pub. 1721) [hereinafter RUSHWORTH, HISTORICAL COLLECTIONS].

<sup>60</sup> See KY. CONST. of 1799, art. X, § 23; OHIO. CONST. of 1802, art. VIII, § 20; PA. CONST. of 1790, art. IX, § 21; VT. CONST. of 1793, pt. 1, art. XVI.

<sup>61</sup> CHARLES, THE SECOND AMENDMENT, *supra* note 4, at 132; Nathan Kozuskanich,

Throughout the English Interregnum and the subsequent Cromwellian Protectorate, the doctrines of “self-preservation” and “resistance” were asserted in Parliament and illuminated in contemporaneous political tracts. For instance, before the House of Lords in 1657, Lord Brohill argued for indemnifying persons of a local rebellion because it was done “in emergency, and mere necessity, for self-preservation.”<sup>62</sup> Meanwhile a tract entitled *The Cause of God and of these Nations* described the removal of Charles I from the throne as an “Action for self-preservation” because the king had “forfeited the security we might have laid upon him[.]”<sup>63</sup>

William Prynne also addressed the doctrine in a 1659 tract entitled *A Short, Legal, Medicinal, Useful, Safe, Easy, Prescription, &c.*<sup>64</sup> The tract primarily focused on the illegality of standing armies, but also addressed whether “command of the Militi[a]” should be in the hands of Parliament.<sup>65</sup> Prynne argued that because Parliament represented the interests of the people, it was best that Parliament also possessed power over the militia as a means to “maintain [the people’s] own preservation and safety.”<sup>66</sup> Prynne’s observations are significant for the next section of this article. However, for now it is only important to note that the doctrine of “self-preservation” was invoked to place the militia in the hands of Parliament—the same militia that Prynne viewed as representing the “Nobilities, Gentries, and Peoples . . . defence and protection of themselves in and by their own persons . . . according to their respective abilities[.]”<sup>67</sup>

The prominence of the doctrines of “self-preservation” and

---

*Originalism, History, and the Second Amendment: What Did Bearing Arms Really Mean to the Founders?*, 10 U. PA. J. CONST. L. 413, 418–29 (2008).

<sup>62</sup> 1 THOMAS BURTON, THE DIARY OF THOMAS BURTON 312 (London, Henry Colburn 1828).

<sup>63</sup> THE CAUSE OF GOD, AND OF THESE NATIONS 3 (London, n. pub. 1658).

<sup>64</sup> WILLIAM PRYNNE, A SHORT, LEGAL, MEDICINAL, USEFUL, SAFE, EASY, PRESCRIPTION, &C. (London, n. pub. 1659) [hereinafter PRYNNE, A SHORT, LEGAL, MEDICINAL, USEFUL, SAFE, EASY, PRESCRIPTION, &C.].

<sup>65</sup> *Id.* at 3.

<sup>66</sup> *Id.* A 1661 tract argued the complete opposite in a published speech of Thomas Higgons. It stated that the king should have power over the militia for “his and you own preservation.” THE SPEECH OF MR. HIGGONS IN PARLIAMENT AT THE READING OF THE BILL FOR THE MILITIA 4 (London, Roger Norton 1661) [hereinafter THE SPEECH OF MR. HIGGONS IN PARLIAMENT].

<sup>67</sup> WILLIAM PRYNNE, EIGHT MILITARY APHORISMES 20 (London, n. pub. 1658) [hereinafter PRYNNE, EIGHT MILITARY APHORISMES]. Prynne’s mention of “according to their respective abilities” was in reference to the legal restrictions on arms according to socio-economic and hierarchal status, for he goes on to state, “[The] Precepts for arraying the people of the Realm in times of War and danger [are] according to their Tenures, Estates, [and] Customs[.]” *Id.*

“resistance” temporarily subsided following the Restoration of Charles II. A 1673 tract entitled *The Great Law of Nature, or Self-Preservation*<sup>68</sup> was published as an answer to Thomas Hobbes *Leviathan*.<sup>69</sup> However, outside of this philosophical exchange, the doctrines of “self-preservation” and “resistance” remained dormant in the popular print culture until the 1688 Glorious Revolution. The pamphlets of that revolution give great insight into what Blackstone was referring to when he described the “have arms” provision as a political right to enforce the doctrines of “self-preservation” and “resistance.”

For example, Gilbert Burnet’s 1688 political tract addressed whether it was “Lawful or Necessary for *Subjects*, to Defend their *Religion, Lives, and Liberties*.”<sup>70</sup> Invoking the right of “self-preservation,” Burnet asserted that the “common principles of all Religion” bind the people to preserve themselves and their rights.<sup>71</sup> He felt the “Duty of Self-Preservation” requires the “taking of Just Revenges of those who have invaded [society] so secretly[.]”<sup>72</sup> However, as Burnet makes clear, such resistance requires that the right of “self-preservation” be “brought under Rules and Forms.”<sup>73</sup> Otherwise, society could perpetually rebel by claiming the right of “self-preservation” or “resistance” for themselves.

During the Glorious Revolution, Parliament was faced with a legal hurdle in exercising the right of “self-preservation” and “resistance” that was not faced by their 1642 predecessor. This is because following the Restoration the Cavalier Parliament passed three Militia Acts that made it unlawful for the militia, military, or Parliament to take up arms against the sovereign.<sup>74</sup> Burnet addressed this legal and philosophical dilemma by arguing the “Publick Liberty of the Nation” supersedes any act that renounces resistance.<sup>75</sup> Burnet believed:

---

<sup>68</sup> J. SHAFTE, *THE GREAT LAW OF NATURE, OR SELF-PRESERVATION, EXAMINED, ASSERTED, AND VINDICATED FROM MR. HOBBS HIS ABUSES* (London, n. pub. 1673).

<sup>69</sup> THOMAS HOBBS, *LEVIATHAN* (London, n. pub. 1651).

<sup>70</sup> GILBERT BURNET, *AN ENQUIRY INTO THE MEASURES OF SUBMISSION TO THE SUPREAM AUTHORITY, AND THE GROUNDS UPON WHICH IT MAY BE LAWFUL, OR NECESSARY FOR SUBJECTS TO DEFEND THEIR RELIGION LIVES AND LIBERTIES 2* (London, n. pub. 1688) [hereinafter BURNET, *AN ENQUIRY INTO THE MEASURES OF SUBMISSION TO THE SUPREAM AUTHORITY*].

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

<sup>74</sup> 13 & 14 Car. 2, c. 3, §§ 17, 18 (1662) (Eng.); 13 Car. 2, c. 6, § 5 (1661) (Eng.).

<sup>75</sup> BURNET, *AN ENQUIRY INTO THE MEASURES OF SUBMISSION TO THE SUPREAM AUTHORITY*, *supra* note 70, at 9.

[S]ince the chief Design of Our whole Law, and all the several Rules of our Constitution, is to secure and maintain Our Liberty, we ought to lay that down for a conclusion, that is both the most plain and most important of the two: And therefore the other Article against Resistance out to be so soft[e]ned, as that it do[] not destroy [our liberties].<sup>76</sup>

Of course, not everyone agreed with the political right of “self-preservation.” In a 1689 tract entitled *Vindiciæ Juris Regii*, Jeremy Collier responded to Burnet’s interpretation of the law by arguing that “the Subjects [have] no colour of Authority to Levy Arms against the King.”<sup>77</sup> The center of Collier’s argument rested with the 1662 Militia Act which made it unlawful for the people to “take up Arms” against the king.<sup>78</sup> However, Collier also argued that it was dangerous to describe rebellion, lawful or not, “with the specious Titles of *The Laws of Nature and Self-Preservation*[.]”<sup>79</sup> He imagined situations where the people would claim to be invoking such a right while disobeying other just laws.

In a political pamphlet entitled *A Brief Justification of the Prince of Orange’s Descent into England*,<sup>80</sup> Robert Ferguson supported Parliament’s exercising the political right of “self-preservation.” Similar to Burnet, he did not see the 1662 Militia Act’s provision—making it unlawful for the people to take up arms—as binding Parliament from exercising the right of “self-preservation.” Ferguson justified the removal of James II because when a “Sovereign, does invade and subvert the Fundamental Laws of the Society, he does thereby *ipso facto* annul all the Legal Right he had to Govern, and Absolves all who were before his Subjects, from the Legal Engagements they were under of yielding

---

<sup>76</sup> *Id.*

<sup>77</sup> JEREMY COLLIER, *VINDICIÆ JURIS REGII, OR REMARQUES UPON A PAPER, ENTITLED, AN ENQUIRY INTO THE MEASURES OF SUBMISSION TO THE SUPREAM AUTHORITY* 15 (London, n. pub. 1689).

<sup>78</sup> *Id.* at 16–18, 24, 27. William Sherlock made a similar argument in 1683. See WILLIAM SHERLOCK, *THE CASE OF RESISTANCE OF THE SUPREME POWERS STATED AND RESOLVED, ACCORDING TO THE DOCTRINE OF THE HOLY SCRIPTURES* 111–12 (London, n. pub. 1683).

<sup>79</sup> COLLIER, *supra* note 77, at 33.

<sup>80</sup> ROBERT FERGUSON, *A BRIEF JUSTIFICATION OF THE PRINCE OF ORANGE’S DESCENT INTO ENGLAND, AND OF THE KINGDOMS LATE RECOURSE TO ARMS, WITH A MODEST DISQUISITION OF WHAT MAY BECOME THE WISDOM AND JUSTICE OF THE ENSUING CONVENTION IN THEIR DISPOSAL OF THE CROWN* (London, n. pub. 1689) [hereinafter FERGUSON, *A BRIEF JUSTIFICATION OF THE PRINCE OF ORANGE’S DESCENT INTO ENGLAND*].

him Obedience.”<sup>81</sup> Ferguson went on to state that for “the preservation of the Society” Parliament was authorized to use what “means that are necessary for Peace, Preservation, and Prosperity” to prevent tyranny.<sup>82</sup>

Samuel Johnson made a similar observation in his 1689 tract entitled *Remarks Upon Dr. Sherlock’s Book Intituled The Case of Resistance of the Supreme Powers Stated and Resolved*. Responding to the doctrine of “non-resistance,” Johnson believed “Every Man has the Right of Self-Preservation, as intire under the Civil Government, as he had in a state of Nature” when government engages in “acts of Illegal Violence . . . and armed with no manner of Authority at all[.]”<sup>83</sup> William Denton agreed with the likes of Johnson, Ferguson, and Burnet in his tract entitled *Jus Regiminis*. Describing the social contract between the sovereign and his people, Denton believed the people are only bound to “submit to such Laws as may preserve themselves in Peace, and Godliness, and from unjust Violence, and Oppression[.]”<sup>84</sup> However, “if Kings Tyrannize over the People” and “usurp a Power which the People never gave them,” Denton argued the people may exercise the right of “self-preservation” because such acts are “against the Law of Nature, and consequently against the Law of God; for . . . all acts of Tyranny are Oppression, and sinful Injustice, and therefore cannot be from God.”<sup>85</sup>

The philosophical principle of lawful rebellion to restore government was not limited to terms such as “self-preservation,” “resistance,” or as preserving the “laws of nature.” Often the term “self-defence” was used to describe lawful rebellion. In 1649 James Howell used the term to describe Parliament’s rebellion against Charles I.<sup>86</sup> Not to mention, during the American Revolution pamphleteers such as John Cartwright and James Otis used “self-defence” to describe lawful rebellion.<sup>87</sup> Similar to the use of “self-defence” in the preceding English

<sup>81</sup> *Id.* at 9.

<sup>82</sup> *Id.* at 14.

<sup>83</sup> SAMUEL JOHNSON, REMARKS UPON DR. SHERLOCK’S BOOK INTITULED THE CASE OF RESISTANCE OF THE SUPREME POWERS STATED AND RESOLVED, ACCORDING TO THE DOCTRINE OF THE HOLY SCRIPTURES 54 (London, n. pub. 1689) [hereinafter JOHNSON, REMARKS UPON DR. SHERLOCK’S BOOK] (written in 1683).

<sup>84</sup> WILLIAM DENTON, JUS REGIMINIS: BEING A JUSTIFICATION OF DEFENSIVE ARMS IN GENERAL AND CONSEQUENTLY OF OUR LATE REVOLUTIONS AND TRANSACTIONS TO BE THE JUST RIGHT OF THE KINGDOM 47 (London, n. pub. 1689).

<sup>85</sup> *Id.*

<sup>86</sup> Howell rightfully believed that Parliament exercised the principle of the natural right of “self-defence” when it took “arms for their defence,” and Charles I “was content[] to acknowledge.” JAMES HOWELL, AN INQUISITION AFTER BLOOD 4–5 (n.p., n. pub. 1649).

<sup>87</sup> John Cartwright described the Americans’ actions at the Boston Tea Party as being “done

Civil War and the subsequent American Revolution, the 1689 Glorious Revolution was no different, for sometimes the right of “self-preservation” was described as invoking the right of “self-defence.” The 1689 tract entitled *The History of Self-Defence in Requitall to the History of Passive Obedience* proves this very point.<sup>88</sup> The tract’s author argues against the philosophy of “non-resistance” and asserts that “Subjects [may] lawfully defend themselves against the Encroachments of Princes upon their Laws and Liberties.”<sup>89</sup> The author sums up the principle of lawful rebellion, stating:

[Until there are] better Arguments for Non-resistance than we have yet seen, we must take the Liberty to say, that in order to the preserving of our Lives against a Tyrant that would take them away, we may as warrantably make use of Self-Defense[.]<sup>90</sup>

It is this political and natural right of “self-defence,” “resistance,” and “self-preservation” that Blackstone was describing, not a right to repel burglars or defend the home against trespassers. Blackstone makes this abundantly clear when he describes the “have arms” provision as “the natural right of resistance and self-preservation, when the sanctions of society and laws are found insufficient to restrain the violence of oppression.”<sup>91</sup> Moreover, Blackstone describes the “have arms” provision as the fifth and last *auxiliary right*, not a civil right as the Individual Right Scholars claim. The difference is significant, for auxiliary rights are the means to ensure that civil rights are “ascertained,

---

in *self-defence*, with the greatest good order and decency, and unaccompanied with incivility to any one, or the smallest damage to any thing in the ships besides the treacherous tea.” CARTWRIGHT, *AMERICAN INDEPENDENCE*, reprinted in *ENGLISH DEFENDERS OF AMERICAN FREEDOMS 1774-1778*, supra note 49, at 182. James Otis also described the right to revolt as a right of self-defense when he paraphrased Blackstone. See JAMES OTIS, *THE RIGHTS OF THE BRITISH COLONIES ASSERTED AND PROVED* (Boston, Edes & Gill 1764), reprinted in *1 PAMPHLETS OF THE AMERICAN REVOLUTION 1750-1776*, at 419, 428 (Bernard Bailyn ed., 1965).

<sup>88</sup> ABEDNEGO SELLER, *THE HISTORY OF SELF-DEFENCE, IN REQUITALL TO THE HISTORY OF PASSIVE OBEDIENCE* (London, n. pub. 1689).

<sup>89</sup> *Id.* at 22.

<sup>90</sup> *Id.* at 30.

<sup>91</sup> 1 BLACKSTONE, supra note 44, at \*136–39. Subsequent early nineteenth century treatises interpreted the “have arms” provision in a similar fashion. See FRANCIS PLOWDEN, *THE CONSTITUTION OF THE UNITED KINGDOM OF GREAT BRITAIN & IRELAND 147* (London, T. Sutton 1802) (“To preserve these rights or liberties from violation it is necessary, that the Constitution of parliament be supported in its full vigor. . . . And to vindicate them, when actually violated or attacked, all British subjects are entitled in the first place to regular administration . . . next to the right of petitioning the King and parliament . . . and lastly to the right of having and using arms for self-preservation and defence.”); J. L. DE LOLME, *THE CONSTITUTION OF ENGLAND; OR, AN ACCOUNT OF THE ENGLISH GOVERNMENT 315–24* (London, T. Spilsbury, new ed. 1775) (discussing Blackstone’s right of “self-preservation” and “resistance”).

and protected by the dead letter of the laws, [remain in force] if the constitution [provides] no other method to secure their actual enjoyment.”<sup>92</sup> In other words, *auxiliary rights* “serve principally as barriers to protect and maintain inviolate the three great primary rights, of personal security, personal liberty, and private property.”<sup>93</sup>

The problem with the Individual Right Scholars’ interpretation of the “have arms” provision is that they join the right of personal security with the right of qualified Protestants to take up arms in defending their liberties when society dissolves or is threatened.<sup>94</sup> The latter is a preexisting ancient English right, while the former has nothing to do with the ownership, possession, or the use of arms. In fact, Blackstone does not even mention arms, a right to arms, the English constitution, or the 1689 Declaration of Rights in his entire examination of the right of personal security.<sup>95</sup> This is significant because Blackstone cites the Declaration of Rights in other sections of his *Commentaries*, including the personal right against unreasonable bail, excessive fines, suspending and dispensing with the law, and the Declaration itself.<sup>96</sup> It is highly unlikely that Blackstone just forgot to include the “have arms” provision in his description of the personal right of individual self-defense. If anything, he intentionally excluded it because it has nothing to do with defending one’s person from individual violence.<sup>97</sup> The “have arms”

---

<sup>92</sup> 1 BLACKSTONE, *supra* note 44, at \*136.

<sup>93</sup> *Id.* See also Steven J. Heyman, *Natural Rights and the Second Amendment*, 76 CHI.-KENT L. REV. 237 *passim* (2000).

<sup>94</sup> See STEPHEN P. HALBROOK, *THE FOUNDERS’ SECOND AMENDMENT: ORIGINS OF THE RIGHT TO BEAR ARMS* 20 (2008) (“The individual right to have arms for self-defense was a bulwark to guarantee personal security and liberty. The right extended not just to individual preservation but also to collective resistance to oppression.”). At the Cleveland City Club Alan Gura described Blackstone’s understanding of the right to “have arms” by confusing auxiliary and civil rights as follows:

The right to arms was well established . . . from Blackstone’s conception of a right of self-preservation. If you have the right to preserve your own life, Blackstone reasoned, you have an auxiliary right to arms with which you would do so, and that is what the English law protected, and that is the right the English king started to encroach upon . . . and it is very well documented.

See Alan Gura Presentation Podcast, *supra* note 23.

<sup>95</sup> Charles, *Arms for Their Defense?*, *supra* note 18, at 417.

<sup>96</sup> Blackstone states that should “31 Car. II. c. 2 commonly called *the habeas corpus act* . . . be evaded by demanding unreasonable bail, or sureties for the prisoner’s appearance, it is declared by 1 W. & M. st. 2 c. 2. that excessive bail ought not be required.” 1 BLACKSTONE, *supra* note 44, at \*131; see also *id.* at \*138 (“And by 1 W. & M. st. 2. c.2. it is declared, that the pretended power of suspending, or dispensing with laws . . . is illegal.”); 4 BLACKSTONE, *supra* note 44, at \*372 (“For the bill of rights has particularly declared, that excessive fines ought not to be imposed.”); *id.* at \*433 (noting that the Declaration of Rights ensures “the doctrine of resistance, when the executive magistrate endeavors to subvert the constitution”).

<sup>97</sup> From 1729 to 1797 every edition of *A New Law Dictionary* did not equate “self-defense” with a right to have arms, nor did they cite to the Declaration of Rights.

provision only applies to defending the realm and “when the sanctions of society and laws are found insufficient to restrain the violence of oppression.” In other words, the people have a right to take up “arms for their defence” to defend their liberties against enemies—foreign and domestic.<sup>98</sup>

It is this limited right of “self-preservation” that St. George Tucker described in his edition of *Blackstone’s Commentaries*<sup>99</sup> and that the Founding Fathers understood and invoked during the American Revolution. The first attempt occurred in 1768 when the Boston Town Council learned that Parliament authorized the sending of two British regiments to quell the Boston’s rebellious behavior.<sup>100</sup> The Council viewed this action similar to the standing army dilemma that their English forefathers faced during the English Civil War and Glorious Revolution. In response the Council issued a resolve to invoke the Declaration of Rights “have arms” provision by calling upon the Massachusetts militia to defend Boston.<sup>101</sup> Individual Right Scholars often quote the Council’s resolve to argue that the Founders understood the “have arms” provision as protecting armed individual self-defense.<sup>102</sup> There is no evidence that proves this assertion.<sup>103</sup>

---

See Charles, *Arms for Their Defense?*, *supra* note 18, at 357 n.30.

<sup>98</sup> 1 BLACKSTONE, *supra* note 44, at \*139. As shown above, Blackstone was not the first to articulate this argument. For instance, in 1649, James Howell wrote how “self-defence” was “the universall Law of Nature” and how “it extends to all other creatures, as well as the rationally.” HOWELL, *supra* note 86, at 4. It was this natural law principle that Parliament exercised when they were “necessitated to take Armes for their defence.” *Id.* As was shown above, Blackstone was also not the first to use “self-preservation” in a broader military context. For instance, in the pamphlet by a Gentleman of Ireland, he stated, “[T]he necessity of Self-preservation made the late King at last arm Papists.” GENTLEMAN OF IRELAND, *THE PRESENT SETTLEMENT VINDICATED, AND THE LATE MIS-GOVERNMENT PROVED* 46 (London, n. pub. 1690).

<sup>99</sup> CHARLES, *THE SECOND AMENDMENT*, *supra* note 4, at 49–52; Charles, *Arms for Their Defense?*, *supra* note 18, at 418–21.

<sup>100</sup> Charles, *Arms for Their Defense?*, *supra* note 18, at 423–25; see also BERNARD BAILYN, *THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION* 113–14 (2d ed. 1992) (discussing how the Boston Town Council’s resolve was a response to a fear that a standing army was sent to destroy the colonists’ liberties and constitutions).

<sup>101</sup> Charles, *Arms for Their Defense?*, *supra* note 18, at 425–35.

<sup>102</sup> HALBROOK, *supra* note 94, at 19–21. One *Amicus Curiae* Brief in Support of the Petitioners takes the resolve completely out of context. The brief states, “[T]he British Ministry responded by seeking to disarm the inhabitants of Boston. Bostonians became alarmed, and passed a resolution advising every man to arm himself ‘in Case of Sudden Danger.’” See Brief for the National Shooting Sports Foundation, Inc. as *Amicus Curiae* in Support of Petitioners at 9–10, *McDonald v. City of Chicago*, No. 08-1521 (U.S. Nov. 23, 2009), 2009 WL 4099515.

<sup>103</sup> Charles, *Arms for Their Defense?*, *supra* note 18, at 423–35. The earliest history of this event was written by William Tudor (1779–1830) in his 1823 work *The Life of James Otis, of Massachusetts*. Tudor, the son of America’s first Judge Advocate Colonel William Tudor (1715–1819), did not characterize the 1768 Boston Town Council’s resolve as a right to armed individual self-defense. He described the resolve as “founded in nature, reason, and sound policy, and is well adapted for the necessary defence of the community.” WILLIAM TUDOR, *THE LIFE*

In fact, the evidence of this historical event makes it abundantly clear that the Founders viewed the “have arms” provision as the *auxiliary right* that Blackstone eloquently penned. For instance, the Council resolve stated it was for the “necessary Defence of the community” that the “good and wholesome Law of this Province, [which requires] every listed Soldier and other Householder (except Troopers, who by Law are otherwise to be provided) shall be always provided with a well fix’d Firelock, Musket, Accoutrements and Ammunition.”<sup>104</sup> The “good and wholesome Law” was a reference to the 1693 Militia Act which required:

That every listed Soldier and other Householder (except Troopers) shall be always provided with a well fix’d Firelock, Musket, of Musket or Bastard Musket bore, the Barrel not less than three Foot and a half long; or other good Fire Arms to the Satisfaction of the Commission Officers of the Company; a Snapsack, a Collar with twelve Bandaliers, or Cartouch-Box; one Pound of good Powder, twenty Bullets fit for his Gun; and twelve Flints.<sup>105</sup>

Just as Parliament called upon the militia to defend against the standing armies of Charles I and James II, the Boston Town Council believed it was doing the same when it exercised its right of “self-preservation” and “resistance” by invoking the 1693 Militia Act. Samuel Adams’ numerous editorials that defended the Council’s resolve support this understanding.<sup>106</sup> For instance, in the *New York Journal*,

---

OF JAMES OTIS, OF MASSACHUSETTS 332–33 (Boston, Wells & Lilly 1823). Tudor elaborated on “founded in nature” in a footnote. The footnote states:

It will be perceived, that by the authority they quoted, it was only “*protestants*,” that could be justified by “*nature, reason and policy*,” for having arms. There lurks in this resolve, as well as in that of the legislature, in the observation, that “an army brought among them without their consent, was an *unlawful assemblage* of the worst and most alarming nature,” a kind of grave humour, which does not disparage the soundness of reasoning.

*Id.* at 332 n.\*. The footnote reiterates that the 1768 Militia Act was an attempt to revive the 1693 Militia Act and invoke the limited nature of the “have arms” provision. An Act for Regulating of the Militia, 1692-1714 Mass. Acts page no. 128 (1693).

<sup>104</sup> AT A MEETING OF THE FREEHOLDERS AND OTHER INHABITANTS OF THE TOWN OF BOSTON, LEGALLY QUALIFIED AND WARN’D IN PUBLIC TOWN MEETING ASSEMBLED, AT FANEUIL-HALL, ON MONDAY THE 12TH OF SEPTEMBER, A.D. 1768 (Boston, n. pub. 1768).

<sup>105</sup> *An Act for Regulating the Militia*, 1693, 5 W. & M., c. 7 (Mass.), reprinted in THE CHARTER GRANTED BY THEIR MAJESTIES KING WILLIAM AND QUEEN MARY, TO THE INHABITANTS OF THE PROVINCE OF THE MASSACHUSETTS BAY IN NEW ENGLAND, pt. 3, at 38 (Boston, S. Kneeland 1759); accord An Act for Regulating of the Militia, 1692-1714 Mass. Acts page no. 128 (1693).

<sup>106</sup> Being the political propagandist that Samuel Adams was, he changed his argument multiple times to cast the British government in a negative light. In none of these editorials or arguments did Adams assert the people have a right to armed individual self-defense. He always

Adams stated the resolve was necessary for the colonists to exercise their “natural Right which the People have reserved to themselves, confirmed by the Bill of Rights, to keep Arms for their own Defence; and as Mr. Blackstone observes, it is to be made use of when the Sanctions of Society and Law are found insufficient to restrain the Violence of Oppression.”<sup>107</sup> Similarly in the *Boston Gazette*, Adams defended the resolve because Boston had “reason to fear, there would be a necessity of the means of self preservation against the *violence of oppression*.”<sup>108</sup>

Blackstone’s right of “self-preservation” and lawful “resistance” was also used by Judge William Henry Drayton. In his famous *Charge to the Grand Jury* Drayton declared the colonies to be lawfully separated from England. He felt that the abuses by the British government were so destructive that “[n]ature cried aloud, self-preservation is the great law,”<sup>109</sup> which “forced [the colonies] to take up arms in [their] own defence.”<sup>110</sup> Drayton’s use of the terms “self-preservation” and “arms in their own defence” comports with the proper and limited understanding of the English allowance to “have arms.” He was not the only revolutionary to do so.

As American pamphleteer Samuel Williams stated in *A Discourse on the Love of Our Country*, “self-preservation” was the “main aim” and “end” of the English Constitution.<sup>111</sup> The Founding Fathers understood this, evidenced by Congress frequently justifying their rebellious behavior and the taking up of arms on the principle of “self-preservation.” On May 18, 1775, Congress resolved in order to prevent the “destroying [of] our lives and liberties” that “the northern colonies, residing in the vicinity of Ticonderogo” should act in a “just regard for the defence and preservation of themselves and their countrymen” and secure their military provisions.<sup>112</sup> On May 23rd James Duane spoke before Congress, stating the colonies must make a

---

referred to the “have arms” provision as a right to lawful rebellion and defense of the realm. Charles, *Arms for Their Defense?*, *supra* note 18, at 421–34.

<sup>107</sup> *Boston, March 17, Journal of Occurrences, continued*, N.Y.J., Apr. 13, 1769, *supp.* at 1, 3, col. 3.

<sup>108</sup> SAMUEL ADAMS, *Article Signed “E.A.”*, BOSTON GAZETTE, Feb. 27, 1769, *reprinted in* 1 THE WRITINGS OF SAMUEL ADAMS, at 316, 318 (Harry Alonzo Cushing ed., Octagon Books 1968) [hereinafter Adams, *Article signed “E.A.”*].

<sup>109</sup> William Henry Drayton, *The Charge to the Grand Jury* (Apr. 23, 1776), *in* 1 AMERICAN ELOQUENCE: A COLLECTION OF SPEECHES AND ADDRESSES BY THE MOST EMINENT ORATORS OF AMERICA 50, 52 (Frank Moore ed., New York, D. Appleton & Co. 1859).

<sup>110</sup> *Id.* at 51.

<sup>111</sup> SAMUEL WILLIAMS, A DISCOURSE ON THE LOVE OF OUR COUNTRY 21 (Salem, Samuel & Ebenezer Hall 1775) [hereinafter WILLIAMS, A DISCOURSE].

<sup>112</sup> 2 JOURNALS OF THE CONTINENTAL CONGRESS 1774–1789, at 56 (1905).

“vigorous preparation for our common defence” that “shall be conducted to our own *self preservation*[.]”<sup>113</sup> Duane went on to state, “Let this [rebellion] be ever considered as a *family quarrel, unnatural, disgraceful* and *ruinous* into which we are innocently plunged by intolerable oppression,” but was necessary because it was “consistent with the preservation of our just rights.”<sup>114</sup>

When Congress drafted a *Letter to Great Britain* on June 27, 1775 to justify their actions to the English people it was declared that “the principles of Self preservation [no] longer permit us to neglect providing a proper defence to prevent the pernicious practices of wicked men and evil Counsellors, alike enemies to the religion, laws, rights, and liberties of England and America.”<sup>115</sup> An earlier letter addressed to *The People of Great Britain and Ireland* similarly stated it was the principle of “self preservation, which demands the Protection of their Liberty, the Security of their lives and property; against a lately adopted System of plantation government, repugnant to the english constitution, the faith of Charters, and constant Usage from the first settlement of englishmen in North America[.]”<sup>116</sup> Maybe the most telling congressional letter was a 1777 letter addressed to the *Inhabitants of the United States*, for it proclaimed that Congress was “forced to take Arms for self-preservation” to “maintain the Liberty, Religion and property of ourselves[.]”<sup>117</sup>

Individual correspondence also reveals the Founders’ understanding of the “self-preservation” principle to which Blackstone referred. For instance a May 22, 1777 letter by Philip Schuyler defended the revolutionary cause, stating,

But as the first Principle of Human Nature is Self preservation; as we are engaged in a Conflict the Event of which must Either be a perfect Establishment of our Civil & Religious Priviledges or a Total Deprivation of both, It is a Duty incumbent on Us, in Order to avert the Latter, to embrace all Means made Lawful from the most evident Necessity[.]<sup>118</sup>

---

<sup>113</sup> 1 LETTERS OF THE DELEGATES TO CONGRESS, 1774-1789, at 391, 392 (1977) (emphasis in original).

<sup>114</sup> *Id.* (emphasis in original).

<sup>115</sup> *Id.* at 548, 551. For another example see 1 JOURNALS OF THE CONTINENTAL CONGRESS 1774-1789, at 35 (1904) (Congress, writing to Thomas Gage, justifying their rebellious actions stating the colonists are “merely upon the defensive, so long as such conduct may be vindicated by reason and the principles of self-preservation, but no longer.”).

<sup>116</sup> 1 LETTERS OF THE DELEGATES TO CONGRESS, 1774-1789, *supra* note 113, at 174, 175.

<sup>117</sup> 7 LETTERS OF THE DELEGATES TO CONGRESS, 1774-1789, at 144, 148, 149 (1981).

<sup>118</sup> *Id.* at 107.

Meanwhile, on April 26, 1776 John Hancock described the colonies rebellion as being “compelled unprepared hastily to take up the Weapons of Self Preservation[.]”<sup>119</sup>

Even Rhode Island’s 1775 *Rules and Regulations for the Army* declared “the great Law of Self Preservation hath required our raising & keeping an Army of Observation and Defence, in order to prevent or repel, any farther Attempts to enforce the late cruel and oppressive Acts of the British Parliament.”<sup>120</sup> Thus it is clear that the doctrines of “self-preservation” and “resistance” to which Blackstone referred had nothing to do with armed individual self-defense. It was a much broader principle. More importantly, there is no evidence that the American colonies’ interpretation of Blackstone and the “have arms” provision was any different than as it was intended in 1689. This being that the “have arms” provision insured that qualified Protestants may take part in defending their liberties, which included exercising the right of lawful rebellion to restore government.

B. *The Right of Self-Preservation in Understanding the 1689 Declaration of Rights, the Allowance to “Have Arms”, and the Second Amendment*

The greatest misnomer by Individual Right Scholars is that the “have arms” provision and Second Amendment protect the right of the people, as individuals, to own arms to check tyrannical government. Such an interpretation is only partially correct. While the people certainly have a right to take part in defending their liberties against tyranny should the occasion arise, this right cannot be exercised individually.<sup>121</sup> As was shown above, the right of “self-preservation” was to be exercised by representative bodies such as Parliament, the Boston Town Council, and Congress.<sup>122</sup> Furthermore, the Individual Right

---

<sup>119</sup> 3 LETTERS OF THE DELEGATES TO CONGRESS, 1774-1789, at 583 (1978).

<sup>120</sup> RULES AND REGULATIONS FOR THE RHODE-ISLAND ARMY 4 (Newport, S. Southwick 1775).

<sup>121</sup> CHARLES, THE SECOND AMENDMENT, *supra* note 4, at 95-96; 30 Geo. 2, c. 25 (1757) (Eng.).

<sup>122</sup> See *supra* pp. 36-40. In 1791 James Wilson stated the Second Amendment provides only two protections. First, it enjoins homicide “when it is necessary for the defence of the United States,” and second, that it provides for “the common defence.” 2 JAMES WILSON, THE COLLECTED WORKS OF JAMES WILSON 1141-42 (Kermit L. Hall & Mark David Hall eds., 2007). Individual Right Scholars frequently rely on Wilson’s description of the Pennsylvania state constitution’s right to bear arms in “defence of themselves and the state.” Wilson felt Pennsylvania’s “bear arms” provision gave citizens the privilege of bearing arms in defense of their “person or house.” *Id.* at 1142. However, Individual Right Scholars confuse and combine the

Scholars interpretation of the “have arms” provision and Second Amendment is only partially correct because individuals do not have to actually possess arms *per se*. As the statutory record of the militia laws definitively show, an individual did not have to own arms to “keep” or “bear” them in either the capacity to defend the realm or exercise the right of “self-preservation.”<sup>123</sup>

There is no denying that that the Founding Fathers wanted a militia system based on the ideological philosophy of Machiavelli, James Harrington, and Algernon Sidney—a system where every man is armed to defend the nation and their liberties.<sup>124</sup> However, the manner in which individuals should be armed and the power to exercise the right of “self-preservation” to check tyranny never rested with the people, in their individual capacity *per se*, but with their representatives.<sup>125</sup> Otherwise, as it was feared by Parliament during the English Civil War and following the Glorious Revolution, the right of “self-preservation” would be abused by the people as a justification for violating the laws and the Constitution.<sup>126</sup>

---

two descriptions to describe the Second Amendment. Wilson was merely referring to the Pennsylvania’s constitution as granted the privilege to defend their “person or house,” not the Second Amendment. Wilson’s analysis makes it clear that the Second Amendment protected a limited right, and that states could grant broader protections.

<sup>123</sup> The 1689 Declaration of Rights only stated Protestants “may have arms.” See Charles, *Arms for Their Defense?*, *supra* note 18, at 378–83. Meanwhile the Second Amendment’s protection to “keep arms” meant the people had a right to maintain or have access to arms when necessary. An individual did not have to own arms to “keep” them. See CHARLES, THE SECOND AMENDMENT, *supra* note 4, at 27–34.

<sup>124</sup> CHARLES, THE SECOND AMENDMENT, *supra* note 4, at 107, 111–12; Charles, *Arms for Their Defense?*, *supra* note 18, at 409.

<sup>125</sup> See THE LEVELLER, OR, THE PRINCIPLES & MAXIMS CONCERNING GOVERNMENT AND RELIGION, WHICH ARE ASSERTED BY THOSE THAT ARE COMMONLY CALLED, LEVELLERS 9 (London, n. pub. 1658) [hereinafter THE LEVELLER] (stating the people should be “masters of their own Arms” through Parliament); JOHN SADLER, RIGHTS OF THE KINGDOM, OR, CUSTOMS OF OUR ANCESTORS, TOUCHING THE DUTY, POWER, ELECTION, OR SUCCESSION OF OUR KINGS AND PARLIAMENTS, OUR TRUE LIBERTY, DUE ALLEGIANCE, THREE ESTATES, THEIR LEGISLATIVE POWER, ORIGINAL, JUDICIAL, AND EXECUTIVE, WITH THE MILITIA, FREELY DISCUSSED THROUGH THE BRITISH, SAXON, NORMAN LAWS AND HISTORIES, WITH AN OCCASIONAL DISCOURSE OF GREAT CHANGES YET EXPECTED IN THE WORLD 143 (London, n. pub. 1682) [hereinafter SADLER, RIGHTS OF THE KINGDOM] (stating that the quality and quantity of arms was assessed by the “Common Consent” of Parliament according to the “Proportion of every Man’s *Estate*[.]”). In 1698 John Toland proposed militia reform that would arm every “Freeman”, but would only arm “Servants” at “time[s] of Necessity.” JOHN TOLAND, THE MILITIA REFORM’D, OR, AN EASY SCHEME OF FURNISHING ENGLAND WITH A CONSTANT LAND FORCE 89–90 (London, John Darby 1698). Toland believed such reform would “render the Militia useful for the King’s and our common Preservation[.]” *Id.* at 92.

<sup>126</sup> BURNET, AN ENQUIRY INTO THE MEASURES OF SUBMISSION TO THE SUPREAM, *supra* note 70, at 1 (arguing that the right of self-preservation should be “brought under Rules and Forms”). In 1693 a bill proposed to allow “every Protestant to keep a musket in his House for his defence” because it would aid in the “security of the government[.]” THE PARLIAMENTARY

The 1689 Declaration of Rights “have arms” provision insured this by placing the right of “self-preservation” and “resistance” in Parliament,<sup>127</sup> all the while controlling the access to arms in order to exercise this right. This is why the “have arms” provision states “as allowed by law.” To be precise, the “have arms” provision provided Parliament with the legal authority to exercise the right of “self-preservation” should oppressive standing armies be maintained or if the laws, liberties, estates, and Protestant religion be subverted by the sovereign. It began in 1642 when Parliament used political propaganda to allege the maintenance of a standing army against Charles I politically. Charles I was not violating any statutes nor was he operating outside the limits of the crown’s prerogative. However, Parliament used the standing army issue to promote its own interests, including control over the militia.<sup>128</sup>

Parliament was particularly concerned with the reports from Ireland that the Protestant militias were being disarmed and that Catholics were taking their place—a scenario that would also play out during the Glorious Revolution.<sup>129</sup> In response to these reports, which were mostly exaggerated as political fodder,<sup>130</sup> a bill was proposed for “putting the kingdome into a posture of defence, and for the Commanding the armes therof” in Parliament.<sup>131</sup> The politics of the bill caused tensions between Parliament and the king to flare to the

---

DIARY OF NARCISSUS LUTTRELL 1691-1693, at 444 (Henry Horwitz ed., 1972). The bill was defeated because such a bill “savours of the politics to arm the mob, which” was “not very safe for any government.” *Id.* In 1757 Lord Harwicke stated, “Can any thing be more dangerous to the peace of the kingdom, than for so great a quantity of arms to be distributed about the country . . . ? In cases of rebellions and insurrection, nay of riots, instead of being *arms for your defence*, they will be arms in the hands of disturbers of the public peace.” 15 PARLIAMENTARY HISTORY OF ENGLAND FROM THE EARLIEST PERIOD TO THE YEAR 1803, at 739 (London, T.C. Hansard 1813).

<sup>127</sup> During the drafting of the Declaration of Rights, Heneage Finch justified Parliament’s actions, stating, “The constitution being limited, there is a good foundation for defensive arms.—It has given us right to demand full and ample security.” Somers, *Notes of the Debates*, in 2 MISCELLANEOUS STATE PAPERS, *supra* note 58, at 410.

<sup>128</sup> SCHWOERER, NO STANDING ARMIES!, *supra* note 50, at 33–50; Lois Schwoerer, “*The Fittest Subject for A King’s Quarrel: An Essay on the Militia Controversy 1641-1642*,” J. BRITISH STUDIES, Nov. 1971, at 45 *passim* [hereinafter Schwoerer, “*The Fittest Subject for A King’s Quarrel*”].

<sup>129</sup> Schwoerer, “*The Fittest Subject for A King’s Quarrel*,” *supra* note 128, at 50.

<sup>130</sup> See MARSHALL, A PLEA FOR DEFENSIVE ARMES, *supra* note 56, at 26 (“[S]o many Papists in Armes contrary to so many knowne Laws, and armed with Commission, to disarm Protestants contrary to their knowne Liberties, and the Protestants who exceed their number an hundred told not to rise as one man to subdue them?”).

<sup>131</sup> THE JOURNAL OF SIR SIMONDS D’EWES FROM THE FIRST RECESS OF THE LONG PARLIAMENT TO THE WITHDRAWAL OF KING CHARLES FROM LONDON 202 (Willson Havelock Coates ed., 1942).

point that on December 9, 1642 Charles I instructed the Lord Mayor of London to place a guard of two hundred men around Parliament.<sup>132</sup> Parliament then responded by requesting the trained bands to be arrayed and that watches be placed around the city.<sup>133</sup>

Contemporaneous pamphleteers of the era defended Parliament's actions by arguing that Parliament had the authority to call upon the militia<sup>134</sup> to exercise their right of "self-preservation." For instance, in a tract entitled *Observations Upon Some of His Majesties Late Answers and Expresses*, Henry Parker asserted that Parliament had the right to rise in arms "for their owne necessary defence" when the king denies "all possible means for their safetie[.]"<sup>135</sup> Parker defended Parliament's "desire that such Townes, and Forts, and the publick *Militia* . . . be intrusted to the custody and command of such Noblemen and Gentlemen as they confide in."<sup>136</sup> Otherwise, without this power, sovereigns "may destroy their best subjects at pleasure, and all the Charters and Lawes of publike safetie and freedoms are v[oid], and God hath not left humane nature any meanes of sufficient preservation."<sup>137</sup>

Other tracts similarly defended Parliament's calling upon the militia for "self-preservation." Peter Bland defended Parliament in his 1643 pamphlet entitled *An Argument of Justification* by presenting a hypothetical dialogue between a doctor of divinity and a student of law.<sup>138</sup> However the most expansive contemporaneous examination of Parliament's authority to call upon the militia for "self-preservation" was Stephen Marshall's *A Plea for Defensive Armes*. Marshall viewed Parliament as "the highest Court, from whence there is no appeal"

---

<sup>132</sup> *Id.* at 263–64.

<sup>133</sup> Schwoerer, "The Fittest Subject for A King's Quarrel", *supra* note 128, at 55.

<sup>134</sup> When Parliament called upon the county militias in 1643, they did so for their "mutual Preservation," "defence of themselves," and "own Preservation," etc. See 5 RUSHWORTH, HISTORICAL COLLECTIONS, *supra* note 59, 102–27.

<sup>135</sup> HENRY PARKER, OBSERVATIONS UPON SOME OF HIS MAJESTIES LATE ANSWERS AND EXPRESSES 16 (n.p., n. pub. 1642).

<sup>136</sup> *Id.* at 26 (emphasis in original).

<sup>137</sup> *Id.* at 30. For other 1642 tracts on the militia debate in Parliament see PETER BLAND, RESOLVED UPON THE QUESTION, OR A QUESTION RESOLVED CONCERNING THE RIGHT WHICH THE KING HATH TO HULL, OR ANY OTHER FORT OR PLACE OF STRENGTH FOR THE DEFENCE OF THE KINGDOME (n.p., n. pub. 1642); MILITIA OLD AND NEW (London, n. pub. 1642).

<sup>138</sup> PETER BLAND, AN ARGUMENT OF JUSTIFICATION OF THE FIVE MEMBERS ACCUSED BY HIS MAJESTY WHEREIN IS PROVED THAT THE RAISING OF THIS PRESENT ARMY BY AUTHORITY OF PARLIAMENT IS NOT TREASON (London, n. pub. 1643). See also CHARLES HERLE, A FULLER ANSWER TO A TREATISE WRITTEN BY DOCTOR FERNE 1–24 (London, n. pub. 1642).

because it represented the interests of the people.<sup>139</sup> Thus, it was “lawfull for [Parliament], yea, necessary to take . . . Defensive Armes,” and to call upon the militia for the “benefit of preservation.”<sup>140</sup> Parliament was not only justified because of Charles I’s alleged maintenance standing army, but also because it was necessary to “maintaine the Protestant Religion.”<sup>141</sup> Similar to one of the grievances that would justify removing James II from the throne in 1688, Marshall stated Parliament was forced to take up arms because papists were “armed with Commission[.]”<sup>142</sup>

With the end of the Crowellian Protectorate looming, similar political tracts surfaced.<sup>143</sup> However, by this time it was asserted that the power over the militia rested solely in Parliament. One example is a 1658 tract entitled *The Leveller or, the Principles & Maxims Concerning Government and Religion*. The tract defended Parliament by claiming Charles I had “pretended a right to the Militia, to command the Peoples Arms without their consent[.]”<sup>144</sup> The tract argued that the militia rested with Parliament because it is “prudent and safe for the People to be masters of their own Arms, and to be commanded in the use of them by a part of themselves, (that is their Parliaments) whose interest is the same with theirs.”<sup>145</sup> The people could not just possess arms *per se*. As the tract states, it was important that the people “be formed into such a Constant military posture, by and under the commands of their Parliament” so that it may compel everyman “to defend their Country from Forrainers, and inforce right and Justice from them upon all emergent occasions.”<sup>146</sup>

However, when Charles II was restored to the throne in 1660, Parliament was forced to relinquish any claim to power over the militia and the right to “self-preservation.” Parliament placed the command of the militia solely within the sovereign.<sup>147</sup> Just a year prior the militia had been within the authority of Parliament.<sup>148</sup> The 1661, 1662, and

---

<sup>139</sup> MARSHALL, A PLEA FOR DEFENSIVE ARMES, *supra* note 56, at 25.

<sup>140</sup> *Id.*

<sup>141</sup> *Id.* at 28.

<sup>142</sup> *Id.*

<sup>143</sup> See PRYNNE, A SHORT, LEGAL, MEDICINAL, USEFUL, SAFE, EASY, PRESCRIPTION, &C., *supra* note 64, at 3–7; PRYNNE, EIGHT MILITARY APHORISMS, *supra* note 67, at 19–32.

<sup>144</sup> THE LEVELLER, *supra* note 125, at 10.

<sup>145</sup> *Id.* at 9.

<sup>146</sup> *Id.* at 8.

<sup>147</sup> 13 & 14 Car. 2, c. 3 (1662) (Eng.); 13 Car. 2, c. 6 (1661) (Eng.).

<sup>148</sup> On July 31, 1661 the Speaker of the House of Commons stated before all of Parliament:  
In the next Place, we held it our Duty to undeceive the People, who have been

1663 Militia Acts changed this by making the power over the militia somewhat concurrent. While the sovereign retained authority over all of England's forces including the militia, the day-to-day operation of the militia was still in control of the landed gentry.<sup>149</sup> The most significant provision, however, was in the 1662 Militia Act. It proclaimed that "both or either of the Houses of Parliament cannot nor ought to pretend [to have command of the militia] . . . nor lawfully may, raise or levy any War, offensive or defensive" against the sovereign.<sup>150</sup>

The provision is significant because it expressly restricted Parliament from exercising the right of "self-preservation" against the king. All that remained was the long established guarantee that well affected Protestants would have "arms for their defence."<sup>151</sup> However when James II assumed the throne and employed Catholic Lieutenants in lieu of the counties' Protestant landed gentry, Parliament felt it had lost its last and only security against tyranny. The Lieutenants controlled every aspect of the militia, including apportioning arms to estates, training, controlling the magazines, and nominating subordinate officers.<sup>152</sup> As a 1684 pamphlet properly stated, "The Lord Lieutenant may *alone* perform, and cause to put in Execution, all, and every [one of] the Powers in the Acts for the Militia."<sup>153</sup>

With the Lieutenancies out of Protestant hands it was universally feared that the lives, liberties, estates, and religion of the nation were in danger.<sup>154</sup> The 1689 Declaration of Rights "have arms" provision protected against this. It was adopted because "By causing several good subjects being Protestants to be disarmed at the same time when papists were both armed and employed contrary to law . . . the subjects which are Protestants may have arms for their defence suitable to their conditions and as allowed by law."<sup>155</sup>

---

poisoned with an Opinion, that the Militia of this Nation was in themselves, or in their Representatives in Parliament; and, according to the ancient known Laws, we have declared the sole Right of the Militia to be in Your Majesty[.]

11 H.L. JOUR. 329 (1661).

<sup>149</sup> SCHWOERER, NO STANDING ARMIES!, *supra* note 50, at 82–83.

<sup>150</sup> 13 & 14 Car. 2, c. 3, § 1.

<sup>151</sup> *Id.* § 2; see also Charles, *Arms for Their Defense?*, *supra* note 18, at 362, 369.

<sup>152</sup> 13 & 14 Car. 2, c. 3; see also Charles, *Arms for Their Defense?*, *supra* note 18, at 363–64; Schwoerer, *To Hold and Bear Arms*, *supra* note 41, at 211–12.

<sup>153</sup> A METHOD FOR EXECUTING THE POWERS, RELATING TO THE MILITIA AND TRAINED-BANDS, ACCORDING TO THE ACTS OF PARLIAMENT SINCE THE HAPPY RESTORATION OF OUR GRACIOUS SOVEREIGN K. CHARLES THE II, at 13 (London, n. pub. 1684).

<sup>154</sup> Charles, *Arms for Their Defense?*, *supra* note 18, at 363–73.

<sup>155</sup> The Bill of Rights, 1689, 1 W. & M., c. 2 (Eng.).

David T. Hardy claims the “have arms” provision had little to do with the employment of Catholic Lieutenants and was primarily drafted to prevent the future disarming of individuals.<sup>156</sup> Hardy further claims “no authority” and only “personal surmise” supports an interpretation that the allowance to “have arms” provision was the result of employing Catholic lieutenants.<sup>157</sup> However, the parliamentary records, statutes of the realm, and popular print literature of the era all prove Hardy and the other Individual Right Scholars wrong.<sup>158</sup>

The power to appoint the Lord Lieutenants of the counties was a matter of dispute between the king and Parliament since the English Civil War.<sup>159</sup> The 1662 Militia Act settled this debate by stating that the power to appoint lieutenants was “Alwa[ys] understood”<sup>160</sup> to be with the sovereign,<sup>161</sup> or, as Thomas Higgons stated, “if [the king] have not power to arm and appoint them as he pleased when he hath levied and arrayed them, to what purpose will they be levied and arrayed?”<sup>162</sup> Despite the sovereign having the power to appoint lieutenants, Parliament ensured that such appointments were restricted to well-affected Protestants.<sup>163</sup> These restrictions, coupled with tenure and estate requirements to be appointed a lieutenant, is why John Sadler described the militia as being assessed, charged, and arrayed by the

<sup>156</sup> Hardy, *Armed Citizens, Citizen Armies*, *supra* note 40, at 581–82.

<sup>157</sup> *Id.* at 581.

<sup>158</sup> Charles, *Arms for Their Defense?*, *supra* note 18, at 356–411.

<sup>159</sup> In 1669, nearly two decades prior to the Glorious Revolution, the issue of employing Catholics as lieutenants arose in Parliament. George Villiers, Henry Bennet, and John Maitland (three of Charles II’s chief ministers) were accused of employing Catholics as military lieutenants in violation of the law. See SCHWOERER, *NO STANDING ARMIES!*, *supra* note 50, at 105–06. The Founding Fathers’ sixth edition of Henry Care’s *English Liberties* stated the English Civil War was the result of the dispute over the “commission of array[.]” See HENRY CARE, *ENGLISH LIBERTIES, OR THE FREE-BORN SUBJECT’S INHERITANCE* 174–76 (Providence, John Carter, 6th ed. 1774) [hereinafter CARE, *ENGLISH LIBERTIES*].

<sup>160</sup> 13 & 14 Car. 2, c. 3, § 1 (1662) (Eng.); *accord* 11 H.L. JOUR. 463 (1662).

<sup>161</sup> On May 19, 1662 the Speaker of the House of Commons presented to Charles II the following:

[W]e applied ourselves to the settling our great Concern, the Militia. We have already, according to our Duties and the Laws, declared the sole Right of the Militia to be in Your Majesty: And now, with Your Permission, we humbly tender Your Majesty a Bill for the better Regulation and Ordering the Standing Forces of this Nation; wherein we have taken Care to make all Things so certain, that Your Majesty’s Lieutenants and their Deputies may know what to command, and all the People learn how to obey.

<sup>162</sup> 11 H.L. JOUR. 471 (1662); *see also* *Id.* at 457.

<sup>163</sup> THE SPEECH OF MR. HIGGONS IN PARLIAMENT, *supra* note 66, at 5.

<sup>164</sup> See Test Act, 1672, 25 Car. 2, c. 2, § 2 (Eng.); 13 & 14 Car. 2, c. 3, § 18 (1662) (Eng.). The House of Lords wanted to keep the oath of allegiance for service in the militia. See 11 H.L. JOUR. 317 (1661).

“common consent” of Parliament.<sup>164</sup>

Sadler’s tract is telling as to just how significant the control of arraying the militia was to late seventeenth century politics. Seven years prior to the allowance to “have arms” being codified, Sadler stated that “Men ought indeed to have *Arms*, and them to keep in Readiness for Defence of the King and Kingdom.”<sup>165</sup> The quality and quantity of arms was not assessed by the sovereign or individuals, but by the “common consent” of Parliament to the “Proportion of ever[y] Man’s *Estate*, and *Fee for the Defence of the King and Kingdom*.”<sup>166</sup> Sadler described this arraying of the militia as the “undoubted Right of this Kingdom . . . for [the] Defence of the Realm” by the “Will and Consent in Parliament.”<sup>167</sup> A right he traced to the days of William the Conqueror when the landed gentry were bestowed with the allowance to “*have and keep themselves in Arms and Horses*” according to “*their Fees and Tenure*.”<sup>168</sup>

As Sadler’s tract makes clear, the allowance to “have arms” was a preexisting customary right to defend the realm as a militia. It was a concurrent allowance between the sovereign and Parliament. However, it was the crown appointed lieutenants that had the real power, for they controlled the arming of the militia.<sup>169</sup> This is why Parliament objected so heavily to the employment of Catholics as military lieutenants—a grievance that was the entire basis of the “have arms” provision.<sup>170</sup> Not only by employing Catholic lieutenants did James II dispense with the laws,<sup>171</sup> but more importantly the militia was viewed as the security to protect the lives, liberties, estates, and religion of three kingdoms. Parliament could not trust the arms and defense of the nation to papists. Thus, Parliament thought it was essential that it retain its limited, but concurrent power over the militia and the 1689 Declaration of Rights “have arms” provision accomplished this objective.

The historical record of the Glorious Revolution sheds light on this fact, for it addresses the significance of Parliament being able to determine who may “have arms” and that Parliament be lawfully

---

<sup>164</sup> SADLER, RIGHTS OF THE KINGDOM, *supra* note 125, at 143–47.

<sup>165</sup> *Id.* at 143.

<sup>166</sup> *Id.* (emphasis in original).

<sup>167</sup> *Id.* at 146.

<sup>168</sup> *Id.* at 144–45 (emphasis in original).

<sup>169</sup> 13 & 14 Car. 2, c. 3 (1662) (Eng.).

<sup>170</sup> Charles, *Arms for Their Defense?*, *supra* note 18, at 368–83.

<sup>171</sup> LOIS G. SCHWOERER, THE DECLARATION OF RIGHTS, 1689, at 74–78 (1981) [hereinafter SCHWOERER, THE DECLARATION OF RIGHTS].

permitted to call upon the militia to exercise the right of “self-preservation” and “resistance.” First, it should be noted that the 1689 Declaration of Rights contained two military compromises which codified Parliament’s right to have concurrent power in arming the nation and lawfully permitted Parliament’s exercising the right of “self-preservation” against a tyrannical sovereign. The first was Article VI which prevented future sovereigns from “the raising or keeping a standing Army within the kingdom in time of peace, unless it be with the consent of Parliament[.]”<sup>172</sup> The Article was a military compromise over the long standing seventeenth century debate as to whether Parliament or the sovereign controlled the forces of the realm. The provision maintained the status quo by affirming the sovereign’s ancient prerogative to array England’s forces to defend the realm.<sup>173</sup> However, the compromise was that the sovereign was limited in maintaining standing armies during times of peace without the consent of Parliament.<sup>174</sup>

Should the sovereign violate this provision as Parliament alleged Charles I and James II had done, Article VII provided Parliament with the means to resist such tyranny. Article VII ensured qualified Protestants could “have arms for their defence.”<sup>175</sup> Again, Individual Right Scholars claim the allowance to “have arms” was drafted to protect an individual’s right to possess arms for their personal defense. There is no substantiated evidence to support this claim.<sup>176</sup> The 1689 Declaration of Rights “have arms” provision was a military compromise over the militia and nothing more than a reaffirmation of preexisting law and custom.<sup>177</sup> It created no new guarantees or rights. Instead it insured that Parliament would have the means to exercise the right of “self-preservation” and ensured Catholics would no longer be placed in a position to control those means, i.e., the militia.

It should be noted that the “have arms” provision was an allowance based on socio-economic hierarchal status<sup>178</sup> or the chain-of-being.<sup>179</sup>

---

<sup>172</sup> The Bill of Rights, 1689, 1 W. & M., c. 2, art. VI (Eng.).

<sup>173</sup> SCHWOERER, NO STANDING ARMIES!, *supra* note 50, at 151.

<sup>174</sup> SCHWOERER, THE DECLARATION OF RIGHTS, *supra* note 171, at 71–74.

<sup>175</sup> 1 W. & M., c. 2, art. VII.

<sup>176</sup> Charles, *Arms for Their Defense?*, *supra* note 18, at 380–98.

<sup>177</sup> *Id.* at 357–58. The 1689 Declaration of Rights only “affirmed old law.” The idea that individuals have a right to own arms would have been a revolutionary idea and against the existing statutes of the realm. Schwoerer, *To Hold and Bear Arms*, *supra* note 41, at 214.

<sup>178</sup> See 1 Jac. 2, c. 8 (1685) (Eng.); 14 Car. 2, c. 3 (1662) (Eng.); 4 & 5 Phil. & M., c. 2 (1557) (Eng.); 26 Hen. 8, c. 6, § 3 (1534) (Eng.); 20 Rich. 2, c. 1 (1396) (Eng.); 12 Rich. 2, c. 6 (1388) (Eng.); 7 Rich. 2, c. 13 (1383) (Eng.); 25 Edw. 3, c. 2 (1351) (Eng.); 2 Edw. 3, c. 3 (1328) (Eng.);

This is evidenced by the use of “may” and making the allowance “suitable to their conditions and as allowed by law.”<sup>180</sup> This language ensured arms would only be placed in the hands of well affected persons and those classes that Parliament deemed appropriate.<sup>181</sup> More importantly, and for our purposes, the “have arms” provision was more of a protection of parliamentary power than it was a protection for the “subjects which are Protestants.”

The popular print culture of the Glorious Revolution confirms this. For instance, Samuel Johnson’s 1688 tract entitled *Several Reasons for the Establishment of a Standing Army, and Dissolving the Militia* is telling. It was a satirical piece that discussed the disarming of the militia by James II’s appointing Catholics as military lieutenants. The tract sarcastically made such statements as “there are no *Irish Papists* in the *Militia*” and a “*Popish Army* is a *Nullity*.”<sup>182</sup> Johnson also sarcastically stated a standing army was preferred because “the Lords, Gentlemen, and Free-holders of *England*, are not fit to be Trusted with their own Laws, Lives, Liberties, and Estates[.]”<sup>183</sup> This last statement is significant because it shows how seventeenth century England viewed the militia. It was the establishment that secured the lives, liberties, property, and religion of the nation.

Johnson’s tract is just one of many which show that the “have arms” provision was intimately connected with the employment of Catholic lieutenants. Gilbert Burnet wrote of his displeasure, stating, “The *Militia* [is] put into the Hands of Persons not qualified by Law; and a Popish Mercenary Army maintained in the Kingdom in Time of Peace, absolutely contrary to Law.”<sup>184</sup> Burnet believed such employment “struck at” “all the rights of the Church of England, and the whole establishment of the Protestant Religion[.]”<sup>185</sup> Robert Ferguson described James II’s employment of Catholic lieutenants as

---

13 Edw., c. 6 (1285) (Eng.); 13 Edw., c. 2 (1285) (Eng.); 7 Edw. (1279) (Eng.).

<sup>179</sup> Charles, *Arms for Their Defense?*, *supra* note 18, at 378, 386; *An Exhortation concerning Good Order and Obedience to Rules and Magistrates*, in 1 THE TWO BOOKS OF HOMILIES 105 (Oxford, n.pub. 1859).

<sup>180</sup> Charles, *Arms for Their Defense?*, *supra* note 18, at 378–87, 403.

<sup>181</sup> *Id.* at 378.

<sup>182</sup> SAMUEL JOHNSON, *SEVERAL REASONS FOR THE ESTABLISHMENT OF A STANDING ARMY, AND DISSOLVING THE MILITIA* (n.p., n. pub. 1688).

<sup>183</sup> *Id.*

<sup>184</sup> GILBERT BURNET, 1 A COLLECTION OF PAPERS RELATING TO THE PRESENT JUNCTURE OF AFFAIRS IN ENGLAND 29–30 (n.p., n. pub. 1688).

<sup>185</sup> BURNET, *AN ENQUIRY INTO THE MEASURES OF SUBMISSION TO THE SUPREAM AUTHORITY*, *supra* note 70, at 14.

“committ[ing] and entrust[ing] to such, who judge it to be both their Duty and Meritorious to Rob, Destroy and Extirpate us.”<sup>186</sup> Andrew Hamilton attributed taking up “Arms in defence of the laws” because the Protestants were “no longer under obligation to be active in our own Destruction, to acknowledge Officers whom our Laws did incapacitate[.]”<sup>187</sup> Not to mention, the 1689 Declaration of Rights itself and the similar 1689 Scottish Claim of Right both attributed the allowance to “have arms” to the employment of Catholic lieutenants.<sup>188</sup>

The print literature and political tracts of the Glorious Revolution do not illuminate the massive individual disarmaments or the interpretation of the “have arms” provision that the Individual Right Scholars herald. What the literature does show is that the Protestant military, especially the commissioned officers, were disarmed and Catholics were armed in their stead.<sup>189</sup> In fact, the search and seizure of arms was supported by Parliament both prior to and after the Glorious Revolution.<sup>190</sup> The 1662 Militia Act search and seizure provision was actually carried over from the Interregnum<sup>191</sup> and the Cromwellian Protectorate.<sup>192</sup> When Parliament considered including the provision in the 1662 Militia Act, the House of Commons was actually concerned as

---

<sup>186</sup> FERGUSON, A BRIEF JUSTIFICATION OF THE PRINCE OF ORANGE’S DESCENT INTO ENGLAND, *supra* note 80, at 20; *see also* ROGER L’ESTRANGE, A BRIEF HISTORY OF THE TIMES, &c. 53-54 (London, n. pub. 1687).

<sup>187</sup> ANDREW HAMILTON, A TRUE RELATION OF THE ACTIONS OF INNISKILLING-MEN, FROM THEIR FIRST TAKING UP OF ARMS IN DECEMBER 1688. FOR DEFENCE OF THE PROTESTANT RELIGION, AND THEIR LIVE S AND LIBERTIES, at vi (London, n. pub. 1690); *see also* SAMUEL MASTERS, THE CASE OF ALLEGIANCE IN OUR PRESENT CIRCUMSTANCES CONSIDER’D 14 (London, n. pub. 1689) (“[I]f Officers be appointed by the King to oppress his Subjects contrary to Law, their Commission being illegal, must be without authority: and therefore the Subject is not bound in Conscience to submit to them[.]”).

<sup>188</sup> The Bill of Rights, 1689, 1 W. & M. 2, c. 2 (Eng.) (“By causing several good subjects being Protestants to be disarmed at the same time when papists were both armed and employed contrary to law . . . the subjects which are Protestants may have arms for their defence suitable to their conditions and as allowed by law”); 9 Scot. Parl. Acts 28 (1822) (“Disarming protestants while at the same tyme he Employed papists in the places of greatest trust, civil and military; such as Chancellor Secretaries, Privie Counsellors, and Lords of Sessione, thrusting out protestants to make roome for papists, and Intrusting the forts and magazins of the Kingdome in ther hands [that the] Disarming of Protestants and Implying papists [was] Contrary to Law.”).

<sup>189</sup> *See* AN ACCOUNT OF THE LATE, HORRID AND BLOODY MASSACRE IN IRELAND OF SEVERAL THOUSANDS OF PROTESTANTS, PROCUR’D AND CARRY’D ON BY THE L[ORD DEPUTY] TYRCONNEL AND HIS ADHERENTS 2 (n.p., n. pub. 1691); THE POISH CHAMPION, OR, A COMPLEAT HISTORY OF THE LIFE AND MILITARY ACTIONS OF RICHARD EARL OF TYRCONNEL 13 (London, n. pub. 1689).

<sup>190</sup> Charles, *Arms for Their Defense?*, *supra* note 18, at 373-83.

<sup>191</sup> ACTS AND ORDINANCES OF THE INTERREGNUM, 1642-1660, at 74-76, 648-50, 992-94, 1233-51 (1911).

<sup>192</sup> *Id.* at 1455-58; AN ACT FOR THE SETTLING THE MILITIA FOR THE CITY OF LONDON, AND LIBERTIES THEREOF 3 (London, John Streater & John Macock 1659).

to whether “sufficient Power [was] given by the Act to enter into any House to make Search for Arms.”<sup>193</sup> Not to mention, there is no evidence that Parliament even considered removing the search and seizure of arms provision. The Individual Right Scholars’ interpretation is not within the bounds of logic if the vehicle for the usurpation of an individuals right to have arms for personal defense—the search and seizure of arms provision in the 1662 Militia Act—was never even considered to be altered.<sup>194</sup>

A 1689 tract by revolutionary Samuel Johnson actually discussed the search and seizure of arms in detail. At no point did Johnson question the authority of lieutenants to search and seize arms. He described such disarming as essential for “securing the Peace of the Kingdom[.]”<sup>195</sup> Johnson did have qualms with “disarming the Loyalest and Best Subjects the King has,” but made no mention of this authority being abused.<sup>196</sup> In fact, Johnson detailed the legal requirements for enforcing a warrant to seize “Arms in the possession of any Person[.]”<sup>197</sup> It does not follow that the “have arms” provision was intended to protect against individual disarmament if all the evidence shows Parliament acquiesced the search and seizure of arms. Certainly Parliament had qualms with Catholic Lieutenants carrying out the 1662 Militia Act search and seizure of arms provision against Protestants.<sup>198</sup> However, the provision itself was never questioned or altered because it was viewed as a useful tool to protect against unlawful rebellion and to keep arms out of the hands of dangerous or disaffected persons.<sup>199</sup>

What further diminishes the Individual Right Scholars’ claims is the fact that the 1662 Militia Act was immediately altered following the Glorious Revolution. While the search and seizure of arms provision remained untouched, the oath that stated the militia, military, and Parliament had to swear that they would not take up arms against the king or those commissioned by him was immediately repealed.<sup>200</sup> This is significant because no longer were Parliament and the militia statutorily restricted from exercising the right of “self-preservation.”<sup>201</sup>

---

<sup>193</sup> 8 H.C. JOUR. 420 (1662).

<sup>194</sup> Charles, *Arms for Their Defense?*, *supra* note 18, at 373–83.

<sup>195</sup> JOHNSON, REMARKS UPON DR. SHERLOCK’S BOOK, *supra* note 83, at 45.

<sup>196</sup> *Id.*

<sup>197</sup> *Id.*

<sup>198</sup> Charles, *Arms for Their Defense?*, *supra* note 18, at 371.

<sup>199</sup> *Id.* at 376.

<sup>200</sup> 1 W. & M., c. 8, § 11 (1688) (Eng.).

<sup>201</sup> Henry Capel supported the provision because Parliament was not always in session to

Political tracts of the era show Parliament's dissatisfaction with statutory restriction on their right of "self-preservation" and that it was essential that the landed gentry "have arms" should the right need to be exercised. For instance, in a 1675 tract entitled *A Letter From a Person of Quality, to His Friend in the Country* it stated the oath of non-resistance "establisheth a *standing Army* by a Law, and swears Us into a *Military Government*."<sup>202</sup> Numerous 1688 and 1689 tracts show similar disfavor. For instance, Gilbert Burnet thought "the Article against Resistance ought to be softened so that it does not destroy" the "chief Design of Our whole Law, and all the several Rules of our Constitution," which "is to secure and maintain Our Liberty."<sup>203</sup> Samuel Johnson stated "the People of *England* [are] enslaved" by the 1662 Militia Act's oath of non-resistance.<sup>204</sup> The oath destroyed liberty itself, thus Johnson argued for the "Lawfulness of defending our selves against Illegal Violence[.]"<sup>205</sup> Samuel Masters made a similar observation when he queried, "But how can we defend our selves against any exorbitant Acts of the *King's* private Will, if disarm'd and fetter'd by the Doctrines of *passive Obedience* and *Nonresistance*?"<sup>206</sup> Master's interpretation may also explain why Richard Temple referred to the Militia Act as being "made use of to disarm all *England*."<sup>207</sup> However, Robert Ferguson addressed the issue in the most detail when he wrote:

To extend the [Sovereign's] Right to Command, and Subjects Duty to Obey, beyond the Laws of ones Country, is Treason against the Constitution, Treachery to the Society whereof we are Members, and through dissolving the Ties by which Princes stand confined, and overthrowing the Hedges by which the reserved Rights, Privileges, and Properties of the Subjects are fenced about, every Prince is made a Tyrant, and all the Subjects are rendered Slaves. Nor are all previous Agreements, Stipulations, and Laws, made insignificant and useless by such pernicious and adulatory Doctrine

---

check "Money [that] has been arbitrarily raised" to support a standing army. 9 DEBATES OF THE HOUSE OF COMMONS, *supra* note 58, at 520. In other words, Capel was stating that the removal of the 1662 Militia Act's "non-resistance" provision allotted qualified Protestants another check on unlawful standing armies. *Id.*

<sup>202</sup> ANTHONY ASHLEY COOPER, A LETTER FROM A PERSON OF QUALITY, TO HIS FRIEND IN THE COUNTRY 2 (n.p., n. pub. 1675).

<sup>203</sup> BURNET, AN ENQUIRY INTO THE MEASURES OF SUBMISSION TO THE SUPREAM AUTHORITY, *supra* note 70, at 11.

<sup>204</sup> JOHNSON, REMARKS UPON DR. SHERLOCK'S BOOK, *supra* note 83, at 38.

<sup>205</sup> *Id.* at 52.

<sup>206</sup> MASTERS, *supra* note 187, at 12.

<sup>207</sup> 9 DEBATES OF THE HOUSE OF COMMONS, *supra* note 58, at 31; Charles, *Arms for Their Defense?*, *supra* note 18, at 371-72.

as that of Non-resistance, when our Rights are Arbitrarily invaded, and the Constitution and Government avowedly subverted[.]<sup>208</sup>

In other words, Ferguson was stating the “Treasonable Doctrines of *Passive Obedience*, and *Non-Resistance*” are unconstitutional even if codified in statutes such as the 1662 Militia Act.<sup>209</sup> No law could supersede the “duty of every Protestant and English-man, to resist” and “turn their Arms against, as well as abandon[.]” a sovereign that usurps the laws, lives, liberties, estates, and religion of the nation.<sup>210</sup> The 1689 Declaration of Rights “have arms” provision insured such resistance was possible. It gave Parliament the means to arm those who were “qualified by law” to check a tyrannical sovereign or standing army.

This right to defend the realm, against foreign and domestic enemies, is what was meant by the language “arms for their defence,” not armed individual self-defense of the one’s person, home, or property. For instance, when Parliament was calling upon the county militias for the “mutual Preservation and Defense of themselves,” John Pym described it as “Preparation to take up Arms for their Defence[.]”<sup>211</sup> At the same time the Earl of Manchester described the situation of arraying of the militia as being for the “Preservation both of the Parliament and the Kingdom[.]”<sup>212</sup> A 1642 parliamentary resolution for *Defence of Popular* used similar language when it ordered the inhabitants of Popular and Blackwell to provide “One hundred and Fifty Pounds” to provide “Arms for their Defence[.]”<sup>213</sup> Meanwhile a 1648 tract entitled *The Peaceable Militia* stated the militia “Lawes of the land have made and allowed . . . provisions for war” which included the “having and viewing of Armes, and mustering men in their own Counties[.]”<sup>214</sup>

In 1658, William Prynne did not use the phrase “arms for their defence,” but he did illuminate the significance of “having arms” for defense of the realm in his tract *Eight Military Aphorismes*. Prynne

---

<sup>208</sup> FERGUSON, A BRIEF JUSTIFICATION OF THE PRINCE OF ORANGE’S DESCENT INTO ENGLAND, *supra* note 80, at 8.

<sup>209</sup> *Id.* at 21.

<sup>210</sup> *Id.*

<sup>211</sup> 3 THE PARLIAMENTARY HISTORY OF ENGLAND FROM THE EARLIEST PERIOD TO THE YEAR 1803, at 58 (William Cobbett ed., London, T.C. Hansard 1806) [hereinafter 3 COBBETT’S PARLIAMENTARY HISTORY]. *See also* 5 RUSHWORTH, HISTORICAL COLLECTIONS, *supra* note 59, at 102–27.

<sup>212</sup> 3 COBBETT’S PARLIAMENTARY HISTORY, *supra* note 211, at 58.

<sup>213</sup> 2 H.C. JOUR. 855 (1802).

<sup>214</sup> THE PEACEABLE MILITIA: OR THE CAUSE AND CURE OF THIS LATE AND PRESENT WARRE 5 (London, n. pub. 1648).

stated the “Nobility, Gentry, and People of all sorts” should be entrusted “with their *own arms and self-defence*, as [it had been] in former Ages, [it] being their native *Privilege and Birthright*, their on[ly] best security and prevention against all publike Enemies and Invaders[.]”<sup>215</sup> Prynne was for placing arms in the hands of qualified Protestants because with standing armies the people “are forced to put their *Armes, Lives, Estates[, and] Protection* into the hands of *Mercenary Officers[.]*”<sup>216</sup>

Lastly, John Sadler’s 1682 tract perfectly describes the significance of having “arms for their defence.” In discussing the importance of a militia, Sadler stated, “Men ought indeed have *Arms*; and them to keep in Readiness for Defence of the King and Kingdom.”<sup>217</sup> Such arms “must be *Assessed by the Common Consent*” of Parliament in “Proportion [to] every Man’s *Estate, and Fee for the Defence of the Kingdom[.]*”<sup>218</sup> Sadler was against placing the power to assess and array the militia in “two or three Strangers[.]” He felt it important that such power be placed in “Men but themselves”—i.e. Parliament—“to provide and bear Arms, *how*, and *when*, and *where* it shall seem good to such Commissioners[.]”<sup>219</sup> Any question of the parliamentary power to exercise the right of “self-preservation” and determine who may “have arms” for the defense of the realm is removed when Sadler states, “[A]ll matters of History, telleth us their general Custom was; *Not to entrust any man with bearing Arms . . . till some Common Council, more or less, had approved him.*”<sup>220</sup>

All these examples show that having “arms for their defence” was in reference to arming and arraying the militia, for it was the militia laws that determined who was qualified to “have arms.”<sup>221</sup> In the meantime, Individual Right Scholars provide no evidence of how the phrase “arms for their defence” was understood in the seventeenth or even eighteenth century. Instead they interpret the phrase and the “have arms” provision in a manner to support their political beliefs, not in manner that places it in its historical context.

What is more appalling is the fact that Individual Right Scholars

---

<sup>215</sup> PRYNNE, EIGHT MILITARY APHORISMES, *supra* note 67, at 14.

<sup>216</sup> *Id.* See also THE LEVELLER, *supra* note 125, at 9.

<sup>217</sup> SADLER, RIGHTS OF THE KINGDOM, *supra* note 125, at 143.

<sup>218</sup> *Id.*

<sup>219</sup> *Id.* at 146.

<sup>220</sup> *Id.* at 159.

<sup>221</sup> See *supra* note 178.

claim that the Founding Fathers drafted the Second Amendment in response to the repetitive violations of this ancient English right. It is claimed that the seizure of arms and ammunition by men such as Thomas Gage and Lord Dunmore were grievances upon which the American Revolution was fought. Furthermore, Individual Right Scholars Claim the *Declaration of the Causes and Necessity for Taking Up Arms* recognized this unconstitutional disarming when it stated:

The inhabitants of Boston being confined within that town by the general their governor, and having, in order to procure their dismissal, entered into a treaty with him, it was stipulated that the said inhabitants having deposited their arms with their own magistrates, should have liberty to depart, taking with them their other effects. They accordingly delivered up their arms, but in open violation of honour, in defiance of the obligation of treaties, which even savage nations esteemed sacred, the governor ordered the arms deposited as aforesaid, that they might be preserved for their owners, to be seized by a body of soldiers; detained the greatest part of the inhabitants in the town, and compelled the few who were permitted to retire, to leave their most valuable effects behind.<sup>222</sup>

Individual Right Scholars take this grievance out of context. What is apparent upon looking at the grievance is that there is no mention of a right or privilege to “have arms.” This is odd seeing that the Declaration describes the deprivation of trial by jury grievance as denying an “accustomed and inestimable privilege”—a grievance that was described in the 1774 *Declaration of Rights and Grievances* as a “constitutional” right.<sup>223</sup> More importantly, the grievance against Gage was not with the seizure of arms, but that he violated the “treaty” with Boston’s inhabitants—a fact that is evidenced by the Declaration’s language “in defiance of the obligation of treaties” and the contemporaneous literature of the period.<sup>224</sup>

All and all the Individual Right Scholars’ claim about the British disarming the colonists as directly impacting American independence and the drafting the Second Amendment is historically and contextually perplexing. Such an interpretation fails to answer why the Founding Fathers were justified in seizing the arms of suspected loyalists, but the

---

<sup>222</sup> DECLARATION OF THE CAUSES AND NECESSITY OF TAKING UP ARMS (1775), reprinted in SOURCES OF OUR LIBERTIES 295, 298 (Richard L. Perry ed., rev. ed. 1978).

<sup>223</sup> Charles, *Arms for Their Defense?*, *supra* note 18, at 444.

<sup>224</sup> *Id.* at 443–48.

disarming of the colonists was an alleged violation of the 1689 Declaration of Rights “have arms” provision.<sup>225</sup> It also doesn’t explain the lawful disarming of Shays Rebellion insurgents<sup>226</sup> who’s Massachusetts’ Constitution insured the people had a right to “keep and bear arms for the common defence.”<sup>227</sup> Most importantly, such an interpretation fails to answer why not one declaration, petition, list of grievances, or letter from Congress claimed the British were violating their right or privilege to “have arms.”<sup>228</sup> Not even the Declaration of Independence mentioned such a grievance or violation.<sup>229</sup> This is telling as to how inaccurate and misleading the individual right theory of the “have arms” provision and the Second Amendment is.

What the Individual Right Scholars fail to understand is that the colonial assemblies and Continental Congress were invoking the right of “self-preservation” that the “have arms” provision ensures. The current situation was viewed all too similar to their English forefathers’ lawful rebellions of the seventeenth century. Just as Charles I was charged with breaching the “liberties of the people” and the “settling of the Protestant religion” which justified Parliament’s “just occasion to raise forces for the defence of their laws and liberties,” the Founding Fathers believed they were also justified in their rebellion.<sup>230</sup> For instance a 1774 pamphlet reported that it was declared before the Continental Congress that the “destructive measures . . . operating against the colonists” will reduce them “to such a situation, that they shall be compelled to renounce every regard, but that of self-preservation.”<sup>231</sup>

As has already been shown, the Boston Town Council tried to

---

<sup>225</sup> CHARLES, THE SECOND AMENDMENT, *supra* note 4, at 41–42.

<sup>226</sup> *Id.* at 84–87.

<sup>227</sup> MA. CONST. of 1780, art. XVII.

<sup>228</sup> Charles, *Arms for Their Defense?*, *supra* note 18, at 435.

<sup>229</sup> *Id.* at 443; *see also* CHARLES, THE SECOND AMENDMENT, *supra* note 4, at 82. Local declarations of independence did not list it as a grievance either. *See* PAULINE MAIER, AMERICAN SCRIPTURE 227 (1998); *see also* 5 AMERICAN ARCHIVES, ser. 4, at 1034–35, 1046, 1047, 1205 (Peter Force ed., Washington, Clarke & Force 1844); 6 AMERICAN ARCHIVES, ser. 4, at 556–58, 602–04, 649, 698–701, 933, 1017–21 (Peter Force ed., Washington, Clarke & Force 1844).

<sup>230</sup> CARE, ENGLISH LIBERTIES, *supra* note 160, at 175–76. Care’s writings were very influential to the Founding Fathers. *See* LOIS G. SCHWOERER, THE GENIUS OF MR. HENRY CARE: LONDON’S FIRST SPIN DOCTOR 270–73 (2004); J.C.D. CLARK, THE LANGUAGE OF LIBERTY, 1660–1832 (1994); Winthrop S. Hudson, *William Penn’s English Liberties: Tract for Several Times*, 26 WM. & MARY Q. 585 (1969).

<sup>231</sup> EXTRACTS FROM THE VOTES AND PROCEEDINGS OF THE AMERICAN CONTINENTAL CONGRESS, HELD AT PHILADELPHIA ON THE 5TH OF SEPTEMBER 1774, at 39 (Boston, Edes & Gill 1774).

invoke the right of “self-preservation” in 1768 when Boston had “reason to fear, there would be a necessity of the means of self preservation against the *violence of oppression*.”<sup>232</sup> In multiple instances the Continental Congress called upon the right to justify their rebellion.<sup>233</sup> This includes the *Declaration of Causes and Necessity for Taking Up Arms* which stated that the colonies had “taken up arms” against “violence actually offered” in “defence of the Freedom that is our Birthright[.]”<sup>234</sup> The Olive Branch Petition similarly justified rebellion by stating the colonists were “compelled . . . to arm in our own defence” and that they must bring their grievances with “just attention to our own preservation[.]”<sup>235</sup>

Even 1775 American political tracts characterized their rebellion as exercising the right of “self-preservation.” For instance, a tract entitled *Resistance No Rebellion* justified the colonies’ rebellion by stating that the people were forced “to have recourse to that resistance, which they had an unquestionable right to make use of, whenever it become absolutely necessary for the defence and preservation of their constitution.”<sup>236</sup> Meanwhile, in the tract entitled *A Discourse on the Love of Our Country*, Samuel Williams wrote America’s rebellion was “not the cause of a mob, of a party, or a faction that American means to plead.” It was “the cause of *Self-Defence*, of *Public Faith*, and of the *Liberties of Mankind*[.]”<sup>237</sup> The most telling tract, however, was Thomas Paine’s *The Crisis XIV*. It proclaimed:

Americans may lawfully and justly, by the great principles of the constitution, without any treason or rebellion, take up arms in defence of their privileges, laws, lives, liberties and properties . . . . When a King throws off all restraint of law, and is

---

<sup>232</sup> Adams, *Article signed “E.A.”*, *supra* note 108, at 316, 318.

<sup>233</sup> See *supra* pp. 137–138.

<sup>234</sup> THE DECLARATION OF THE CAUSES AND NECESSITY FOR TAKING UP ARMS, *supra* note 222.

<sup>235</sup> *Second Petition from Congress to the King (July 8, 1775)*, in 1 THE PAPERS OF THOMAS JEFFERSON 219, 220–21 (Julian P. Boyd et al. eds., 1950). The Founding Fathers repeatedly justified the rebellion by claiming they were taking up arms for their defence in one way or another. See, e.g., 1 AMERICAN ARCHIVES, ser. 4, at 660, 1181, 1330, 1394, 1462 (Peter Force ed., Washington, Clarke & Force 1837); 2 AMERICAN ARCHIVES, ser. 4, at 968, 969 (Peter Force ed., Washington, Clarke & Force 1839) (General Thomas Gage describing the colonists at Lexington & Concord as making “use of their arms only in their own defence”); *Id.* at 383, 725, 1015; 3 AMERICAN ARCHIVES, ser. 4, at 127, 764, 1376, 1740 (Peter Force ed., Washington, Clarke & Force 1840).

<sup>236</sup> RESISTANCE NO REBELLION, IN WHICH THE RIGHT OF THE BRITISH PARLIAMENT TO TAX THE AMERICAN COLONIES, IS FULLY CONSIDERED, AND FOUND UNCONSTITUTIONAL 21–22 (n.p., n. pub. 1775).

<sup>237</sup> WILLIAMS, A DISCOURSE, *supra* note 111, at 26.

bound by no principles of justice or humanity, when he invades with open force the liberties and persons of his subjects in a hostile manner . . . the people of England, and every part of the British empire, will be justified in taking up arms, and resisting such invasions and violence . . . . We have several instances in the history of this country, and in many of the ages, of the people of England resisting, by force of arms . . . for their own necessary defence and preservation, the support of human society and liberty, to protect themselves against all unlawful violence and tyranny[.]<sup>238</sup>

Alexander Hamilton's Federalist No. 28 echoes how this right of "self-preservation" was represented in the framework of the United States Constitution. Hamilton wrote, when the federal government betrays "their constituents, there is then no resource left but in the exertion of that original right of self-defense which is paramount to all positive forms of government[.]"<sup>239</sup> To exercise this right, Hamilton wrote, the people should appeal to their "State Governments . . . [to] afford complete security against invasions of the public liberty[.]"<sup>240</sup> Thus similar to how the right of "self-preservation" was invoked by Parliament during the seventeenth century, the Boston Town Council in 1768, and Congress during the American Revolution, Hamilton felt it was through their state governments that the people could invoke the right of "self-preservation" to "unite their common forces for the protection of their common liberty."<sup>241</sup> Hamilton elaborated on this point should the federal government maintain an oppressive standing army. He wrote when the federal government "raise and maintain an army capable of erecting a despotism", the people may, "through the medium of their State governments . . . take measures for their own defense."<sup>242</sup>

Regarding the protection the Second Amendment affords, there is no evidence from the debates that it was drafted to prevent individual disarming.<sup>243</sup> If anything, the statutory use of the phrases "keep arms" and "bear arms" throughout eighteenth century America affirm it is a right intimately connected with state militias.<sup>244</sup> These statutes and subsequent state constitutions frequently used the language "well-

---

<sup>238</sup> THOMAS PAINE, THE CRISIS, NUMBER XIV 114–15 (n.p., n. pub. 1775).

<sup>239</sup> THE FEDERALIST NO. 28 (Alexander Hamilton).

<sup>240</sup> *Id.*

<sup>241</sup> *Id.*

<sup>242</sup> *Id.*

<sup>243</sup> CHARLES, THE SECOND AMENDMENT, *supra* note 4, at 34–47.

<sup>244</sup> *Id.* at 22–34.

regulated militia,”<sup>245</sup> meaning the right to “keep and bear arms” was never intended to be an unfettered right to possess modern weaponry as Individual Right Scholars claim. The allowance to “have arms” and the Second Amendment protects the ancient Anglo-American right to take part in defending one’s liberties.<sup>246</sup> The Founding Fathers understood this better than anyone due to their continued reliance on the militia system.<sup>247</sup> Control of the militia was particularly significant because it was the means by which the right of “self-preservation” was invoked and their liberties and estates were preserved. This premise was even stated at the 1787 Constitutional Convention, when Luther Martin conveyed his concern in giving control of the militia to the federal government, he stated that to give the federal government such a power would take away “from [the states] the only means of self preservation.”<sup>248</sup>

### CONCLUSION

While the *Heller* majority was correct in noting that the Second Amendment was based upon the rights of “resistance” and “self-preservation” that Blackstone refers to, the Court improperly assumed these rights are in reference to armed individual self-defense of the home. The historical record of the 1689 Declaration of Rights shows the “have arms” provision ensured Parliament had the authority to arm qualified Protestants to resist enemies—foreign and domestic—nothing more, nothing less. This is significant for the *McDonald* Court because it shows the *Heller* right to have arms for defense of one’s home is not fundamental to the Anglo-American scheme of justice.<sup>249</sup> This is also significant in regards to interpreting the Constitution’s right to “keep and bear arms,” for the Second Amendment acted as a similar restriction on the federal government. Just as the “have arms” provision prevented the sovereign from disarming qualified Protestants defined by Parliament, the Second Amendment prevents the federal government

---

<sup>245</sup> For a detailed list of statutes, proclamations, and constitutions that link the right to right to “keep and bear arms” with a “well-regulated militia” see Charles, *Arms for Their Defense?*, *supra* note 18, at 450 n.701. For an understanding of what a “well-regulated militia” meant see Paul Finkelman, “A Well Regulated Militia”: *The Second Amendment in Historical Perspective*, 76 CHI.-KENT L. REV. 195 (2000).

<sup>246</sup> Charles, *Arms for Their Defense?*, *supra* note 18, at 444.

<sup>247</sup> CHARLES, *THE SECOND AMENDMENT*, *supra* note 4, at 71–88.

<sup>248</sup> 3 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 259 (Max Farrand ed., 1911).

<sup>249</sup> *Duncan v. Louisiana*, 391 U.S. 145, 149 (1968).

from interfering with the states' police power and the right to arm its militia.

This is not to say the Second Amendment does not protect an individual right *per se*. Similar to their English forefathers, the drafters of the Constitution feared placing their laws, lives, liberties, and estates in the hands of a standing army. The Second Amendment's right to "keep and bear arms" protected against this by allowing all citizens to take part in securing their liberties.<sup>250</sup> While we may view the codification of such a limited right as odd today, the right was viewed as inherent and fundamental to the Founding generation. As the Philadelphia *Independent Gazetteer* described the Second Amendment on September 9, 1789, it was a protection that did not "abridge" the "absolute command vested by [the Constitution's] other sections in Congress over the militia."<sup>251</sup> Nor did it "ordain, or constitutionally provide for, the establishment" of a militia.<sup>252</sup> That was a power that was remained in the states, for while Congress could organize, arm, and array the federal militia, the states still maintained the power to organize their own.<sup>253</sup>

---

<sup>250</sup> CHARLES, THE SECOND AMENDMENT, *supra* note 4, at 49–54.

<sup>251</sup> *Centinel, Revivied. No. XXIX*, INDEP. GAZETTEER, Sept. 9, 1789, at 2, col. 2, reprinted in THE ORIGIN OF THE SECOND AMENDMENT 711, 712 (David E. Young ed., 1991).

<sup>252</sup> *Id.*

<sup>253</sup> CHARLES, THE SECOND AMENDMENT, *supra* note 4, at 71–79.