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Patrick J. Charles

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Recommended Citation

Patrick J. Charles, *Arms for Their Defence - 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)
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“ARMS FOR THEIR DEFENCE”? 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

PATRICK J. CHARLES*

*That the subjects which are Protestants may have arms for their defence suitable
to their conditions and as allowed by law.*—English Declaration of Rights of 1689

I. INTRODUCTION	352
II. THE 1689 ENGLISH DECLARATION OF RIGHTS.....	356
A. <i>The Road to an Affirmed Allowance to</i> <i>“Have Arms”</i>	358
B. <i>The Creation of the Allowance to</i> <i>“Have Arms”</i>	363
III. CORRECTING THE “INDIVIDUAL RIGHT” INTERPRETATION OF THE CONVENTION	383
IV. THE GAME ACTS AND UNDERSTANDING “ARMS FOR THEIR DEFENCE”	386
V. THE DISARMING OF PAPISTS AND THE ALLOWANCE OF ARMS FOR SELF-DEFENSE.....	398
VI. THE MILITIA ACT OF 1757	403
VII. GRANVILLE SHARP IN UNDERSTANDING THE ALLOWANCE TO “HAVE ARMS”	411
VIII. BLACKSTONE’S <i>COMMENTARIES</i> AND THE ALLOWANCE TO “HAVE ARMS”	414
IX. ST. GEORGE TUCKER ON BLACKSTONE’S <i>COMMENTARIES</i> AND THE ALLOWANCE TO “HAVE ARMS”	418
X. THE AMERICAN PERSPECTIVE ON “HAVE ARMS”	421
XI. CONCLUSION.....	454

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I. INTRODUCTION

In early 2010, the United States Supreme Court will hear oral arguments for *McDonald v. City of Chicago* to determine whether the Second Amendment is incorporated through the Fourteenth Amendment and applies directly to the states.¹ Coming less than two years after the Court's landmark decision in *District of Columbia v. Heller*,² the issues affecting the Fourteenth Amendment are two-fold. First, the Court will determine whether the Second Amendment is incorporated through the Fourteenth Amendment's Due Process Clause. Second, the Court will determine if the Second Amendment applies to the states through the Fourteenth Amendment's Privileges and Immunities Clause. While the "privileges and immunities" issue will receive the overwhelming attention of the legal community, what will seemingly be ignored is the history of the Anglo-American tradition of "having arms," for its history may prove crucial as to whether the Second Amendment is incorporated through either the Fourteenth Amendment's Due Process or Privileges and Immunities Clauses.

In the wake of *Heller*, the first and only court to issue an opinion incorporating the Second Amendment was the Ninth Circuit Court of Appeals' vacated decision in *Nordyke v. King*.³ In incorporating the Second Amendment through the Fourteenth Amendment's Due Process Clause, the court determined that "the right to keep and bear arms is 'deeply rooted in this Nation's history and tradition'" and "is necessary to the Anglo-American conception of ordered liberty that we have inherited."⁴ There is no denying that the limited "individual right" to defend against standing armies—foreign or domestic—predated the Constitution. However, there is no substantiating historical evidence that a right to own and use guns in the home was ever meant to be "fundamental to the American scheme of justice."⁵ Given the Supreme Court's holding in *District of Columbia v. Heller*, the *Nordyke* court's conclusion was not at all surprising. The Court majority had already determined that the "District's ban on handgun possession in the home violates the Second Amendment, as does its prohibition against rendering any lawful firearm in the home operable for the purpose of immediate self-defense."⁶

The Second Amendment reads, "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed."⁷ Most legal scholars and historians argue that this right mirrors a provision in the 1689 English Declaration of Rights, which ensures that "subjects which are Protestants may *have arms* for their defence suitable to their conditions

¹ *NRA v. City of Chicago*, 567 F.3d 856 (7th Cir. 2009), *cert. granted sub nom. McDonald v. City of Chicago*, 2009 U.S. LEXIS 5150 (U.S. Sept. 30, 2009) (No. 08-1521).

² *District of Columbia v. Heller*, 128 S. Ct. 2783 (2008).

³ *Nordyke v. King*, 563 F.3d 439 (9th Cir. 2009), *vacated en banc*, 2009 U.S. App. LEXIS 16908 (D.C. Cir. July 29, 2009) (No. 07-15763).

⁴ *Id.* at 457.

⁵ *Duncan v. Louisiana*, 391 U.S. 145, 149 (1968).

⁶ *Heller*, 128 S. Ct. at 2821-22.

⁷ U.S. CONST. amend. II.

and as allowed by law.”⁸ It is more than reasonable to assert that this provision heavily influenced the Second Amendment, because the Founding Fathers viewed the American Revolution as a reaffirmation of the Glorious Revolution.⁹ Therefore, it is fair to say that the Declaration of Rights’ “have arms” guarantee was the precursor to, if not the inspiration for, the Second Amendment.

This fact is not only historically significant, it is also legally significant. It was the means by which the Supreme Court majority came to its determination in *Heller*. The Court stated that the English “right secured in 1689 as a result of the Stuarts’ abuses was by the time of the founding understood to be an individual right protecting against both public and private violence.”¹⁰ In other words, the Supreme Court majority interpreted the English “have arms” provision as a right to personal armed self-defense—an interpretation it thought the Founders understood to be the Second Amendment’s “central component.”¹¹

This historical interpretation of the “have arms” provision laid the foundation for the decision in *Nordyke*. The Ninth Circuit Court of Appeals did not touch upon the history of the English right to “have arms.” Instead, it merely took the *Heller* majority’s analysis as sufficient to prove that an alleged right to own a gun for defense of the home was firmly rooted in the Anglo-American tradition. Both the Ninth Circuit Court of Appeals and the Supreme Court majority have been misled. They have relied upon incomplete and misguided research of both the English “have arms” provision and the Founders’ understanding of that limited right.¹² Both courts have been led to believe that lower-status Englishmen’s discontent with the gaming laws, coupled with their required duties in the militia, created a constitutional right to own arms to defend the home—a right that has never historically or legally existed.

The problem is that Individual Right Scholars have seemingly ignored the abundant sources that explain exactly what the English allowance to “have arms” was meant to protect. First, the provision is an allowance—not a right—because it states that Protestants “may have arms.” Furthermore, it was conditioned on the arms being “suitable to their condition and as allowed by law.” Both phrases greatly limit an individual’s ability to possess arms. This was done intentionally, for the “have arms” provision was an affirmation of preexisting law and custom. This

⁸ 1 W. & M. 2, c. 2 (1688) (Eng.) (emphasis added). This is commonly known as the 1689 Declaration of Rights.

⁹ There are countless reaffirmations of this in the Founders’ writings. See PATRICK J. CHARLES, *IRRECONCILABLE GRIEVANCES: THE EVENTS THAT SHAPED THE DECLARATION OF INDEPENDENCE* 55-64 (2008) [hereinafter CHARLES, *IRRECONCILABLE GRIEVANCES*].

¹⁰ *District of Columbia v. Heller*, 128 S. Ct. 2783, 2798-99 (2008).

¹¹ *Id.* at 2801 (emphasis omitted).

¹² See JOYCE LEE MALCOLM, *TO KEEP AND BEAR ARMS: THE ORIGINS OF AN ANGLO-AMERICAN RIGHT* (1994). The Court also cites WILLIAM BLIZARD, *DESULTORY REFLECTIONS ON POLICE* 59-60 (London, Baker & Galabin 1785) and GRANVILLE SHARP, *TRACTS, CONCERNING THE ANCIENT AND ONLY TRUE LEGAL MEANS OF NATIONAL DEFENCE, BY A FREE MILITIA* 17-18, 27 (3d ed. London, n. pub. 1782) both of which were written well after the adoption of the English Declaration of Rights. Neither is historically significant in examining the original intent of the English “have arms” provision. Nevertheless, both will be addressed later in this Article to refute the Court majority and Malcolm’s contentions.

included allowing qualified Protestants to “have arms” in defense of the realm and check tyrannical standing armies.

To some, these historical facts may seem like a moot point considering the Supreme Court has already given its opinion. This is not necessarily the case. As seen in the stayed *Nordkye*, the legal debate of the history of the Second Amendment is still alive. There is no question that the Ninth Circuit Court of Appeals relied on *Heller*’s history of the Second Amendment, but the court did open the door for refutation when it 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.”¹³

Furthermore, litigation of the history of the “right to keep and bear arms” is prevalent because the Supreme Court never affirmatively answered whether the Second Amendment is incorporated through the Due Process Clause of the Fourteenth Amendment.¹⁴ The *Nordkye* court mistakenly assumed that the holding in *Heller* was meant to overturn the late nineteenth-century cases that addressed this issue.¹⁵ However, before that decision was stayed, it was the only circuit to do so. Both the Second¹⁶ and Seventh¹⁷ Circuits have held that the Second Amendment does not apply to the states. They rely on the fact that *Heller* stated that the Supreme Court’s nineteenth-century case precedent “reaffirmed that the *Second Amendment* applies only to the Federal Government.”¹⁸

Therefore, given these interpretational differences and the Supreme Court granting certiorari on this issue, a detailed look into the history and original intent of the English Declaration of Rights’ “have arms” provision is significant. Both cases before the Court are arguing that the *Heller* majority’s understanding of this history is adequate to incorporate the Second Amendment through the Fourteenth Amendment’s Due Process Clause. This is not necessarily true. The first test in determining if a right is incorporated under the Due Process Clause is whether it is

¹³ *Nordkye v. King*, 536 F.3d 439, 456 (9th Cir. 2009).

¹⁴ *Heller*, 128 S. Ct. at 2817-18; see also PATRICK J. CHARLES, THE SECOND AMENDMENT: THE INTENT AND ITS INTERPRETATION BY THE STATES AND THE SUPREME COURT (2009) [hereinafter CHARLES, SECOND AMENDMENT]. There has been much speculation by lawyers and legal scholars as to whether the Second Amendment is a right that would be incorporated under the Due Process Clause of the Fourteenth Amendment. Unfortunately, all those who have addressed this legal issue have done so prior to the *Heller* decision. See Michael Anthony Lawrence, *Second Amendment Incorporation through the Fourteenth Amendment Privileges or Immunities and Due Process Clauses*, 72 MO. L. REV. 1 (2007); David A. Lieber, Comment, *The Cruikshank Redemption: The Enduring Rationale for Excluding the Second Amendment from the Court’s Modern Incorporation Doctrine*, 95 J. CRIM. L. & CRIMINOLOGY 1079 (2005); Koren Wai Wong-Ervin, Note, *The Second Amendment and the Incorporation Conundrum: Towards a Workable Jurisprudence*, 50 HASTINGS L.J. 177 (1998).

¹⁵ See *Miller v. Texas*, 153 U.S. 535 (1894); *Presser v. Illinois*, 116 U.S. 252 (1886); *United States v. Cruikshank*, 92 U.S. 542 (1876).

¹⁶ *Maloney v. Cuomo*, 554 F.3d 56, 58 (2d Cir. 2009).

¹⁷ *NRA v. City of Chicago*, 567 F.3d 856, 858 (7th Cir. 2009).

¹⁸ *District of Columbia v. Heller*, 128 S. Ct. 2783, 2813 n.22 (2008).

“fundamental to the American scheme of justice.”¹⁹ In conducting this test, the Court has traditionally examined the Anglo-American tradition of the right being asserted.

For example, in determining whether the right to a jury trial met this test, the Supreme Court traced its roots back to Greek and Roman history, the Magna Carta, through the English Declaration of Rights, and to the colonies from the *Commentaries* of William Blackstone.²⁰ Although it is true that the *Heller* majority did briefly examine these historical issues, no historian, besides Joyce Lee Malcolm, who specializes in seventeenth-century English history, has supported the Court’s contentions. In fact, the most prominent historian that specializes in this era and the Glorious Revolution—Lois G. Schwoerer—has persistently refuted the *Heller* majority’s interpretation.²¹ Therefore, it is most likely that the Court will need to address these historical issues again and with more specificity.

Not to mention, the four dissenting Justices in *Heller* will have no qualms about revisiting this issue. There can be little doubt that not only will the English history of “having arms” be reexamined, but perhaps the entire history of the Second Amendment as well. The historical and constitutional inconsistencies within the *Heller* majority’s opinion are all too clear. While these inaccuracies are significant, what is more relevant is the Court’s misinterpretation of its constitutional predecessor—the English allowance to “have arms,” for by starting off its historical analysis on the wrong foot, so to speak, the Court ultimately reached a textually perplexing conclusion. It was this initial step toward an inaccurate historical interpretation of the Declaration of Rights that allowed the Court to incorporate the faulty holding in *Heller*. Thus, it is essential that the original intent of that right be examined in exacting detail and the Court follow its well-established precedent of reexamining the history of constitutional provisions in light of recent scholarship.²²

¹⁹ *Duncan v. Louisiana*, 391 U.S. 145, 149 (1968).

²⁰ *Id.* at 151-52.

²¹ 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). Carl Bogus also addresses this. Carl T. Bogus, *The Hidden History of the Second Amendment*, 31 U.C. DAVIS L. REV. 309 (1998).

²² See *Smith v. Alright*, 321 U.S. 649, 665-66 (1944); *Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 575 (1985); *Coolidge v. New Hampshire*, 403 U.S. 604, 611 (1971); *Burnham v. Superior Court of California*, 495 U.S. 604, 611 (1985). Some of the historical and constitutional inconsistencies within *Heller* are:

It does not examine any relevant legislative history immediately following the adoption of the Constitution, but rather uses commentary and cases drafted at least forty years later. It relies on state Constitutions’ “right to bear arms” provisions after the adoption of the Second Amendment, without textually analyzing them or giving them a plurality meaning. Furthermore, the holding ignores the states’ ratification of convention amendments that contradicted the individual right theory, but still erroneously inferred that these conventions all point to the individual right model. It added the word “because” to the beginning of the prefatory clause (“A well regulated militia, being necessary to the security of a free State”), changed the word “State” to “country,” argued the word “against” would had to have been incorporated for the amendment to have some form of a collective right interpretation, and added a self-defense exception that never historically existed. In short, the opinion was a selective

II. THE 1689 ENGLISH DECLARATION OF RIGHTS

On February 13, 1689, the Declaration of Rights was presented to the soon-to-be sovereigns of the three kingdoms—William and Mary.²³ The Declaration is undoubtedly a statement of rights that the members of the Convention deemed necessary for the future governance of England. Whether the rights listed therein are an affirmation of preexisting fundamental rights or newly avowed rights has been the issue of debate.²⁴ For example, the protection “[t]hat the raising or keeping a standing Army within the kingdom in time of peace, unless it be with consent of Parliament” was a newly avowed right and a response to the discontent felt over James II’s standing army.²⁵ There was certainly nothing contrary in the statutes about the manner in which James II maintained his standing army.²⁶ It had traditionally and legally been a power that the sovereign maintained.²⁷ Parliament

incorporation of the evidence to ensure the Second Amendment protected an “individual right” for self-defense in the home.

CHARLES, *supra* note 14, at 9-10. .

²³ LOIS G. SCHWOERER, *THE DECLARATION OF RIGHTS, 1689*, at 11 (1981) [hereinafter SCHWOERER, *DECLARATION OF RIGHTS*].

²⁴ Thomas Macaulay wrote, “Not a single new right was given to the people. The whole English law, substantive and adjective, was, in the judgment of all the greatest lawyers, of Holt and Treby, of Maynard and Somers, exactly the same after the Revolution as before it.” THOMAS BABINGTON MACAULAY, 2 *MACAULAY’S HISTORY OF ENGLAND 377-78* (1906). G.M. Trevelyan wrote:

The Declaration of Right was, in form at least, purely conservative. It introduced no new principle of law . . . [f]or the Convention had wisely decided that alterations in the existing laws would require time for debate, and not another day could be spared before the throne was filled, without great risk to the public safety. Therefore the Declaration of Right had been framed as a mere recital of those existing rights of Parliament and of the subject, which James [II] had outraged, and which William must promise to observe. All further changes, however pressing their need, must wait till Parliament should have time to discuss and pass them, and till there was a King to give them statutory force by royal assent to new laws.

GEORGE MACAULAY TREVELYAN, *THE ENGLISH REVOLUTION 1688-1689*, at 150-51 (1938). Lois G. Schwoerer has taken a more objective and accurate approach. She has affirmatively shown that eight of the thirteen rights listed in the Declaration of Rights were not ancient or preexisting. SCHWOERER, *DECLARATION OF RIGHTS*, *supra* note 23, at 100-01.

²⁵ LOIS G. SCHWOERER, *NO STANDING ARMIES!: THE ANTIARMY IDEOLOGY IN SEVENTEENTH-CENTURY ENGLAND 147-54* (1974) [hereinafter SCHWOERER, *NO STANDING ARMIES*].

²⁶ SCHWOERER, *DECLARATION OF RIGHTS*, *supra* note 23, at 71-74. Schwoerer states: The Militia Act of 1661 unequivocally confirmed the monarch’s right to sole command of the military forces of the nation: “the sole supreme government, command and disposition of the militia” as well as, so the act ran, “of all forces by sea and land . . . is, and by the laws of England ever was, the undoubted right” of the crown.

Id. at 72; *see also* CHARLES, *IRRECONCILABLE GRIEVANCES*, *supra* note 9, at 64-69; TIM HARRIS, *POLITICS UNDER THE LATER STUARTS: PARTY CONFLICT IN A DIVIDED SOCIETY 1660-1715*, at 134 (1993).

²⁷ 13 & 14 Car. 2, c. 3, § 1 (1662) (Eng.) (“[T]hat both or either of the Houses of Parliament cannot nor ought to pretend to the same; nor can nor lawfully may raise or levy any

was merely distrustful of the sovereign given the oppressive use of standing armies during the Cromwellian Protectorate. Therefore, when the danger of Monmouth's Rebellion subsided,²⁸ and James II refused to disband his standing army, a tension developed between Parliament and the King. This issue would be settled upon William and Mary's accession to the throne on April 11, 1689, for the Declaration of Rights created a newly avowed parliamentary power, thus settling the dispute of standing armies during times of peace.

Meanwhile, unlike the protection against standing armies, the allowance to "have arms" was a preexisting fundamental right. It had been reaffirmed many times since the Middle Ages by England's continuous reliance on the hue and cry, assize of arms, and the militia.²⁹ For centuries, laws permitted qualified Englishmen to maintain arms³⁰ for the defense of the realm³¹—an allowance that had always been

War offensive or defensive against His Majesty."); see also SCHWOERER, DECLARATION OF RIGHTS, *supra* note 23, at 72.

²⁸ BARRY COWARD, THE STUART AGE: ENGLAND, 1603-1714, at 338 (2d ed. 1994).

²⁹ SCHWOERER, DECLARATION OF RIGHTS, *supra* note 23, at 74.

³⁰ According to Giles Jacob's 1729 *A New Law Dictionary*, the definition of arms "extended to any Thing that a Man wears for his Defence, or takes into his Hands, or useth in Anger to strike or cast at another." GILES JACOB, A NEW LAW DICTIONARY, at "Arms" (n.p., E. & R. Nutt 1729). The definition makes no mention of the 1689 Declaration of Rights or a right to self-defense. Moreover, there is no mention of the Declaration of Rights or the "have arms" provision at any of the following 1729 dictionary entries: "self-preservation," "se defendendo" (self-defense), "defence," and "game."

However, the dictionary does make mention of the Declaration of Rights at the entries of "convention parliament" and "dispensation by non obstante," thus giving weight to the argument that armed individual self-defense was not linked to the "have arms" provision. In fact, in all the subsequent editions up to his death in 1744, Jacob's legal dictionary never modified the "arms" entry to include the "have arms" provision or change the other entries—"self-preservation," "se defendendo" (self-defense), "defence," and "game." See GILES JACOB, A NEW LAW DICTIONARY, at "armour and arms," "self-preservation," "se defendendo," "defence," "game" (n.p., Henry Lintot 5th ed. 1744); GILES JACOB, A NEW LAW DICTIONARY, at "armour and arms," "self-preservation," "se defendendo," "defence," "game" (n.p., Henry Lintot 1743); GILES JACOB, A NEW LAW DICTIONARY, at "armour and arms," "self-preservation," "se defendendo," "defence," "game" (n.p., E. & R. Nutt & R. Gosling 4th ed. 1739); GILES JACOB, A NEW LAW DICTIONARY, at "armour and arms," "self-preservation," "se defendendo," "defence," "game" (n.p., E. & R. Nutt & R. Gosling 3d ed. 1736); GILES JACOB, A NEW LAW DICTIONARY, at "armour and arms," "self-preservation," "se defendendo," "defence," "game" (n.p., E. & R. Nutt & R. Gosling 2d ed. 1733); GILES JACOB, A NEW LAW DICTIONARY, at "armour and arms," "self-preservation," "se defendendo," "defence," "game" (n.p., E. & R. Nutt & R. Gosling 2d ed. 1732). Following Jacob's death, subsequent editions of *A New Law Dictionary* continued to be published. It was not until 1773—after William Blackstone had published his *Commentaries*—that the "arms" entry included: "As to arms for necessary defence, vide *Black. Com.* 1V. 143." A NEW LAW DICTIONARY, at "armour and arms" (Owen Ruffhead & J. Morgan eds., Dublin, n. pub. 1773). The cite to Blackstone's *Commentaries* is significant because it shows that the editors interpreted the "have arms" provision as Blackstone understood it—as the "fifth auxiliary right" to resist and overthrow tyrannical government, not as armed individual self-defense. See *infra* Part VII. With J. Morgan remaining as the editor, the 1782 edition of *A New Law Dictionary* also included the Blackstone reference. A NEW LAW DICTIONARY, at "armour and arms" (J. Morgan ed., London, W. Strahan & W. Woodfall 1782). However, in 1797, T.E. Tomlins expanded *A New*

conditioned upon hierarchal and socio-economic status.³² This right, however, came with great social responsibility. An individual could not have just any arms per se. Arms were regulated by law and deemed an allowance that could be taken away.³³ Furthermore, with this allowance came certain duties and restrictions, which will be discussed in great detail, but for our purposes now, it is significant only in understanding why the “have arms” provision was drafted.

A. *The Road to an Affirmed Allowance to “Have Arms”*

What has been forgotten in the debate over the meaning of the English “have arms” provision is that the Declaration of Rights was the documentary means that justified the removal of James II as King.³⁴ It was drafted as a conditional charter of liberty by which William and Mary had to abide in order to maintain parliamentary support. By contemporary standards, the Declaration’s grievances may seem to be broadly worded, but the grievances had a uniform meaning in the Seventeenth Century.³⁵ This broadness has confused Individual Right Scholars and has begotten debate on the practice of disarming that happened under the Stuarts. The threshold question is whether the disarming happened on the scale that Individual Right Scholars have implied.

As previously addressed, James II’s maintenance of a standing army was more of a fabricated grievance than an actual one. There is no denying that a standing army was maintained.³⁶ However, it is just historically and legally inaccurate to state that James II violated the fundamental laws of the land by doing so. The Declaration’s “have arms” grievance is similar if we examine it as a contemporary phrase. This is because the historical record provides us with no ironclad proof of James II actually “disarming” large numbers of Protestants in England. Thus, one may argue that the disarming of Protestants was more of a fabricated grievance than a real one.

Law Dictionary into two volumes. Tomlins removed the Blackstone reference and replaced it with the actual statute. It read:

By the Bill of Rights, 1 W. & M. st. 2. c. 2, It is declared that “the subjects which are Protestants may have arms for their defence suitable to their condition as allowed by law.” See stat. 33 H. 8. c. 6. and tit. *Game and Constable* III. 2.

T.E. TOMLINS, 1 A NEW LAW DICTIONARY, at “armour and arms” (London, Andrew Strahan 1797). Similar to Jacob’s previous editions, neither the Bill of Rights nor the “have arms” provision was listed in the 1797 dictionary entries “homicide,” “self-defense,” “defence,” “self-preservation,” or “game.”

³¹ See 1 Jac. 2, c. 8 (1685) (Eng.); 13 & 14 Car. 2, c. 3 (1662) (Eng.); 4 & 5 Phil. & M., c. 2 (1557-1558) (Eng.); 26 Hen. 8, c. 6, § 3 (1534) (Eng.); 20 Rich. 2, c. 1 (1396-1397) (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.); 13 Edw., c. 2 (1285) (Eng.); 13 Edw., c. 6 (1285) (Eng.); 7 Edw. (1279) (Eng.).

³² *Id.*; see also SCHWOERER, DECLARATION OF RIGHTS, *supra* note 23, at 77.

³³ See *supra* note 31.

³⁴ See Lois G. Schwoerer, *The Bill of Rights: Epitome of the Revolution of 1688-89*, in THREE BRITISH REVOLUTIONS: 1641, 1688, 1776, at 225 (J.G.A. Pocock ed., 1980) (agreeing that the Declaration of Rights lists grievances that were “both alleged and real”).

³⁵ SCHWOERER, DECLARATION OF RIGHTS, *supra* note 23, at 100.

³⁶ SCHWOERER, NO STANDING ARMIES, *supra* note 25, at 139-44.

In fact, there is substantially more evidence that the disarming provision was based upon the fear that it could occur on a massive scale rather than on an actual occurrence of the event. First, this is supported by the fact that we have only scant evidence of this disarming.³⁷ In every instance where “disarming” is mentioned, it is done briefly either in unreliable political pamphlets of the period or within the records of Convention on the Declaration itself—neither of which provide concrete examples. In fact, one pamphleteer even described the disarming grievance as being a grievance of which he “[did] not know the time it was done in England.”³⁸ He knew “it was twice done in Ireland . . . after the suppression of Monmouth’s Rebellion” but could not recollect such an instance occurring by James II in England.³⁹ Second, no list or any detailed accounts of arms being confiscated by James II exist.⁴⁰

³⁷ 5 WILLIAM COBBETT, *THE PARLIAMENTARY HISTORY OF ENGLAND FROM THE EARLIEST PERIOD TO THE YEAR 1803*, at 54-55 (London, T.C. Hansard 1806); 9 ANCHITELL GREY, *DEBATES OF THE HOUSE OF COMMONS* 31, 32 (London, D. Henry & R. Cave 1769); 2 JOHN SOMERS, *NOTES OF THE DEBATES, MISCELLANEOUS STATE PAPERS, FROM 1501 TO 1726*, at 416, 417 (London, W. Strahan & T. Cadell 1778). The best evidence of disarming occurs in J.R. WESTERN, *THE ENGLISH MILITIA IN THE EIGHTEENTH CENTURY* 30-40, 48 (1965). While Western’s research in this area gives us the greatest amount of evidence regarding this, he points out disarming only during Charles II’s reign. This still leaves us with no substantiated evidence of actual disarming by James II. Not to mention, there is nothing in the records of Parliament that there was dissatisfaction with the disarming of insurgents or individuals that were disaffected to the crown. If anything, the evidence shows that Parliament supported it.

³⁸ CHARLES CAESAR, *NUMERUS INFAUSTUS: A SHORT VIEW OF THE UNFORTUNATE REIGNS OF WILLIAM THE SECOND, HENRY THE SECOND, EDWARD THE SECOND, RICHARD THE SECOND, CHARLES THE SECOND, JAMES THE SECOND* 46 (London, n. pub. 2d ed. 1689).

³⁹ *Id.* Regarding the disarming of Protestants in Ireland, this was a reference to Richard Talbot, the Earl of Tyrconnel. Talbot disarmed the Protestant soldiers and officers and replaced them with Catholics. Out of the eight thousand troops raised, less than one hundred were English Protestants. Protestant soldiers were continuously replaced by papist substitutes. See AN ACCOUNT OF A LATE, HORRID AND BLOODY MASSACRE IN IRELAND OF SEVERAL THOUSANDS OF PROTESTANTS, PROCUR’D AND CARRY’D ON BY THE BY THE L[ORD DEPUTY] TYRCONNEL AND HIS ADHERENTS 2 (n.p., n. pub. n.d.). Another account by Anon describes the disarming as follows:

And so it proved, for *Talbot*, by this time made Earl of *Tyrconnel*, causing them to be drawn up in Companies, commanded them to lay down and quit their Arms; which done, they were expresly told, that it was the King’s Pleasure to have none but Roman Catholicks in his standing Forces of that Kingdom, and as many as would comply with it, might return to their Arms, and those that would not might depart.

THE POPISH CHAMPION, OR, A COMPLEAT HISTORY OF THE LIFE AND MILITARY ACTIONS OF RICHARD EARL OF TYRCONNEL 13 (London, John Dutton 1689). Another disarming occurred when Talbot learned of Protestant noblemen scheming against him. He disarmed “the Protestants that lay within the Circle of his Command”—the Protestants in the army that had not laid down their weapons in the first instance. *Id.* at 18. Talbot then used these arms to equip “his Souldiers that came in unarmed.” *Id.* at 19. Both disarmaments equate to the disarming described in the 1689 Declaration of Rights and the 1689 Scottish Claim of Right—that arms were taken from Protestants who were serving in a military capacity and given to Catholics.

⁴⁰ This means that there is nothing of substance on the historical record that James II actually disarmed English Protestants in large amounts. Lois Schwoerer lists the “Popish Plot

Despite this historical uncertainty, it is clear why the Declaration's "have arms" provision was drafted. Although there are no concrete examples of Protestants being disarmed, the record shows that the "have arms" provision was directly linked to the dispensing of the Test Act to employ Catholic military officers.⁴¹ To be more precise, it was the power military Lieutenants possessed in arming the militia and disarming disaffected persons that perpetuated a fear among the Protestant elite that disarming could occur on a massive scale. It was this fear that would lead to the drafting of the Declaration of Rights' "have arms" provision.

As early as 1680, Francis Winnington conveyed his concern for disarmament by a Catholic army.⁴² He knew the "Militia of London" could "disarm men at discretion" if they pleased.⁴³ The concern was that if the militia was composed of Catholics, then papists could disarm all the Protestants at any time.⁴⁴ The fear of disarming by papists reached new heights upon James II's accession to the throne in 1685, for the King had employed Catholic military officers to suppress Monmouth's Rebellion, and he planned on keeping them.⁴⁵

and Exclusion Crisis in 1678-81, the Rye House Plot scare in 1683, and Monmouth's Rebellion in 1685" as instances where "Charles, and, later, James II" used the militia to disarm Protestants. SCHWOERER, *DECLARATION OF RIGHTS*, *supra* note 23, at 76. She, however, provides no sources to this fact. She relies on its mention by the Convention's members in the rights committee when they debated the Declaration of Rights. 9 GREY, *supra* note 37, at 31, 32; 2 SOMERS, *supra* note 37, at 416, 417.

⁴¹ 25 Car. 2, c. 2, § 2 (1672) (Eng.). Entitled *An Act for preventing Dangers which may happen from Popish Recusants*, it required "all and every persons or persons that shall be admitted entered placed or taken into any Office or Offices Civill or Military . . . shall take the said Oaths aforesaid in the said respective Court or Courts." *Id.* The Militia Act of 1662, entitled *An Act for ordering the Forces in several Counties of this Kingdom*, which preceded the Test Act, dually required it. 13 & 14 Car. 2, c. 3, § 18 (1662) (Eng.). The employing of Catholic military officers was also highlighted due to the events of the Seven Bishops case. In that case, James II prosecuted seven bishops for their petitioning that the dispensing of the Test Act was against law. The court rejected that the bishops had a right to petition, and James II continued to dispense with the Test Act. *See* THE STUART CONSTITUTION 1603-1688: DOCUMENTS AND COMMENTARY 406-11 (J.P. Kenyon ed., 1966); *see also* SCHWOERER, *DECLARATION OF RIGHTS*, *supra* note 23, at 69-70.

⁴² 8 ANCHITELL GREY, *DEBATES ON THE HOUSE OF COMMONS, FROM THE YEAR 1667 TO THE YEAR 1694*, at 165 (London, n. pub. 1769).

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ This was a direct violation of the Test Act of which the King was all too aware. James II wrote to Parliament:

Let no man take exception, that there are some Officers in the Army not qualified according to the late Tests for their Employments: the Gentlemen, I must tell you, are most of them well-known to me; and, having formerly served me on several occasions, and always approved the loyalty of their principles by their Practices I think them now fit to be employed under me; and will deal plainly with you, that after having had the benefit of their service in such a time of need and danger, I will neither expose them to disgrace, nor myself to the want of them, if there should be another Rebellion to make them necessary to me.

4 WILLIAM COBBETT, *THE PARLIAMENTARY HISTORY OF ENGLAND FROM THE EARLIEST PERIOD TO THE YEAR 1803*, at 1370-71 (London, R. Bagshaw 1808).

James II knew “some men may be so wicked to hope and expect that a difference may happen” over the Catholic officers’ employment.⁴⁶ He just hoped Parliament would view this as a non-issue. He believed “when you consider what advantages have arisen to us in a few months, by the good understanding we have hitherto had; what wonderful effects it hath already produced in the change of the whole scene of affairs” that the Catholic officers did not affect the security of the nation.⁴⁷ What may have been the most shocking statement of the speech was James II’s dismissal of the militia system. He hoped that Parliament would “be convinced, that the Militia, which [had] been so much depended on, [was] not sufficient” for occasions such as Monmouth’s Rebellion.⁴⁸ Only a “good force of well-disciplined troops in constant pay” could defend England from these continuous threats to the “peace and quiet of [his] subjects, as well as for the safety of the government.”⁴⁹

It must be noted that James II neither disbanded the militia nor said he would not employ their services. He was merely stating that the threats that the nation was facing required a professional fighting force, as well as the militia. The House of Commons did not take the King’s speech as an attempt to disband the militia either. It was primarily concerned with the employment of Catholic officers and the maintenance of a standing army. One member reminded the House “that no Papist [could] possibly creep into any employment” because of the Test Act.⁵⁰ He felt a “great difference” toward such an action and was personally “afflicted greatly at this breach on [their] Liberties.”⁵¹

Another member of the House could not agree more. He viewed the employment of Catholic officers as “dispensing with all the Laws at once.”⁵² It was “treason for any man to be reconciled to the Church of Rome; for the Pope, by law is [a] declared enemy to this kingdom.”⁵³ The most interesting statement came from John Maynard. He predicted these employments would lead to the disarming of alleged disaffected Protestants. Citing the 1662 Militia Act, Maynard reminded the House that not only was it illegal to take up arms against the King,⁵⁴ but that “lords-lieutenants, and

⁴⁶ *Id.* at 1371.

⁴⁷ *Id.*

⁴⁸ *Id.* at 1369.

⁴⁹ *Id.*

⁵⁰ *Id.* at 1373.

⁵¹ *Id.* (“I was here, and showed myself against it; the arguments for it were, ‘That we should in case of a Popish Successor, have a Popish Army.’ You see the Act of the Test already broken, but pray remember what the late lord chancellor told you, when the late King (of blessed memory) passed that Act; the words were to this effect: ‘By this Act you are provided against Popery, that no Papist can possibly creep into any Employment.’ I am afflicted greatly at this Breach of our Liberties, and seeing so great difference betwixt this Speech, and those heretofore made, cannot but believe this was by some other advice. This, struck at here, is our all, and I wonder there have been any men so desperate, as to take any employment not qualified for it; and I would therefore have the question, ‘That a Standing Army is destructive to the country.’”).

⁵² *Id.* at 1374.

⁵³ *Id.*

⁵⁴ 13 & 14 Car. 2, c. 3, § 1 (1662) (Eng.).

deputy-lieutenants, have power to disarm the disaffected.”⁵⁵ He felt that if Parliament supplied an army employed with Catholic officers, it would just be providing James II with the means to produce a destructive end. The Test Act was not a “punishment for the Papists, but a protection for ourselves.”⁵⁶ In other words, Maynard feared that by allowing the King to maintain Catholic officers, Parliament was putting the country in a perilous situation.

Based on the potential impositions on liberty the maintenance of a standing army would produce, coupled with the illegality of employing Catholics as military officers, the House prepared an address to the King asking him to remove the Catholic officers.⁵⁷ James II responded by stating that he did not “expect such an Address from the house of commons.”⁵⁸ He hoped he “would have created and confirmed a greater confidence” of the House by then, and he refused to remove the officers or even negotiate concessions to do so.⁵⁹ Instead, James II reminded its members that he had “warn[ed] of Fears and Jealousies amongst [themselves].”⁶⁰ In the King’s eyes, the security of the realm was more important than Parliament’s fears and laws restricting papists. He was the sovereign. It was up to him to ensure the peace of England by whatever means necessary.

The House of Commons’ address to the King shows just how interconnected all the grievances that would make up the Declaration of Rights were, for it was through James II’s dispensing of the Test Act that allowed him to employ Catholics, maintain his standing army, and place Catholics in a position to disarm Protestants. More

⁵⁵ 4 COBBETT, *supra* note 45, at 1374-75. The power to search and seize arms of disaffected persons can be found in 13 & 14 Car. 2, c. 3, § 14 (1662) (Eng.). See also 8 GREY, *supra* note 42, at 359.

⁵⁶ 4 COBBETT, *supra* note 45, at 1375.

⁵⁷ *Id.* at 1378-79. The address went as follows:

And as to the part of [the King’s speech], relating to the Officers in the Army not qualified for their Employments, according to an Act of parliament made in the 25th year of the reign of your majesty’s royal brother, Entituled, ‘An Act for preventing Dangers which may happen from Popish Recusants.’ [W]e do, out of our bounden duty, humbly represent unto your majesty, That those Officers cannot by law be capable of their Employments; and that the Incapacities they bring upon themselves thereby can no way be taken off but by an act of parliament.—Therefore, out of that great deference and duty we owe unto your majesty, who have been graciously pleased to take notice of their services to you we are preparing a Bill to pass both houses, for your royal assent, to indemnify them from the Penalties they have now incurred; and, because the continuing of them in their Employments may be taken to be a dispensing with the law without an act of parliament, (the consequence of which is of the greatest concern to the rights of all your majesty’s subjects, and to all the laws made for the security of their religion we therefore do most humbly beseech your majesty, that you would be graciously pleased to give such directions therein, that no apprehensions or jealousies may remain in the hearts of your Majesty’s most good and faithful subjects.

Id. The House of Lords never approved this address. The House vote to concurrence with the House of Lords was not necessary. *Id.*

⁵⁸ *Id.* at 1385.

⁵⁹ *Id.*

⁶⁰ *Id.*

importantly, the address shows that Parliament presupposed that James II would disarm Protestants in large numbers even though it had no evidence to support this fear. At no point during the debates did members of the House give examples of either Charles II or James II disarming disaffected persons—let alone outstanding Protestants.

B. The Creation of the Allowance to “Have Arms”

Parliament’s next mention of disarming Protestants would not come as a hypothetical, but as a grievance. On February 2, 1689, a committee of thirty-nine headed by George Treby, drafted twenty-three Heads of Grievances.⁶¹ In regards to the disarming of Protestants, one grievance read, “[I]t [is] necessary to the public safety that the Protestant subjects ‘should provide and keep arms for the common defense, and that arms, which have been seized and taken from them . . . restored.’”⁶²

The grievance claimed that Protestants had, in fact, been disarmed by James II.⁶³ It made no mention of when or in what context this disarming occurred.⁶⁴ Thus, it is uncertain when, and if it ever, happened on the massive scale that the grievance implies by contemporary standards. This may explain why the last portion of the grievance—“and arms that have been seized from them restored”—was removed five days later,⁶⁵ for dissemination of James II’s disarming may have been based primarily on political propaganda rather than fact. Also, if Parliament did not have any documentation of Protestants being disarmed, what arms were taken by whom and so forth, it could not keep the last section. It would be a grievance that only asserted to return arms that were never taken on the large scale that the Declaration of Rights would have implied.

Certainly, James II’s Catholic officers must have disarmed some disaffected persons. Parliament had explicitly authorized this disarming with the adoption of the 1662 Militia Act.⁶⁶ The Act set up the laws by which individuals were to provide “Horse and Armes and Furniture.”⁶⁷ First, the King appointed military Lieutenants that had the power to call and assemble the militia, to “arm and array them” according to hierarchal and socio-economic status, and “form them into Companies,

⁶¹ HISTORICAL DICTIONARY OF STUART ENGLAND, 1603-1689, at 151 (Robert H. Fritze & William B. Robison eds., 1996).

⁶² SCHWOERER, DECLARATION OF RIGHTS, *supra* note 23, at 75; H. RICHARD UVILLER & WILLIAM MERKEL, THE MILITIA AND THE RIGHT TO ARMS, OR, HOW THE SECOND AMENDMENT FELL SILENT 53 (2002).

⁶³ HISTORICAL DICTIONARY OF STUART ENGLAND, *supra* note 61, at 151.

⁶⁴ On August 24, 2004, the Department of Justice, under the advisement of President George W. Bush, constructed an opinion in favor of the “individual right” model. It claims that Charles II’s 1662 Militia Act and 1671 Game Act were used to search and seize the arms of individuals on a large scale. Whether the Second Amendment Secures an Individual Right, Op. Off. Legal Counsel 41-42 (Aug. 24, 2004). It provides no substantiating evidence for its claim other than citing Malcolm. *See id.*

⁶⁵ SCHWOERER, DECLARATION OF RIGHTS, *supra* note 23, at 75.

⁶⁶ 13 & 14 Car. 2, c. 3, § 14 (1662) (Eng.).

⁶⁷ *Id.* § 2.

Troops and Regiments . . . in case of Insurrection, Rebellion or Invasion.”⁶⁸ The appointment of these Lieutenants was of particular importance,⁶⁹ because Lieutenants had the explicit power, or could appoint such deputies with such power, to “train exercise and put in readines and . . . lead and conduct the persons so to be armed arrayed and weaponed.”⁷⁰ The only arming restrictions within the Militia Act were that Lieutenants were required to ensure that only individuals of certain qualities or conditions would be provided arms, weapons, horses, and furniture.⁷¹ Thus, through the Militia Act, an individual did not have a right to arms. It was an allowance by

⁶⁸ *Id.* § 1.

⁶⁹ The appointment of lieutenants was an issue of contention between the king and Parliament on multiple occasions. In 1641, Oliver Cromwell made mention of how the “factious Parliament” wanted to know who the lieutenants were because this was the “Power of the Militia.” Thomas Carlyle, *Preliminary* to Letter by Oliver Cromwell (May 3, 1641), in 1 THE LETTERS AND SPEECHES OF OLIVER CROMWELL 103, 105 (S.C. Lomas ed., 1904). In a petition to Charles I entitled *Propositions Concerning the Security and Peace of the Kingdom* Parliament requested the following:

1. That men of honour and trust be placed lord lieutenants in every county; and that direction be given to these lieutenants, to be careful in the choice of their deputies. 2. That the Trained Bands be furnished with arms, powder, and bullet; and that they be exercised and made ready for service. Also that an oath be prepared to pass both houses of parliament, to be taken by the lord lieutenants, deputy lieutenants, and other officers of Trained Bands, to secure their fidelity in these dangerous times.

2 WILLIAM COBBETT, THE PARLIAMENTARY HISTORY OF ENGLAND FROM THE EARLIEST PERIOD TO THE YEAR 1803, at 849 (London, R. Bagshaw 1807). This request shows just how important the lieutenants were in arming and training the people as a militia.

⁷⁰ 13 & 14 Car. 2, c. 3, § 1 (1662) (Eng.).

⁷¹ *Id.* §§ 2-3.

the Lieutenants, and it was a tax,⁷² a duty,⁷³ and a privilege⁷⁴ that was dependent on hierarchal and socio-economic standing.⁷⁵

Second, the Militia Act authorized Lieutenants to “employ such Person or Persons as they shall thinke fit” to “search for and seize all Armes in the custody or possession of any person or persons whom the said Lieutenants . . . shall judge dangerous to the Peace of the Kingdome.”⁷⁶ This search and seizure provision was

⁷² *Id.* § 8. Those that failed to “provide and furnish such sufficient Horse and Horseman Horses and Horsemen Armes and other Furniture or to pay such sum or sums of Money towards the providing and furnishing as aforesaid” could be held liable to pay a penalty “not exceeding twenty pounds.” *Id.* Lieutenants could place liens and take property of those who did not comply to obtain this money, if needed. *Id.* The Act even stipulated the requirement of providing arms as a tax. Section 25 stipulated that “nothing in this Act contained shall extend to put any new charge of Armes upon the Tinnners in the Counties of Devon and Cornwall other then [sic] the Tax mentioned in the former Provisio.” *Id.* § 25.

⁷³ *Id.* § 9. “That if any person or persons so to be armed arrayed and weaponed shall detain or imbezil his Horse Armes or Furniture,” Lieutenants may “imprison such persons and persons.” *Id.* “[T]hat if any person so to be armed horsed or weaponed as aforesaid shall not appear and serve compleatly furnished with Horse and Armes and other Furniture wherewith he is intrusted,” Lieutenants may “imprison such person or persons for the space of five dayes.” *Id.* “And if any person or persons so assessed or charged as aforesaid shall refuse or neglect to send in or deliver his Horse Armes or other Furniture upon such summons or other notice,” Lieutenants may “inflict a penalty not exceeding five pounds.” *Id.*

⁷⁴ The Act stipulated what type of arms each person was to have, depending on that person’s status. For example, a Foot Soldier was required to have “a Musquett the Barrell whereof is not to be under three Foot in length and the Gage of the Bore to be for twelve Bullets to the pound A Coller of Bandeleers with a Sword.” *Id.* § 20.

⁷⁵ Lieutenants had:

[F]ull Power and Authority to charge any person with Horse Horsman and Armes or with Foot Souldier and Armes . . . having respect unto and not exceeding the limitations and proportions hereafter mentioned (that is to say) No Person shall be charged with finding a Horse Horseman and Armes unless such person or persons have a Revenue of Five hundred pounds by the yeare in possession or have an Estate of Six thousand pounds in goods or money besides the furniture of his or their houses and so proportionably for a greater Estate in lands in possession or goods as the respective Lieutenants and their Deputies as aforesaid in their discretions shall see cause and thinke reasonable And they are not to charge any person with finding a Foot Souldier and Armes that hath not a yearly Revenue of Fifty pounds in possession or a personal Estate of Six hundred pounds in goods or moneys (other than the stocke upon the ground) and after the aforesaid rate proportionably for a greater or lesser Revenue or Estate . . . Nor shall they charge any person with the finding of both of Horse and Foot in the same County.

Id. § 2. Lieutenants could also join “two or three or more persons together” to “impose the finding and providing of Horse Horseman and Armes.” *Id.* § 3. Tenants could also be required to provide arms. *Id.* § 15. It was lawful for them to even default on rent money by using that money to buy the required armaments. *Id.* § 16. Nothing in the Act was meant to “avoid any Covenant or Agreement which hath beene or shall be made betweene any Landlord and Tenant concerning the finding Horses or Armes or the bearing or paying of any [Taxes Rates or other charges by any Tenant either by generall or speciall Covenants].” *Id.* § 28 (alteration in original).

⁷⁶ *Id.* § 13.

“for the better securing the Peace of the Kingdome” and seems to have never been questioned until the employment of Catholic military officers.⁷⁷ This is most likely because the houses that were searched and seized—prior to James II’s accession—were primarily those of Catholics. But historians have overstated this. As will be shown, many Protestants were also disarmed in large amounts.

The 1662 Militia Act provision for the search and seizure of arms was a statutory confirmation of what was already being done by the Restoration government. In numerous instances, orders were issued to seize arms of disaffected and dangerous persons, often without warrant.⁷⁸ In fact, it became so common that it was petitioned to Charles II that a proclamation be issued “forbidding the seizing of persons or searching of houses without warrant, except in time of actual insurrection.”⁷⁹ The petitioner was concerned that continued searches without warrant could “renew the war” and that future searches should not be conducted “without lawful authority.”⁸⁰ It is uncertain what effect, if any, the petition had on Charles II. What is known is that within a year after its submission, the 1662 Militia Act was adopted, and it outlined the manner in which future searches and seizures of arms were to be conducted.⁸¹

For the next six years, the historical record provides numerous instances of disarming dangerous, disaffected, and unqualified persons—most of whom were not identified as papists.⁸² On November 1, 1662, Charles II ordered Sir Thomas Peyton

⁷⁷ *Id.*

⁷⁸ 1 CALENDAR OF STATE PAPERS, *Domestic Series, of the reign of Charles II, 1660-1661*, at 150 (Mary Anne Everett Green ed., London, Longman, Green, Longman & Roberts 1860) (stating that, in 1660, instructions were issued to the Lord Lieutenants that “the full numbers to be kept up, well-affected officers chosen, the volunteers who offer assistance formed in troops apart and trained, the officers to be numerous, disaffected persons watched and not allowed to assemble, and their arms seized.”). In November 1660, Henry Croswick and others of Bristol had petitioned for “leave to retain in the city armory 315 muskets, 126 pikes, 245 pairs of bandoleers, . . . belonging to the five companies of Sir Edw. Massey’s regiment, disbanded; their arms were taken away during the troubles, and they are in want of them for preservation of the peace.” *Id.* at 393. For other examples see *id.* at 472, 475, 481, 567 and 2 CALENDAR OF STATE PAPERS, *Domestic Series, of the reign of Charles II, 1661-1662*, at 125, 212, 248, 321 (Mary Anne Everett Green ed., London, Longman, Green, Longman & Roberts 1861).

⁷⁹ 1 CALENDAR OF STATE PAPERS, *supra* note 78, at 475.

⁸⁰ *Id.*

⁸¹ 13 & 14 Car. 2, c. 3 (1662) (Eng.).

⁸² See, e.g., 6 CALENDAR OF STATE PAPERS, *Domestic Series, of the reign of Charles II, 1666-1667*, at 238 (Mary Anne Everett Green ed., London, Longman, Green, Longman, Roberts & Green 1864). On November 5, 1666, James Hicks reported that:

The house of Mr. John Digby, son of Sir Kenelm Digby, and a strong papist, living near Stony Stratford, has been searched, and 300 arms found. They were not taken away, but he took it so ill that he went away in his coach and six horses, with only his coachman and postilion, and is supposed to be gone for Ireland.

Id. On December 11, 1666, Deputy Lieutenants were ordered to:

[S]earch for arms in the houses of Popish recusants, but there are only two or three in the county. Searched that of his neighbour, Mr. Pulton, but found only two birding guns and an old sword, besides his militia arms. Asks leave to restore him the two

“to seize all arms found in the custody of disaffected persons in the lathe of Shepway, and disarm all factious and seditious spirits, and such as travel with unusual arms at unseasonable hours.”⁸³ On April 27, 1667, a warrant was issued to apprehend “Mason and others suspected of corresponding with him” and to seize all “arms, papers, writings, [etcetera], belonging to him.”⁸⁴

Three years later, on May 25, 1670, the Lord Mayor of London wrote to Lord Arlington requesting a “special warrant” to “seize and secure all dangerous and suspicious persons, with their arms, weapons, [etcetera], and to detain them so long as his Majesty or the said Commissioners shall think fit; and to give to all commanding officers and soldiers of the Militia orders requisite for the accomplishment of the same.”⁸⁵ No mention was made of papists. The Lord Mayor was only concerned with apprehending his “Majesty’s enemies, rebels, traitors, and offenders.”⁸⁶ The next day, the King ordered the Lord Mayor and Commissioners for the Lieutenancy of London to “make [a] strict search in the city and precincts for dangerous and disaffected persons, seize and secure them and their arms, and detain them in custody till our further pleasure.”⁸⁷

The disarming of disaffected and dangerous persons was especially prevalent in 1683.⁸⁸ The fears perpetuated from the Rye House Plot⁸⁹ caused the disarming of many persons suspected to be dangerous and disaffected.⁹⁰ Also, these seizures were not explicitly contingent upon the dangerous and disaffected persons being papists. For example, Militia Colonel Robert West had two chests of arms seized and placed in the Tower of London.⁹¹ Then, on July 12, Secretary Jenkins thanked the Earl of

guns, as he loves shooting, and also two birding guns taken from two day labourers’ houses. Enquires whether to search the house of Lord Cardigan, he being a peer.

Id. at 337.

⁸³ 2 CALENDAR OF STATE PAPERS, *supra* note 78, at 538.

⁸⁴ 7 CALENDAR OF STATE PAPERS, *Domestic Series, of the reign of Charles II, 1667*, at 57 (Mary Anne Everett Green, ed., Kraus Reprint 1969) (1865). For other examples of arms being seized see 2 CALENDAR OF STATE PAPERS, *supra* note 78, at 434, 438, 525; 3 CALENDAR OF STATE PAPERS, *Domestic Series, of the reign of Charles II, 1663-1664*, at 44, 83, 346, 361, 525 (Mary Anne Everett Green, ed., London, Longman, Green, Longman & Roberts 1862); and 6 CALENDAR OF STATE PAPERS, *supra* note 82, at 91.

⁸⁵ 10 CALENDAR OF STATE PAPERS, *Domestic Series, 1670*, at 236 (Mary Anne Everett Green ed., London, Eyre & Spottiswoode 1895) (emphasis omitted).

⁸⁶ *Id.* (emphasis omitted).

⁸⁷ *Id.* at 237.

⁸⁸ See generally 24 CALENDAR OF STATE PAPERS, *Domestic Series, 1683* (F.H. Blackburne Daniell ed., 1933); 25 CALENDAR OF STATE PAPERS, *Domestic Series, 1683* (F.H. Blackburne Daniell ed., 1933) (mentioning numerous instances of disarming due to fear of popish plots and preventing disaffected and dangerous persons from supporting the Duke of Monmouth).

⁸⁹ The Rye House Plot was a conspiracy to murder Charles II and James II. It is unknown whether the plot was real or a political fabrication. See Doreen J. Milne, *The Results of the Rye House Plot and Their Influence upon the Revolution of 1688* (1950), in 1 TRANSACTIONS OF THE ROYAL HISTORICAL SOCIETY 91, 91-108 (1951).

⁹⁰ *Id.*

⁹¹ 25 CALENDAR OF STATE PAPERS, *supra* note 88, at 343.

Shrewsbury for seizing the arms of suspected persons in Staffordshire.⁹² Meanwhile, Captain Thomas Whitley had fifty muskets seized because he was suspected of supporting the Duke of Monmouth.⁹³

Seizures of arms continued up to James II's accession to the throne. For instance, on May 20, 1684, Charles II issued detailed orders to Lieutenants throughout the kingdom to seize the arms from "dangerous and disaffected persons."⁹⁴ Such arms that were deemed "useful for arming the militia" were to "be deposited for that purpose in such a place as [they] think most convenient."⁹⁵ The rest of the arms were to be "delivered to the keeper of the magazine[s]" at designated locations.⁹⁶

It is this massive disarming in 1684 that is of particular interest in understanding the disarming grievance against James II, for this disarming, like its predecessors, was never questioned by Parliament or even mentioned upon James II's accession to the throne. This is because Parliament did not have a problem with Protestant Lieutenants seizing the arms of dangerous, disaffected, or unqualified persons. It had been common practice throughout Charles II's reign and had even been supported by statute.⁹⁷ James II's employment of Catholics to military appointments changed all of this. With Catholic officers now in charge of searches, the Militia Act was no longer a protection against popery or the safety of the kingdom. It was now seen as a means for Catholics to disarm qualified Protestants, thus, establishing a Catholic England.⁹⁸ This is exactly what men like John Maynard feared. He thought Catholics would no longer be targeted—only Protestants.⁹⁹ Conversely, there were restrictions to the searching and seizing of arms. For instance, all searches required a warrant from the King.¹⁰⁰ The King, however, was also Catholic. Thus, one can only imagine how members of Parliament who were easily paranoid could be convinced of a potential plot to disarm all Protestants.

The fear of a Catholic plot to overthrow English Protestants provided the context out of which the language of the "have arms" provision developed. The Declaration of Rights states it was by "causing several good subjects being Protestants to be disarmed at the same time when papists were both armed and employed contrary to law" that "subjects which are Protestants may have arms for their defence suitable to their conditions and as allowed by law."¹⁰¹ When James II appointed Catholics as

⁹² *Id.* at 310.

⁹³ *Id.* at 293, 323, 389.

⁹⁴ 27 *CALENDAR OF STATE PAPERS, Domestic Series of the reign of Charles II, 1684-1685*, at 26-27, 83-85, 102 (F.H. Blackburne Daniell ed., 1933). These orders were given to over thirty-four counties and eighteen Lieutenants, all of which gave locations for the depositing of the arms seized.

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ 13 & 14 Car. 2, c. 3 (1662) (Eng.).

⁹⁸ SCHWOERER, *DECLARATION OF RIGHTS*, *supra* note 23, at 71-75.

⁹⁹ 4 COBBETT, *supra* note 45, at 1375, 1378-79, 1385.

¹⁰⁰ 13 & 14 Car. 2, c. 3, § 14 (1662) (Eng.).

¹⁰¹ 1 W. & M. 2, c. 2 (1688) (Eng.).

Lieutenants, he subverted the Test and Militia Acts. It was these appointments that “armed and employed” papists “contrary to law.”¹⁰² The mention of arming papists was not referencing all Catholics in general but, rather, was specifically mentioning Catholic military officers alone, for it was the newly appointed Catholic Lieutenants that not only had the power to search and seize arms from disaffected and dangerous persons, but also had the power to disarm Protestants through the militia laws.¹⁰³

The Militia Act expressly stipulated that it was through the Lieutenants’ direction that individuals were armed and arrayed.¹⁰⁴ Furthermore, it was the Lieutenants who trained and mustered the militia.¹⁰⁵ These facts help place the Declaration of Rights’ “have arms” provision in its true context. The Declaration even mentions the disarming of Protestants “at the same time” when Catholics were armed. The grievance was not stating that Protestants were physically disarmed by Catholics *per se*. Rather, the grievance was addressing the issue that Catholics were employed as Lieutenants—a military position that only Protestants were legally allowed to perform¹⁰⁶ and a position that determined how individuals were to provide, use, train, and muster arms in the militia. Therefore, the real disarmament was that Catholic Lieutenants now had charge of the militia arms stores and magazines.

The Scottish Claim of Right supports this understanding of the Declaration of Rights’ “have arms” provision.¹⁰⁷ Like the Declaration, the Claim of Right states the

¹⁰² *Id.*

¹⁰³ 13 & 14 Car. 2, c. 3, §14 (1662) (Eng.).

¹⁰⁴ *Id.* §§ 3, 7-9.

¹⁰⁵ *Id.* § 21.

¹⁰⁶ See Gilbert Burnet, *An Answer to the Disertion Discuss’d*, (1688), in ELEVENTH COLLECTION OF PAPERS RELATING TO THE PRESENT JUNCTURE OF AFFAIRS IN ENGLAND AND SCOTLAND 1, 9 (London, Richard January 1689). This political tract read:

Upon the Disbanding of the Papists, the *Discusser* makes a special Observation, *That no Test-Acts nor any Others could barr the King from Listing them as Common Souldiers*. This perhaps may be true; that is to say, that a Protestant Prince may list Papists, and a Popish Prince Protestants, to follow him in a lawful War. But when a Popish Prince in a Protestant Nation had made his chiefs Levies of Popish Common Souldiers to over-aw his Protestant Subjects, and put his sole Confidence in them for his known and open Designs and manifest Endeavors to introduce Popery into a Protestant Kingdom, contrary to the Law, ‘twas time then to think of disbanding such Vermin, and ridding them out of the Land. And the reason why the Protestants could not be trusted was as certain. For if the King would not trust his Protestants, nay disarm’d them, when Papists were both arm’d and Employ’d, what reason had the Protestants to trust the King.

Id.

¹⁰⁷ The Claim of Right is an essential historical document that all previous historians and legal commentators have utterly ignored regarding the “have arms” debate, for what is lost in their analyses is that often the same policies that the Stuart monarchy applied in England were also implemented in Scotland. As historian Tim Harris informs us, “[B]y looking north of the border the English could see what was in store for them under their popish king.” See Tim Harris, *Reluctant Revolutionaries? The Scots and the Revolution of 1688-89*, in *POLITICS AND THE POLITICAL IMAGINATION IN LATER STUART BRITAIN* 97, 97 (Howard Nenner ed., 1997). In other words, Scotland was the testing ground for most of James II’s policies—including the disarming of Protestants. *Id.*

reason why the right exists.¹⁰⁸ While the Declaration stipulates that it was by “causing several good subjects being Protestants to be disarmed at the same time when papists were both armed and employed contrary to law” that Protestants “may have arms,” the Claim of Right grievance provides a bit more detail. It claims that it was by:

Disarmeing 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] Disarmeing of Protestants and Implying papists [was] Contrary to Law.¹⁰⁹

The language of the Claim of Right makes abundantly clear that the main grievance between the Parliament and James II was not the disarmament of individuals, but the principle that Catholics were in positions whereby they, in theory, could disarm Protestants. To be more specific, the grievance claimed that the King was employing papists “in places of great trust, civil and military”¹¹⁰ and that these employments were disarming Protestants. As the grievance states, the King was entrusting the “forts and magazins” to Catholics.¹¹¹ The seventeenth-century line of thought was that if the Catholics had control of the arms it was a *de facto* disarming of Protestants.¹¹²

What is unique about the Claim of Right is that it does not protect the allowance to “have arms.” It was only “contrary to law” to disarm Protestants and employ papists “in the places of greatest trust” and to entrust these papists “with the forts and magazines of the Kingdome.”¹¹³ Arguably, due to textual construction, the Claim of Right does not even offer the limited allowance to “have arms” that is protected by the Declaration of Rights. Despite this fact, there is no doubt that the intents of both documents’ provisions are synonymous. Both were concerned with the employing of Catholics as military officers—a position that was responsible for the arming of the militia and the keeping of its stores and magazines.

¹⁰⁸ For the entire Claim of Right, see 9 Scot. Parl. Acts 28 (1822).

¹⁰⁹ *Id.* Ultimately, the grievance remained the same as its first draft from the Committee for Settling Government. It stated:

B[y] Disarmeing protestants while at the same tyme he Employed papists in the places of the greatest trust, civil and military; such as Chancellor Secretaries, Privie Counsellors, Lords of Sessione thrusting out protestants to make roome for papist, and Intrsuting the forts and magazins of the Kingdome in ther hands.

Id. For the adopted wording and language see *id.*

¹¹⁰ *Id.*

¹¹¹ It was stated in Parliament as a grievance that “the militia armes by proclamation [were] being taken out of protestants hands, and committed to his Majesties stores, and since given out to papists.” *Id.*

¹¹² SCHWOERER, DECLARATION OF RIGHTS, *supra* note 23, at 71-77.

¹¹³ 9 Scot. Parl. Acts 28 (1822) (“T[hat] the Disarming of protestants and Implying papists in the places of greatest trust, both Civil and military, the thrusting out protestants, to make roome for papists, and the intrusting papists with the forts and magazines of the Kingdome are Contrary to Law.”).

Joyce Lee Malcolm is the only author to state that the Declaration of Rights' grievance of disarming and the Protestant right to "have arms" did not have a limited application. She believes that the redrafting process of the "have arms" provision moved away from "private ownership of arms as a political duty and toward a right to have arms for individual defence."¹¹⁴ She comes to this conclusion because the "sparse records of the Convention yield only an outline of the discussions which took place and no account of what occurred either within the committees that drafted the Declaration of Rights or at conferences between the committees for the two Houses."¹¹⁵ Despite the "sparse records," Malcolm claims the "patchy evidence" that is available "reveals the anxieties of Convention members and the compromises they made to protect and strengthen the ability of Englishmen to have weapons."¹¹⁶

This is quite a bold statement. Malcolm makes a large historical assumption without sufficient documentation.¹¹⁷ "Patchy evidence" is never sufficient to support an opinion as an historical fact. Despite the lack of direct and substantiated evidence that supports this conclusion, Malcolm's research infers that there is a solid foundation of evidence that the drafters of the Declaration of Rights were looking to incorporate the protection of armed individual self-defense.¹¹⁸ Nothing, however, could be farther from the intent, meaning, and protection for which the "have arms" provision was drafted. The evidence does not suggest that the drafters were concerned with individual armed self-defense or the authority of military Lieutenants to disarm. What the evidence does suggest is that the drafters merely had qualms with Catholics performing it against Protestants without justification.

There is nothing in the Convention debates that proves otherwise. There are three accounts of the debates, each of which connect the employing of Catholic Lieutenants and the Militia Act with the disarmament of Protestants.¹¹⁹ For example, Sir Richard Temple stated that the "Militia Act was made use of to disarm all England."¹²⁰ What Temple meant by "all England" was what has already been

¹¹⁴ MALCOLM, *supra* note 12, at 119.

¹¹⁵ *Id.* at 115.

¹¹⁶ *Id.*

¹¹⁷ Lois G. Schworer correctly states the true purpose behind the "have arms" provision. She writes that it "was, in a way, to reaffirm the value of the militia and to imply that legitimate military power resided, not in a standing army, the creature of the executive, but in the independent citizenry, embodied in the militia, the force of the parliamentary gentry." SCHWOERER, DECLARATION OF RIGHTS, *supra* note 23, at 76. If anything, the sources for this period raise more questions than they provide definitive conclusions.

¹¹⁸ See generally MALCOLM, *supra* note 12, at 115, 119.

¹¹⁹ For Richard Temple's account see 5 COBBETT, *supra* note 37, at 53; 9 GREY *supra* note 37, at 31; 2 SOMERS, *supra* note 37, at 416. For John Maynard's account see 2 SOMERS, *supra* note 37, at 407, 417. For Boscawen's account see 4 COBBETT, *supra* note 45, at 220; 9 GREY *supra* note 37, at 32; and 2 SOMERS, *supra* note 37, at 416.

¹²⁰ 5 COBBETT, *supra* note 37, at 54. Anchitell Grey's account reads, "An Army was no part of the Government till the late King's tie. The Militia-Act was made use of to disarm all England." 9 GREY, *supra* note 37, at 31. Somers' account reads, "Standing army settled without consent of Parliament, though not part of constitution.—May be allowed in case of

conclusively shown. By commissioning Catholics as Lieutenants, James II placed the power of arming the militia in papist hands. John Maynard confirmed this when he stated that James II's use of the Militia Act was "an abominable thing" that the King used "to disarm the nation, to set up a standing army."¹²¹

Moreover, the Militia Act permitted these Catholic Lieutenants to search and seize the arms of disaffected persons. Mr. Boscawen complained about such an event when he stated, "The Militia, under pretence of persons disturbing the government, disarmed and imprisoned men without any cause," an action with which Boscawen had a personal grievance since he too "was so dealt with."¹²² Parliament never had any quarrels with the Militia Act's provision that disarmed dangerous persons. What Boscawen was upset about was that he was disarmed and imprisoned *without any cause*. He did not think the Lieutenants had any reason to believe that he was "dangerous to the Peace of the Kingdom."¹²³

John Maynard also expressed this concern. He thought the Militia Act "was made to disarm all Englishmen, whom the Lieutenants should suspect, by day or by night[,] by force or otherwise."¹²⁴ It upset him that this was being done in Ireland "for the sake of putting arms into Irish Hands," and because it was being done by Catholics without cause.¹²⁵ Therefore, to the Convention, disarming dangerous persons was supported, as long as did not occur to prominent members of Parliament or the upstanding Protestant gentry.

At no time during the Convention's debates did any of the members seek, state, or claim that the disarming of "dangerous persons" provision in the Militia Act was illegal, arbitrary, or against their alleged fundamental right to "have arms" for

war, invasion, or rebellion.—Militia bill.—Power to disarm all England.—Now done in Ireland." 2 SOMERS, *supra* note 37, at 416.

¹²¹ 2 SOMERS, *supra* note 37, at 417.

¹²² 5 COBBETT, *supra* note 37, at 54. Grey's, account reads, "The Militia, under pretence of persons disturbing the Government, disarmed and imprisoned men without any cause: I myself was so dealt with." 9 GREY, *supra* note 37, at 32. Somers' account reads, "Militia.—Imprisoning without reason: disarming.—Himself disarmed." 2 SOMERS, *supra* note 37, at 416.

¹²³ 13 & 14 Car. 2, c. 3, § 13 (1662) (Eng.). This would become an issue of discontent with the maintaining of a popish standing army. At the time the 1662 Militia Act was passed, Parliament stated the following:

In the next place, we held it our duty to undeceive the people, who have been 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. And forasmuch as our time hath not permitted us to finish a Bill intended for the future ordering of the same; we shall present you with a temporary Bill, for the present managing and disposing of the Land Forces; and likewise another Bill for establishing certain Articles and Orders for the Regulation and Government of your majesty's Navies and Forces by sea.

4 COBBETT, *supra* note 45, at 220.

¹²⁴ 2 SOMERS, *supra* note 37, at 407.

¹²⁵ *Id.* The fear of Catholics taking control of government may have been more prominent than the disarming grievance itself. For this anti-Catholic sentiment see HARRIS, *supra* note 26, at 80-86.

personal defense. They had always found the Militia Act “grievous” but not in the manner that Individual Right Scholars claim. In the Heads of Grievances, the fifth grievance stated that “[t]he Acts concerning the Militia are grievous to the Subject.”¹²⁶ What was “grievous” were the powers given to the King in the 1661 and 1662 Militia Acts. In the 1661 Act, Parliament had qualms with the provision that gave the King sole command of the military forces, including the militia and “all forces by sea and land.”¹²⁷ The 1662 Act reiterated this legal right of the King and stated that the King possessed “the sole and supreme Power Government Command and Disposition of the Militia . . . and that both or either of the Houses of Parliament cannot nor ought to pretend to the same.”¹²⁸ What was also “grievous” was that the 1662 Act made it illegal for Parliament to “raise or levy any War offensive or defensive against his Majesty.”¹²⁹ Both Acts were “grievous” because Parliament not only had no legal recourse to check the King’s power to raise military forces, but it was also expressly illegal for Parliament to exert its right of self-preservation in the scenario that the army subverted their liberties.

Furthermore, at no time after the inception of the 1662 Militia Act or during any of the debates to revise it did either house of Parliament seek to alter the searching and seizure of arms provision. In 1668, Parliament sought to reform only the tax provisions of the Militia Act.¹³⁰ Mr. Weller was of the opinion that the Act made the militia “as burthensome to 50*l.* [per] man in the country.”¹³¹ The amount required to be paid was “almost [as much] as all other taxes” combined.¹³² What he found equally frustrating was that it was a tax that “the lords have gotten this advantage on us” because “they touch not the burthen of it with their finger.”¹³³ The taxes in the Militia Act and the embezzling of other money to support Charles II’s army were the

¹²⁶ MALCOLM, *supra* note 12, at 117.

¹²⁷ 13 Car. 2, c. 6 (1661) (Eng.).

¹²⁸ 13 & 14 Car. 2, c. 3, § 1 (1662) (Eng.); *see also* ANTHONY FLETCHER, REFORM IN THE PROVINCES: THE GOVERNMENT OF STUART ENGLAND 321 (1986).

¹²⁹ 13 & 14 Car. 2, c. 3, § 1 (1662) (Eng.).

¹³⁰ 4 COBBETT, *supra* note 45, at 245-46. When the Act was adopted, Parliament supported its provisions:

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 to learn how to obey.—And because our late wounds are yet but green, and possibly, before the body politic be well purged, may incline to break out again, whereby your majesty may be forced to draw your sword before your treasury be supplied with Money; we have consented that your majesty may raise, for the 3 next ensuing years, one month’s tax in each year, after the rate of 70,000*l.* per mensem, if necessity shall so require.

Id.

¹³¹ *Id.* at 301. For further information on the militia taxes see FLETCHER, *supra* note 128, at 326-27.

¹³² 4 COBBETT, *supra* note 45, at 301.

¹³³ *Id.* at 391.

primary reforms that were attempted until the ascension of William and Mary.¹³⁴ The only other requests rested on why the Militia Acts were considered “grievous”—this principle being that the King should rely on the militia rather than on a standing army.¹³⁵

In sum, the search and seizure provision never received a proposal for its alteration. In fact, the disarming of disaffected people began two years prior to the inception of the 1662 Militia Act¹³⁶ and was undeniably supported by the government. By 1666, it was even generally accepted that it was within the King’s authority to place a “special watch on those of the disaffected who had horses or arms above their station, which were to be taken from them.”¹³⁷ This was affirmed again in 1678 with the Popish Plot. The House of Commons authorized Lieutenants to search and seize the persons of Sir Francis Ratcliffe and Lord Carrington, and to “secure all their horses.”¹³⁸ Sir Eliab Harvey reminded his fellow members that Ratcliffe and Carrington were Catholic when he clarified that the “Papists generally have now extraordinary horses; four or five more than ordinary.”¹³⁹ Colonel Titus did not want to punish the accused conspirators. He said he would rather “have their horses secured, and a farther search for arms” conducted.¹⁴⁰ Meanwhile, Sir Robert Sawyer advocated calling up one third of the militia, the sheriff, and the *posse comitatus* of the county to search and seize the arms of papists and other disaffected persons potentially participating in the Popish Plot.¹⁴¹ Thus, Parliament wholeheartedly agreed with the Militia Act’s search and seizure provision. Sawyer eloquently summed up Parliament’s consensus on this matter, stating, “By Law, when the Kingdom is in danger, those persons who are the authors of that danger should be secured.”¹⁴²

Even when William and Mary assumed the throne and Parliament debated and proposed a new militia bill,¹⁴³ the search and seizure provision was never the subject of debate or even mentioned. William of Orange wanted to put the militia “into

¹³⁴ WESTERN, *supra* note 37, at 46-48.

¹³⁵ See 4 COBBETT, *supra* note 45, at 606, 666, 952, 1052, 1167, 1292, 1372-74; 2 ANCHITELL GREY, DEBATES OF THE HOUSE OF COMMONS, FROM THE YEAR 1667 TO THE YEAR 1694, at 392 (London, n. pub. 1769); 3 ANCHITELL GREY, DEBATES OF THE HOUSE OF COMMONS, FROM THE YEAR 1667 TO THE YEAR 1694, at 23-24 (London, n. pub. 1769); 9 GREY, *supra* note 37, at 30; SCHWOERER, DECLARATION OF RIGHTS, *supra* note 23, at 75.

¹³⁶ WESTERN, *supra* note 37, at 31-34.

¹³⁷ *Id.* at 32.

¹³⁸ 6 ANCHITELL GREY, DEBATES OF THE HOUSE OF COMMONS, FROM THE YEAR 1667 TO THE YEAR 1694, at 211 (London, n. pub. 1769)

¹³⁹ *Id.*

¹⁴⁰ *Id.* at 212.

¹⁴¹ *Id.* at 215. Parliament resolved, “That an humble Address be made to his Majesty, that the Militia of the several counties may be in readiness, and that a third part of them may be raised for a fortnight, and that there be a farther search for Papist arms.” *Id.* at 216.

¹⁴² *Id.*

¹⁴³ For the bill’s career, see 10 H.C. JOUR. (1689) 102-03, 112, 137, 163, 169, 186, 192, 197, 199, 207, 212, 214, 223, 235 and 14 H.L. JOUR. (1689) 284, 287, 302-03.

some better Posture”¹⁴⁴ and the House of Commons worked to accomplish this objective. The bill was referred to a committee of thirty-eight members, including Richard Temple, Mr. Sacheverell, Sir William Williams, and Mr. Boscawen,¹⁴⁵ each of whom had showed dissatisfaction with the disarming of Protestants at the Declaration of Rights’ Convention.¹⁴⁶ When the bill was sent to the House of Lords, it had a provision that would have repealed all the previous militia acts.¹⁴⁷ In other words, the search and seizure of arms provision in the 1662 Militia Act would have been negated absent a similar provision in the new bill.¹⁴⁸ The bill, however, did not pass. Thus, historians are unsure whether the final version of the new bill would have included a search and seizure of arms provision.

Based on the information available, however, it is highly likely that a similar provision would have eventually been incorporated. The legislative record shows no dissatisfaction with the search and seizure of arms. If anything, the records of the new militia bill show implicit support for it. On July 9, 1689, the House of Commons put forth a provision in the bill for the purpose of “indemnifying and saving harmless all Persons that have taken Arms on the Behalf of the King’s Majesty” William of Orange.¹⁴⁹ This shows that the Parliament supported the seizure of arms; it just preferred to have the power to determine who could seize the arms and to limit that it not be done by Catholics.¹⁵⁰

¹⁴⁴ 14 H.L. JOUR. (1689) 258-59.

¹⁴⁵ 10 H.C. JOUR. (1689) 102-03.

¹⁴⁶ For Malcolm’s account see MALCOLM, *supra* note 12, at 113-16.

¹⁴⁷ 10 H.C. JOUR. (1689) 212.

¹⁴⁸ WESTERN, *supra* note 37, at 86. For the Act’s contents see HISTORICAL MANUSCRIPTS COMM’N, 12 HISTORICAL MANUSCRIPTS COMMISSION, 1689-1690, at 206-17 (London, Byre & Spottiswoode 1889). Its contents do not include a provision similar to the search and seizure provision in the 1662 Militia Act. Nevertheless, the bill did not pass. Furthermore, if the House of Lords chose to approve the bill, there was nothing to prevent it from amending it to include one.

¹⁴⁹ 10 H.C. JOUR. (1689) 212. Language similar to this clause is contained in the bill that was presented to the House of Lords. See HISTORICAL MANUSCRIPTS COMM’N, *supra* note 148, at 241 (“That all and every person and persons who have or hath taken arms on the behalf of the King’s Majesty that now is, whilst he was Prince of Orange.”).

¹⁵⁰ The search and seizure provision remained in force until the inception of the 1757 Militia Act. Lord Hardwicke initially gained some support for the defeat of the bill in 1756 because the Act did not have a provision for the search and seizure of arms. His fifth grievance with the Act read:

In the Militia Act of king Charles 2, sect. 14, a power is given to the lord lieutenant and deputy lieutenants to “search for and seize the arms of persons, whom they shall judge dangerous to the peace of the kingdom.” This power is totally repealed by this Bill, and no such new power is given.

15 WILLIAM COBBETT, THE PARLIAMENTARY HISTORY OF ENGLAND FROM THE EARLIEST PERIOD TO THE YEAR 1803, at 738 (London, T.C. Hansard 1813). The grievance helped prevent the bill from passing in 1756, but due to pressure from the King and the people, the bill passed in 1757. The search and seizure provision was removed. Nevertheless, the bill gave arms to the militia only during times of drill. The people were required to return them after muster. See 30 Geo. 2, c. 25, §§ 32-34, 36 (1757) (Eng.).

The frequent search and seizures of arms during William and Mary's reign gives credit to this interpretation. These prove that the 1662 Militia Act's seizure of arms provision was not only frequently used, but it was also supported by both Houses of Parliament. It was a useful tool to remove arms from individuals that were dangerous to government, especially Catholics.¹⁵¹ In 1689, Mr. Smith wanted to "know why persons have stopped the lieutenancy of Middlesex from seizing Papists, and taking away their horses."¹⁵² Papists were not the only conspirators who could be subjected to search and seizure, for Smith and his fellow members knew that "ill protestants join with" the papists.¹⁵³ Thus, Protestants could also be subject to arms being confiscated. This was reiterated when Parliament proposed "[t]hat all Papists, and all such persons as are not qualified by law, be disarmed, disbanded, and removed from all employments, civil and military."¹⁵⁴ Although the proposal's main purpose was to target papists, the phrase "such persons as are not qualified by law" extended disarmament to Protestants and whoever else was deemed dangerous.¹⁵⁵

Because of this threat, William Williams knew there was "no time to form a [new] law for the militia."¹⁵⁶ He was for executing "the laws as they are, and . . . [for

¹⁵¹ On March 5, 1689, the House of Lords ordered the following:

This House being informed that there are divers Arms in the House of one *Filkins*, in the Parish of *St. Giles*: It is thereupon ORDERED, by the Lords Spiritual and Temporal in Parliament assembled, That the Doors of the Rooms where those Arms are, be broken open by the Officers of the Ordnance, in the Presence of a Constable; and that the Arms there found be taken, and sent to *The Tower of London*. This House being informed that there are Arms in the Custody of *Moleneux*, a Pawnbroker: It is thereupon ORDERED, by the Lords Spiritual and Temporal in Parliament assembled, That what Arms or Belts shall be found in his Custody, with the King's Mark on them, be taken, and sent to *The Tower of London*; and that such other Arms as shall be found in his Custody shall be inventoried, and secured until further Order.

14 H.L. JOUR. (1689) 138-39.

¹⁵² 5 COBBETT, *supra* note 37, at 342.

¹⁵³ *Id.* at 343. Smith also stated:

I would have the Papists seized, and I would address the king for a proclamation limiting a time for those with king James: recall them by a day limited; if they surrender not themselves, seize their estates. Let us know why orders to seize the horses and arms of Papists have had counterorders. If that was done, I doubt not but the king may appear at the head of the militia as well as at the head of a standing Army.

Id. at 343-44.

¹⁵⁴ *Id.* at 19.

¹⁵⁵ *Id.* at 14 ("[A]ll Papists who shall be found in open arms, or with arms in their houses, or about their persons, or in any office civil or military, upon any pretence whatsoever, contrary to the known laws of the land, shall be treated by us and our forces, not as soldiers and gentlemen, but as robbers, free-booters and banditti; they shall be incapable of quarter, and entirely delivered up to the discretion of our soldiers. We do farther declare, that all persons who shall be found any ways aiding or assisting to them, or shall much under their command, or shall join with, or submit to them in the discharge or execution of their illegal commissions or authority, shall be looked upon as partakers of their crimes, enemies to the laws, and to their country.").

¹⁵⁶ *Id.* at 344.

forming] the Militia as well as [the Lieutenants] can.”¹⁵⁷ Mr. Hampden then resolved:

1. That an humble Address be presented to his majesty, that the considerable Papists, or reputed Papists, of this kingdom, may be forthwith taken into custody; and the arms and horses of all Papists, and reputed Papists, be searched for, and seized. 2. That whatever Protestants, who shall own, protect, or conceal, any arms or horses, belonging to Papists, or reputed Papists, shall be looked upon as enemies to their majesties and this kingdom; and be proceeded against accordingly.¹⁵⁸

This address to William of Orange confirms that Protestants were not exempt from the 1662 Militia Act’s search and seizure of arms provision. While it had primarily been used to disarm papists since William and Mary’s accession, Protestants were never exempt from being classified as disaffected or dangerous.¹⁵⁹ In fact, there are numerous instances where individuals’ arms were seized without regard to religion. For instance, when warrants were issued to search for arms at “Queens Head Tavern” and the house next to “Anchor and Crown” in Brewer Street,” no mention was made of papists.¹⁶⁰ The same was true when a warrant was

¹⁵⁷ *Id.*

¹⁵⁸ *Id.* at 344-45 (citation omitted). This address would lead to the adoption of *An Act for the better securing the Government by disarming Papists and reputed Papists*. 1 W. & M., c. 15 (1688) (Eng.); see also 9 GREY, *supra* note 37, at 168-71 (discussing debates relating to the Act).

¹⁵⁹ 5 COBBETT, *supra* note 37, at 153-54. William of Orange was cognizant of the Declaration of Rights and the sanctions it imposed on government. For instance, the king confided in Parliament about the suspension of the writ of habeas corpus. He wrote to Parliament:

That his majesty had credible information, that there are several persons in and about this town, that keep private Meetings and Cabals, to conspire against the Government, and for the assistance of the late king James: That his majesty has caused some of those persons to be already apprehended and secured, upon the suspicion of High Treason; and that, he thinks, he may see cause to do so by others, within a little time: but that his majesty is between two great difficulties in this case; for that, if he should set those persons at liberty, that are apprehended, he would be wanting his own safety, and the safety of his government and people: on the other hand, if he should detain them, he is unwilling to do any thing, but what shall be fully warranted by law, which he has so often declared he will preserve: and that therefore, if those persons should deliver themselves by the act of Habeas Corpus, there would be another difficulty. That his majesty is likewise unwilling, that excessive Bail should be taken in this case; his majesty remembering that to be one Article of the Grievances presented to him: that ordinary Bail will not be sufficient; for men who carry on such designs, in hopes of succeeding will not stick at forfeiting a small sum: and that, this falling out when the parliament is sitting, his majesty therefore thought fit to ask the Advice of this house therein; and intends to advise with the lords also.

Id. No such advice was sought when he requested that the arms of disaffected Protestants be seized.

¹⁶⁰ 1 CALENDAR OF STATE PAPERS, *Domestic Series, of the reign of William and Mary, 1689-1690*, at 30, 292 (William John Hardy ed., Kraus Reprint 1969) (1895).

issued for a man named “Smith.” His home was located at “the Crown and Thistle,’ Princes Street, in St. Ann’s Parish, and another home for concealed arms and ammunition.”¹⁶¹ In both instances, no mention was made of religion.¹⁶²

In comparison, when warrants were issued to search for the arms of papists, it was expressly stipulated as such. On April 10, 1690, a warrant was issued “to search for concealed arms belonging to papists, and to apprehend all Irish papists together with other traitors and conspirators of whom . . . [the Colonel] shall have information.”¹⁶³ The Earl of Shrewsbury also made this distinction in an order to Lord Lumley. It read “that something should be done to discountenance those meetings of disaffected persons and papists . . . whether it may not be fit for the justices of the peace and the deputy lieutenants to go through the county again and give orders for disarming papists and their adherents.”¹⁶⁴

The fact that arms were searched for and seized from both Protestants and Catholics alike more adequately explains why the Declaration of Rights’ arms provision stated that Protestants “may have arms.” The possession of arms was surely a duty and a tax through the respective militia laws, but it was primarily a privilege “suitable to their condition” and “as allowed by law.” It was a privilege because the government could seize arms from disaffected or dangerous persons—Catholic or Protestant. All that was required was a warrant and good cause.¹⁶⁵

The restrictions the House of Lords placed on the “may have arms” provision also helps explain its language. The arms had to be “suitable to their condition” and “as allowed by law.”¹⁶⁶ The phrase “suitable to their condition” unequivocally shows that the House of Lords wanted to maintain the hierarchal “chain of being” and the cultural status quo. Laws concerning the militia, defense of the realm, game, and weapons all incorporated provisions stipulating “condition” or “quality” as a factor in applying and structuring them. For instance, the militia laws stipulated who was to be provided what arms based on one’s revenue and landed estates.¹⁶⁷ In game,

¹⁶¹ *Id.* at 195.

¹⁶² There are other examples of arms being seized of “dangerous” or “disaffected” persons. *See id.* at 165, 206, 329.

¹⁶³ *Id.* at 548. There are other examples of papists’ arms being seized. *See* 2 *CALENDAR OF STATE PAPERS, Domestic Series, of the reign of William III, 1696* (William John Hardy ed., Kraus Reprint 1969) (1895).

¹⁶⁴ 1 *CALENDAR OF STATE PAPERS*, *supra* note 160, at 554.

¹⁶⁵ 13 & 14 Car. 2, c. 3, § 14 (1662) (Eng.).

¹⁶⁶ 1 W. & M. 2, c. 2 (1688) (Eng.).

¹⁶⁷ Lieutenants had:

[F]ull Power and Authority to charge any person with Horse Horsman and Armes or with Foot Souldier and Armes . . . having respect unto and not exceeding the limitations and proportions hereafter mentioned (that is to say) No person shall be charged with finding a Horse Horseman and Armes unless such person or persons have a Revenue of Five hundred pounds by the yeare in possession or have an Estate of Six thousand pounds in goods or money besides the furniture of his or their houses and so proportionably for a greater Estate in lands in possession or goods as the respective Lieutenants and their Deputies as aforesaid in their discretions shall see cause and thinke reasonable And they are not to charge any person with finding a Foot Souldier and Armes that hath not a yearly Revenue of Fifty pounds in possession, or a

deer, and hunting laws, individuals were allowed to maintain weapons, arms, and tools only for hunting depending on similar factors.¹⁶⁸ Finally, laws governing the use, ownership, and privileges of weapons were almost always subject to the individual's degree, station, or condition.¹⁶⁹

personal Estate of Six hundred pounds in goods or moneys, (other than the stock upon the ground) and after the aforesaid rate proportionably for a greater or lesser Revenue or Estate Nor shall they charge any person with the finding both of Horse and Foot in the same County.

13 & 14 Car. 2, c. 3, § 2 (1662) (Eng.).

The Militia Act set up the following socio-economic structure:

Every Man between fifteen years of age, and sixty years, shall be assessed and sworn to Armor according to the quantity of their Lands and Goods; that is to wit, [from] Fifteen Pounds Lands, and Goods Forty Marks, an Hauberke, [a Breast-plate] of Iron, a Sword, a Knife, and an Horse; and [from] Ten Pounds of Lands, and Twenty Marks Goods, an Hauberke, [a Breast-plate of Iron,] a Sword, and a Knife; and [from] from Five Pound Lands, [a Doublet,] [a Breast-plate] of Iron, a Sword, and a Knife; and from Forty Shillings Land and more, unto One hundred Shillings of Land, a Sword, a Bow and Arrows, and a Knife; and he that hath less than Forty Shillings yearly, shall be sworn to [keep Gis-armes,] Knives, and other [less Weapons]; and he that hath less than Twenty Marks in Goods, shall have Swords, Knives, and other [less Weapons]; and all other that may, shall have Bows and Arrows out of the Forest, and in the Forest Bows and [Boults.]

13 Edw., c. 6 (1285) (Eng.) (alterations in original).

¹⁶⁸ See 22 & 23 Car. 2, c. 25, § 2 (1670-1671) (Eng.) ("That all and every person and persons, not haveing Lands and Tenements or some other Estate of Inheritance in his owne or his Wifes right of the cleare yearly value of one hundred pounds per annu or for terme of life, or haveing Lease or Leases of ninety nine yeares or for any longer terme, of the cleare yearly value of one hundred and fifty pounds, other than the Sonne and Heire apparent of an Esquire, or other person of higher degree. and the Owners and Keepers of Forrests, Parks, Chases or Warrens, being stocked with Deere or Conies for their necessary use in respect of the said Forrests, Parks, Chases or Warrens, are hereby declared to be persons by the Lawes of this Realme, not allowed to have or keepe for themselves or any other person or persons any Guns, Bowes, Grey hounds, Setting-dogs, Ferretts, Cony-doggs, Lurchers, Hayes, Netts, Lowbells, Hare-pipes, Ginns, Snares or other Engines aforesaid, But shall be, and are hereby prohibited to have, keepe or use the same."); 3 Ja., c. 13, § 4 (1605-1606) (Eng.) ("That if any pson or psons not having any Mannors Landes Tenements or Hereditaments of the cleere yeerly value of Forty Pounds, or not worth in Goodes or Chattels the some of Two hundred Poundes, shall use any Gunne Bowe or Crosbowe to kill any Deere or Connyes, or shall keepe any Buckstall or Engine Hayes Gatenets Pursnets Ferrets or Conny Dogges, except such pson or psons as shall have any Ground imparked with Pale or inclosed with Wall or Hedge as aforesaide used for the keeping breeding or cherishing of any Deere or Connyes, the increase of which said Connyes shall amount to the cleer yeerly value of Forty Shillings to bee letten at the leaste."); 4 & 5 W. & M., c. 23, § 4 (1592) (Eng.) (providing that the 1692 Game Act permitted the destruction of guns, weapons, nets, and dogs that were "prohibited to be kept by persons of their degree").

¹⁶⁹ See 26 Hen. 8, c. 6, § 3 (1534) (Eng.) ("[T]hat no psone or psonnes dwelling or resiaunte within Wales or the Lordshipps marches of the same, of what estate degree or condition so ev[er] he or they be of, comynge resortinge or repayinge unto any Sessions or Courte to be holden within Wales or any Lordshippes marches of the same, shall bringe to beare or cause to be brought or borne, to the same Sessions or Courte or to any place within the distaunce of two myles from the same Sessions or Courte, nor to any towne, church,

Malcolm's account of these affairs is much different. The arms provision in the Heads of Grievances used the phrase "should provide and keep arms," but by the time the provision made it through the House of Commons, it was changed to "may have arms." Malcolm contends that "should" was replaced by "may" because the former "smacked too much of preparation for popular rebellion to be swallowed by the more cautious Lords or, for that matter, by William."¹⁷⁰ There are no sources, letters, or debates to back up this assertion. Such an historical interpretation seemingly ignores all the laws that restricted arms by hierarchy and socio-economic status—laws that William and Mary of Orange maintained and Parliament never overturned. Malcolm attempts to counter this fact by arguing that the compromise to create the "have arms" provision in the Declaration of Rights was the first step in Parliament to modify and reform the Militia and Game laws.¹⁷¹ She believes that although "the arms article declared a right that current law negated, [this was done] with the understanding that future legislation would eliminate the discrepancy."¹⁷² No historical evidence exists to support this assertion either.

fayre, marktett, or other congregacion, except yt be upon a hute or outcrie made of any felonye robberie done or perpetrated, nor yn the highe wayes yn affraye of the Kyng[']s peace or the Kyng[']s liege . . . or any other maner of weapon, prive cote or armour defence."); 25 Hen. 8, c. 17, § 1 (1533-1534) (Eng.) ("[N]o pson or persons of what Estate or degree he or they be, except he or they in their owne right or in the right of hys or their wyfes to hys or their owne uses, or any other to the use of any suche person or perons, have lands tenements fees annuities or offices to the yerely value of an hundred poundes, frome the first day of June next comyng shall shote in any [hangonne] or crosse bow, or use or kepe in hys or their houses or els where any crosse bow or handgonne; upon payne to forfeite for every tyme that he or they soo offende contrary to this acte . . . And that it shalbe lefull to every person that may use or kepe any crosse bowe or handgonne or that may shote in the same notwithstanding this Acte, to sease and take every suche crosse bowe and handgonne or any of theyme frome the keypyng or possession of every suche offender, and the same to kepe or retayne to hys or their owne use.") (second alteration in original); 12 Rich. 2, c. 6 (1388) (Eng.) ("That no Servant of Husbandry, or Labourer, nor Servant [or] Artificer, nor of Victualler, shall from henceforth bear any [Buckler,] Sword, nor Dagger, upon Forfeiture of the same, but in the Time of War for Defence of the Realm of England.") (alterations in original); 2 Edw. 3, c. 3 (1328) (Eng.) ("That no Man great nor small, of what Condition soever he be, except the King's Servants in his presence, and his Ministers in executing of the King's Precepts, or of their Office, and such as be in their Company assisting them, and also [upon a Cry made for Arms to keep the Peace, and he same in such places where such Acts happen,] be so hardy to come before the King's Justices, or other of the King's Ministers doing their office, with force and arms, nor bring no force in affray of the peace, nor to go nor ride armed by night nor by day, in Fairs, Markets, nor in the presence of the Justices or other Ministers, nor in no part elsewhere, upon pain to forfeit their Armour to the King, and their Bodies to Prison at the King's Pleasure.") (alteration in original); 13 Edw. (1285) (Eng.) ("It is enjoined that none be so hardy to be found going or wandering about the Streets of the City, after Curfew tolled at St. Martins le Grand, with Sword or Buckler, or other Arms for doing Mischief, or whereof evil suspicion might arise; nor any in any other Manner, unless he be a great Man or other lawful Person of good repute, or their certain Messenger, having their Warrants to go from one to another, with Lanthorn in hand.")

¹⁷⁰ MALCOLM, *supra* note 12, at 119.

¹⁷¹ *Id.* at 120.

¹⁷² *Id.*

If anything, given the legal and statutory record, “should” was replaced by “may” because of the legal implications that the former would supply. If the Declaration of Rights stated that Protestants “should have arms” it would have implied that every Protestant had an affirmative right to arms for defense of the realm. Not to mention, when “should” remained in the provision, it did not possess the language “suitable to their condition as allowed by law.” Thus, the initial proposal in the Heads of Grievances would have extended a right to “have arms” for defense of the realm to all Protestants.¹⁷³ The House of Lords’ alterations fixed this. It wanted to ensure that not only did the current arms restrictions remain, but that future Parliaments could curtail this allowance as they deemed necessary.¹⁷⁴

For seventeenth-century historians, understanding the “have arms” provision in such a light is not difficult. The provision was intended grant a limited right in connection with the English militia system that would prevent the illegal maintenance of standing armies and echoed the legal justification for armed rebellion when government usurped the rights of the people.¹⁷⁵ Although one may argue that there is no mention of the militia in the “have arms” provision or the Declaration of Rights, the three subjects are undoubtedly linked. One needs to look only at the Heads of Grievances, which provides the following grievances in this numerical order:

5. The Acts of the Militia are grievous to the Subject.

6. The raising or keeping a Standing Army within this Kingdom in time of Peace, unless it be with the consent of Parliament, is against Law.

7. It is necessary for the publick Safety, that the Subjects, which are Protestants, should provide and keep Arms for their common Defence: And that the Arms which have been seized, and taken from them, be restored.¹⁷⁶

As previously addressed, what was “grievous” about the Militia Act was not the disarming of disaffected and dangerous persons, it was that the King had sole authority over the armed forces¹⁷⁷ and that the Act made it illegal to take up arms against him.¹⁷⁸ These facts were intertwined with the phrase “keeping a Standing Army.” Parliament feared that if the King had sole authority of the militia—the means by which Parliament was to check a tyrannical government—and there was

¹⁷³ The right to have arms supported the “anti-army prejudice and pro-militia sentiment.” THE SECOND AMENDMENT IN LAW AND HISTORY, *supra* note 21, at 207, 211. It was in no way meant to extend to the “individual right” to have arms. *Id.* at 210.

¹⁷⁴ Schwoerer contends “that the change was made to satisfy the Prince of Orange, who objected to the idea that Protestants ‘should provide and keep Arms.’” *Id.* at 214.

¹⁷⁵ See *supra* pp. 356-67.

¹⁷⁶ MALCOLM, *supra* note 12, at 131.

¹⁷⁷ At the Convention, Sir William Williams even stated, “The Act of the Militia is worthy your consideration, and he in whose hands you put it should be our Head. I take it to be your security to settle your safety for the future, and then to consider the person.” 9 GREY, *supra* note 37, at 30.

¹⁷⁸ 13 & 14 Car. 2, c. 3, § 2 (1662) (Eng.).

no statutory check on the maintenance of a standing army, the potential usurpations on liberty were philosophically endless.¹⁷⁹ This is why the Heads of Grievances conditioned a standing army on parliamentary approval, which ultimately leads us to the “have arms” grievance. Parliament felt that by allowing the people to “have arms” for “the common Defence”—i.e., militia—there would always remain a means to check a standing army that refused to disband.¹⁸⁰

Lastly, Malcolm’s interpretation does not support the fact that William used the 1662 Militia Act to disarm papists and dangerous persons on a massive scale nearly a decade after the Declaration of Rights remained in force. For instance, in 1699, William used the search and seizure provision to disarm “great numbers of papists and other disaffected persons, who disown his Majesty’s government.”¹⁸¹ He expressly authorized:

[The] mayor of London, and all justices . . . [to] put in execution the statute[s] intituled, An Act for the amoving papists and reputed papists from the cities of London and Westminster, and ten miles distance from the same, . . . An act for the better securing the government by disarming papists and reputed papists[, and] . . . An Act for the better security of his Majesty’s royal person and government.¹⁸²

The statutes that William authorized gave the government power to disarm not only papists, but dangerous and disaffected persons as well.

In fact, in 1701, William even granted monetary rewards for arms seized from dangerous or disaffected persons. On February 26th, he proclaimed: “And we charge all lieutenants and deputy-lieutenants, within the several counties of [England] and Wales, that they cause search to be made for arms in the possession of any persons whom they judge dangerous, and seize such arms according to law.”¹⁸³

¹⁷⁹ SCHWOERER, DECLARATION OF RIGHTS, *supra* note 23, at 73-74.

¹⁸⁰ One may argue that if the three grievances were meant to be intertwined, they would have combined as such in the Declaration of Rights. A valid point, but, nevertheless, the Convention’s record also intertwined them. In most instances where disarming was mentioned, the Militia Act and standing armies were mentioned right beside it. This was not by chance. It was intentional. Sir Richard Temple stated that “to provide against a Standing Army without consent of parliament, not in peace, when there is no war nor rebellion. An Army was no part of the government till the late king’s time. The Militia Act was made use of to disarm all England.” 5 COBBETT, *supra* note 37, at 54. Anchitell Grey’s account of Richard Temple reads: “An Army was no part of the Government till the late King’s time. The Militia-Act was made use of to disarm all *England*.” 9 GREY, *supra* note 37, at 31. Somers’ account of Richard Temple reads: “Standing army settled without consent of Parliament, though no part of constitution.—May be allowed in case of war, invasion, or rebellion.—Militia bill.—Power to disarm all England.—Now done in Ireland.” 2 SOMERS, *supra* note 37, at 416. Mr. Boscawen stated that it was “[t]he Militia, under pretence of persons disturbing the Government, disarmed and imprisoned men without cause: I myself was so dealt with.” 9 GREY, *supra* note 37, at 32.

¹⁸¹ 5 CALENDAR OF STATE PAPERS, *Domestic Series, of the reign of William III, 1699-1700*, at 79 (Edward Bateson ed., Kraus Reprint 1969) (1937).

¹⁸² *Id.* at 379.

¹⁸³ 6 CALENDAR OF STATE PAPERS, *Domestic Series, of the reign of William III, 1700-1702*, at 234 (Edward Bateson ed., Kraus Reprint 1969) (1937) (alteration in original).

As a result, warrants were issued for papists and persons suspected to be dangerous or disaffected.¹⁸⁴ Parliament did not object to these searches as a violation of the “have arms” provision. In fact, the searches were applauded. The House of Lords “humbly thanked his majesty for . . . order[ing] the seizing of all horses and arms of Papists, and other disaffected persons, and hav[ing] those ill men removed from London, according to the law.”¹⁸⁵ Furthermore, the Lords hoped the King would “give directions” for a further search of arms.¹⁸⁶ This evidence is a far cry from the “individual right” interpretation that Malcolm puts forward.

Therefore, the historical and legislative record of the “have arms” provision does not support the “individual right” model of armed self-defense. Rather, the “have arms” provision was a means to check arbitrary government—nothing more, nothing less. Its “may have arms” language in no way implies that every Protestant Englishman had a right to guns, weapons, or other instruments. It was a governmental allowance that depended on hierarchal structure and socio-economic status.¹⁸⁷ Most importantly, it was an allowance that could be altered and regulated “as allowed by law.” What could never be taken away, however, was the philosophical right the “have arms” provision echoed—the right of the people to take up “arms for their Defence” when all other means of redress to a tyrannical government are exhausted. This is why William Blackstone labeled it the “fifth and last auxiliary right,”¹⁸⁸ for it should only be looked upon as the last option to secure the liberties of the people.

III. CORRECTING THE “INDIVIDUAL RIGHT” INTERPRETATION OF THE CONVENTION

The two best arguments that Individual Right Scholars make concerning the legislative history of the “have arms” provision are taken out of context. The first is their interpretation of Mr. Finch’s testimony at the Convention. Malcolm contends that “[t]he need for the private possession of weapons to restrain the Crown was pressed by Mr. Finch.”¹⁸⁹ In John Somers’ account, he abbreviated Finch’s statement as follows:

Question, If the King has lost his title to the crown?—I think no man safe under his administration.—No safety but in the consent of the nation.—The constitution being limited, there is a good foundation for defensive arms.—It has given us right to demand full and ample security.—If there be an expedient wherein all may be secure, and all agree, that is the best.—1. We are to examine and inquire of the succession.—2. Every man must swear to it as lawful and rightful.¹⁹⁰

¹⁸⁴ See *id.* at 239, 242, 259, 271, 531.

¹⁸⁵ 5 COBBETT, *supra* note 37, at 1236.

¹⁸⁶ *Id.*

¹⁸⁷ See *supra* notes 31–32.

¹⁸⁸ See 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 139 (Oxford, Clarendon 1765).

¹⁸⁹ MALCOLM, *supra* note 12, at 116.

¹⁹⁰ 2 SOMERS, *supra* note 37, at 410.

Based on this account, Malcolm believes Finch was making the point that “there was both a personal and a national interest in the ability of citizens to have ‘defensive arms.’”¹⁹¹ In making this contention, however, Malcolm omits all the preceding and subsequent language of the quote.¹⁹² What Finch was actually referring to was the “title to the throne.”¹⁹³ His reference to “defensive arms” had nothing to do with private possession of weapons but instead had to do with the philosophical principle that Parliament may overthrow a tyrannical government. At no time was Finch referencing anything except the succession conundrum that the Convention faced: How would it legally proclaim William and Mary of Orange the true sovereigns of England? Finch argued that if the English Constitution was limited, then when James II dispensed and suspended those limitations, the Constitution gave Parliament and the people the right to take up arms in its defense.¹⁹⁴

Individual Right Scholars’ misuse of historical context at the Convention does not end here. They also believe that Thomas Erle’s draft of a speech which was “probably presented . . . in one of the [Convention’s] early debates” gives weight to the argument that the “have arms” provision protected individual firearm possession.¹⁹⁵ The portion of the speech to which they refer reads:

It will be convenient to make no man a militia officer but such as have a good estate to bear the expense of such an office, as hath been in ancient times; and it will prevent the misemploying the money gathered for the service of the county if there be two treasurers appointed that are persons of ability and known integrity to receive it, their clerks or servants to be allowed some small rewards for disbursing and receiving the money; commissioners to be appointed that are no militia officers for taking an account and for the disposal of the militia money. Besides the militia arms it will be convenient that every man that hath £10 and every substantial householder in any town or city should be provided of a good musket in case of an invasion: if it be said they will destroy the game, there is a law made against it so that ’tis not the gun or musket that offends but the man that makes an ill use of his arms and he may be punished for it by the law.¹⁹⁶

¹⁹¹ MALCOLM, *supra* note 12, at 116.

¹⁹² In the text, Malcolm only included the phrase, “no safety but the consent of the nation—The constitution being limited, there is a good foundation for defensive arms—It has given us right to demand full and ample security.” *Id.*

¹⁹³ THE SECOND AMENDMENT IN LAW AND HISTORY, *supra* note 21, at 207, 210.

¹⁹⁴ Somers’ account is a summation of what was stated. See also 6 GREY, *supra* note 138, at 13-15 (examining Anchitell Grey’s account). This principle was well known from John Locke’s *Two Treatises of Government*, which was reprinted to retroactively justify the Glorious Revolution. See SCHWOERER, DECLARATION OF RIGHTS, *supra* note 23, at 117.

¹⁹⁵ MALCOLM, *supra* note 12, at 116.

¹⁹⁶ Mark Goldie, *Thomas Erle’s Instructions for the Revolution Parliament, December 1688*, in 14 PARLIAMENTARY HISTORY 337, 345 (Clyve Jones ed., 1995).

Although Erle never delivered these sentiments in a speech to Parliament, there is no denying that he would have expressed his opinion on these matters to his fellow members.¹⁹⁷ As historian Mark Goldie shows us, Erle's speech was constructed in the midst of the Glorious Revolution, meaning it was drafted around December 1688.¹⁹⁸ But even if Goldie has miscalculated the date, the draft supports the limited purpose of the "have arms" provision—defense of the realm against foreign invasion. What makes this abundantly clear is the militia context that Erle mentions: "[E]very substantial householder . . . should be provided of a good musket."¹⁹⁹ The purpose of providing these muskets was "in case of an invasion."²⁰⁰ It was not for individual protection of the home whatsoever, a point Erle clarifies when he mentions the game laws, for he knew the governments arming of the people—even if it were to apply only to "substantial householders"—would be seen as a dangerous proposition. He hoped to ease those fears by reminding Parliament that there were already laws on the books regarding the unlawful use of arms.

Furthermore, the fact that Erle sought to arm only "substantial householders" speaks to the "have arms" provision's exception that it be "suitable to their condition." Erle was not asking Parliament to arm every man in England, nor was he asking that they be allowed to arm themselves as the "individual right" view would have it. Rather, he sought to arm only those who met certain hierarchal and socio-economic qualifications. Just what would qualify as a "substantial householder" is uncertain, but this does not mean that Erle's use of language should be taken lightly. It is significant that Erle's arming proposal was placed immediately after his mention of the Stuart Kings' standing armies and his grievances with the Militia Act, including the grievances that militia arms had been put into the hands of "lewd dissolute persons' custody."²⁰¹ Rather, Erle thought it was in the nation's best interest to "put the militia arms into such hands that have estates of their own."²⁰² He reasoned that "lewd dissolute persons" were not to be trusted because they "have nothing [and] do not care to preserve that for others that they have no share in themselves."²⁰³ Meanwhile, people of landed estates "have something to lose [and] will be careful to preserve it."²⁰⁴

In the end, Erle's proposal that every "substantial shareholder" be provided a good musket did not pass. His recommendations may have led to the Heads of Grievances' language that Protestants "should provide and keep Arms for their common Defence." These words articulate what Erle sought to propose: it was every Protestant's duty to protect against invasion. The language was substantially changed to "may have arms," though, articulating that having arms was an allowance by law—not a right *per se*.

¹⁹⁷ See THE SECOND AMENDMENT IN LAW AND HISTORY, *supra* note 21, at 207, 217.

¹⁹⁸ See 14 PARLIAMENTARY HISTORY, *supra* note 196, at 337, 340-42.

¹⁹⁹ *Id.* at 345.

²⁰⁰ *Id.*

²⁰¹ *Id.* at 344.

²⁰² *Id.*

²⁰³ *Id.* at 344-45.

²⁰⁴ *Id.* at 344.

IV. THE GAME ACTS AND UNDERSTANDING ARMS FOR THEIR DEFENCE

Individual Right Scholars contend that the passing of the “have arms” provision should have negated the 1671 Game Act’s restrictions on weapons. Otherwise, with the Game Act still in force, the “have arms” provision would be a right that “merely . . . [protected] the wealthy.”²⁰⁵ First and foremost, there is nothing in the drafting history of the Declaration of Rights that extended the right to “have arms” to hunting or game. None of the grievances or debates even mentioned it in passing. The right to “have arms” was expressly linked to the employing of Catholic Lieutenants, and no substantiating historical evidence exists to prove otherwise.

In fact, the Heads of Grievances stipulated the possession of arms for “their common Defence,” a phrase that even Joyce Lee Malcolm believes speaks of arms ownership as a “public duty.”²⁰⁶ The only public duties that involved the possession of arms were connected to the defense of the realm through the assize and militia laws.²⁰⁷ The phrase “for their common Defence,” however, was altered by the House of Lords. Its final language dropped the word “common” so it read “for their defence.”²⁰⁸ Malcolm and other Individual Right Theorists believe that this change “marked a final shift away from the private ownership of arms as a political duty and toward a right to have arms for individual defense.”²⁰⁹

This interpretation, however, does not adequately explain the House of Lords’ decision to add the phrase “suitable to their conditions and as allowed by law.” As has already been shown, the term “condition” was frequently used in weapon,²¹⁰ militia,²¹¹ and game laws.²¹² In every instance, the term referenced hierarchal and socio-economic status—the chain of being.²¹³ The clause was not “vague,” as

²⁰⁵ MALCOLM, *supra* note 12, at 120. Here Malcolm is showing her twentieth-century bias. The Declaration of Rights’ “have arms” provision and the Game Acts were in fact adopted to protect the interests of the wealthy. The 1690’s Parliamentarians were primarily concerned with the landed gentry’s interests.

²⁰⁶ *Id.* at 118-19.

²⁰⁷ *See supra* note 31.

²⁰⁸ *Id.* at 119.

²⁰⁹ *Id.*

²¹⁰ *See supra* note 30.

²¹¹ 13 & 14 Car. 2, c. 3, § 2 (1662) (Eng.); 13 Edw., c. 6 (1285) (Eng.).

²¹² 22 & 23 Car. 2, c. 25, § 2 (1670-71) (Eng.); 3 Ja., c. 13, § 4 (1605-06) (Eng.). The 1692 Game Act permitted the destruction of things such as guns, weapons, nets, and dogs that were “prohibited to be kept by persons of their degree.” 4 & 5 W. & M., c. 23, § 4 (1692) (Eng.).

²¹³ The “chain of being” was a hierarchal conception. The classical expression of this idea was the Anglican Homily of Obedience, which was read to the churches:

ALMIGHTY God hath created and appointed all things, in heaven, earth, and waters, in a most excellent and perfect order. In heaven he hath appointed distinct (or several) orders and states of archangels and angels. In earth he hath assigned and appointed kings and princes, with other governors under them, all in good and necessary order. . . . The sun, moon, stars, rainbow, thunder, lightning, clouds, and all birds of the air, do keep their order. The earth, trees, seeds, plants, herbs, corn, grass, and all manner of beasts, keep themselves in their order. . . . And man himself also

Malcolm contends, nor was it included to allow for “legislative clarification and for perpetuation of restrictions such as that on ownership of handguns.”²¹⁴ It was intended to clarify just how limited one “may have arms for their Defence.”

The next contention made by Individual Right Scholars is the argument that the lingual understanding of “arms for their Defence” clearly speaks to individual self-defense, whether it is of the home, person, or property. Historian J. R. Western believes that the removal of the word “common,” “suggested only that it was lawful to keep a blunderbuss to repel burglars: ‘Subjects which are protestants may have arms for their defence suitable to their conditions and as allowed by law.’”²¹⁵ Malcolm takes Western’s analysis a step further by claiming that the shift protected an individual’s “right to have arms for individual defense.”²¹⁶ Neither interpretation, however, is correct. While Western accurately includes the hue and cry²¹⁷ as one of the allowances by law that Protestants “may have arms . . . suitable to their conditions,” he did not adequately articulate the protective scope of the right to “have arms.” Not to mention, even the hue and cry limited what types of arms one may possess.²¹⁸ Meanwhile, Malcolm assumes that “for their defence” spoke to individual firearm ownership without providing any use of this language—in contemporary seventeenth-century law or literature—that proves her assertion.

A look at the books, pamphlets, and literature prior to, contemporaneous with, and after the Glorious Revolution actually shows that the phrases “arms for their common defence” and “arms for their defence” were synonymous in meaning. Both referenced the use of arms for military purposes, defense of the realm, or that the people have a right to overthrow tyrannical government, in the philosophical context. For instance, in his treatise on the art of war, Roger Boyle, the Earl of Orrery, wrote that it was the duty of the “[s]oldiers [to] carry Arms for their Defence.”²¹⁹ In 1623, Richard Jobson wrote of “Ferambra” the “Lord of his Country” putting “himselfe [and] Country in armes for their defence.”²²⁰ In 1674, Blaise Monluc wrote of his personal experience of going to the Court of French Parliament to convince it to

hath all his parts both within and without . . . members of his body, in a profitable, necessary, and pleasant order. Every degree of people, in their vocation, calling, and office, hath appointed to them their duty and order. Some are in high degree, some in low; . . . and every one have need of other.

An Exhortation concerning Good Order and Obedience to Rulers and Magistrates, in 1 THE TWO BOOKS OF HOMILIES 105 (Oxford, n. pub. 1822).

²¹⁴ MALCOLM, *supra* note 12, at 121.

²¹⁵ J. R. WESTERN, *MONARCHY AND REVOLUTION: THE ENGLISH STATE IN THE 1680s*, at 339 (1972).

²¹⁶ MALCOLM, *supra* note 12, at 119.

²¹⁷ The hue and cry laws always limited what arms individuals were allowed and prescribed to own according “to the quantity of their Lands and Goods.” *See* 13 Edw. 1, c. 6 (1285) (Eng.).

²¹⁸ *Id.*

²¹⁹ ROGER BOYLE, *A TREATISE OF THE ART OF WAR* 75 (London, T.N. 1677).

²²⁰ RICHARD JOBSON, *THE GOLDEN TRADE* 100 (Charles G. Kingsley ed., Devonshire, E. E. Speight & R. H. Walpole 1623); *see also* SAMUEL PURCHAS, *PURCHAS HIS PILGRIMES* 1456 (London, William Stansby 1625).

“take up arms.”²²¹ Monluc argued that it was the Parliament’s duty to “encourage the people” to defend France.²²² In order for Parliament to convince the people, though, he believed it must “see those who have power over their lives and estates take arms for their defence.”²²³ The use of the phrase in these examples was purely military in context. However, this use of “arms for their defence” was not common.

In most instances, “arms for their defence” referenced the people—either in a militia or military context—standing up against tyrannical oppression. For example, in 1585, when Thomas Bilson addressed whether it was lawful to resist tyrannical princes and magistrates, he stated that the Protestant “subjectes taking armes for their defence in such a case” was “in no way to be accounted treason.”²²⁴ This philosophy of lawful rebellion with the phrase “arms for their defence” was reiterated in multiple tracts. In 1608, Jean Francois Le Petit wrote that rebellion against tyrannical government was “permitted both by godly, naturall, and humaine laws.”²²⁵ This made it lawful “by authority of the councell of [the] state then ruling to take armes for their defence and securities.”²²⁶ In 1643, William Prynne wrote of the duty of Parliament to engage with “open Force of Armes” when the King “betray[ed] [its] trust, yea the whole kingdome too.”²²⁷ Prynne explained that Parliament must “defend their owne and the Subjects Liberties, persons, privileges, . . . against his Majesties offensive Armies which invade them.”²²⁸ The power to engage in such rebellion was “agreeable to the very Law of nature and reason,” and, therefore, Prynne explained it was “lawfull to take up Armes for their Defence when it was needful.”²²⁹

Many other examples of the phrase “arms for their defence” exist in this context,²³⁰ but there are two that are particularly important. The first is a

²²¹ BLAIZE DE MONTLUC, COMMENTARIES 306 (London, Andrew Clark 1674).

²²² *Id.*

²²³ *Id.*

²²⁴ THOMAS BILSON, THE TRUE DIFFERENCE BETWEENE CHRISTIAN SUBIECTION AND UNCHRISTIAN REBELLION 508 (Oxford, Barnes 1585).

²²⁵ FRANCOIS LE PETIT, GENERALL HISTORIE OF THE NETHERLANDS 610 (London, Edward Grimbstone trans., A. Islip & G. Eld 1608).

²²⁶ *Id.*

²²⁷ WILLIAM PRYNNE, THE THIRD PART OF THE SOVERAIGNE POWER OF PARLIAMENTS AND KINGDOMES 4 (London, Michael Sparke 1643).

²²⁸ *Id.*

²²⁹ *Id.*

²³⁰ THOMAS BAKER, THE WICKED MANS PLOT DEFEATED 62 (London, n. pub. 1656) (stating “shall therefore make no Bones of provoking their most Potent Neighbors to take up Armes for their Defence”); ELIE BENOIST, THE HISTORY OF THE FAMOUS EDICT OF NANTES 57 (London, John Duton 1694) (stating “often gives them cause to take up Armes in their defence”); EDMUND BORLASE, BRIEF REFLECTIONS ON THE EARL OF CASTLEHAVEN’S MEMOIRS OF HIS ENGAGEMENTS AND CARRIAGE IN THE WARS OF IRELAND 20 (London, n. pub. 1682) (stating “[t]hat the whole Nation took up Arms for their defence”); ROBERT CODRINGTON, A DECLARATION SENT TO THE KING OF FRANCE AND SPAYNE FROM THE CATHOLIKES OR REBELLS IN IRELAND 3 (Paris, n. pub. 1642) (stating “those only excepted who shall be declared

contemporaneous 1688 pamphlet by Peter Pett entitled *The Happy Future State of England*.²³¹ Pett discussed how the papists brought almost as much alarm and fear throughout the kingdom as a foreign invasion would.²³² In fact, the fear was so extreme that it caused the government to “occasionally lay[] a Tax on men to buy what Arms for their defence the Law allows.”²³³ The pamphlet’s use of the phrase “arms for their defence” perfectly captures what the Declaration of Rights’ “have arms” provision protected. This is because the allowance that Protestants “may have arms” was more of a tax than anything else. Through the militia acts, the hue and cry, and the assize of arms, individuals were required to possess arms depending on their quality or condition.²³⁴ Moreover, Pett makes reference to “as the law allows,” further showing the limited nature of the allowance to “have arms.”²³⁵ The government could always change what types of arms persons were allowed to provide depending on their quality or condition.²³⁶

The second example is a 1649 work by James Howell describing the events of the English Civil War and Charles I’s fleeing to the Isle of Wight.²³⁷ Howell wrote that Charles I was “contented to declare, That the two Houses [of Parliament] were necessitated to take Armes for their defence”—a connotation that clearly speaks of military defense.²³⁸ What is particularly interesting is that Howell would further write about “self-defence.” To Howell, “self-defence” is “the universall Law of Nature, and it extends to all other creatures, as well as the rationall.”²³⁹ It is not a written principle:

[B]ut a Law born with us; A Law which we have not learnt, receiv’d or read, but that which we have suck’d, drawn forth, and wrung out of Nature her self; A Law to which we are not taught, but made unto, wherewith we are not instructed, but indued withall, that if our lifes be in jeopardy, [etcetera] we may repell force by force.²⁴⁰

enemies to the common cause, or shall refuse to take armes for their defence”); PHILIPPE DE COMMINES, *THE HISTORIE OF PHILIP DE COMMINES KNIGHT, LORD OF ARGENTON* 69 (London, Ar. Hatfield & I. Norton 1596) (stating “the Bishoprick . . . commanded them to take armes for their defence”); MARTIN FUMÉE, *THE HISTORIE OF THE TROUBLES OF HUNGARIE* 162 (London, Felix Kynston 1600) (stating “[a]nd because in this towne where many persons, who willingly, or by compulsion of the Turkes, had taken armes for their defence”).

²³¹ PETER PETT, *THE HAPPY FUTURE STATE OF ENGLAND* (London, n. pub. 1688).

²³² *Id.* at 60.

²³³ *Id.*

²³⁴ See *supra* notes 31-32.

²³⁵ PETT, *supra* note 231, at 60.

²³⁶ *Id.*

²³⁷ JAMES HOWELL, *AN INQUISITION AFTER BLOOD* (n.p., n. pub. 1649).

²³⁸ *Id.* at 4.

²³⁹ *Id.*

²⁴⁰ *Id.* at 4-5.

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.”²⁴¹ Individual Right Theorists will argue that Howell’s analysis proves that “self-defence” and “arms for their defence” were synonymous phrases—that the latter spoke to armed individual self-defense. This, however, takes Howell out of context. Howell makes it clear that “self-defence” is an individual natural right to defend one’s person when assaulted.²⁴² The term can also be a broader principle for revolution. It is this revolutionary context in which the people may “have arms” to protect their liberties.²⁴³ It was this natural law principle that prompted Parliament to take up “arms for their defence.” If the two phrases were synonymous, Howell would have stated that “arms for their defence” “is the universall Law of Nature.” He did not. Instead, he was clear to differentiate between the two principles. “Arms for their defence” is in reference to organized and justified rebellion or military action based on the principle of “self-defence.” Meanwhile, “self-defence” often was in reference to an individual’s right to protect his or her person when endangered, but this right was not absolute.²⁴⁴

If anything, Howell’s tract shows that “self-defence” was a common term used prior to the drafting of the Declaration of Rights.²⁴⁵ And because it was common, it begets the question, “Why was ‘self-defence’ not used in lieu of ‘arms for their defence’?” The use of the former would have more adequately articulated an “individual right” to “have arms” to protect their person, house, and property. The truth of the matter is that “arms for their defence” was used because it properly articulated the principle of defending the realm against outside forces and against tyrannical governments. It had nothing to do with an individual’s protection of his person, house, or property.

Parliament’s use of the phrase “arms for their defence” twice in 1642 supports this understanding. The first usage occurred on January 12th in the House of Lords. John Pym, responding to the charge that Parliament endeavored to raise a force of men to remove Charles I, stated that it was “the king’s going into the North and raising armies there” that preceded Parliament taking “any course, or [making] any

²⁴¹ *Id.* at 5.

²⁴² *See id.* at 4-5.

²⁴³ John Cartwright described the Americans’ actions at the Boston Tea Party as being “done 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.” John Cartwright, Letter IX (Apr. 9, 1744), in *ENGLISH DEFENDERS OF AMERICAN FREEDOM 1774-1778*, at 173, 182 (Paul H. Smith ed., 1972). 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).

²⁴⁴ *See* JAMES HOWELL, *DIVERS HISTORICALL DISCOURSES OF THE LATE POPULAR INSURRECTIONS IN GREAT BRITAIN, AND IRELAND* 378 (London, J. Grismond 1661).

²⁴⁵ A search for “self-defence” provides 793 instances in 231 books, pamphlets, and tracts from the years 1473-1700. Early English Books Online, <http://eebo.chadwyck.com/home> (last visited Sept. 28, 2009).

preparation to take up arms for their defence.”²⁴⁶ The second instance occurred in the House of Commons. On November 18th, Parliament ordered that the inhabitants of the Hamlets Popular and Blackwall:

[S]hall have Power to make Assessses, as well upon the Lands as the Inhabitants, to the Value of One hundred and Fifty Pounds, for Providing of Arms for their Defence, and Satisfying of the great Charge they have been at for the Courts of Guard, and Posts, and other Necessaries for their Security.²⁴⁷

Both examples limit “arms for their defence” to a defense of the realm context.

Individual Right Scholars have never explored the seventeenth-century understanding of the phrase “arms for their defence.” They merely assume it equates with armed individual “self-defence”²⁴⁸—a contemporary misunderstanding of seventeenth-century terminology. Not even *Cato’s Letters* linked the two together. In writing on self-defense in 1720, Thomas Gordon wrote that the “Law of Nature does not only allow us, but oblige[s] us, to defend ourselves. It is our Duty, not only to ourselves, but to Society.”²⁴⁹ *Cato’s Letters* and quotations like this have been used by Individual Right Scholars to support their stance. What these scholars fail to mention, however, is that Gordon was discussing a natural right, and he made no mention of a right to weaponry or arms. There is not one instance in *Cato’s Letters* that states that society cannot determine what means individuals may use to defend themselves and society upon entering civilization. In fact, the first law of nature is that “all Men are bound alike not to hurt one another.”²⁵⁰

There is not even a mention of the Declaration of Rights or a right to “have arms” in any of the *Cato* tracts mentioning or examining self-defense. One may argue that Gordon and Trenchard forgot to include it, or that it was just naturally understood to exist. However, this does not explain why the authors went to great lengths to include the Declaration of Rights and the Constitution when discussing other matters of a constitutional nature. These other matters include the right to petition, separation of powers in a limited monarchy, and standing armies—all of which are expressly contained within the Declaration of Rights. The right to petition and redress was a “legal Remedy at Hand: It is their undoubted Right, and acknowledged to be so in the *Bill of Rights* passed in the Reign of King Charles the First; and since by the Act of Settlement of the Crown at the *Revolution*.”²⁵¹ In writing about the

²⁴⁶ 3 WILLIAM COBBETT, *THE PARLIAMENTARY HISTORY OF ENGLAND FROM THE EARLIEST PERIOD TO THE YEAR 1803*, at 58 (London, R. Bagshaw. 1806)

²⁴⁷ 2 H.C. JOUR. 855 (1802).

²⁴⁸ MALCOLM, *supra* note 12, at 113-34;

²⁴⁹ John Trenchard & Thomas Gordon, *Considerations on the Nature of Laws* (Aug. 26, 1721), in 2 CATO’S LETTERS 64, 69 (London, W. Wilkins, T. Woodward, J. Walthoe & J. Peele 3d ed. 1733).

²⁵⁰ *Id.* at 68.

²⁵¹ John Trenchard & Thomas Gordon, *Of the Natural Honesty of the People, and Their Reasonable Demands* (Apr. 8, 1721), in 1 CATO’S LETTERS 177, 182 (London, W. Wilkins, T. Woodward, J. Walthoe & J. Peele 3d ed. 1733). Gordon later wrote:

By the Bill of Rights, and the Act of Settlement, at the *Revolution*, a Right is asserted to the People of applying to the King and to the Parliament, by Petition and Address,

limited powers of the crown, Gordon wrote, “We have a Constitution that abhors Absolute Power; we have a King that does not desire it; and we are a People that will never suffer it.”²⁵² For the unconstitutionality of standing armies, one need look no further than the title of Trenchard’s 1697 tract, *An Argument Shewing that a Standing Army is Inconsistent with a Free Government and Absolutely Destructive to the Constitution of the English Monarchy*.²⁵³

To be clear, neither Trenchard nor Gordon viewed armed individual self-defense as a right—natural or civil. In a state of nature, it is undeniable that every person has “a Right to repel Injuries, and to revenge them.”²⁵⁴ That is, people have “a Right to punish the Authors of those Injuries, and to prevent their being again committed.”²⁵⁵ An individual, however, gives up this unfettered natural right to the government upon entering society. As Gordon wrote, “[I]t is absurd to suppose that National Legislatures, to whom every . . . [person’s] private Power is committed, have not the same Right, and ought not to exercise it on proper Occasions.”²⁵⁶ In society, the people also turn over justice to the government. Gordon felt that the natural right of “repelling and revenging Injuries, in such [a] Manner as every [person] thought best, is transferred to the Magistrate, when Political Societies are formed.”²⁵⁷ It only returns to “private [individuals] again, when the Society is dissolved.”²⁵⁸

This dissolution of society and government can occur with a lack of proper succession or when society restrains “the great End of their Trust, in protecting the Innocent; an End for which alone Men part with their natural Rights, and become the Members and Subjects of Society.”²⁵⁹ When this trust is broken and government is oppressive, the people “have a Right to defend and preserve themselves” because “there is no other Power in Being to protect and defend them.”²⁶⁰ In other words, the people have a right to revolt against unjust rule. Even Trenchard knew it was difficult to imagine that “any Number of Men [would be] formidable enough to disturb a settled State” given the “Artillery, and all the Magazines of War” at the

for a Redress of publick Grievances and Mismanagement, when such there are, of which They are left to judge.

The Right and Capacity of the People to judge of Government (July 22, 1721), in 2 CATO’S LETTERS, *supra* note 251, at 34, 42.

²⁵² Considerations on the Destructive Spirit of Arbitrary Power (Apr. 15, 1721), in 1 CATO’S LETTERS, *supra* note 249, at 184, 192.

²⁵³ JOHN TRENCHARD, AN ARGUMENT SHEWING THAT A STANDING ARMY IS INCONSISTENT WITH A FREE GOVERNMENT AND ABSOLUTELY DESTRUCTIVE TO THE CONSTITUTION OF THE ENGLISH MONARCHY (London, n. pub. 1697).

²⁵⁴ The Justice and Necessity of Punishing Great Crimes, Though Committed Against no Subsisting Law of the State (Jan. 7, 1720), in 1 CATO’S LETTERS, *supra* note 251, at 66, 66.

²⁵⁵ *Id.*

²⁵⁶ *Id.*

²⁵⁷ The Lawfulness of Killing Julius Caesar Considered, and Defended, Against Dr. Prideaux (Dec. 2, 1721), in 2 CATO’S LETTERS, *supra* note 249, at 165, 169.

²⁵⁸ *Id.*

²⁵⁹ *Id.*

²⁶⁰ *Id.*

government's disposal.²⁶¹ But when the "publick Grievances are so enormous, the Oppression so great, and the Disaffection so universal" the people must rebel.²⁶² It is this "Principle of People's judging for themselves, and resisting lawless Force," wrote Trenchard, that "stands our late happy [Glorious] *Revolution*."²⁶³ People did not have an unfettered right to "have arms" to accomplish this either. What they did have was the right to take up arms and restore their rights.

Individual Right Scholars ignore these historical and philosophical facts. They are so bold to believe that even if the Declaration of Rights allowed Protestants to "have arms," it must have overridden any laws restricting firearm ownership, including the game laws.²⁶⁴ The Declaration of Rights never overrode these laws, nor was it ever intended to do so. In fact, upon the accession of William and Mary, the 1692 Game Act affirmed that "all and every Law and Statute now in force for the better preservation of the Game" shall remain in force.²⁶⁵ The only laws that were voided were those that were "altered or repealed" by the 1692 Game Act's provisions.²⁶⁶

Both the 1671 and 1692 Game Acts put in place a provision by which "one or more Justice of the Peace" had the authority to search the "Houses[,] Out-houses[,] or other places belonging" to "suspected persons not qualified" by law to possess certain hunting instruments.²⁶⁷ Clearly, the 1692 Game Act's search and seizure provision overrode its 1671 predecessor. What Individual Right Theorists stress is that the word "guns" was omitted in the 1692 Game Act—an astute and correct observation.²⁶⁸ The 1671 Act allowed the Justices of the Peace to take the following hunting instruments from persons who were suspected of violating property requirements: "Gunns, Bows, Grayhounds, Setting-dogs, Lurchers or other Dogs to kill Hares or Conies, Ferrets, Trampels, Lowbells, Hayes or other Netts, Harepipes, Snares or other Engines for the takeing and killing of Conyes, Hares, Pheasants Partridges or other Game."²⁶⁹ Meanwhile, the 1692 Act overrode this by listing only the following hunting instruments: "Bows Greyhounds Setting Dogs Ferrits Coney Dogs Hayes Lurchers Netts Tunnels Lowbells Hare-Pipes Snares or any other Instruments for the destruction of Fish Fowle or other Game."²⁷⁰

A comparison of the two provisions shows that the word "guns" was omitted from the 1692 Act. One may argue that "guns" could be grouped in with the 1692 Act's mention of "other Instruments." This may be true, but any guns found would

²⁶¹ Liberty Proved to be the Unalienable Right of all Mankind (Dec. 30, 1721), in 2 CATO'S LETTERS, *supra* note 249, at 214, 225.

²⁶² *Id.*

²⁶³ *Id.*

²⁶⁴ MALCOLM, *supra* note 12, at 118-19.

²⁶⁵ 4 W. & M., c. 23, § 1 (1692) (Eng.).

²⁶⁶ *Id.*

²⁶⁷ *Id.* § 14; 22 & 23 Car. 2, c. 25, § 1 (1670-1671) (Eng.).

²⁶⁸ 4 W. & M., c. 23, § 3 (1692) (Eng.).

²⁶⁹ 22 & 23 Car. 2, c. 25, § 1 (1670-1671) (Eng.).

²⁷⁰ 4 W. & M., c. 23, § 2 (1692) (Eng.).

have had to been shown to be an instrument for hunting game. In other words, upon the justice's search, there could be no question that (1) the firearm was for hunting game; and (2) that the individual whose premises were searched did not meet the property qualifications to possess it, for the search and seizure provision was one of presumed guilt.²⁷¹ Persons suspected of violating the Game Act were presumed to be unable to meet the property qualifications.²⁷² To be qualified, one had to: (1) have freeholds worth at least 100*l.* a year; (2) have leaseholds (for ninety-nine years or longer) or copyholds worth at least 150*l.* a year; (3) be a son and heir apparent of esquires or other persons of higher degree; or (4) hold franchises of park, chase or free warren.²⁷³

These qualifications help explain why the word "guns" was removed from the search and seizure provision. It expressly conflicted with the Militia Act's requirement that all persons with a yearly revenue of 50*l.* were required to provide a "Foot Souldier and Armes" for the defense of the realm.²⁷⁴ This is likely what Lord Macclesfield was objecting to in the 1706 Game Act's debates when he stated that it was a "great inconvenience" to maintain "guns" in the Game Act.²⁷⁵ Joyce Lee Malcolm implies that the "great inconvenience" was in reference to the Game Act's interference with the alleged right for every individual to own arms for self-defense that the Declaration of Rights echoed.²⁷⁶ This is not the case nor does the record support it, for the 1692 Game Act did not repeal Henry VIII's statute on firearms.

Henry VIII's statute regulating arms had been enacted to prevent "shamefull murthers robberies felonies ryots and routs" and limited what arms one could own.²⁷⁷ The act required individuals have "lands, teñts rents fees annuyties or Office, to the yearly value of one hundred Pounds."²⁷⁸ Otherwise, it was unlawful for them to own, possess, or use guns. Those who did qualify had to ensure that the gun was "not of the lengthe of one whole Yarde or hagbut or demyhake beinge not of the lenghe of thre quarters of a Yarde, Tenne pounds sterlinge."²⁷⁹ Meanwhile, "Crosbowes little shorte handguns and little hagbutts" were illegal for anyone to own, regardless of his condition or quality.²⁸⁰

²⁷¹ See 22 & 23 Car., c. 25, § 2 (1670-1671) (Eng.).

²⁷² See *id.*

²⁷³ *Id.*; RICHARD BURN, 1 THE JUSTICE OF THE PEACE AND PARISH OFFICER 441 (n.p., Henry Lintot 1755); P.B. MUNSCHÉ, GENTLEMEN AND POACHERS: THE ENGLISH GAME LAWS 1671-1831, at 12 (1981).

²⁷⁴ 13 & 14 Car. 2, c. 3, § 2 (1662) (Eng.). A foot soldier was required to have "a Musquet the Barrell whereof is not to be under three Foot in length and the Gauge of the Bore to be for twelve Bullets to the pound A Coller of Bandeleers, with a Sword." *Id.* § 21.

²⁷⁵ BURN, *supra* note 273, at 443.

²⁷⁶ MALCOLM, *supra* note 12, at 128.

²⁷⁷ 33 Hen. 8, c. 6, § 1 (1541-1542) (Eng.).

²⁷⁸ *Id.* § 3.

²⁷⁹ *Id.* § 2.

²⁸⁰ *Id.* § 1.

The statute also regulated the manner in which one could use firearms. Those who were qualified could shoot lawful firearms only “within any Cittie Boroughe or Market Towne or within one quarter of a myle of any Cittie, Boroughe or Market Towne” at “Butt of Banck of earth in place convenient, or for the defence of his pson or house.”²⁸¹ It is here where a statute made it lawful for an individual to use firearms for self-defense. It was not an affirmed right, but an allowance that could be regulated by law. More importantly, it was an allowance that extended only to individuals that earned a yearly value of 100£.²⁸² All other individuals were disqualified unless they resided “in anye house standinge and being sett distance twoo furlongs from any Cittie Borough or Towne.”²⁸³ Only then may the individual have lawful firearms to “ayde and assist to the defence of this Realme.”²⁸⁴

As late as 1755, Richard Burn²⁸⁵ cites Henry VIII’s statute as still being in force and as the reason “guns” was removed from the 1692 Game Act. He wrote that “it was not at all necessary to insert a gun in this act, since the carrying of a gun is prohibited under double the penalty by the statute of [Henry VIII].”²⁸⁶ Meaning the 1671 Game Act’s inclusion of “guns” was repetitive. Henry VIII’s statute already regulated the illegal carrying, ownership, and use of firearms.²⁸⁷ This conflict of laws helps put into context Lord Macclesfield’s objection that the maintaining of “guns” in the Game Act “might be attended with great inconvenience,” but this is not the only reason.²⁸⁸

As has already been addressed, the 1671 Game Act’s qualifications for hunting instruments conflicted with the Militia Act. While persons with a yearly revenue of 50*l.* were required to provide certain arms, it was illegal for these same persons to possess guns or bows for hunting if they did not make a yearly revenue of 100*l.*²⁸⁹ The 1692 Game Act did not fix this. It merely altered the search and seizure provision, and it did not address whether it was legal to own guns for hunting.²⁹⁰

What Individual Right Scholars ignore is that while Section Two’s search and seizure of illegal hunting instruments may have been revised by omitting “guns,” Section Three remained in force. It still stipulated that any person not meeting the

²⁸¹ *Id.* § 4.

²⁸² *Id.* § 3.

²⁸³ *Id.* § 7.

²⁸⁴ *Id.* § 6.

²⁸⁵ Malcolm cited only the portion of Burn’s treatise that stated the word “guns” was removed because it was a “great inconvenience.” MALCOLM, *supra* note 12, at 128. She omitted the subsequent analysis, which read, “And indeed it was not at all necessary to insert a gun in this act, since the carrying of a gun is prohibited under the double penalty by the statute of H. 8 hereafter following.” BURN, *supra* note 273, at 443.

²⁸⁶ *Id.*

²⁸⁷ See 33 Hen. 8, c. 6 (1541-1542) (Eng.).

²⁸⁸ BURN, *supra* note 273, at 443.

²⁸⁹ Compare 22 & 23 Car. 2, c. 25, § 2 (1670-1671) (Eng.) with 13 & 14 Car. 2, c. 3, § 2 (1662) (Eng.).

²⁹⁰ See 4 W. & M., c. 25, § 2 (1692) (Eng.).

hierarchical and socio-economic qualifications were “not allowed to have or keepe for themselves or any other person or persons any Guns, Bowes, Grey hounds, [or] Setting-dogs” to hunt protected game.²⁹¹ Thus, while it may have been an individual’s duty to provide arms for the militia, at the same time it could also be illegal for the same individual—who did not meet the 1671 Game Act’s qualifications—to own firearms for hunting game.

The 1706 Game Act altered this conflict of law. It revised Section Three of the 1671 Game Act.²⁹² No longer were “guns” or “bows” listed as illegal hunting instruments for unqualified persons.²⁹³ Now, it was unlawful only to “keep or use any Greyhounds Setting Dogs Hayes Lurchers Tunnells or any other Engine to kill and destroy Game.”²⁹⁴ This fixed the “great inconvenience” maintaining “guns” in the Section Three of the 1671 Game Act attended. Furthermore, it is in this legal context that *Rex v. Gardiner*²⁹⁵ and *Wingfield v. Stratford & Osman*²⁹⁶ were decided.

Individual Right Scholars incorporate the decisions of these cases in a light that supports their pre-determined conclusion.²⁹⁷ Unfortunately, in doing this, they do not understand the legality of “guns” in early eighteenth-century England. The scholars claim that the court’s failure to mention the militia implies that there was a right to have guns for reasons besides defense of the realm and against tyrannical government. Nothing is farther from the truth. As will be shown, the court accurately applied the statutes of the realm in both cases. The decisions had nothing to do with a right to own arms for self-defense. They had to do with the proper adjudication of the game laws.

In *Rex v. Gardiner*, the defense “moved to quash a conviction, for unlawfully having and keeping a *gun*” in violation of the game laws.²⁹⁸ It was rightfully argued, in accordance with the 1706 Game Act, the defendant’s possession of a gun did not prove that it was being used for the illegal destruction of game,²⁹⁹ for “guns” were no longer expressly mentioned in the game laws.³⁰⁰ Therefore, the prosecution had to prove that the gun was used for the illegal destruction of game. Mere possession was no longer a strict liability offense that could be prosecuted.³⁰¹ This legal principle was articulated by defense counsel when it was argued:

²⁹¹ 22 & 23 Car. 2, c. 25, § 2 (1670-1671) (Eng.).

²⁹² See 6 Ann., c. 16, § 6 (1706) (Eng.).

²⁹³ *Id.*

²⁹⁴ *Id.*

²⁹⁵ BURN *supra* note 273, at 442.

²⁹⁶ *Wingfield v. Stratford & Osman* (1752), in 1 REPORTS OF CASES ADJUDGED IN THE COURT OF THE KING’S BENCH 1751-1756, at 15 (Joseph Sayer ed., London, W. Strahan & M. Woodfall 1775).

²⁹⁷ MALCOLM, *supra* note 12, at 129.

²⁹⁸ BURN, *supra* note 273, at 442.

²⁹⁹ *Id.*

³⁰⁰ *Id.*

³⁰¹ *Id.*

For . . . if the statute is to be construed so largely, as to extend to the bare having of any instrument, that may possibly be used in destroying game, it will be attended with very great inconvenience; there being scarce any, tho' ever so useful, but what may be applied to that purpose. And tho' a gun may be used in destroying game, and when it is so, doth then fall within the words of the act.³⁰²

Individual Right Scholars rely too much on the defense's argument that a "gun" did not qualify as an "engine." The defense stated that a "gun is an engine, not for the killing of game, but for the defence of a man's house."³⁰³ The defense was not stating that having a gun for the defense of the home was a right. Rather, it was making the point that "guns" were "frequently necessary to be kept and used for other purposes,"³⁰⁴ including the "killing of noxious vermin" and self-defense of the home by persons "qualified to have such arms."³⁰⁵

Having arms as an allowance was even articulated in the Individual Right Scholars' second example—*Wingfield v. Stratford & Osman*. In that case, the court stated that "a Gun *may* be kept for the Defence of a Man's House, and for divers other lawful Purposes."³⁰⁶ At no time did it stipulate that having arms was a right. The court was merely making the same point that was made in *Rex v. Gardiner* when it stated:

As Greyhounds, Setting dogs, Hayes, Lurchers and Tunnels are expressly mentioned in that Statute, it is never necessary to alledge, that any of these have been used for killing or destroying the Game; and the rather, as they can scarcely be kept for any other Purpose than to kill or destroy the Game.³⁰⁷

In other words, "guns" served purposes other than hunting. This was not the case with the instruments listed in the 1706 Game Act.³⁰⁸ It was rare for anyone to keep "greyhounds, setting dogs, hayes, lurchers and tunnels" but to kill game.

In sum, the "individual right" contention about the phrase "arms for their Defence" and the game laws are unfounded. First, Individual Right Scholars assume that the Convention's adoption of "arms for their Defence" affirmed an individual right for armed self-defense. As the historical record shows, the phrase "arms for their Defence" has always been associated with using arms in the limited circumstances of the defense of the realm or to take up arms to overthrow tyrannical government³⁰⁹—neither of which comport with the "individual right" theory.

³⁰² *Id.*

³⁰³ *Id.*

³⁰⁴ *Id.*

³⁰⁵ *Id.* at 442-43.

³⁰⁶ 1 REPORTS OF CASES ADJUDGED IN THE COURT OF THE KING'S BENCH 1751-1756, *supra* note 296, at 16.

³⁰⁷ *Id.*

³⁰⁸ See 6 Ann., c. 16, § 6 (1706) (Eng.).

³⁰⁹ See *supra* pp. 386-91.

Second, no evidence exists that shows that the Convention intended on modifying the game laws to comply with an alleged right to “have arms” for personal self-defense. The removal of “guns” and “bows” from subsequent game laws was done to remove any confusion with the 1662 Militia Act’s requirement to provide arms and because the penalties for the illegal possession of arms were already covered under Henry VIII’s statute.³¹⁰ Not to mention, the “individual right” theory that “future legislation would eliminate the discrepancy” between current gun laws and the “have arms” provision³¹¹ does not explain why “arms” qualifications remained. Both the hierarchal and socio-economic qualifications to possess arms and the confiscation of the arms of unqualified persons not only remained in force, they were affirmed by William and Mary of Orange.³¹² Needless to say, the “individual right” theory of a right to armed self-defense lacks sufficient legal and historical support.

V. THE DISARMING OF PAPISTS AND THE ALLOWANCE OF ARMS FOR SELF-DEFENSE

Starting in the late thirteenth century, the hue and cry required individuals to maintain arms, weapons, and armor for the defense of their community and the realm. When violent crimes were committed—i.e., robbery, burglary, and murder—people were called from their houses to find and arrest perpetrators according to the law.³¹³ Michael Dalton’s 1697 edition of *Country Justice* provides the following helpful example:

If Thieves shall come to a Man’s House, to rob or murder him, he may lawfully assemble company to defend his House by force; and if he or any of his company shall kill any of them in defence of Himself, his Family, his Goods or House, This is no felony, neither shall forfeit any thing therefore.³¹⁴

Dalton accurately shows us that self-defense was lawful through the hue and cry. In fact, self-defense has always been lawful because it is one of the primary rules of nature.³¹⁵ However, an individual gives up some of these rights once he enters society.³¹⁶ Although individuals can never relinquish their right to repel force by

³¹⁰ 33 Hen. 8, c. 6 (1541-1542) (Eng.).

³¹¹ MALCOLM, *supra* note 12, at 120.

³¹² 4 W. & M., c. 23, § 1 (1692) (Eng.).

³¹³ MICHAEL DALTON, *THE COUNTRY JUSTICE, CONTAINING THE PRACTICE OF THE JUSTICES OF THE PEACE OF THEIR SESSIONS* 308 (London, n. pub 1619) [hereinafter DALTON, PRACTICE].

³¹⁴ MICHAEL DALTON, *THE COUNTRY JUSTICE, CONTAINING THE PRACTICE OF THE JUSTICES OF THE PEACE OF THEIR SESSIONS* 308, 356 (London, J. Walthoe 1697).

³¹⁵ See HOWELL, *supra* note 237.

³¹⁶ See ST. GEORGE TUCKER, 2 BLACKSTONE’S COMMENTARIES 145 (Augustus M. Kelley 1969) (1803) (“When a man quits the state of nature, and enters into a state of society, he resigns into the hands of society the right of punishing an offender, for an injury already done him, the society by the terms of the social compact, having engaged to punish every such offender for him.”).

force, they do relinquish the society-allowed means by which to accomplish that end.³¹⁷ This was true even with the hue and cry, for in 1285, Edward I stipulated what were lawful arms through hierarchal and socio-economic conditions.³¹⁸

The 1619 edition of Dalton's *Country Justice* supports this. In it, Dalton shows that hierarchal and socio-economic gun restrictions were enforceable by law. Immediately after his analysis of the hue and cry laws, he wrote, "Every man knowing of any that keepeth, or useth any gun, . . . contrary to the stat[ute] may arrest them, [and] bring them to the next [justice of the peace]."³¹⁹ Restrictions on gun ownership and use remained in subsequent editions of Dalton's work, including the 1746 edition.³²⁰ Malcolm believes that the 1697 edition of Dalton's *Country Justice*—which was released after the Glorious Revolution—inaccurately interpreted the gun laws. She writes that the 1697 edition "ought to have clarified changes in the law resulting from the Glorious Revolution, [and] bears all the marks of a rushed and patchy update."³²¹ Dalton's work is deemed inaccurate because the "chapter on guns listed the acts of Henry VIII and Edward VI even though the latter had been repealed two years before."³²²

Although Malcolm's note on the statute of Edward VI is correct, her overall analysis of Dalton's legal treatise is unsupported. Her theory does not explain why every edition after 1697 retained the hierarchal and socio-economic conditions on gun use and ownership—including using arms for self-defense in the home. The fact of the matter is that the statute of Henry VIII remained in force. It had express limitations on who could own, use, and operate guns. As the 1746 edition of Dalton's *Country Justice* affirms, although the statute made it lawful to "shoot in any Gun" in "Defence of his Person, or House," it did not remove the qualifications to own a gun.³²³ Moreover, this self-defense allowance was an exception to the legal

³¹⁷ See 13 Edw., c. 6, § 2 (1285) (Eng.).

³¹⁸ *Id.* The laws stipulated that:

Every Man between fifteen years of age, and sixty years, shall be assessed and sworn to Armor according to the quantity of their Lands and Goods; that is to wit [from] Fifteen Pounds Lands, and Goods Forty Marks, an Hauberke, [a Breast-plate] of Iron, a Sword, a Knife, and an Horse; and [from] Ten Pounds of Lands, and Twenty Marks Goods, an Hauberke, [a Breast-plate of Iron,] a Sword, and a Knife; and [from] Five Pound Lands, [a Doublet], [a Breast-plate] of Iron, a Sword, and a Knife; and from Forty Shillings Land, and more, unto One Hundred Shillings of Land, a Sword, a Bow and Arrows, and a Knife; and he that hath less than forty Shillings yearly, shall be sworn to [keep Gis-armes,] Knives, and other [less Weapons]; and he that hath less than Twenty Marks in Goods, shall have Swords, Knives, and other less Weapons; and all other that may shall have Bows and Arrows out of the Forest, and in the Forest Bows and [Boults].

13 Edw., c. 6, § 2 (1285) (Eng.) (alterations in original).

³¹⁹ DALTON, PRACTICE, *supra* note 313, at 309.

³²⁰ MICHAEL DALTON, THE COUNTRY JUSTICE, CONTAINING THE PRACTICE, DUTY AND POWER OF THE JUSTICE OF THE PEACE (n.p., S. Birt 1746) [hereinafter DALTON, PRACTICE, DUTY AND POWER].

³²¹ MALCOLM, *supra* note 12, at 128.

³²² *Id.*

³²³ DALTON, PRACTICE, DUTY AND POWER, *supra* note 320, at 110.

requirement that guns were to be shot only at a “butt or banke of Earth or in tyme of Warre.”³²⁴ At no time had any law allowed every person to own and operate firearms for self-defense. One had to qualify for a gun in order to lawfully use it.

It may seem odd to contemporary Americans that only qualified persons were allowed to own and use guns for self-defense or for any purpose, but this was not the case to persons living in seventeenth-century England. They were familiar with these types of gun laws. For instance, in 1690 the inhabitants of Westminster and St. James requested the King to enforce the militia laws as written.³²⁵ The inhabitants were mustered with each being levied “2s. 6d.”³²⁶ The money, however, was not going towards providing arms for the militia as the inhabitants were told. Instead, the money was pocketed for “private use, to the great oppression of your Majesty’s poor subjects.”³²⁷ The inhabitants knew that the militia laws stated that no person “was to ‘find a foot arms,’ who has not a yearly revenue of 50*l.* of real or 600*l.* in personal estate.”³²⁸ More importantly, and for our purposes, they knew they were “not qualified by law to bear arms.”³²⁹ The inhabitants merely wanted to comply with the law by finding “men and arms proportionable of their estates.”³³⁰

This example shows that the people were well aware of the gun laws and the ramifications of non-compliance, as well as the fact that only qualified persons may possess guns—even after the adoption of the Declaration of Rights. The people’s knowledge of the laws did not mean that everyone agreed with the laws or how they were enforced. Nevertheless, what is certain is that the people knew that the laws were in place. For example, in 1682 Henry Booth hoped the search and seizure provision would not be used against “Protestant Dissenters but only against Papists.”³³¹ He was of the “opinion . . . that no man should be denied to keep a gun in his house, provided he did not destroy the game, for a man’s house is his castle and for the defence.” He further stated that he “thought it reasonable he should keep a gun” even “though the laws enjoin that none under a certain qualification should have that privilege.”³³²

Booth recognized the fact that only people of a “certain qualification” had the “privilege” of having arms. There is no doubt Booth disagreed with these laws, but it does not override the fact they were in existence. Moreover, the Declaration of Rights’ “have arms” provision did not take precedence over these laws, for if the “have arms” provision had overrode the gun laws, the 1690 inhabitants’ petition

³²⁴ 33 Hen. 8, c. 6, § 5 (1541) (Eng.).

³²⁵ 2 CALENDAR OF STATE PAPERS, *Domestic Series, of the reign of William and Mary, 1690-1691*, at 14-15 (William John Hardy ed., Kraus Reprint 1969) (1898).

³²⁶ *Id.*

³²⁷ *Id.* (emphasis omitted).

³²⁸ *Id.* at 14 (emphasis omitted).

³²⁹ *Id.* (emphasis omitted).

³³⁰ *Id.* at 15 (emphasis omitted).

³³¹ 23 CALENDAR OF STATE PAPERS, *Domestic Series, of the reign of Charles II, 1682*, at 457 (F.H. Blackburne Daniell 1932).

³³² *Id.*

would not have referenced that they were “not qualified by law to bear arms.”³³³ Therefore, even after the Declaration of Rights, the historical evidence makes it clear that it was within parliamentary power to limit who could use what arms and for what purposes—including in situations of self-defense.³³⁴

To support their arguments, Individual Right Scholars often point to Parliament’s March 1689 decision to allow qualified papists to maintain “weapons” for self-defense.³³⁵ In December 1688, Parliament issued the following order:

In the mean time we will endeavor to preserve, as much as in us lies, the peace and security of these great and populace cities of London and Westminster, and the parts adjacent, by taking care to disarm all Papists, and secure all Jesuits and Romish priests, who are in or about the same.³³⁶

To maintain this disarmament and secure the peace and security of the kingdom Parliament passed the Disarming Act, *An Act for the better securing the Government by disarming Papists and reputed Papists*.³³⁷ This Act included a provision allowing qualified papists to maintain “such necessary Weapons as shall be allowed to him by Order of the Justices of the Peace at their Generall Quarter Sessions for the Defence of his House or person.”³³⁸ The Act’s use of “weapons” in lieu of “arms” or “guns” has two legal interpretations.

The first interpretation is that the use of the word “weapons” was not meant to include “guns.” For the Disarming Act made it expressly illegal to “have or keepe in his House or elsewhere . . . any Arms Weapons Gunpowder or Ammunition.”³³⁹ The self-defense exception to this rule, however, mentions only “weapons.” This was probably intentional because in subsequent sentences and paragraphs of the Act “Arms, Weapons, Gunpowder, and Ammunition” always are mentioned together.³⁴⁰ Thus, there is a valid argument that the Act never intended to allow papists to have “guns” because it would have fallen under the term “arms.”

The second interpretation includes “guns” as “weapons.” When the bill was proposed, John Maynard moved that all papists “bring all their fire-arms in, unless for the necessary defence of their Houses, to officers appointed.”³⁴¹ Maynard’s proposal was for allowing qualified papists to maintain “fire-arms” if they could prove that the firearms were “necessary.”³⁴² Despite differences in the interpretation of “weapons,” the Disarming Act raised the dilemma of how to convict persons of

³³³ 2 CALENDAR OF STATE PAPERS, *supra* note 325, at 15.

³³⁴ *Supra* notes 29, 30; 33 Hen. 8, c. 6 (1541-1542) (Eng.).

³³⁵ MALCOLM, *supra* note 12, at 122-23.

³³⁶ 5 COBBETT, *supra* note 37, at 20.

³³⁷ 1 W. & M., c. 15 (1688) (Eng.).

³³⁸ *Id.* § 4.

³³⁹ *Id.* Malcolm had no qualms with making this argument when “guns” was removed from the gaming laws, but fails to mention it here. See MALCOLM, *supra* note 12, at 126.

³⁴⁰ See generally 1 W. & M. 2, c. 15 (1688) (Eng.).

³⁴¹ 9 GREY, *supra* note 37, at 169.

³⁴² See *id.*

being a papist. Parliament was concerned that “not one man will go out of Town, nor deliver their Arms[] Unless actually convicted” of being a papist.³⁴³ Parliament settled this matter by requiring suspected persons to take Oaths of Allegiance.³⁴⁴ Those who did not take the oath were to be “subject to all and every the Penalties Forfeitures and Disabilities hereafter in this Act mentioned.”³⁴⁵

Malcolm believes the Act shows there was “general agreement that for the time being Catholics should be deprived of all arms except those needed for personal defence.”³⁴⁶ She supports this with Mr. Wogan’s concern during the debates of the bill when he stated, “If you find not a way to convict them, you cannot disarm them.”³⁴⁷ She claims Wogan’s statement “clearly meant the new right to have arms [was] to include all Protestants, whatever their condition.”³⁴⁸ The truth is that Wogan was concerned only with finding an enforcement mechanism, for immediately following the words cited by Malcolm, Wogan stated, “I would have a Clause for [identifying papists] in the Bill.”³⁴⁹ Malcolm goes on to conclude from the language of the Disarming Act that Parliament “assumed that everyone had a right to own firearms unless he could be conclusively convicted of Catholicism” and that “Catholics were considered to have a right to own arms for their personal defence and the defence of their households.”³⁵⁰

These are several historical assumptions that do not comport with the English laws governing arms or self-defense. Mr. Maynard delivered a motion to *allow* Catholics to maintain arms “unless for the necessary defence of their Houses.”³⁵¹ These allowances not only required an order of the justice of the peace, but also required the individual to meet the hierarchal and socio-economic qualifications to possess these “weapons.”³⁵² Furthermore, the use of the word “weapons” does not necessarily speak to “guns.” What Parliament meant to constitute as “weapons” is unknown. All that is certain is that “weapons” were intended to be different from “arms.”

If anything, the Disarming Act and its debates prove that the having of “arms” or “weapons” for self-defense was an allowance—not a right. Parliament could never abolish individual self-defense, but it could regulate how individuals were equipped for self-defense. Customary practice by the laws of England proves this to be true.³⁵³ Even the holdings of *Rex v. Gardiner* and *Wingfield v. Stratford & Osman* support this understanding. The defense counsel argued in *Rex v. Gardiner* that a “gun is an

³⁴³ *Id.* at 170.

³⁴⁴ 1 W. & M. 2, c. 15, § 1 (1688) (Eng.).

³⁴⁵ 1 W. & M. 2, c. 15, § 1 (1688) (Eng.).

³⁴⁶ MALCOLM, *supra* note 12, at 122-23.

³⁴⁷ *Id.*

³⁴⁸ *Id.*

³⁴⁹ 9 GREY, *supra* note 37, at 169.

³⁵⁰ MALCOLM, *supra* note 12, at 123.

³⁵¹ 9 GREY, *supra* note 37, at 169.

³⁵² *Id.*

³⁵³ *See* 33 Hen. 8, c. 6 (1541) (Eng.).

engine, not for killing the game, but for the defence of a man's house."³⁵⁴ Nothing was said about the "right" to have a gun. The defense was merely making an argument that the use of a gun by qualified persons was a lawful purpose by the statutes of the realm. Meanwhile, *Wingfield v. Stratford & Osman* affirmed this, stating, "[A] gun may be kept for the defence of a man's house."³⁵⁵ Legal emphasis must be placed on the use of the word "may."

Furthermore, the Individual Right Scholars' understanding of the "have arms" provision and an alleged right to armed self-defense is ludicrous given that in 1693 a parliamentary motion was made that allowed "every Protestant to keep a musket in his House for his defence."³⁵⁶ The motion was made during the debates of a bill for the preservation of game.³⁵⁷ After the bill was read three times, Mr. Norris made the motion, and members Bowyer, Howe, Clarke, and Wharton expressed their support for it.³⁵⁸ They "thought it a good clause and for the security of the government that all Protestants should be armed sufficiently to defend themselves."³⁵⁹ It is this support for the bill that proves a general right to "have arms" for personal defense did not exist. Not one member of the House even mentioned the "have arms" provision in the Declaration of Rights or that "having arms" was a pre-existing right.

John Lowther's response sums up the overwhelming majority of the Parliament's stance on the subject. He stated that the motion was "not proper for this bill" and was appalled that Norris "would add a clause to it that savours of the politics to arm the mob, which," he thought, was "not very safe for any government."³⁶⁰ Lowther's opinion also articulated the concerns that the House of Lords must have had when it revised the House of Commons' version of the "have arms" provision. To state that every Protestant "should" have arms would have created an armed mob. It was better that the power to regulate "arms" stayed true to customary practice and remained with the government. This explains why the final version of the Declaration of Rights guaranteed that only Protestants "may have arms for their defence suitable to their condition and as allowed by law."

VI. THE MILITIA ACT OF 1757

In 1757, with pressure from the George II and the people, Parliament passed a new militia bill.³⁶¹ The legislative and statutory construction of the bill provides great insight in understanding the socio-economic and hierarchal structure of using and possessing arms. The bill first came to fruition because of the government's

³⁵⁴ BURN, *supra* note 273, at 442.

³⁵⁵ 1 REPORTS OF CASES ADJUDGED IN THE COURT OF THE KING'S BENCH, *supra* note 296, at 15, 16.

³⁵⁶ Parliamentary Diary Entry of Narcissus Luttrell (Feb. 23, 1693), in THE PARLIAMENTARY DIARY OF NARCISSUS LUTTRELL 1691-1693, at 444 (Henry Horwitz ed., 1972).

³⁵⁷ *Id.*

³⁵⁸ *Id.*

³⁵⁹ *Id.*

³⁶⁰ *Id.*

³⁶¹ 30 Geo. 2, c. 25 (1757) (Eng.).

frequent employment of Hessian soldiers. Although the use of Hessian auxiliaries was meant to provide only temporary security, the length of the Seven Years War caused their employment to be continual, causing great dissent throughout England. The people and many members of Parliament hoped to resolve this problem with a new militia bill—a bill that would put the militia on an equal footing with the best armies of Europe.

The 1758 bill was first proposed in 1756 and reached the House of Lords on May 24th.³⁶² Needless to say, it was not well received. The overwhelming majority agreed that a “well regulated and well disciplined militia” was “the only proper military force of a free country.”³⁶³ However, the majority disagreed as to whether this could actually be achieved, and it disagreed even further over providing the people with arms. For instance, the Earl of Stanhope knew the Swiss had achieved much success in providing its people with arms and hoped that England would do the same.³⁶⁴ Stanhope feared that if the men in England’s army were the only class that “knew any thing of arms, or military discipline” the country would be forever forced to defend itself by “keeping up a standing army of at least 100,000 men.”³⁶⁵

The Earl of Granville opened the debate by arguing that the bill was too conservative in arming the militia. He felt that what is “properly called the militia of any country” consists of “every freeman in that country who is able to carry arms.”³⁶⁶ Additionally, he viewed the 1662 Militia Act’s requirement that individuals have at least “50*l.* a year land estate” as ridiculous.³⁶⁷ Despite his belief that every man should be armed, Granville thought the bill would ultimately fail. For the bill to work, Granville knew the government would have to compel every man to make it their “immediate and apparent interest to breed himself to arms.”³⁶⁸ Parliament would have to require “men to employ a considerable part of their time . . . and even some expence, to learn an art which they think they may never once in their whole life have occasion to make use of.”³⁶⁹

The Duke of Bedford concurred saying, “[I]f it were possible, [that] every freeman in the kingdom ought to be bred to arms, and taught military discipline,” then he was for it.³⁷⁰ Bedford saw the “natural spirit and courage of . . . men” deteriorate because they had been discouraged from the “use of arms, and every sort

³⁶² 15 COBBETT, *supra* note 150, at 706.

³⁶³ *Id.* The Earl of Stanhope stated, “[A] well regulated and well disciplined militia, or some other sort of military force for our defence is what, I am sure, no man will dispute.” *Id.* at 708. The Earl of Granville, who opposed the bill, stated, “[A] well regulated and well disciplined militia is so necessary for the glory as well as safety of every nation, that I wish with all my heart we had it.” *Id.* at 714.

³⁶⁴ *Id.* at 709.

³⁶⁵ *Id.* at 710.

³⁶⁶ *Id.* at 715.

³⁶⁷ *Id.*

³⁶⁸ *Id.*

³⁶⁹ *Id.*

³⁷⁰ *Id.* at 721.

of military exercise.”³⁷¹ Bedford argued that things had deteriorated to such an extreme that “many of the inferior rank of people amongst us, are now afraid of handling a gun or a sword, and are terrified at the very name of a soldier.”³⁷² Therefore, Bedford viewed the establishment of a new militia as being paramount. To him, the militia was “the best guard we can have for our liberties, and the best military force we can provide for our defence.”³⁷³

The bill, however, failed. It was defeated by a vote of fifty-nine to twenty-three.³⁷⁴ This defeat can be attributed primarily to Lord Harwicke who distributed a pamphlet containing his sentiments against the bill to the House of Lords.³⁷⁵ The pamphlet provided seven objections, the fifth and seventh of which objected to placing arms in the hands of the common people.³⁷⁶ Specifically, the pamphlet’s fifth objection regarded the Parliament’s failure to include a search and seizure of arms provision in the bill.³⁷⁷ Harwicke wrote:

In the Militia Act of king Charles 2, sect. 14, a power is given to the lord lieutenant and deputy lieutenants to “search for and seize the arms of persons, whom they shall judge dangerous to the peace of the kingdom.” This power is totally repealed by this Bill, and no such new power [is] given.³⁷⁸

This fifth objection is significant for two reasons. First, it shows that the government had continued to search and seize arms well into the eighteenth century. Search and seizure of arms had always been an important tool used to keep arms out of hands of persons not qualified by law to possess them.³⁷⁹ Second, no one even mentioned or argued that the maintaining of such a provision was in violation of the Declaration of Rights’ allowance to “have arms.” In fact, Harwicke’s seventh objection to the militia bill shows that there was great concern in providing arms to the common people.³⁸⁰ It stated:

The last thing, which I shall mention, by way of particular objection, is the loose and unsafe custody, wherein the arms of this militia are directed to be deposited. 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 the houses of churchwardens, seldom stronger or more

³⁷¹ *Id.* at 720.

³⁷² *Id.*

³⁷³ *Id.* at 724.

³⁷⁴ *Id.* at 769.

³⁷⁵ *Id.* at 736-39.

³⁷⁶ *Id.* at 738-39.

³⁷⁷ *Id.* at 738.

³⁷⁸ *Id.*

³⁷⁹ See *supra* notes 196-204 and accompanying text.

³⁸⁰ See 1 W. & M., c. 15 (1688) (Eng.); 22 & 23 Car. 2, c. 25, § 3 (1670-1671) (Eng.); 13 & 14 Car. 2, c. 3, § 14 (1662) (Eng.).

defensible than cottages? In cases of rebellions and insurrections, nay of riots, instead of being *arms for your defence*, they will be arms in the hands of the disturbers of the public peace.³⁸¹

This seventh objection is significant for multiple reasons. First, and most importantly, Hardwicke described the militia arms as “being arms for your defence.” By “your” he meant Parliament, men of the aristocracy, landed gentry, and the government, not the general people. This terminology echoes the limited right that the “have arms” provision was drafted to protect. Second, Hardwicke was objecting to making arms easily available to the common people. Arms in the hands of men who were “educated and trained” to use them, stated Hardwicke, “gives a habit, and a love of that kind of life.”³⁸² Meanwhile, arms in the hands of the “common people” produce “a love of idleness, of sports, and at last of plunder.”³⁸³

Hardwicke had nothing against putting arms into men of property. Rather, he “heartily wish[ed] that all the men of property in the nation were bred to arms and taught military discipline.”³⁸⁴ He was afraid, however, to provide arms “to the very lowermost rank of our people,”³⁸⁵ which included “journeymen, day-labourers, and servants.”³⁸⁶ Meanwhile, “men of property are our only freemen,” stated Hardwicke.³⁸⁷

Lord Talbot partially agreed. He felt that the “rich and great” needed to be part of the militia,³⁸⁸ but he also thought that there could be a compromise.³⁸⁹ As long as “men of property were bred to arms and taught military discipline” how could there be “any danger from a seditious insurrection among those of no property, even supposing they should possess themselves of the arms provided for the militia”?³⁹⁰ The dilemma was how to get the upper classes to participate. The bill did not have any mechanism that forced “men of property” to serve.³⁹¹ Well-to-do individuals could pay a fine to meet their militia obligation, which, therefore, made lower-class

³⁸¹ 15 COBBETT, *supra* note 150, at 739 (emphasis added).

³⁸² *Id.* at 734.

³⁸³ *Id.*

³⁸⁴ *Id.* at 744.

³⁸⁵ *Id.* at 743.

³⁸⁶ *Id.* at 744.

³⁸⁷ *Id.* Hardwicke’s sentiments echo those of Thomas Gordon in *Cato’s Letters*. Gordon wrote:

In Attacks upon a free State, every Man will fight to defend it, because every Man has something to defend in it. He is in love with his Condition, his Ease, and Property, and will venture his Life rather than lose them, because with them he loses all the Blessings of Life.

Military Virtue produced and supported by Civil Liberty only (Feb. 10, 1721), in 2 CATO’S LETTERS, *supra* note 249, at 277, 278.

³⁸⁸ 15 COBBETT, *supra* note 150, at 748.

³⁸⁹ *Id.* at 748-49.

³⁹⁰ *Id.* at 749.

³⁹¹ *Id.* at 758.

men serve as substitutes—a legal loophole that scared Lord Sandys.³⁹² Sandys reminded his fellow Lords that “no free state ever at first trusted the arms of the commonwealth in the hands of the poor and indigent; and every one of those we read of in history, lost their liberties soon after they began to do so.”³⁹³

Sandys also made sure to address the concerns of the Earl of Granville, and many other Lords, regarding making this new militia an efficient fighting force. He knew that military discipline and training took years to develop, and, therefore, he questioned how the militia could depend on individuals who were not familiar with the use of arms unless they were compelled to train every day.³⁹⁴ Not to mention, the proposed militia law did not oblige individuals to have their own arms. Instead, all militia arms were to be provided at the expense of the public with general taxation.³⁹⁵

This was a drastic change from the old militia laws that required individuals, depending on their socio-economic and hierarchal status, to pay for their own arms. These laws required men of property of 50*l.* and upward to provide their own arms.³⁹⁶ Many of these men were required to provide more arms depending on the number of militiamen they were charged.³⁹⁷ Because this new militia bill placed all arms in the hands of the Lieutenants, Sandys referred to it as “a Bill for establishing a popular militia by disarming the people,” and he questioned:

How a man is to learn the exercise of the fire-lock, who is never to handle a fire-lock but for four or five hours of a Sunday, or how a man is to learn to form in battalion, that is never to see a battalion, or so much as a whole company formed, but once a year.³⁹⁸

Therefore, Sandys not only viewed the bill as placing the nation’s security into the “hands of the poor and indigent,” but he also felt that it disarmed “men of property” who traditionally were qualified to possess arms.³⁹⁹ In other words, Sandys feared that this kind of disarming hindered the effectiveness and integrity of the militia, for how were the men to have a “warlike spirit” if they were not “possessed of arms, and often handling and making use of them”?⁴⁰⁰ Sandys stated, “The art of war is now carried to such a height, that even that part of it which belongs to the common soldier, is not to be learned without frequent and long practice.”⁴⁰¹

Ultimately, the bill did not pass for a multitude of reasons: it did not have a search and seizure of arms provision; it lacked an effective regiment to train men in

³⁹² *Id.*

³⁹³ *Id.* at 758.

³⁹⁴ *Id.* at 755-58.

³⁹⁵ WESTERN, *supra* note 37, at 130.

³⁹⁶ 15 COBBETT, *supra* note 150, at 754.

³⁹⁷ *Id.*; *see also* 13 & 14 Car. 2, c. 3, § 2 (1662) (Eng.).

³⁹⁸ 15 COBBETT, *supra* note 150, at 755.

³⁹⁹ *Id.* at 758.

⁴⁰⁰ *Id.* at 754.

⁴⁰¹ *Id.* at 765.

military maneuvers and discipline; and—what scared the House of Lords the most—it put the nation's security in the hands of the poor.⁴⁰² The Earl of Temple summed up this last concern best when he stated, "A man [of property] that will not fight for his liberty, I am sure, does not deserve it, and a man who is no way qualified, cannot fight for it if he would."⁴⁰³ Simply stated, the poor could not fight for liberties that they did not possess. It was commonly believed that only men of property knew what true liberty was, and it was through property that all liberty was derived.⁴⁰⁴

However, in less than a year, all of these objections and concerns would not matter. On December 2, 1756, the King personally requested that Parliament push through the militia bill.⁴⁰⁵ Consequently, the failed militia bill of 1756 would virtually become the basis of 1757 Militia Act. This, however, did not occur without some changes. For instance, the militia force of sixty-thousand persons in the 1756 bill was reduced to thirty-thousand.⁴⁰⁶ This change further required that the militia force come from only the larger towns in an effort to concentrate large bodies of men quickly.⁴⁰⁷ Moreover, these acts made it easier to drill the militia, and it positioned armories in places where they could be watched. Therefore, the nation's arms no longer would be scattered among the parishes,⁴⁰⁸ nor would there be a danger of arms falling into the wrong hands. Moreover, to further protect against this last point, the 1757 Act included a provision allowing Lieutenants to remove the arms to a safe place at any time.⁴⁰⁹ Not surprisingly, the original proposition of how arms were to be supplied, provided, and secured in the 1756 bill remained unaltered.⁴¹⁰

⁴⁰² *Id.*

⁴⁰³ *Id.*

⁴⁰⁴ See An Enquiry into the Nature and Extent of Liberty; with its Loveliness and Advantages, and the vile Effects of Slavery (Jan. 20, 1721), in 1 CATO'S LETTERS, *supra* note 251, at 426, 427.

⁴⁰⁵ 15 COBBETT, *supra* note 150, at 772. The King wrote to Parliament:

An adequate and firm defence at home must have the chief place in my thoughts; and, in this great view, I have nothing so much at heart, as that no ground of dissatisfaction may remain in my people.

To this end a national militia, planned and regulated with equal regard to the just rights of my crown and people, may, in time, become one good resource, in case of general danger; and I recommend the framing of such a militia to the care and diligence of my parliament.

The unnatural union of councils abroad, the calamities which, in consequence of this unhappy conjunction, may, by irruptions of foreign armies into the empire, shake its constitutions, overturn its system, and threaten oppression to the Protestant interest there, are events which much sensibly affect the minds of this nation, and have fixed the eyes of Europe on this new and dangerous crisis.

Id.

⁴⁰⁶ WESTERN, *supra* note 37, at 135.

⁴⁰⁷ *Id.*

⁴⁰⁸ *Id.*

⁴⁰⁹ *Id.* at 136.

⁴¹⁰ 30 Geo. 2, c. 25, § 32 (1757) (Eng.); WESTERN, *supra* note 37, at 130.

As previously addressed, the “Arms, Clothes and Accoutrements” of the militia were provided by general taxation. They were required by law to be kept “under Lock and Key” in a place where they would be secure.⁴¹¹ Not to mention, they were to be distributed only during musters and times of training.⁴¹² Upon the completion of such “exercises,” the law required “every Militia Man [to] clean[] and return[] his Arms, Clothes and Accoutrements, to his Captain, or to such Person as shall be appointed as aforesaid to receive the same.”⁴¹³ These provisions led Lord Sandys to be so critical of the 1756 bill,⁴¹⁴ for the bill essentially disarmed the old militia. Since 1662, “men of property” were required to provide their own arms “suitable to their condition.”⁴¹⁵ This 1662 provision allowed qualified men to possess and exercise the use of arms at any time. No longer was this the case.

Both the House of Commons and the House of Lords were in consensus on this matter. In fact, it was the House of Commons that submitted the new arming restrictions in the bill. Apart from Lord Sandys’ reservations, no one was even concerned with placing sole control of the arms in the hands of government. It was Parliament’s right to pass laws that determined who was allowed to “have arms” and for what purposes.⁴¹⁶ Furthermore, the 1757 Militia Act did not infringe upon the Declaration of Rights’ “have arms” provision. Like the previous militia laws, it established property qualifications based upon military rank.⁴¹⁷ Where it differed, however, was that individuals were no longer taxed with providing arms. They were now taxed monetarily, and the government procured and provided the arms.⁴¹⁸ Additionally, the 1757 Militia Act allowed individuals to serve in the militia. Although the 1757 Act did not allow all persons to individually “have arms” per se, it more closely resembled James Harrington’s militia ideology.⁴¹⁹ It gave a larger contingent of the population an active participation in the defense of its liberties and government.

⁴¹¹ 30 Geo. 2, c. 25, § 32 (1757) (Eng.).

⁴¹² *Id.*

⁴¹³ *Id.*

⁴¹⁴ WESTERN, *supra* note 37, at 130.

⁴¹⁵ 13 & 14 Car. 2, c. 3 (1662) (Eng.); 15 COBBETT, *supra* note 150, at 758.

⁴¹⁶ 1 W. & M. 2, c. 2 (1668) (Eng.).

⁴¹⁷ 30 Geo. 2, c. 25, § 3 (1757) (Eng.).

⁴¹⁸ *Id.* § 32.

⁴¹⁹ Harrington believed that a militia comprised of English yeoman citizens would provide better protection than any of the professional armies of Europe. EDMUND S. MORGAN, *INVENTING THE PEOPLE: THE RISE OF POPULAR SOVEREIGNTY IN ENGLAND AND AMERICA* 156-57 (1988). Harrington slightly altered the Roman militia system, giving the ability to bear arms to all citizens. JAMES HARRINGTON, *OCEANA* (1656), *reprinted in* *IDEAL COMMONWEALTHS* 183, 361 (Henry Morley ed., Kennikat Press 1968) (1901). The inclusion of all citizens made the “common soldier herein a better man than the general of any monarchial army.” *Id.* at 361. The result was that members of the militia against “that reward which is so much higher as heaven is above the earth”—the “common right” that “he who stands in the vindication of, has used that sword of justice for which he receives the purple of magistracy.” *Id.*

Even Lord Sandys' reservations do not conflict with this limited understanding of the allowance to "have arms." If anything, Sandys supports it. When he referenced the 1756 bill as "establishing a popular militia by disarming the people,"⁴²⁰ Sandys meant only qualified men of property—a point he clarified when he expressed concern over placing arms in the "hands of the poor and indigent."⁴²¹ Moreover, Sandys' use of "disarming" comports with our understanding of the "disarming" described in the "have arms" provision. Notice that his use of the term does not describe an individual physical disarming, but a larger concept. Just as James II placed Catholics in a position to control the militia arms, thereby "disarming" Protestants, a similar "disarming" was also occurring: the "disarming" of the old militia system in which qualified individuals possessed the arms. These two disarmings, however, differ from each other in their legality. Leading up to the Glorious Revolution, it was against the law for Catholics to be employed in military commissions or possess arms in service of the militia.⁴²² Thus, this "disarming" by Catholic Lieutenants was against the law, as written. Meanwhile, the "disarming" in the 1757 Militia Act was legal. Parliament authorized this disarming when it approved changing the qualifications and conditions that Protestants "may have arms for their defence."⁴²³ In other words, "disarming" was not always a reference to the individual act itself, but to a larger principle.⁴²⁴

Most importantly, the legislative history of the 1757 Militia Act debunks the "individual right" theory on the use and ownerships of arms by the middle of the eighteenth century. It can be seen from the debates that not only did both Houses of Parliament want to place limitations on the access to firearms, but that there was also a general consensus that the people were not familiar with the use of firearms, period.⁴²⁵ The Earl of Stanhope expressed his fear when he stated that only the army "knew any thing of arms, or military discipline."⁴²⁶ Meanwhile, the Duke of Bedford

⁴²⁰ 15 COBBETT, *supra* note 150, at 755.

⁴²¹ *Id.* at 758.

⁴²² 25 Car. 2, c. 2, § 2 (1672) (Eng.); 13 & 14 Car. 2, c. 3, § 18 (1662) (Eng.).

⁴²³ 30 Geo. 2, c. 25 (1757) (Eng.).

⁴²⁴ The same is true with the phrase "arms for their defence." As Lord Hardwicke's objection makes clear, this terminology was not speaking to individual self-defense but, rather, to the larger principle of self-preservation. It is a principle that applies to society as whole to protect the government that provides individuals their civil liberties. John Trenchard made this clear in *Cato's Letter No. 12* when he wrote:

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.

Of Treason: All Treasons not to be found in Statutes.—The Right of the Legislature to declare Treasons (Jan. 14, 1720), in 1 CATO'S LETTERS, *supra* note 251, at 74, 75. Harwicke articulated this same principle when he addressed his concern about the security of arms being placed in the countryside. He stated, "[I]nstead of being arms for your defence, they will be arms in the hands of the disturbers of the public peace." 15 COBBETT, *supra* note 150, at 739.

⁴²⁵ 15 COBBETT, *supra* note 150, at 764-65.

⁴²⁶ *Id.* at 710.

reiterated the fact that the people had been discouraged from the “use of arms, and every sort of military exercise.”⁴²⁷ To the extent that “many of the inferior rank of people amongst us, are now afraid of handling a gun or a sword, and are terrified at the very name of a soldier.”⁴²⁸

Not one member in the House of Lords disagreed with either of these points. No one stated that the people were generally allowed to have “arms for their defence,” thus making them somewhat proficient in arms use. It was quite the contrary. The general populous was not in possession of firearms as Individual Right Scholars contend. The truth of the matter is that there was a general fear of placing arms—of any kind—in the hands of the poor and indigent.

VII. GRANVILLE SHARP IN UNDERSTANDING THE ALLOWANCE TO “HAVE ARMS”

Even Granville Sharp—whom “individual right” supporters⁴²⁹ and the Supreme Court majority⁴³⁰ cite as providing evidence of a fundamental right to own guns—supports the limited nature of the allowance to “have arms.” Sharp expressly defined the Declaration of Rights’ “have arms” provision as follows:

By the constitution of this kingdom, as well as by many express laws still in force, *apprentices, wards, and indeed laymen of all ranks and conditions, from fifteen to sixty years of age*, are required to *have arms*, and be duly *exercised* in the use of them, for the national defence.⁴³¹

Sharp’s interpretation undoubtedly limits “having arms” to defense of the realm as a means to prevent unlawful standing armies, and as a philosophical justification to usurp tyrannical government. Neither Individual Right Scholars nor the Supreme Court cite this portion of Sharp’s tract. Instead, both focus on an earlier portion which reads:

⁴²⁷ *Id.* at 750.

⁴²⁸ *Id.* at 720.

⁴²⁹ See, e.g., MALCOLM, *supra* note 12, at 132-33. Malcolm writes:

In a polemical tract written in defence of the armed citizen and the militia, Granville Sharp insisted that the phrase in the Bill of Rights “suitable to their conditions and as allowed by law” referred only to the act of Henry VIII “restraining use of some particular sort of arms, meaning only such arms as were liable to be concealed, or otherwise favour the designs of murderers,” but proper arms for defence “are so far from being forbidden by this statute, that they are clearly authorized, and the exercise thereof expressly recommended by it.” He claimed that “the laws of England always required the people to be armed, and not only to be armed, but to be expert in arms.” No Englishman, he argued, “can be truly loyal” who opposes these essential principles of English law whereby the people are required to have “arms of defence and peace” for mutual as well as private defence.

Sharp’s passionate defence of the militia raises the question of whether the right of Englishmen to have arms as a political, as opposed to an individual, safeguard was inextricably bound to the institution of the militia.

Id.

⁴³⁰ *District of Columbia v. Heller*, 128 S. Ct. 2783, 2798 (2008).

⁴³¹ SHARP, *supra* note 12, at 81.

This latter expression, “*as allowed by law*,” respects the limitations in the above-mentioned act of 33 Hen. VIII c. 6, which restrain the use of *some particular sorts of arms*, meaning only such arms as were liable to be concealed, or otherwise favour the designs of murderers, as “*cross-bows, little short hand-guns, and little hagbuts*,” and all guns UNDER CERTAIN LENGTHS, specified in the act; but *proper arms for defence* (provided they are *not shorter* than the act directs) are so far from being forbidden by this statute, that they are clearly authorised, and “*the exercise thereof*” expressly recommended by it, as I have already shewn. And indeed the laws of England always required the people to be armed, and not only to be *armed*, but to be *expert in arms*; which last was particularly recommended by the learned chancellor Fortescue.⁴³²

From this quotation, Individual Right Scholars strongly infer that an “individual right” to “have arms” for self-defense existed.⁴³³ The first error in this interpretation is their misquotation of Sharp. These scholars contend that “suitable to their conditions as allowed by law” was in reference to only Henry VIII’s gun statute. As the quote shows, Sharp stated “as allowed by law” only in reference to the statute. The differentiation between the two interpretations is significant for interpretative purposes, for the Individual Right Scholars’ misquotation of Sharp implies that only Henry VIII’s Act was a proper legal limitation on the “have arms” provision. This is not true. As Sharp correctly states, the “as allowed by law” condition respected the government’s ability to restrict the types of weapons that a person may use and who may have them.

Individual Right Scholars are quick to forget that Henry VIII’s statute required individuals to have lands of 100£ to possess lawful weapons.⁴³⁴ Furthermore, the statute stipulated:

[N]oe psn or psns, other then suche as have lands tents rents fees annuities or Offices, to the yearley value of one hundred Pounds . . . shall carrie, or have in his or their Journey, goinge or ridinge in the Kings highe waye, or elsewhere, any Crosbowe bent or Gun charged or furnished withe Powder, fir or touche for the same, Except it bee in the tyme and Service of warre.⁴³⁵

At no time did Sharp write that Henry VIII’s statute was the only allowable restriction on firearm ownership; he was merely clarifying that it “respects the limitations.”⁴³⁶

The second error that Individual Right Scholars make is that their implication of the phrase “*proper arms for defence* . . . are so far from being forbidden by this statute, that they are clearly authorised, and ‘*the exercise thereof*’ expressly recommended by it.”⁴³⁷ This quote is used as a contextual jumping point to another

⁴³² *Id.* at 17-18.

⁴³³ *See Heller*, 128 S. Ct. at 2798; MALCOLM, *supra* note 12, at 132-33.

⁴³⁴ 33 Hen. 8, c. 1 (1541-1542) (Eng.).

⁴³⁵ *Id.* c. 6, § 3.

⁴³⁶ SHARP, *supra* note 12, at 17.

⁴³⁷ *Id.* at 18.

section of Sharp's political tract.⁴³⁸ To jump from one section of a political work to another—without informing the reader of this improper context—is misleading and perilous in interpreting the law, for Sharp's mentioning of "proper arms" not "being forbidden" is again referencing Henry VIII's gun statute. First, it required individuals to have annual revenue of 100£.⁴³⁹ Second, the Act specified that guns shall be "the lenghe of one whole Yarde, or any Haquebut, or Demie hake of the length of three quarters a yard"⁴⁴⁰—a standard that the 1662 Militia Act conformed to when it required musket barrels "not to be under three Foot in length."⁴⁴¹ Third, these lawful guns were to "better ayde and assist to the defence of this Realme."⁴⁴² Lastly, qualified persons were allowed to shoot lawful guns only "at anye butt of banke of Earth onlye in place convenient" or in defense of their person or house.⁴⁴³

It is this last allowance—that a qualified person may use lawful guns for personal self-defense—that gives minor credibility to the "individual right" argument, but not much. This is because even though the statute made armed self-defense lawful, it still extended to only qualified persons based on hierarchal and socio-economic status.⁴⁴⁴ Individual Right Theorists and the Supreme Court majority in *Heller* ignored these facts. Both rely too heavily on the following Sharp quote: "No Englishman, therefore, can be truly LOYAL, who opposes these essential principles of the English LAW, whereby the people are required to have '*arms of defence and peace*,' for mutual as well as private defence."⁴⁴⁵

The quote is often cited to support the "individual right" model and brings us to the third error in the individual right interpretation of Sharp. Notice the quotation's use of "therefore." It denotes that the sentence is concluding the preceding paragraph. Individual Right Scholars intentionally omit this paragraph because it undermines their entire argument. That paragraph reads:

If it be alleged that there can be no occasion, in these modern times, to arm and train the inhabitants of England, because there is an ample military force, or *standing army*, to preserve the peace; yet let it be remembered, that, the greater and more powerful the *standing army* is, so much more necessary is it that there *should be a proper balance to that power*, to prevent any ill effects from it: though there is one bad effect, which *the balance* (howsoever perfect and excellent) cannot prevent; and that is *the enormous and ruinous expence* of maintaining a large number of men, without any civil employment for their support; an expence, which

⁴³⁸ MALCOLM, *supra* note 12, at 132-33.

⁴³⁹ 33 Hen. 8, c. 6, § 1 (1541-1542) (Eng.).

⁴⁴⁰ *Id.* § 6.

⁴⁴¹ 13 & 14 Car. 2, c. 3, § 20 (1662) (Eng.).

⁴⁴² 33 Hen. 8, c. 6. (1541-1542) (Eng.).

⁴⁴³ *Id.*

⁴⁴⁴ *Id.* § 1.

⁴⁴⁵ SHARP, *supra* note 12, at 27.

neither the *land* nor *trade* of this realm can possibly bear longer, without public failure!⁴⁴⁶

Therefore, Sharp states that the people were required to have arms as a means to check a standing army. This is reiterated immediately following the phrase “for mutual as well as private defence.” Sharp wrote that the people were required to “have arms” because “*a standing army of regular soldiers is entirely repugnant to the constitution of England, and the genius of its inhabitants.*”⁴⁴⁷ Individual Right Scholars assume too much from Sharp’s statement that “the people are required to have ‘*arms of defence and peace*’, for mutual as well as private defence.”⁴⁴⁸ Because Sharp states that this was “required” proves that he was referring to the laws respecting the militia, hue and cry, and assize of arms. A right is never a requirement. It is a guarantee.

The last error of Individual Right Scholars’ interpretation is their failure to reference, cite, or even examine Sharp’s interpretation of the “have arms” provision. It explicitly conditions having arms on militia service “for the national defence.”⁴⁴⁹ Most importantly, it refutes Malcolm’s interpretation of the statement: “*proper arms for defence* (provided they are *not shorter* than the act directs) are so far from being forbidden by this statute, that they are clearly authorized, and ‘*the exercise thereof*’ expressly recommended by it.”⁴⁵⁰ For it is here—when Sharp defines the “have arms” provision—that he immediately cites pages nine through twenty-four of his tract.⁴⁵¹ It is within these same pages to which the Court’s majority cites in *Heller* to assert that Sharp promoted an “individual right” to armed self-defense.⁴⁵² This interpretation, however, is inaccurate.

VIII. BLACKSTONE’S *COMMENTARIES* AND THE ALLOWANCE TO “HAVE ARMS”

Individual Right Scholars often cite William Blackstone’s *Commentaries* to support their stance that the “have arms” provision and the Second Amendment support an “individual right” to armed self-defense. In these instances, Blackstone is always taken out of context. Blackstone perfectly articulates the limited right that the “have arms” provision was drafted to protect when he wrote:

The fifth and last auxiliary right of the subject, that I shall at present mention, is that of having arms for their defense, suitable to their condition and degree, and such as are allowed by law. Which is also declared by the same statute 1 W. & M. st. 2 c. 2. and is indeed a public allowance, under due restrictions, of the natural right of resistance and

⁴⁴⁶ *Id.* at 26.

⁴⁴⁷ *Id.* at 27.

⁴⁴⁸ *Id.*

⁴⁴⁹ *Id.* at 81.

⁴⁵⁰ *Id.* at 18.

⁴⁵¹ *Id.* at 81.

⁴⁵² See *District of Columbia v. Heller*, 128 S. Ct. 2783, 2798 (2008).

self-preservation, when the sanctions of society and laws are found insufficient to restrain the violence of oppression.⁴⁵³

Never has a commentator so eloquently stated the protective scope of the “have arms” provision. Malcolm and Individual Right Theorists draw support for their argument from Blackstone’s phrase “the natural right of resistance and self-preservation.”⁴⁵⁴ From this phrase, Individual Right Scholars believe that Blackstone is talking about armed individual self-defense. Unfortunately, this interpretation does not comport with the definition of what is an “auxiliary right.” The “have arms” provision was the “fifth and last auxiliary right”—meaning there were four other preceding rights.⁴⁵⁵ Just what was an “auxiliary right”? Blackstone states that it was a means to ensure that rights “ascertained, and protected by the dead letter of the laws, [would remain in force] if the constitution had provided no other method to secure their actual enjoyment.”⁴⁵⁶ 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.”⁴⁵⁷

What Blackstone made clear was that when government intruded on people’s natural and civil rights that the people had recourse by turning to the “auxiliary rights” to retain them.⁴⁵⁸ The first three auxiliary rights stemmed from the political structure of England. The first was Parliament; the second was the King; and the third was the courts of justice.⁴⁵⁹ All three entities possessed a duty to maintain natural and civil individual rights.⁴⁶⁰ It was when all three government entities failed and there was an “uncommon injury” to the people or when an “infringement of the rights” of personal security, personal liberty, and private property occurred—“which the ordinary course of law is too defective to reach”—that there “still remain[ed] a fourth subordinate right appertaining to every individual.”⁴⁶¹

This fourth auxiliary right allowed every person to petition Parliament or the King for the “redress of grievances”—a right that Blackstone cites as being protected by the Declaration of Rights.⁴⁶² It was only once these four auxiliary rights were exhausted that the people may resort to the “have arms” provision—it too being an auxiliary right that was “declared by the same statute.”⁴⁶³ Thus, what Blackstone was stating is that the Declaration’s guarantees—the right to petition and the allowance to “have arms”—were intended to be legal devices that ensured the protection of individuals’ natural and civil rights.

⁴⁵³ 1 BLACKSTONE, *supra* note 188, at 136-39.

⁴⁵⁴ See MALCOLM, *supra* note 12, at 130.

⁴⁵⁵ See 1 BLACKSTONE, *supra* note 188, at 136-39.

⁴⁵⁶ *Id.* at 136.

⁴⁵⁷ *Id.*

⁴⁵⁸ *Id.*

⁴⁵⁹ *Id.* at 136-38.

⁴⁶⁰ *Id.*

⁴⁶¹ *Id.* at 138.

⁴⁶² *Id.* at 138-39.

⁴⁶³ *Id.* at 139.

Individual Right Theorists extend this interpretation to armed individual self-defense because they misinterpret the phrase “the natural right of resistance and self-preservation.” They seem to ignore that Blackstone even states that the “have arms” provision is a “public allowance”—not a right. Furthermore, he confirms that this “allowance” is “under due restrictions,” which supports the fact that Parliament can regulate it “suitable to their condition and degree.”⁴⁶⁴ In no way does Blackstone state that the “have arms” provision was drafted to give individuals an armed right to self-defense.⁴⁶⁵ He merely articulates the principle that the “have arms” provision comes from the “natural right of resistance and self-preservation.”⁴⁶⁶ In other words, “when the sanctions of society and laws are found insufficient to restrain the violence of oppression” the people have a right to take up “arms for their defence” to overthrow tyrannical government.⁴⁶⁷ The allowance to “have arms” justified lawful rebellion.⁴⁶⁸

If there was an eighteenth-century right—either through the English Constitution or common law—to possess arms for self-defense, then it certainly would have been included in Blackstone’s section on the absolute rights of individuals. The first absolute right that the “fifth auxiliary right” could be exercised to protect was “personal security.” This first absolute right echoes the principle of self-defense by protecting “[a] man’s limbs,” and enabling “man to protect himself from external injuries in a state of nature.”⁴⁶⁹ It is a right that “cannot be wantonly destroyed or disabled without a manifest breach of civil liberty.”⁴⁷⁰ However, there is no mention

⁴⁶⁴ *Id.*

⁴⁶⁵ *See id.*

⁴⁶⁶ *Id.*

⁴⁶⁷ *Id.* Blackstone was not the first to articulate this argument. 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 rationall.” HOWELL, *supra* note 237, at 4. It was this natural law principle that Parliament exercised when it was “necessitated to take Armes for their defence.” *Id.* 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 FROM IRELAND, *THE PRESENT SETTLEMENT VINDICATED, AND THE LATE MIS-GOVERNMENT PROVED* (London, Joesph Watts 1690).

⁴⁶⁸ Self-preservation was a broader political principle that was often referred to as justification for resistance or rebellion. In 1774, John Cartwright wrote it was the American principles of “self-preservation and free-will” that the British crown would never be able to eradicate. John Cartwright, Letter VI (Mar. 27, 1774), in *ENGLISH DEFENDERS OF AMERICAN FREEDOM 1774-1778*, *supra* note 243, at 156, 157. 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 that it was the English government’s “putting America out of the protection of its laws, [that] forced it, for self-preservation sake, into the state of Independency.” Willoughby Bertie IV, *Thoughts on the Letter of Edmund Burke, Esq; to the Sheriffs of Bristol on the Affairs of America* (1778), in *ENGLISH DEFENDERS OF AMERICAN FREEDOMS 1774-1778*, *supra* note 243, at 199, 226.

⁴⁶⁹ 1 BLACKSTONE, *supra* note 188, at 126.

⁴⁷⁰ *Id.*

of arms or the use of any kind of instruments to defend this absolute right. Nowhere in his *Commentaries* does Blackstone state that society is bound to allow individuals to “have arms” to defend their person. It had always been a “public allowance” by statute.⁴⁷¹

There is not even one reference to the Declaration of Rights throughout Blackstone’s examination of “personal security.” Although it may seem valid to argue that Blackstone may have just forgotten to cite the Declaration of Rights, this argument becomes perilous upon reaching his analysis of the second absolute right—“personal liberty.” Writing on wrongful detention, Blackstone states that “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[the Declaration of Rights,] that excessive bail ought not to be required.”⁴⁷² Thus, Blackstone was clearly cognizant of the Declaration of Rights and its direct application to the three absolute rights of personal security, personal liberty, and private property. He knew, however, that the “have arms” provision did not apply directly to any of the three, including “personal security” or self-defense. As Blackstone correctly cites, the have arms provision becomes applicable only upon the exhaustion of the preceding four auxiliary rights.⁴⁷³

Moreover, not even Blackstone’s section on self-defense mentions anything resembling a right to “have arms” or instruments to defend one’s person. It is true that Blackstone states that “it is lawful for [man] to repel force by force” in “defence of one’s self, or the mutual and reciprocal defence of such as stand in the relations of husband and wife, parent and child, master and servant.”⁴⁷⁴ However, he does not cite the Declaration of Rights here, nor does he even imply that people have a right to a modern means to defend themselves. He merely states that it is lawful to “repel force by force.” What “force” an individual possesses is not a right. A man can use only whatever “force” society makes available to him.

Most importantly, Blackstone makes it clear that self-defense is not something for which one should prepare. Only in “sudden and violent cases[,] when certain and immediate suffering would be the consequence of waiting for the assistance of the law” could an individual “legally exercise this right of preventative defence.”⁴⁷⁵ In all other circumstances, the “right of natural defence does not imply a right of attacking.”⁴⁷⁶ Instead, the right only required that men have “recourse to the proper tribunals of justice.”⁴⁷⁷ Therefore, Blackstone provides a legal analysis that is a far

⁴⁷¹ *Id.* at 131.

⁴⁷² *Id.*

⁴⁷³ *Id.* at 139.

⁴⁷⁴ 3 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 3 (Oxford, Clarendon 1768).

⁴⁷⁵ 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 184 (Oxford, Clarendon 1769).

⁴⁷⁶ *Id.*

⁴⁷⁷ *Id.*

cry from an alleged right for individuals to prepare in the defense of their homes by having arms.⁴⁷⁸

IX. ST. GEORGE TUCKER ON BLACKSTONE'S *COMMENTARIES* AND THE ALLOWANCE TO "HAVE ARMS"

St. George Tucker's edition of Blackstone's *Commentaries* is of special significance in understanding the "have arms" provision. This is because the *Heller* majority determined that Tucker's analysis "made [it] clear in the notes to the description of the arms right, [that] Americans understood the 'right of self-preservation' as permitting a citizen to 'repe[l] force by force' when 'the intervention of society in his behalf, may be too late to prevent injury.'"⁴⁷⁹ This note that the *Heller* majority paraphrases is not a description of the "have arms" provision, though, and, instead, is actually a note to Blackstone's *Commentaries* stating the following:

So that this review of our situation may fully justify the observation of a learned French author [Montesquieu], who indeed generally both thought and wrote in the spirit of genuine freedom; and who hath not scrupled to profess, even in the very bosom of his native country, that the English is the only nation in the world, where political and civil liberty is the direct end of it's constitution.⁴⁸⁰

Not to mention, the majority even takes the language in the footnote out of context. The pertinent part of that footnote reads:

Rights, then, I apprehend, admit of a fourfold division: 1st, natural rights; 2dly, social rights; 3dly, civil rights; 4thly, political rights. 1. Natural rights, are such as appertain to every man, as a moral agent, independent of any social institutions, or laws, whatsoever: to which all men, without distinction, so long as they remain in the state of nature, are absolutely entitled. The whole of which are comprehended under the right of self-preservation, and of doing whatsoever may be necessary to that end.

It is this right of self-preservation which gives to any person in the state of nature the right to punish any other for any evil he has done; and to be himself both the judge and executioner of the law of nature.

But this natural right doth not amount, even in the state of nature, to a state of license, or uncontrolled liberty; for the state of nature hath the law of nature to govern it, which obliges every one; and reason, which is that law, teaches all mankind that will consult it, that being all equal, and independent, no one ought to harm another in his life, health, liberty, or possessions. And, therefore, when his own preservation comes not in

⁴⁷⁸ See *supra* note 30 (discussing Blackstone's understanding of the "have arms" provision in legal dictionaries).

⁴⁷⁹ District of Columbia v. Heller, 128 S. Ct. 2783, 2799 (2008) (third alteration in original).

⁴⁸⁰ ST. GEORGE TUCKER, 2 BLACKSTONE'S COMMENTARIES 145 (Augustus M. Kelley 1969) (1803).

competition, he ought, as much as he can, to preserve the rest of mankind, and may not, unless it be to do justice on an offender, take away, or impair the life, or what tends to the preservation of liberty, health, limbs, or goods of another.

When a man quits the state of nature, and enters into a state of society, he resigns into the hands of society the right of punishing an offender, for an injury already done him, the society by the terms of the social compact, having engaged to punish every such offender for him. But he retains the right of repelling force by force; because that may be absolutely necessary for self-preservation, and the intervention of the society in his behalf, may be too late to prevent an injury. Upon the same principle, he may be supposed to retain every other natural right, which the society cannot aid him in preserving or enforcing.⁴⁸¹

What Tucker's footnote stated is what Blackstone articulated on the legality of self-defense: the philosophical principle that when an individual leaves a state of nature and enters society, that person gives up certain rights. What no individual gives up, though, is the right to repel force by force, for no matter how many safeguards society may offer, there will always be instances when an individual cannot wait for society's protection and must use force—lethal if necessary—to repel an attacker. Of course, there is no mention of a right to arms or other instruments to accomplish this end. There exists no such right.

Even Tucker, writing in 1803 after the adoption of the Second Amendment, viewed the “have arms” provision as an allowance. This is evidenced by the footnote he places next to Blackstone's writing of the “fifth auxiliary right.” The footnote comes after Blackstone wrote, “The fifth and last auxiliary right of the subject, that I shall present mention, is that of having arms for their defence.”⁴⁸² The footnote reads: “The right of the people to keep and bear arms shall not be infringed. Amendments to C.U.S. Art. 4, and this is without any qualification as to their condition or degree, as is the case in the British government.”⁴⁸³

Notice that Tucker cites the Second Amendment as being similar to the English allowance to “have arms.” The major difference between the two being that the Second Amendment did not place restrictions on the condition or degree of the arms. This is evidenced by the statutory requirements in the militia laws throughout the United States—both preceding and after the adoption of the Constitution—that persons of all classes were required to keep and bear arms.⁴⁸⁴ This included even poor persons and indentured servants. Of course, poor persons and indentured servants usually were exempt from the requirement to provide arms. They were just never exempt from keeping arms that were personally assigned by the government nor relieved from serving during times of emergency.⁴⁸⁵ In other words, the English hierarchal structure was not as prevalent in the American militia laws as it was in England.

⁴⁸¹ *Id.* at 145 n.42.

⁴⁸² *Id.* at 143.

⁴⁸³ *Id.* at 143 n.40.

⁴⁸⁴ See CHARLES, SECOND AMENDMENT, *supra* note 14, at 23.

⁴⁸⁵ *Id.* at 32-34.

This understanding of Tucker's analysis of the relation to the "have arms" provision and the Second Amendment is supported in his *View of the Constitution of the United States*, for Tucker first brings up the Second Amendment in describing Congressional power to provide for "organizing, arming and disciplining the militia."⁴⁸⁶ In it, Tucker reiterates the fact that the Virginia Constitutional Convention was deeply concerned about giving Congress power over the State's militias. The Convention firmly believed "that a well regulated militia, composed of the body of the people trained to arms, is the proper, natural, and safe defense of a free state."⁴⁸⁷ Therefore, the Convention proposed "that each state respectively should have the power to provide for organizing, arming, and disciplining its own militia, whenever congress should neglect to provide for the same."⁴⁸⁸ Tucker believed that "all room for doubt, or uneasiness upon the subject, seems to be completely removed" with the inclusion of the Second Amendment.⁴⁸⁹ Its incorporation added "that the power of arming the militia, not being prohibited to the states, respectively, by the constitution, is, consequently, reserved to them, concurrently with the federal government."⁴⁹⁰

This section of Tucker's *View of the Constitution of the United States* clearly denotes that the Second Amendment was a synonymous limited right with the Declaration of Rights' "have arms" provision. This is a fact that does not support Malcolm or the "individual right" model that the Supreme Court majority adopted in *Heller*.⁴⁹¹ Furthermore, Tucker goes on to discuss the importance of a well-organized and disciplined militia. The Framers thought it was essential that there be uniformity in this regard because of the problems that the country faced during the American Revolution. Tucker described the militia during that war as one of "uncertainty and variety."⁴⁹² By giving the federal government the power to organize and discipline, the exact opposite would present itself. Now the country would present a militia that is "most safe, as well as [a] most natural defense of a free state."⁴⁹³

These facts put both the English "have arms" provision and the Second Amendment in their true contexts. Given that Tucker cites the Second Amendment as being similar to the "have arms" provision in his edition of Blackstone's *Commentaries*, coupled with his analysis on the connection between the militia powers and the Second Amendment, it is clear that neither the English "have arms" provision nor the Second Amendment had anything to do with armed self-defense.⁴⁹⁴

⁴⁸⁶ ST. GEORGE TUCKER, *VIEW OF THE CONSTITUTION OF THE UNITED STATES: WITH SELECTED WRITINGS* 214 (1999).

⁴⁸⁷ *Id.*

⁴⁸⁸ *Id.* (citation omitted).

⁴⁸⁹ *Id.*

⁴⁹⁰ *Id.*

⁴⁹¹ *District of Columbia v. Heller*, 128 S. Ct. 2783, 2805 (2008).

⁴⁹² TUCKER, *supra* note 486, at 215.

⁴⁹³ *Id.*

⁴⁹⁴ TUCKER, *supra* note 480, at 143 n.40.

The *Heller* majority ignored Tucker's comments and, instead, preferred to focus on his description of the Second Amendment as the "true palladium of liberty."⁴⁹⁵ Granted, the purpose of the Second Amendment and the "have arms" provision is just this, because the ability of the people to stand up against oppressive standing armies, foreign and domestic, ensured that everybody had a hand in defending their liberty. This point is stressed when Tucker writes, "Wherever standing armies are kept up, and the right of the people to keep and bear arms is, under any color or pretext whatsoever, prohibited, liberty, if not already annihilated, on the brink of destruction."⁴⁹⁶ Tucker stresses the philosophical underpinnings of the English "have arms" provision—that the people must have the ability to partake in defending their liberties. If the people were left out of this process, it was feared that they would have no redress. People had to fight to ensure the protection of their own liberties. Counting on others to protect them, or in the case of the Second Amendment, if they were ever restricted from the process, the people could essentially lose these liberties.

This is why Tucker refers to hunting laws that confiscated English citizens' arms for non-compliance.⁴⁹⁷ It was suspected that the English government had used the gaming laws as a means to prevent the people from attempting to overthrow tyrannical government.⁴⁹⁸ While English gaming laws prior to the Glorious Revolution might have stated that their purpose was to preserve game and property rights, they also supported the English government's objective to prevent popular uprisings from the lower classes.⁴⁹⁹

Game laws, however, did not conflict with the English Bill of Rights, for the "have arms" provision protected only an allowance and did so under limited circumstances.⁵⁰⁰ At no time did the game laws outright prevent an individual from bearing "arms for their Defence." These laws merely limited who could use and own certain arms outside of countering an illegal standing army and defending the realm from invasion.⁵⁰¹ Tucker believes that this is what the Framers were trying to prevent by drafting the Second Amendment.⁵⁰² The strong language "shall not be infringed" was included to obstruct the passing of laws that prevented classes of people from being able to bear arms—including the authority to overthrow tyrannical government.

X. THE AMERICAN PERSPECTIVE ON "HAVE ARMS"

Not only have Individual Right Scholars misinterpreted St. George Tucker's analysis of the English allowance to "have arms," but they also misunderstand the

⁴⁹⁵ *Heller*, 128 S. Ct. at 2805.

⁴⁹⁶ TUCKER, *supra* note 486, at 239.

⁴⁹⁷ TUCKER, *supra* note 480, at 144 n.41.

⁴⁹⁸ *Id.* at 143; TUCKER, *supra* note 486, at 239.

⁴⁹⁹ 2 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 412 (Oxford, Clarendon 1768).

⁵⁰⁰ CHARLES, SECOND AMENDMENT, *supra* note 14, at 50-51.

⁵⁰¹ *Id.* at 51.

⁵⁰² *Id.*

Founding Fathers' interpretation. Individual Right Scholars reach conclusions without substantiating historical evidence and—in most cases—take quotes out of context. The strength of the “individual right” argument rests in a slew of 1769 newspaper editorials found by Stephen P. Halbrook. These editorials give some insight into the colonists' opinions regarding Massachusetts Governor Francis Bernard's decision to veto the acts and resolves of an illegally assembled Boston Town Council. On April 13th, the *New York Journal* published the following:

Instances of the Licentious and outrageous Behavior of the *Military Conservators* of the peace still multiply upon us, some of which are of such a Nature, and have been carried to so great Lengths, as must serve fully to evince that a late Vote of this Town, calling upon the Inhabitants to provide themselves with Arms for their Defence, was a Measure as *prudent* as it was *legal*: such Violences are always to be apprehended from Military Troops, when quartered in the Body of a populous City; but more especially so, when they are led to believe that they *are become necessary to awe a Spirit of Rebellion*, injuriously said to be existing therein. It is a 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.—We are however, pleased to find that the Inhabitants of this Town, under every Insult and outrage, received from the Soldiery, are looking up to the Laws of the Land for Redress; and if *any Influence* should be powerful enough to *deprive* the Meanest Subject of *this Security*; the People will not be answerable for the *unhappy Consequences* that may flow therefrom.⁵⁰³

It was this editorial that the Ninth Circuit used in *Nordyke* as supporting evidence to incorporate the Second Amendment through the Fourteenth Amendment's Due Process Clause.⁵⁰⁴ The *Nordyke* court did not elaborate on how this editorial supports its stance, but it can be assumed that the court interpreted the “calling upon the inhabitants to provide themselves with Arms for their Defence”—as *prudent* and *legal*—to equate to armed individual self-defense. The problem with such an interpretation is that it is not placed in historical context. What was the substance of the law that called for the inhabitants to provide themselves with arms? What was the context and reason for passing the law? Why was the law vetoed by Governor Bernard? Why is “Spirit of Rebellion” mentioned? Does not the editorial's interpretation of Blackstone equate with the limited “auxiliary right” that the “have arms” provision protects?

The *Nordyke* court failed to ask or analyze any of these important contextual questions, for if it had, it would have come to understand that the law in question was a militia law. More importantly, it was a law that was enacted by Boston's radical leaders—not the Convention of Towns—because they believed that British troops were coming to strip them of their rights; thus, they felt compelled to enforce Blackstone's “fifth and last auxiliary right.”

⁵⁰³ Editorial, *Boston, March 17*, N.Y.J., Apr. 13, 1769, supp. at 1, col. 3.

⁵⁰⁴ *Nordyke v. King*, 563 F.3d 439, 453 (9th Cir. 2009).

In order to place the editorial in its proper context, one must go back to the Spring of 1768. In March, mobs of Bostonians called for the end of the Townshend Duties and were celebrating the repeal of the Stamp Act.⁵⁰⁵ Lieutenant Governor Thomas Hutchinson described these mobs as gangs of thugs “armed with bludgeons.”⁵⁰⁶ The mobs were defying the American Board of Customs Commissioners by continuing to illegally smuggle goods openly through the streets.⁵⁰⁷ By June, things had gotten worse. John Hancock’s sloop, *Liberty*, had been seized, which caused “riots in the streets, physical assaults on the customs officers, the burning of patrol boats, Town Meeting resolutions of the wildest kind, and the harassment of the customs commissioners.”⁵⁰⁸ This all escalated to a point where many of the crown’s officials were forced to seek shelter at the Castle William.⁵⁰⁹

These events forced Governor Bernard to request several regiments to aid him in keeping the peace.⁵¹⁰ The request invoked unpopular reaction, which caused British officials to be secretive in requesting more.⁵¹¹ By July, Bernard had “some Concern for the Safety of the Castle [William] since the Commissioners retired” there.⁵¹² Bernard did not have intelligence that it would be attacked, but he knew of the garrison’s weakness and “the Ease with which it might be surprised.”⁵¹³ There was, however, a larger concern. On July 9th, he wrote to Lord Hillsborough:

This very Morning the Select Men of the Town ordered the Magazine of Arms belonging to the Town to be brought out to be cleaned, when they were exposed for some Hours at the Town-House. They were expostulated with for this imprudent act; they excused themselves by saying, that those Arms were ordered to be cleaned *two* Months ago.⁵¹⁴

It was this rebellious behavior that led Bernard to ask for Thomas Gage’s help. By July 20th, Bernard finally received some encouraging news. He learned that Gage received orders to “collect [and keep] in readiness” his army.⁵¹⁵ The troops,

⁵⁰⁵ BERNARD BAILYN, *THE ORDEAL OF THOMAS HUTCHINSON* 120 (3d prtg. 1976).

⁵⁰⁶ *Id.*

⁵⁰⁷ *Id.*

⁵⁰⁸ *Id.* at 121.

⁵⁰⁹ *Id.*

⁵¹⁰ John C. Miller, *The Massachusetts Convention 1768*, 7 *NEW ENG. Q.* 445, 447 (1934).

⁵¹¹ *Id.* at 448-49.

⁵¹² *Id.* at 448. The commissioners refused to return to Boston unless they were given two or three regiments as bodyguards for “the Security of the Revenue, the Safety of its Officers, and the Honour of Government.” *Id.*

⁵¹³ Letter from Governor Bernard to the Earl of Hillsborough (July 9, 1768), in *LETTERS TO THE MINISTRY FROM GOVERNOR BERNARD, GENERAL GAGE, AND COMMODORE HOOD* 38, 40 (Boston, Edes & Gill 1769).

⁵¹⁴ *Id.*

⁵¹⁵ Letter from Lord Barrington to Governor Bernard (Apr. 16, 1759), in *THE BARRINGTON-BERNARD CORRESPONDENCE AND ILLUSTRATIVE MATTER, 1760-1770*, at 167, 167 (Edward Channing & Archibald Cary Coolidge eds., 1912).

however, did not have orders to deploy. There were constitutional concerns at play. Bernard wrote that neither the “popular [Massachusetts] Constitution nor the present intimidation” would allow troops to be sent to “quell Riots [and] Tumults but at the desire of the Civil Power”—a constitutional limitation with which Bernard generally agreed.⁵¹⁶ He personally felt that “no Troops can be of any Service in quelling a Riot or a Tumult, that are not previously quartered near that Place.”⁵¹⁷

Bernard saw his current situation a bit differently. “Troops are not wanted here to quell a Riot or a Tumult, but to rescue the Government out of the hands of a trained mob, [and] to restore the Activity of the Civil Power, which is now entirely obstructed,” wrote Bernard.⁵¹⁸ In August, Lord Barrington agreed by offering whatever support he could. Barrington felt it was “now evident to all the world that the Civil Magistrate in the Massachusetts should be assisted by troops, in maintaining Peace [and] supporting [the] Law.”⁵¹⁹

The Boston Sons of Liberty were acutely aware of what was afoot. Especially when, on July 27th and 29th, Bernard requested the Boston Town Council’s approval for troops. Both requests were unanimously rejected.⁵²⁰ The Council even issued a reply to Bernard, warning that he would be held ““in the highest degree unfriendly to the Peace and good Order of this Government.””⁵²¹ This response led Bernard to believe that he could ““no longer . . . depend upon the Council for the Support of the small Remains of royal [and] parliamentary Power now left.””⁵²²

In August, Samuel Adams’ correspondence shows that the radical element believed that military intervention was all but certain. He even wrote an editorial under the name “Determinatus,” with the following contents:

I am no friend to “*Riots, Tumults and unlawful Assemblies*,” I take upon me to say, any more than his Excellency is: But when the People are oppress’d, when their Rights are infrin’g’d, when their property is invaded, when taskmasters are set over [to] them, when unconstitutional acts are executed by a naval force before their eyes, and they are daily threatened with military troops, when their legislative is dissolve’d! . . . In such Circumstances, while they have the spirit of freedom, they will *boldly assert* their freedom; and they are to be justify’d in so doing.⁵²³

This editorial shows that Adams believed that rebellion not only was evident, but that the people would be “justify’d” in “assert[ing] their freedom” to do so. James

⁵¹⁶ *Id.*

⁵¹⁷ *Id.*

⁵¹⁸ *Id.*

⁵¹⁹ *Id.* at 164.

⁵²⁰ COLIN NICHOLSON, THE “INFAMOUS GOVERNOR”: FRANCIS BERNARD AND THE ORIGINS OF THE AMERICAN REVOLUTION 175 (2001).

⁵²¹ *Id.* at 176-77.

⁵²² *Id.* at 177 (alteration in original).

⁵²³ SAMUEL ADAMS, ARTICLE SIGNED “DETERMINATUS” (BOSTON GAZETTE, Aug. 8, 1768), reprinted in 1 THE WRITINGS OF SAMUEL ADAMS 1764-1769, at 236, 240 (Harry Alonzo Cushing ed., 1968).

Otis wrote similar sentiments, proclaiming that if the colonists' grievances were not redressed and they "were called on to defend [their] liberties and Privileges, he hoped and believed [they] should one and all resist even unto Blood."⁵²⁴ By September 8th, the Bostonians received affirmation of the Fourteenth and Twenty-ninth Regiments coming from Halifax.⁵²⁵ A week later they were informed that two more regiments would be arriving from Ireland.⁵²⁶ The news caused Samuel Adams and James Otis to curse the governor. They even pledged to defend themselves "at the utmost peril of their lives and fortunes."⁵²⁷

It was under this tumultuous atmosphere that the Boston Town Council requested the Convention of Towns.⁵²⁸ This is where Individual Right Scholars first fail in their contextual understanding of the events that took place. A Boston Town Meeting consisting of Thomas Cushing, Samuel Adams, Richard Dana, John Rowe, John Hancock, Benjamin Kent, and Joseph Warren proposed a law that required inhabitants to provide themselves with arms.⁵²⁹ It was not a resolution by the Convention of Towns. Drafted on September 12th, the proposed law read:

Whereas, By an Act of Parliament, of this first of King *William* and Queen *Mary*, it is declared, That the subjects being Protestants, may have arms for their Defence: It is the Opinion of this Town, That the said Declaration is founded in Nature, Reason and sound Policy, and is well adapted for the necessary Defence of the Community:

And *Forasmuch*, As by a good and wholesome Law of this Province, 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, as is in said Law particularly mentioned, to the Satisfaction of the Commission Officers of the Company: And as there is at time a prevailing Apprehension, in the minds of many, of an approaching War with France: In order that the inhabitants of this town be prepared in Case of sudden Danger: *VOTED*, That those of the said Inhabitants, who may at present be unprovided, be and hereby are Required duely to observe the said Law at this Time.⁵³⁰

The language of the proposal definitively speaks to the limited nature of the allowance to "have arms." This is first evidenced by the requirement that individuals equip themselves with a "Firelock, Musket, Accoutrements and Ammunition." Only

⁵²⁴ Miller, *supra* note 510, at 449.

⁵²⁵ NICHOLSON, *supra* note 520, at 177.

⁵²⁶ *Id.*

⁵²⁷ *Id.*

⁵²⁸ BAILYN, *supra* note 505, at 516; Richard D. Brown, *The Massachusetts Convention of Towns, 1768*, 26 W. & M.Q. 94-104, 95, 97 (1969); Miller, *supra* note 510, at 458.

⁵²⁹ AT A MEETING OF THE FREEHOLDERS AND OTHER INHABITANTS OF THE TOWN OF BOSTON, LEGALLY QUALIFIED AND WARN'D IN PUBLIC TOWN MEETING ASSEMBLED (Philadelphia, n. pub. 1768) [hereinafter MEETING OF THE FREEHOLDERS].

⁵³⁰ *Id.*

Militia laws frequently required these items,⁵³¹ a fact that is made clear with the language “by a good and wholesome Law of this Province.” This phrase was a direct reference to the 1693 Militia Act and the subsequent militia laws that were still in force.⁵³² In fact, the language of the 1693 Act corresponds with the Boston Town Meeting’s proposal. Section 5 of the Act states:

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.⁵³³

The only major difference between the Boston proposal and the 1693 Act is that instead of listing each of the required accoutrements, the Boston proposal broadly defined them as “accoutrements.”⁵³⁴ Other than this, the first sentence of the proposal and the 1693 Act read almost verbatim. This proves that it was the Town Meeting’s clear intention to revive the militia laws as a means to repel an alleged threat from France, for it was through the militia that the inhabitants “may have Arms for their Defence.”⁵³⁵

It is not surprising that Governor Bernard did not allow such a proposal to go forward. He was recently informed that there was a plot to “raise the Country and oppose the Troops.”⁵³⁶ Moreover, at the September town meeting, the same militia arms that the Boston Council had claimed were “brought out to be cleaned” in July,⁵³⁷ were rumored to be “laid upon the floor of the Town Hall to remind the people of the use of them.”⁵³⁸ Bernard was not ignorant. He knew that the Town Meeting’s debates on “Arming the Town and Country against *their Enemies*” was a cover for the radicals’ true intentions—armed rebellion and preventing the Ireland regiments from landing.⁵³⁹ Bernard wrote, “The probability of a French War . . . was

⁵³¹ All the colonies’ militia laws used similar wording throughout the seventeenth and eighteenth centuries. See CHARLES, IRRECONCILABLE GRIEVANCES, *supra* note 9, at 27-30.

⁵³² *Id.*

⁵³³ *An Act for Regulating the Militia* (1693), 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 38 (1759).

⁵³⁴ MEETING OF THE FREEHOLDERS, *supra* note 529.

⁵³⁵ *Id.*

⁵³⁶ Letter from Governor Bernard to [The Earl of Hillsborough.] (Sept. 16, 1768), in PAPERS RELATING TO PUBLIC EVENTS IN MASSACHUSETTS PRECEDING THE AMERICAN REVOLUTION 101, 102 (Philadelphia, T.K. & P.G. Collins 1856).

⁵³⁷ LETTERS TO THE MINISTRY FROM GOVERNOR BERNARD, GENERAL GAGE, AND COMMODORE HOOD, *supra* note 513.

⁵³⁸ PAPERS RELATING TO PUBLIC EVENTS IN MASSACHUSETTS PRECEDING THE AMERICAN REVOLUTION, *supra* note 536, at 101, 103.

⁵³⁹ *Id.*

[merely a] pretence for arming the Town” and “a cover for the frequent use of the word Enemy.”⁵⁴⁰

He had even heard the Town Meeting claim that it “had a right to oppose with Arms military Force which was sent to oblige them to submit to unconstitutional Laws.”⁵⁴¹ Bernard then heard another man argue that “when a people’s Liberties [are] threatened they [are] in a state of War, and [have] a right to defend themselves.”⁵⁴² Both of these quotes adequately articulate the Founding generation’s understanding of the limited right that the “have arms” provision protected. What should be stressed is that the grievance that compelled the Town Meeting to attempt to invoke the militia laws was the sending of a standing army.⁵⁴³ This is significant because it was generally feared that illegal standing armies usurped individuals’ liberties.⁵⁴⁴

Therefore, the Town Meeting’s proposal to reinstate the militia laws was an attempt to prepare to exercise the “fifth and last auxiliary right.” Unfortunately for the select radical Boston men involved, they were the only representatives in Massachusetts that felt that such a measure was necessary. When calling the Convention of Towns, the Boston Town Meeting enclosed its resolves to its surrounding brethren.⁵⁴⁵ It was hoped that the surrounding towns would agree with its measures and, thereby, collectively petition Bernard and Parliament for a redress of grievances.⁵⁴⁶ This did not occur, however, especially in regards to reinstating the 1693 Militia Act.

⁵⁴⁰ *Id.*

⁵⁴¹ *Id.*

⁵⁴² *Id.* at 104.

⁵⁴³ Miller, *supra* note 510, at 451-58.

⁵⁴⁴ Samuel Adams addressed this in an editorial that he signed “Vindex.” It read:

And by the bill of rights it is declared that the raising and keeping a *standing army* within the kingdom in a time of peace is *against law*.

Is there anyone who dares to say that Americans have not the rights of subjects? Is Boston disenfranchised? When, and for what crime was it done? . . . Are *citizens* to be called upon, threatened, ill used at the word of the soldiery, and put under arrest, by pretext of the law military, in breach of the fundamental rights of subjects, and contrary to the law and franchise of the land? And are the inhabitants of this town still to be affronted in the night as well as the day by soldiers arm’d with muskets and fix’d bayonets? . . . Will [the] spirits of the people as yet unsubdued by tyranny, unaw’d by the menaces of arbitrary power, submit to be *govern’d* by military force? No, Let us rouse our attention to the common law, which is our birthright—our great security against all kinds of insult & oppression—The law, which when rightly used, is the *curb* and the *terror* of the haughtiest tyrant—Let our magistrates execute the good and wholesome laws of the land with resolution and an intrepid firmness—aided by the *posse comitatus*, the body of the county, which is their only natural and legal strength.

SAMUEL ADAMS, ARTICLE SIGNED “VINDEXT” (BOSTON GAZETTE, DEC. 5, 1768), *reprinted in* 1 THE WRITINGS OF SAMUEL ADAMS 1764-1769, *supra* note 523, at 255, 257-59.

⁵⁴⁵ Miller, *supra* note 510, at 458.

⁵⁴⁶ *Id.* at 458-65.

The Convention of Towns met on September 22nd.⁵⁴⁷ It is unclear exactly what transpired at this meeting, but, according to Bernard, extremists like Adams were “presently silenced.”⁵⁴⁸ The Convention took more of a moderate stance compared to the Bostonians. The Convention presented a “humble and dutiful petition . . . for the redress of their grievances.”⁵⁴⁹ Thus, unlike the Town Meeting, they sought “the legal, regular, and prudential methods of obtaining the redress.”⁵⁵⁰ It is almost as if the Convention was apologizing for the Town Meeting’s resolves, for the Convention stated that “no irregular steps should be taken by the people, but that all constitutional and prudential methods should closely be attended.”⁵⁵¹

In speaking on the illegality of standing armies, the Convention viewed these armies as “dangerous to [the people’s] civil liberty” and stressed that standing armies were entities that could “ruin the liberties of America.”⁵⁵² The constitutional means to protect against riots and tumults should be handled by “the civil magistrate” and aided by the “*Posse Comitatus*, when legally called in aid of the civil power.”⁵⁵³ The Convention made no mention of arms, providing arms, or the reinstatement of the militia laws.

While the Convention did not outright proclaim that the Town Meeting’s militia proposal was constitutionally unsupported, the Town of Hatfield did.⁵⁵⁴ The town knew the real reason why the Boston Town Council requested a convention—“an apprehension of their being [a standing army] quartered.”⁵⁵⁵ The Town of Hatfield did not see the maintenance of a standing army as unconstitutional in this instance. Had not the entire colony been told that the purpose of arming Boston’s inhabitants was to defend against a French War? Thus, Hatfield’s leaders thought it was plausible that an army be sent there “for your defence in case of a French war.”⁵⁵⁶ These statements were merely witty retorts to the faulty logic of Boston’s radicals. The Town of Hatfield knew the real reason why the troops were being sent to Boston—to check on the latter’s unruly behavior. Therefore, Hatfield told Boston’s radicals to use their “loyalty and quiet behaviour” to “convince his majesty and the world, [a standing army is no] longer necessary for that purpose, that thereupon they will be withdrawn, and your town and the province saved any further trouble and expence from that quarter.”⁵⁵⁷

⁵⁴⁷ BAILYN, *supra* note 505, at 123; Miller, *supra* note 510, at 458.

⁵⁴⁸ Letter from Governor Bernard to the Earl of Hillsborough (Oct. 3, 1768) in LETTERS TO THE MINISTRY FROM GOVERNOR BERNARD, GENERAL GAGE, AND COMMODORE HOOD, *supra* note 513, at 69, 69.

⁵⁴⁹ 37 *The London Magazine or Gentleman’s Monthly Intelligencer* 690 (1768).

⁵⁵⁰ *Id.*

⁵⁵¹ *Id.* at 691.

⁵⁵² *Id.* at 692.

⁵⁵³ *Id.*

⁵⁵⁴ *Id.*

⁵⁵⁵ *Id.* at 694.

⁵⁵⁶ *Id.*

⁵⁵⁷ *Id.*

It is interesting that no mention of the revival of the 1693 Militia Act was made until nearly six months after the troops were sent to Boston. After his failure to gain the support of Massachusetts' leaders at the Convention in January 1769, Samuel Adams and other radical leaders remained silent on the failed measure. Things had even calmed to the point that Commodore Samuel Hood did not see the "least Probability of the People's taking Arms."⁵⁵⁸ "Indeed some few of the Convention took Pains to bring the Ignorant and lower Class into that Mind, and possibly might have succeed[ed] had not the Troops arrived as they did," wrote Hood, "but those few are now alarmed."⁵⁵⁹ This changed when Governor Bernard created a "cabinet council" to take depositions that, later, would be used as evidence in court trials for treason.⁵⁶⁰

Bernard had become aware of all the "hidden purposes" behind the radical leaders of Boston. It began on January 23, 1769 when Richard Silvester made a formal deposition before Thomas Hutchinson. In it, Silvester swore that he had heard Adams howl, "'Let us take up arms immediately and be free, and seize all the King's officers'" and "we will destroy every soldier that dare put his foot on shore."⁵⁶¹ The most inflammatory statement came from Dr. Benjamin Church. Silvester heard Church openly state that not only would Boston resist the King's troops, but that there were plans to seize Hutchinson, Bernard, and their papers and "'send them home in irons."⁵⁶²

In addition to the ongoing investigation by the "cabinet council," Boston's radical leaders were also unhappy with the content of King George III's speech to Parliament on November 8, 1768. What particularly upset them was the King's description of Boston's inhabitants as being "in a state of disobedience to all law and government: and [having] proceeded to measures subversive of the constitution, and attended with circumstances that might manifest a disposition to throw off their dependence on Great Britain."⁵⁶³

It was in this context that Samuel Adams defended the Town Meeting's proposal to reinstate the provisions 1693 Militia Act. In an anonymous editorial signed "Shippen," Adams responded to Bernard's investigation on treason and to the contents of the King's speech. He was appalled that the Ministry believed that "the

⁵⁵⁸ Letter from Commodore Hood to Mr. Stephens (Dec. 12, 1768), in *LETTERS TO THE MINISTRY FROM GOVERNOR BERNARD, GENERAL GAGE AND COMMODORE HOOD*, *supra* note 513, at 84, 84.

⁵⁵⁹ *Id.* John Miller addresses the lack of popular support for physical opposition in detail. *See* Miller, *supra* note 510, at 469-71.

⁵⁶⁰ BAILYN, *supra* note 505, at 128 n.23.

⁵⁶¹ *Id.* at 127.

⁵⁶² *Id.*

⁵⁶³ 16 WILLIAM COBBETT, *THE PARLIAMENTARY HISTORY OF ENGLAND FROM THE EARLIEST PERIOD TO THE YEAR 1803*, at 469 (London, T.C. Hansard 1806). The King further stated, "On my part, I have pursued every measure that appeared to be necessary for supporting the constitution, and inducing a due obedience to the authority of the legislature . . . I shall be able to defeat the mischievous designs of those turbulent and seditious persons, who under false pretences, have but too successfully deluded numbers of my subjects in America."

Id.

proceedings of [Boston], were not only to the highest degree seditious, but nothing short of treason itself.”⁵⁶⁴ Adams felt “the charge[s] appeared to be laid too high,” because neither Bernard, the King, nor Parliament “justly stated or proved, one single act of that town, as a public body, to be, I will not say treasonable or seditious, but even at all illegal.”⁵⁶⁵ Regarding the legality of reviving the 1693 Militia Act, Adams argued:

For it is certainly beyond human art and sophistry to prove that British subjects, to whom the privilege of possessing arms is expressly recognized by the Bill of Rights, and, who live in a province where the law requires them to be equip’d with arms, . . . are guilty of an illegal act, in calling upon one another to be provided with them, as the law directs.⁵⁶⁶

Individual Right Scholars have relied on this quote to infer that the “have arms” provision protected a right to possess firearms outside of a militia or military context.⁵⁶⁷ This is a large assumption given that Adams expressly refers to the “have arms” provision as a “privilege”—not a “right.” Moreover, such an interpretation is unsupported because Individual Right Scholars forget to take notice of Adams’ statement that “the law requires them to be equip’d with arms”—an explicit reference to Section 5 of the 1693 Militia Act.⁵⁶⁸ The fact of the matter is that the two are linked. It was a privilege for an individual to possess arms to defend the state and their liberties. Most importantly, it was a privilege that was regulated through the militia laws, as the Town Meeting’s resolve makes clear.⁵⁶⁹ This is why Adams adamantly defended the resolve as follows:

But if some are bold and base enough, where the interest of a whole country is at stake, to penetrate into the secrets of the human breast, to search for crimes, and to impute the worst of motives to actions strictly legal, whatever may be thought of their expediency, it is easy to recriminate in the same way; and one man has as good reason to affirm, that a few, in calling for a military force under pretence of supporting civil authority, secretly intended to introduce a general massacre, as another has to assert, that a number of loyal subjects, by calling upon one another to be provided with arms, according to law, intended to bring on an insurrection.⁵⁷⁰

⁵⁶⁴ SAMUEL ADAMS, ARTICLE SIGNED “SHIPPEN” (BOSTON GAZETTE, Jan. 30, 1769), reprinted in 1 THE WRITINGS OF SAMUEL ADAMS, *supra* note 523, at 297, 298.

⁵⁶⁵ *Id.*

⁵⁶⁶ *Id.* at 299.

⁵⁶⁷ STEPHEN P. HALBROOK, THE FOUNDERS’ SECOND AMENDMENT: ORIGINS OF THE RIGHT TO BEAR ARMS 18 (2008) [hereinafter HALBROOK, FOUNDERS’].

⁵⁶⁸ SAMUEL ADAMS, ARTICLE SIGNED “SHIPPEN” (BOSTON GAZETTE, Jan. 30, 1769), reprinted in 1 THE WRITINGS OF SAMUEL ADAMS, *supra* note 523, at 297, 298; *see also* 5 W. & M., c. 7, § 5 (1693) (Eng.).

⁵⁶⁹ MEETING OF THE FREEHOLDERS, *supra* note 529.

⁵⁷⁰ *Id.*

Adams' mention of the "interest of the whole country" was a direct reference to the Town Meeting's fabricated purpose behind the militia resolve—a perpetual fear of a war with France.⁵⁷¹ With the Seven Years War ending just six years prior, Adams balked at the resolve as being treasonous or rebellious. If the reinstatement of the militia laws had a "secret" intent, Adams felt that it was just as fair to argue that the same could be said on the stationing of troops in Boston. To him, it was just as plausible that the British troops "secretly intended to introduce general massacre" if Bernard persisted on investigating the Town Meeting's militia resolve as treasonous. This was not Adams' first query into the insidious designs of the British troops. He had written a combination of editorials claiming that the army's presence was in violation of the English Bill of Rights.⁵⁷²

In these editorials, Adams makes multiple references to the people's duty to be aware of their constitutional rights. "It behoves *the publick* then to be aware of the danger, and like sober men *to avail themselves of the remedy of the law*, while it is *in their power*."⁵⁷³ This included restraining military power, especially when it was being used as a substitute for the civil authority.⁵⁷⁴ Adams used the power of the press to push for the peaceful removal of the British troops by arguing that their presence was unconstitutional on multiple levels.

By February 1769, he changed his approach in light of the forfeiture of the Massachusetts charter and the reorganization of government that was being discussed in England.⁵⁷⁵ In another anonymous *Boston Gazette* editorial, Adams responded to the numerous heated exchanges between the selectmen of Boston and Governor Bernard.⁵⁷⁶ The governor's position was that he was forced to solicit the

⁵⁷¹ *See id.*

⁵⁷² For instance, in an article entitled *Principiis Obsta*, Adams argued that the maintaining of a standing army generally led to the adoption of "*military maxims*" that would "soon eradicate every idea of *civil government*." SAMUEL ADAMS, ARTICLE, UNSIGNED (BOSTON GAZETTE, Oct. 17, 1768), *reprinted in* 1 THE WRITINGS OF SAMUEL ADAMS, *supra* note 523, at 251, 252. It was universally believed that soldiers "look upon themselves as a body of men *different from the rest of the people*" and would "*make laws for themselves*, and enforce them by the *power of the sword!*" *Id.* at 252-53. To Adams, it was better that the power be in the hands of the people. He had no quarrels with the "prerogative [being] a power vested in the crown by the constitution, for the safety of the people." SAMUEL ADAMS, ARTICLE SIGNED "VINDE" (BOSTON GAZETTE, Dec. 26, 1768), *reprinted in* 1 THE WRITINGS OF SAMUEL ADAMS, *supra* note 523, at 272, 275. This, however, was a power "which is never to be exerted, but when the safety of the people requires it." *Id.* Otherwise, standing armies are "not to defend the nation, but to destroy its liberties." *Id.*

⁵⁷³ SAMUEL ADAMS, ARTICLE, UNSIGNED (BOSTON GAZETTE, Oct. 17, 1768), *reprinted in* 1 THE WRITINGS OF SAMUEL ADAMS, *supra* note 523, at 251, 253.

⁵⁷⁴ *Id.* at 252.

⁵⁷⁵ RICHARD FROTHINGHAM, *LIFE AND TIMES OF JOSEPH WARREN* 95 (Boston, Little, Brown, & Co. 1865).

⁵⁷⁶ SAMUEL ADAMS, ARTICLE SIGNED "E.A." (BOSTON GAZETTE, Feb. 27, 1769), *reprinted in* 1 THE WRITINGS OF SAMUEL ADAMS, *supra* note 523, at 316, 318; *see also* ANDREW STEPHEN WALMSLEY, *THOMAS HUTCHINSON AND THE ORIGINS OF THE AMERICAN REVOLUTION* 98 (1999).

troops to preserve law and order.⁵⁷⁷ Meanwhile, Adams and the selectmen viewed the troops as a means to strip the colonists of their liberties. They preferred to have the civil authorities handle the security of the town, with the civil magistrate having power to adjudicate. Any riots or tumults were to be suppressed by the militia. “Every one knows that the exercise of the military power is forever *dangerous* to civil rights,” wrote Adams.⁵⁷⁸ It is here that Adams defended the Town’s militia resolve and reiterated the limited legal understanding of the “have arms” provision as stated by Blackstone.⁵⁷⁹

While Individual Right Scholars use Adams’ paraphrase of Blackstone to support their stance, it provides nothing that refutes the limited interpretation of the “have arms” provision. What is unique about this editorial is that it was the first time that Adams admits the true purpose behind reviving the 1693 Militia Act—legal rebellion or the invocation of the “fifth auxiliary right.”⁵⁸⁰ The members of the Town Meeting were not even remotely concerned with a French war. Primarily, they voted to reinstate the militia laws as a means to prepare against a tyrannical government.⁵⁸¹ Of particular interest is the fact that Adams never stated that individuals have a right to own arms. The constitutional issue at hand was whether the representatives of the town may invoke the “have arms” provision.⁵⁸² In other words, the debate was whether it was legal to pass a law providing arms for the colonists’ defense without

⁵⁷⁷ WALMSLEY, *supra* note 576.

⁵⁷⁸ SAMUEL ADAMS, ARTICLE SIGNED “E.A.” (BOSTON GAZETTE, Feb. 27, 1769), *reprinted in* 1 THE WRITINGS OF SAMUEL ADAMS, *supra* note 523, at 316, 318. It read:

At the [Glorious] revolution, the British constitution was again restor’d to its original principles, declared in the bill of rights; which was afterwards pass’d into a law, and stands as a bulwark to the natural rights of subjects. “To vindicate these rights, says Mr. *Blackstone*, when actually violated or attack’d, the subjects of England are entitled first to the regular administration and *free course of justice* in the courts of law—next the right of *petitioning the King* and parliament for redress of grievances—and lastly, to the right of *having and using arms for self-preservation and defence*.” These he calls “auxiliary and subordinate rights, which serve principally as *barriers* to protect and maintain inviolate the three great and primary rights of *personal security, personal liberty* and *private property*”: And that of *having arms for their defence* he tells us is “a public allowance, under due restrictions, of the *natural right of resistance and self preservation*, when the sanctions of society and laws are found *insufficient* to restrain the *violence of oppression*.”—How little do those persons attend to the rights of the constitution, if they know anything about them, who find fault with a late vote of this town, calling upon the inhabitants to *provide themselves with arms for their defence* at any time; but more especially, when they had reason to fear, there would be a necessity of the means of self preservation against the *violence of oppression*.

Id. at 317-18.

⁵⁷⁹ *Id.*

⁵⁸⁰ *Id.*

⁵⁸¹ *Id.*

⁵⁸² *Id.*

the support of the governor.⁵⁸³ Adams certainly thought so, especially because a standing army was being maintained in Boston.⁵⁸⁴

The issue did not end there. Adams—being the great disseminator of political propaganda that he was—forwarded a similar defense of the Town Meeting’s resolve to the *New York Journal*.⁵⁸⁵ He argued that the “late Vote of this Town, calling upon the Inhabitants to provide themselves with Arms for their Defence, was a Measure as prudent as it was legal.”⁵⁸⁶ It was because “Violences are always to be apprehended from Military Troops” that it is the “natural Right which the People have reserved to themselves, confirmed by the Bill of Rights, to keep Arms for their own Defence.”⁵⁸⁷ It was a right “to be made use of when the Sanctions of Society and Law are found insufficient to restrain the Violence of Oppression.”⁵⁸⁸

All and all, the brilliance of Samuel Adams as a political propagandist can be seen on the subject of the Town Meeting’s attempt to reinstate the 1693 Militia Act. Adams’ argument evolved from a reasonable fear of foreign invasion to the invocation of the “have arms” provision in situations when government has oppressed life, liberty, and property, and all other attempts of redress are exhausted. Several months later, however, Adams changed his argument again. This time he took the innocent approach and omitted ever proposing a Militia Act.⁵⁸⁹ It began when Boston’s radicals seized Bernard’s and Hutchinson’s letters, publishing them for all the colonies to see.⁵⁹⁰ Adams no longer needed to be on the defensive and forced to explain Boston’s decision to reinstate the Militia Act. Instead, he claimed that ordering the cleaning of arms was incidental to the riots and tumults occurring at that time.⁵⁹¹ Adams wrote that “revolting” was in “no other Thought in the Minds of any, except in the Governor and a few more.”⁵⁹² He explained the incident:

⁵⁸³ *Id.*

⁵⁸⁴ *Id.* Lord Barrington thought otherwise. He wrote:

I am convinced the Town Meeting at Boston which assembled the States of the Province against the King’s Authority, [and] armed the People to resist his forces, was guilty of high Crimes [and] Misdemeanors, if not of Treason; And that Mr. Otis the *Moderator* (as he is improperly called) of that Meeting together with the Selectmen of Boston who signed the Letters convoking the Convention should be impeach’d.

Letter from Lord Barrington to Governor Bernard (Feb. 12, 1769), in *THE BARRINGTON-BERNARD CORRESPONDENCE AND ILLUSTRATIVE MATTER 1760-1770*, *supra* note 515, at 183, 184.

⁵⁸⁵ *Boston, March 17*, *supra* note 503.

⁵⁸⁶ *Id.*

⁵⁸⁷ *Id.*

⁵⁸⁸ *Id.*

⁵⁸⁹ SAMUEL ADAMS, AN APPEAL TO THE WORLD OR A VINDICATION OF THE TOWN OF BOSTON, FROM MANY FALSE AND MALICIOUS ASPERSIONS (Boston, Edes & Gill 1769), reprinted in 1 *THE WRITINGS OF SAMUEL ADAMS*, *supra* note 523, at 396-445.

⁵⁹⁰ BAILYN, *supra* note 505, at 130-31.

⁵⁹¹ SAMUEL ADAMS, AN APPEAL TO THE WORLD OR A VINDICATION OF THE TOWN OF BOSTON, FROM MANY FALSE AND MALICIOUS ASPERSIONS (Boston, Edes & Gill 1769), reprinted in 1 *THE WRITINGS OF SAMUEL ADAMS*, *supra* note 523, at 396, 434.

⁵⁹² *Id.*

Whereas the simple Truth of the Matter is, these Arms had for many Years been deposited in Chests and laid on the Floor of the Town Hall; but the Hall itself being burnt a few Years ago, the Arms were sav'd from the Ruins and carried to the Town House: After the Hall was Re-built the Town ordered their Removal there; and tho' it happen'd to be done at a Juncture when the Governor and his Confederates talked much of the Town's *revolting*.⁵⁹³

No mention was made of the Town Meeting's militia resolve, and for good reason. Adams wanted to attack Bernard's perception of the Convention of Towns, thereby, making Boston the innocent party. Adams no longer defended the legality of armed rebellion. At this point, the Town Meeting's resolves were "nothing more than a *friendly circular Letter* to the Selectmen of several Towns in the Province."⁵⁹⁴ The Convention was not called to arm the people, but to consult "Measures to promote Peace and good Order."⁵⁹⁵ It was a "very innocent Measure," which "was most certainly attended with all the happy Effects for which it was propos'd."⁵⁹⁶

In sum, the Convention of Towns' resolve to provide the inhabitants with arms was an attempt to invoke the 1693 Militia Act.⁵⁹⁷ While Adams' original argument was that it was a means to prevent another French War, the "secret" intent was to invoke the "have arms" provision's protection of lawful armed rebellion "when the Sanctions of Society and Law are found insufficient to restrain the Violence of Oppression."⁵⁹⁸ The resolve had nothing to do with an armed individual's self-defense.⁵⁹⁹ This is evidenced not only by the frequent paraphrasing of Blackstone's

⁵⁹³ *Id.*

⁵⁹⁴ REPORT OF THE RECORD COMMISSIONERS OF THE CITY OF BOSTON: BOSTON TOWN RECORDS 1758 TO 1769, at 321 (n.p., Rockwell & Churchill 1886).

⁵⁹⁵ SAMUEL ADAMS, AN APPEAL TO THE WORLD OR A VINDICATION OF THE TOWN OF BOSTON, FROM MANY FALSE AND MALICIOUS ASPERSIONS (Boston, Edes & Gill 1769), reprinted in 1 THE WRITINGS OF SAMUEL ADAMS, *supra* note 523, at 396, 426.

⁵⁹⁶ *Id.* at 436.

⁵⁹⁷ 5 W. & M., c. 7, § 5 (1693) (Eng.).

⁵⁹⁸ *Boston, March 17, supra* note 503.

⁵⁹⁹ Stephen P. Halbrook and other Individual Right Scholars mischaracterize the history of the Boston Town Meeting and the Convention of Towns. The earliest history of this event was written by William Tudor (1779-1830) in his 1823 work THE LIFE OF JAMES OTIS, OF MASSACHUSETTS. WILLIAM TUDOR, THE LIFE OF JAMES OTIS, OF MASSACHUSETTS (Boston, Wells & Lilly 1823). Tudor, the son of America's first Judge Advocate Colonel William Tudor (1715-1819), did not characterize the 1768 Militia Act as a right to armed individual self-defense. He described the Militia Act as "founded in nature, reason, and sound policy, and is well adapted for the necessary defence of the community." *Id.* at 332-33. 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.

“fifth auxiliary right,” but also by Adams’ change in political stance—including his retraction of the militia law being put forth at all.⁶⁰⁰

Another “individual right” argument is that the Second Amendment was drafted to protect against the incessant disarming that occurred during the American Revolution.⁶⁰¹ If this is the case, then why did not one colonial petition, list of grievances, declaration, or pamphlet mention the disarming as a violation of their constitutional or natural right to “have arms”? If the Founders were cognizant of the “have arms” provision and the “individual right” interpretation of it, why did no one—including Samuel Adams and other members of the Town Meeting—reference it during this disarming? One need not look further than Lord Dunmore’s actions in Virginia, Judge William Henry Drayton’s *Charge to the Grand Jury*, and the Declaration of Independence to understand that the Founders did not view individual firearm ownership as a right—at any level.

Under cover of night on April 20, 1775, Lord Dunmore ordered a contingent of Marines to seize and move Williamsburg’s gunpowder stores.⁶⁰² The seizure drew an immediate response. The people wanted to know “what motives and for what particular purpose the powder [was] carried off.”⁶⁰³ The people demanded the gunpowder “to be immediately returned to the magazine.”⁶⁰⁴ Dunmore replied that he acted because “he did not think it secure” and moved the gunpowder only “to prevent any alarm.”⁶⁰⁵ He promised to deliver the gunpowder “in half an hour” upon the threat of any insurrection.⁶⁰⁶ The truth of the matter was that Dunmore wanted to disarm and disable the rebel contingent. Lord Dartmouth had given him specific orders to secure as many military stores as possible.⁶⁰⁷ Dunmore had no plans of

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. See 5 W. & M., c. 7, § 5 (1693) (Eng.).

⁶⁰⁰ See SAMUEL ADAMS, AN APPEAL TO THE WORLD OR A VINDICATION OF THE TOWN OF BOSTON, FROM MANY FALSE AND MALICIOUS ASPERSIONS (Boston, Edes & Gill 1769), reprinted in 1 THE WRITINGS OF SAMUEL ADAMS, *supra* note 523, at 396-445.

⁶⁰¹ HALBROOK, FOUNDERS’, *supra* note 567, at 29-114.

⁶⁰² Dunmore was not the only governor to seize gunpowder and/or arms. Governor Josiah Martin of North Carolina and Governor Robert Eden of Maryland enacted similar measures. See CHARLES, IRRECONCILABLE GRIEVANCES, *supra* note 9, at 94-95.

⁶⁰³ Letter from Municipal Common Hall to Governor Dunmore (Apr. 21, 1775), in 3 REVOLUTIONARY VIRGINIA: THE ROAD TO INDEPENDENCE 54, 55 (Robert Scribner ed., 1977).

⁶⁰⁴ *Id.*

⁶⁰⁵ Letter From Governor Dunmore to the Municipal Common Hall An Oral Reply (Apr. 20, 1775), in 3 REVOLUTIONARY VIRGINIA: THE ROAD TO INDEPENDENCE, *supra* note 603, at 55, 55. For Peyton Randolph’s account of the situation see Letter from Peyton Randolph to Mann Page, Jr., Lewis Willis, and Benjamin Grymes, Jr., Esquires (Apr. 27, 1775), in 3 REVOLUTIONARY VIRGINIA: THE ROAD TO INDEPENDENCE, *supra* note 603, at 63, 64.

⁶⁰⁶ *Id.*

⁶⁰⁷ JOHN E. SELBY, THE REVOLUTION IN VIRGINIA, 1775-1783, at 19 (2d prtg. 1989). Dartmouth’s orders on October 19, 1774 called for “the most effectual measures for arresting, detaining, and securing any Gunpowder, or any sort of Arms or Ammunitions which may be attempted to be imported into the Province under your Government.” *Id.*

returning the gunpowder, especially to an armed mob of men. He did “not think it prudent to put powder into [the people’s] hands in such a situation.”⁶⁰⁸

Without powder, the inhabitants could not sufficiently arm themselves—not even against the potential slave revolt that the colonists feared. The belief that “wicked and designing persons have instilled the most diabolical notions into the minds of our slaves” caused the people to request the immediate return of the powder.⁶⁰⁹ This purpose behind the colonists’ need for the powder is significant in debunking the “individual right” myth, for not one locality claimed that the taking of the powder infringed on its right to armed individual self-defense. Surely, just the threat of a slave revolt would have validated an individual in preparing arms under the “individual right” model. Therefore, the hindering of the colonists in effectuating this—with the taking of the gunpowder stores—would have brought forth a grievance that the people were denied the right to “have arms for their defence.” However, no complaint was ever made.⁶¹⁰

One may argue that Dunmore did not seize arms per se, and, thus, the colonists could not claim that they had been disarmed. This is a textually valid argument, but it fails for two reasons. First, Individual Right Scholars have heralded Dunmore’s seizure of gunpowder as one of the events that infringed on the colonists’ right to “have arms for their defence.”⁶¹¹ Second, it does not explain why not one colonist, newspaper, or complaint corrected Dunmore’s claim that he had the authority to seize whatever arms or ammunition he deemed necessary.

Dunmore even expressly informed his council of this power when he stated that it was “under the constitutional right of the crown” that “the custody and disposal of all public stores of arms and ammunition alone belong.”⁶¹² Moreover, he would reiterate this argument to the Virginian people in a proclamation dated May 3, 1775.⁶¹³ There, Dunmore stated that he was “the only constitutional judge, in what manner the munition, provided for the protection of the people of this government, [are] to be disposed of for that end.”⁶¹⁴ He informed the populace that it was under

⁶⁰⁸ Letter From Governor Dunmore to the Municipal Common Hall An Oral Reply (Apr. 20, 1775), in 3 REVOLUTIONARY VIRGINIA: THE ROAD TO INDEPENDENCE, *supra* note 603, at 55, 55.

⁶⁰⁹ 3 REVOLUTIONARY VIRGINIA: THE ROAD TO INDEPENDENCE, *supra* note 603, at 54, 55.

⁶¹⁰ See Letter from Orange County Committee, An Endorsement of Violence and Reprisal (May 19, 1775), in 3 REVOLUTIONARY VIRGINIA: THE ROAD TO INDEPENDENCE, *supra* note 603, at 112, 112. The Orange County Committee’s complaint stated: “That the Governour’s removal of the powder lodged in the magazine, and set apart for the defence of the country, was fraudulent, unnecessary, and extremely provoking to the people of this colony.” *Id.*

⁶¹¹ STEPHEN P. HALBROOK, A RIGHT TO BEAR ARMS: STATE AND FEDERAL BILLS OF RIGHTS AND CONSTITUTIONAL GUARANTEES 16 (1989) [hereinafter HALBROOK, RIGHT TO BEAR ARMS].

⁶¹² Governor Dunmore to His Council (May 2, 1775), in 3 REVOLUTIONARY VIRGINIA: THE ROAD TO INDEPENDENCE, *supra* note 603, at 77.

⁶¹³ See His Council to Governor Dunmore and his Excellency’s Resultant Proclamation (May 3, 1775), in 3 REVOLUTIONARY VIRGINIA: THE ROAD TO INDEPENDENCE, *supra* note 603, at 80, 81.

⁶¹⁴ *Id.*

his authority that the militia and people were armed. “[W]henver the present ferment shall subside, and it shall become necessary to put arms in the hands of the militia, for the defence of the people against a foreign enemy or intestine insurgents,” Dunmore stated, he would exert his best abilities to arm the people “in the service of the country.”⁶¹⁵

No one challenged Dunmore—even after word arrived in late April of Gage’s attempt to seize the arms, ammunition, and gunpowder at Lexington and Concord.⁶¹⁶ The similarities between Dunmore and Gage’s actions were all too clear. A fact the Virginia House of Burgesses even took notice of when it issued the following address:

The inhabitants of this country, my Lord, could not be strangers to the many attempts in the northern colonies to disarm the people, and thereby deprive them of the only means of defending their lives and property. We know, from good authority, that the like measures were generally recommended by the Ministry, and that the export of pow[d]er from Great Britain had been prohibited. Judge then how very alarming a removal of the small stock which remained in the public magazine, for the defence of the country, and the stripping of the guns of their locks, must have been to any people, who had the smallest regard for their security.⁶¹⁷

At no time in its address did the House of Burgesses claim that the widespread disarming was a violation of the Declaration of Rights. No mention was made of a constitutional or a natural right to “have arms,” yet Halbrook and Individual Right Scholars claim that the Founders viewed such seizures as violating the “have arms” provision.⁶¹⁸ Without any direct and circumstantial documentary evidence, it is erroneous for Individual Right Scholars to assert that such seizures violated an alleged right to “have arms.” How can such a theory be correct if not one petition—by any locality—connected either event as infringing on the allowance to “have arms for their defence”?

Judge Drayton’s *Charge to the Grand Jury* is also of particular importance in debunking the “individual right” assumption of a right to “have arms” because it compares the events—particularly the grievances—of the Glorious Revolution to the American Revolution.⁶¹⁹ Judge Drayton delivered the *Charge* on April 2, 1776 in

⁶¹⁵ *Id.*

⁶¹⁶ Although one may argue that such silence is inconclusive, it is well known that Dunmore’s actions were under continuous scrutiny. Newspapers, assembly proceedings, correspondence, and journal entries followed Dunmore’s every move. See generally 3 REVOLUTIONARY VIRGINIA: THE ROAD TO INDEPENDENCE, *supra* note 603 (Virginia Assembly proceedings on Dunmore’s actions and responses to his letters). In fact, even third-party hearsay was prevalent in newspapers and assembly proceedings. See CHARLES, IRRECONCILABLE GRIEVANCES, *supra* note 9, at 95-96; CHRISTOPHER WARD, 2 THE WAR OF THE REVOLUTION 845 (John Richard Alden ed., 1952).

⁶¹⁷ HALBROOK, RIGHT TO BEAR ARMS, *supra* note 611, at 16 (alteration in original).

⁶¹⁸ *Id.*; see also HALBROOK, FOUNDERS’ *supra* note 567, at 29-124.

⁶¹⁹ WILLIAM HENRY DRAYTON, THE CHARGE TO THE GRAND JURY (Apr. 23, 1776), reprinted in 1 AMERICAN ELOQUENCE: A COLLECTION OF SPEECHES AND ADDRESSES BY THE MOST EMINENT ORATORS OF AMERICA 50, 50 (New York, D. Appleton & Co. 1859).

order to “expound to [the jury] the constitution of [their] country.”⁶²⁰ Drayton reminded the jury that the forefathers of the Glorious Revolution vested the protections of the 1689 Declaration of Rights and that the Revolution established an affirmative right of the people to usurp the government when their unalienable rights were ruined.⁶²¹ He catalogued the “attempts to enslave America” by “king and parliament” prior to hostilities.⁶²²

Drayton then went on to describe many events in which the colonists had been disarmed. This list of events included the attempt to seize munitions at Lexington and Concord,⁶²³ Dunmore’s actions,⁶²⁴ and the disarming of Boston’s inhabitants.⁶²⁵ Although Drayton did not mention anything about the seizure of arms at Lexington and Concord or the seizure by Lord Dunmore, it was well known what had occurred. Moreover, Drayton expressly mentioned the taking of arms in his description of what happened to Boston’s inhabitants⁶²⁶—showing that he was aware that the disarming of colonists had taken place.

⁶²⁰ *Id.* (internal formatting omitted).

⁶²¹ *Id.*

⁶²² *Id.* at 51. The charges included:

- By claiming a right to bind the colonies “in all cases whatsoever;”
- By laying duties, at their mere will and pleasure, upon all the colonies;
- By suspending the legislature of New York;
- By rendering the American charters of no validity, having annulled the most material parts of the charter of Massachusetts Bay;
- By divesting multitudes of the colonist of their property, without legal accusation or trial;
- By depriving whole colonies of the bounty of Providence on their own proper coasts, in order to coerce them by famine;
- By restricting the trade and commerce of America;
- By sending to, and continuing in America, in time of peace, an armed force, without and against the consent of the people;
- By granting impunity to a soldiery instigated to murder the Americans;
- By declaring, that the people of Massachusetts Bay are liable for offences, or *pretended* offences, done in that colony, to be sent to, and tried for the same in England, or in any colony where *they cannot have the benefit of a jury of the vicinage*;
- By establishing in Quebec the Roman Catholic religion, and an arbitrary government, instead of the Protestant religion and a free government.

Id.

⁶²³ See CHARLES, SECOND AMENDMENT, *supra* note 14, at 81; JAMES H. STARK, THE LOYALISTS OF MASSACHUSETTS AND THE OTHER SIDE OF THE AMERICAN REVOLUTION 51 (Augustus M. Kelley 1972) (1910).

⁶²⁴ See An Introductory Note (Mar. 28, 1775-June 24, 1775), in 3 REVOLUTIONARY VIRGINIA: THE ROAD TO INDEPENDENCE, *supra* note 603, at 1, 5.

⁶²⁵ See CHARLES, SECOND AMENDMENT, *supra* note 14, at 81; SELBY, *supra* note 607, at 19.

⁶²⁶ 1 AMERICAN ELOQUENCE: A COLLECTION OF SPEECHES AND ADDRESSES BY THE MOST EMINENT ORATORS OF AMERICA, *supra* note 619, at 50, 52 (“For the little purpose of disarming the imprisoned inhabitants of Boston, the king’s general, Gage, in the face of the day, violated the public faith, *by himself plighted*.”).

Drayton felt that the abuses by the British government were so destructive that “[n]ature cried aloud, self-preservation is the great law,”⁶²⁷ which “forced [the colonies] to take up arms in [their] own defence.”⁶²⁸ This use of terminology—“self-preservation” and “arms in their own defence”—comports with the proper and limited understanding of the English allowance to “have arms.” As a judge, Drayton was familiar with the proper use of this language, and his comparison of the provisions—of the Declaration of Rights to the events of the American Revolution—comports with the limited nature of the allowance to “have arms.”

Drayton listed the first eight grievances in the Declaration of Rights verbatim including the accusation that James II caused “several good subjects, being Protestants, to be disarmed, at the same time when Papists were both armed and employed contrary to law.”⁶²⁹ In comparing the grievances to the events of the American colonists, Drayton correlated four grievances to the actions of King George III: the suspending of the laws,⁶³⁰ levying money without consent of parliament,⁶³¹ freedom of elections,⁶³² and the raising and keeping of a standing army without consent.⁶³³ He failed to make any connection between the disarming of the colonists and the English “have arms” provision. Drayton even stated that the colonies needed “no better authority than that illustrious precedent” of the Glorious Revolution and would “therefore compare the causes of, and the law upon the two

⁶²⁷ *Id.*

⁶²⁸ *Id.* at 51.

⁶²⁹ *Id.* at 53.

⁶³⁰ *Id.* In particular:

James the Second suspended the operations of laws—George the Third caused the charter of the Massachusetts Bay to be in effect annihilated; he suspended the operation of the law which formed a legislature in New York, vesting it with adequate powers; and thereby he caused the very ability of making laws in that colony to be suspended.

Id.

⁶³¹ *Id.* (“King James levied money without the consent of the representatives of the people called upon to pay it—king George has levied money upon America, not only without, but expressly *against* the consent of the representatives of the people in America.”).

⁶³² *Id.* The grievance stated that:

King James violated the freedom of election of members to serve in Parliament—King George, by his representative, Lord William Campbell, acting for him and on his behalf, broke through a fundamental law of this country, for the certain holding of General Assemblies; and thereby, as far as in him lay, not only violated but annihilated the very ability of holding a General Assembly.

Id.

⁶³³ *Id.* As to keeping a standing army without consent:

King James in time of peace kept a standing army in England, without consent of the representatives of the people among whom that army was kept—king George hath in time of peace invaded this continent with a large standing army without the consent, and he hath kept it within this continent, expressly against the consent of the representatives of the people among whom that army is posted.

Id.

events.”⁶³⁴ Moreover, he expressly mentioned the disarming of Boston’s inhabitants.⁶³⁵ Therefore, if Halbrook, Malcolm, and the Individual Right Scholars are correct in their interpretation of the “have arms” provision, why did Drayton not connect the disarming of colonists with the 1689 Declaration? Under their interpretation, any eighteenth-century laymen should have connected the disarming of colonists and a right to “have arms for their defence.”

The truth of the matter is that the “individual right” interpretation is inaccurate and incomplete. The “have arms” provision was a limited right and no substantiating historical correlation exists between it and an alleged right to armed individual self-defense. Drayton was an eighteenth-century judge, no less, and he would have understood the legality of the “have arms” provision more than most of the Founding generation. Not to mention, Drayton’s list of grievances goes side by side with the Declaration of Independence, which is the most comprehensive list of grievances against the crown. If the disarming of individuals was against the “have arms” provision, the drafting committee certainly would have included or at least mentioned it; the committee, however, did not.

The Declaration of Independence lists twenty-seven grievances against the British government—twenty-nine were in the original list, but two were deleted by Congress.⁶³⁶ They include allegations from “the imposing of taxes . . . without consent” to the employing of the “merciless Indian savages.”⁶³⁷ What makes the grievances specifically important to understanding the “have arms” provision is their similarity to the grievances in the 1689 Declaration.⁶³⁸ At least eight of the grievances listed in the Declaration of Independence mirror a grievance or right within the Declarations of Rights, including: the dissolving of representative houses repeatedly,⁶³⁹ obstructing the administration of justice,⁶⁴⁰ keeping of standing armies,⁶⁴¹ quartering of troops,⁶⁴² depriving trial by jury,⁶⁴³ abolishing the free system of English laws, the abolishing of charters, and the suspending of the legislatures.⁶⁴⁴

⁶³⁴ *Id.* at 52.

⁶³⁵ *See supra* note 626.

⁶³⁶ THE DECLARATION OF INDEPENDENCE (U.S. 1776).

⁶³⁷ *Id.* For history on employment of Indians in the American Revolution by both sides see CHARLES, IRRECONCILABLE GRIEVANCES, *supra* note 9, at 213-70.

⁶³⁸ The modern consensus is that the English Declaration of Rights heavily influenced the Declaration of Independence. *See* PAULINE MAIER, AMERICAN SCRIPTURE: MAKING THE DECLARATION OF INDEPENDENCE 104-07 (1997).

⁶³⁹ 1 W. & M. 2, c. 2 (1688) (Eng.) (listing “[a]nd that for Redresse of all Grievances, and for the amending strengthening and preserving of the Lawes Parlyament sought to be held frequently”).

⁶⁴⁰ *Id.* (listing “[b]y Prosecutions in the Court of Kings Bench for Matters and Causes cognizable onely in Parlyament and by diverse other Arbitrary and Illegall Courses”).

⁶⁴¹ *Id.* (listing “[b]y raising and keeping a Standing Army within this Kingdome in time of Peace without Consent of Parlyament” it was proclaimed “[t]hat the raising or keeping a standing Army within the Kingdome in time of Peace unlesse it be with Consent of Parlyament is against law”).

⁶⁴² *Id.* (listing “[q]uartering Soldiers contrary to Law”).

Although none of the grievances in the Declaration of Independence expressly referenced the grievances or rights in the Declaration of Rights, Thomas Jefferson, the drafting committee, and the Continental Congress were clearly cognizant of the rights of their forefathers. James Otis described the British constitution as coming “nearest [to] the idea of perfection of any that has been reduced to practice.”⁶⁴⁵ He viewed the “colonists, black and white” as being “freeborn British subjects, and entitled to all the essential civil rights . . . not only . . . from the provincial charters, from the principles of the common law, and acts of Parliament, but from the British constitution, which was reestablished at the [Glorious] Revolution with a professed design to secure the liberties of all the subjects to all generations.”⁶⁴⁶

What is of particular interest regarding Otis is that he briefly wrote upon the “have arms” provision in his pamphlet entitled *A Vindication of the British Colonies*.⁶⁴⁷ The tract was a response to Martin Howard’s *Halifax Letter*.⁶⁴⁸ It outlined the rights of the American colonist, which included the “absolute liberties of Englishmen” the right of personal security, personal liberty, and personal property.⁶⁴⁹ “Besides these three *primary rights*,” writes Otis, “there are others which are *secondary* and *subordinate* (to preserve the former from unlawful attacks).”⁶⁵⁰ It is here where Otis lists the “right of having and using arms for self-defense.”⁶⁵¹ His description of the “have arms” provision—standing alone—would seem to support

⁶⁴³ *Id.* (listing “[a]nd whereas of late yeares Partiall Corrupt and Unqualified Persons have beene returned and served on Juryes in Tryalls and particularly diverse Jurors in Tryalls for High Treason which were not Freeholders” it was proclaimed “[t]hat Jurors ought to be duely impannelled and returned and Jurors which passe upon Men in Trialls for High Treason ought to be Freeholders”).

⁶⁴⁴ *Id.* These last three can all be classified under the Suspending and Dispensing with the law. It was “By Assumeing and Exerciseing a Power of Dispensing with and Suspending of Lawes and the Execution of Lawes without Consent of Parlyament” that it was proclaimed “[t]hat the pretended Power of Suspending of Laws or the Execution of Laws by Regall Authority without Consent of Parlyament is illegall” and “[t]hat the pretended Power of Dispensing with Laws or the Execution of Laws by Regall Authoritie as it hath beene assumed and exercised of late is illegall.” *Id.*

⁶⁴⁵ 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 408, 428 (Bernard Bailyn ed., 1965). James Otis published the Declaration of Rights in his famous pamphlet *The Rights of the British Colonies Asserted and Proved*. He and the other Founders were well aware of what the “have arms” provision entailed. *See id.* at 430-34.

⁶⁴⁶ *Id.*

⁶⁴⁷ JAMES OTIS, *A VINDICATION OF THE BRITISH COLONIES* (Boston, Edes & Gill 1765), *reprinted in* 1 *PAMPHLETS OF THE AMERICAN REVOLUTION 1750-1776*, *supra* note 645, at 545, 545.

⁶⁴⁸ MARTIN HOWARD, *A LETTER FROM A GENTLEMAN AT HALIFAX, TO HIS FRIEND IN RHODE-ISLAND* (Newport, S. Hall 1765).

⁶⁴⁹ JAMES OTIS, *A VINDICATION OF THE BRITISH COLONIES* (1765), *reprinted in* 1 *PAMPHLETS OF THE AMERICAN REVOLUTION 1750-1776*, *supra* note 645, at 545, 558.

⁶⁵⁰ *Id.* at 558-59.

⁶⁵¹ *Id.* at 559.

the “individual right” theory. However, it does not. It is merely a portion of a larger context, for Otis, like Samuel Adams did in defense of his invocation of the 1693 Militia Act, is paraphrasing Blackstone’s *Commentaries*.⁶⁵² Just like Blackstone, he lists the right to arms as the “fifth auxiliary right.” It is a right that may be used only when the “three primary rights” are unlawfully restricted.⁶⁵³ When this happens the people are provided with the following constitutional checks:

(1) The constitution or power of Parliament; (2) The limitation of the King’s prerogative (and to vindicate them when actually violated); (3) The regular administration of justice; (4) The right of petitioning for redress of grievances; (5) The right of having and using arms for self-defense. See Mr. Blackstone’s accurate and elegant analysis of the laws of England.⁶⁵⁴

The Individual Right Theorists will argue that, despite Otis’ reference to the allowance to “have arms” as an auxiliary right, he expressly refers to it as a right to have and use arms for self-defense. They would claim this proves that the colonists and the Founding Fathers understood the allowance to “have arms” as one of armed individual self-defense, especially in the home. This argument would fail for two reasons. The first reason is that it is an auxiliary right. Otis limits the “right of having and using arms” to only when the government unlawfully attacks the “three primary rights.”⁶⁵⁵ He is simply restating Blackstone’s legal analysis of that limited right—nothing more, nothing less.

The second reason the “individual right” argument fails is the grievances listed in the Declaration of Independence. Otis’ pamphlet was well known by the signers of the Declaration. If they interpreted Otis’ statement as a right to armed individual self-defense, the disarming of the colonists certainly would have been added to the Declaration’s list of grievances. This did not occur. There is no doubt that Otis perfectly understood the “have arms” provision. He even cited Blackstone, thus, making clear the limitations on the right he was articulating⁶⁵⁶—that individuals have a right take up arms as a means to check tyrannical government when all other constitutional safeguards have failed.

Otis’ use of “self-defense” in this broader and different context may be confusing to Individual Right Scholars. Pamphleteers, however, were not immune from using “self-defense” in a broader context. For example, in describing Thomas Gage’s seizure of arms, James Macpherson wrote, “The great law of self-defence must therefore have justified [him] for having deprived the former of arms, which they almost avowedly intended to raise against all legal authority.”⁶⁵⁷ John Lind also described Gage’s seizure as an act in “self-defence” of government. Lind felt that

⁶⁵² *Id.*; see also 1 BLACKSTONE, *supra* note 188, at 139.

⁶⁵³ JAMES OTIS, A VINDICATION OF THE BRITISH COLONIES (1765), *reprinted in* 1 PAMPHLETS OF THE AMERICAN REVOLUTION 1750-1776, *supra* note 645, at 545, 558-59.

⁶⁵⁴ *Id.* at 559 (citation omitted).

⁶⁵⁵ *See id.*

⁶⁵⁶ *Id.*

⁶⁵⁷ JAMES MACPHERSON, THE RIGHTS OF GREAT BRITAIN ASSERTED AGAINST THE CLAIMS OF AMERICA: BEING AN ANSWER TO THE DECLARATION OF THE GENERAL CONGRESS 74 (London, T. Cadell 6th ed. 1776).

England was justified in its “acts of self-defence”⁶⁵⁸ because it was acting only “in consequence of resistance already shewn.”⁶⁵⁹

Besides, in understanding the American perception of the English allowance to “have arms,” one cannot forget that the Founding Fathers and the American pamphleteers frequently referred to the 1689 Declaration of Rights to support their arguments.⁶⁶⁰ The British Constitution was always on their minds. This is significant because the Founders would have been particularly familiar with the protective scope of the “have arms” provision. If the Individual Right Scholars are correct in their interpretation, it does not make sense that the Founders did not list the seizure of arms by Thomas Gage, Josiah Martin, Lord Dunmore, and the restrictions on the importation of arms by Lord Dartmouth in the Declaration of Independence. Any of these seizures would have unequivocally infringed on the “individual right” theory of armed self-defense.

However, such an argument was never made in the Declaration of Independence. One may argue that the mention of Gage’s seizure of arms in the 1775 *Declaration of the Causes and Necessity for Taking Up Arms*⁶⁶¹ already addressed this point, and the Founders did not need to mention it again. This argument is diminished when comparing the two Declarations, for the Declaration of Independence included the majority of grievances listed in its 1775 predecessor.⁶⁶² Not to mention, the taking of arms was never stated as an infringement of their natural or constitutional right in the

⁶⁵⁸ JOHN LIND, AN ANSWER TO THE DECLARATION OF THE AMERICAN CONGRESS 129 (London, T. Cadell 1776).

⁶⁵⁹ *Id.* at 128.

⁶⁶⁰ The Declaration of Rights and Grievances, passed in October 1774, catalogues “the principles of the English constitution.” THE DECLARATION OF RIGHTS AND GRIEVANCES (U.S. 1774), <http://usconstitution.net/intol>. Many of the rights listed are in direct reference to the 1689 Declaration of Rights. See John Adams, The Earl of Clarendon to William Pym (Jan. 13-27, 1866), in 1 PAPERS OF JOHN ADAMS 158, 159-62 (Robert J. Taylor ed., 1977). There are countless examples in the pamphlets of the American Revolution. See, e.g., A LETTER TO THE PEOPLE OF PENNSYLVANIA (Philadelphia, n. pub. 1760), reprinted in 1 PAMPHLETS OF THE AMERICAN REVOLUTION 1750-1776, *supra* note 645, at 257, 262, 269; 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, *supra* note 645, at 419, 428-29, 474; STEPHEN HOPKINS, THE RIGHTS OF THE COLONIES EXAMINED (Providence, William Goddard 1765), reprinted in 1 PAMPHLETS OF THE AMERICAN REVOLUTION 1750-1776, *supra* note 645, at 507, 511, 518; REASONS WHY THE BRITISH COLONIES, IN AMERICA, SHOULD NOT BE CHARGED WITH INTERNAL TAXES, BY AUTHORITY OF PARLIAMENT (New Haven, B. Mecom 1764), reprinted in 1 PAMPHLETS OF THE AMERICAN REVOLUTION 1750-1776, *supra* note 645, at 386, 387, 389, 406. Paul H. Smith compiled six pamphlets that incessantly refer to the English Constitution to support the American grievances. See ENGLISH DEFENDERS OF AMERICAN FREEDOMS 1774-1778, *supra* note 243. For the unconstitutionality of standing armies see JAMES BOWDOIN ET AL., A SHORT NARRATIVE OF THE HORRID MASSACRE IN BOSTON in TRACTS OF THE AMERICAN REVOLUTION 1763-1776, at 211 (Merrill Jensen ed., 1967).

⁶⁶¹ THOMAS JEFFERSON & JOHN DICKINSON, DECLARATION OF THE CAUSES AND NECESSITY FOR TAKING UP ARMS (Philadelphia, Continental Congress 1775), in 1 THE PAPERS OF THOMAS JEFFERSON 213, 213-18 (Julian P. Boyd ed., 1950).

⁶⁶² Compare *id.* with THE DECLARATION OF INDEPENDENCE (U.S. 1776).

former.⁶⁶³ The English government's deprivation of trial by jury—"in cases affecting both life and property"—was described as an "accustomed and inestimable privilege."⁶⁶⁴ Meanwhile, the taking of arms was described as an "open violation of Honour, in defiance of the obligation of Treaties, which even savage Nations esteemed sacred."⁶⁶⁵

The two descriptions are drastically different in their implications. The Declaration's description of trial by jury makes it clear that it was an affirmed right.⁶⁶⁶ It was a right that the 1774 Bill of Rights described as "constitutional."⁶⁶⁷ The same cannot be said about the possession of arms. In fact, Individual Right Scholars have taken the true nature of the grievance completely out of context. The "violation of honour" had nothing to do with the colonists' forfeiture of personal arms but, rather, dealt with the fact that Gage violated the terms of their agreement.⁶⁶⁸

⁶⁶³ THOMAS JEFFERSON & JOHN DICKINSON, *supra* note 661, at 216.

⁶⁶⁴ This grievance was also mentioned in the 1774 Bill of Rights. That document stated:

An act for the better securing his Majesty's dock-yards, magazines, ships, ammunition and stores, which declares a new offence in America, and deprives the American subject the constitutional trial by jury of the vicinage, by authorizing the trial of any person, charged with the committing any offence described in the said act, out of the realm, to be indicted and tried for the same in any shire or county within the realm.

THE DECLARATION OF RIGHTS AND GRIEVANCES (U.S. 1774), <http://usconstitution.net/intol>.

⁶⁶⁵ Thomas Jefferson, The Declaration as Adopted by Congress (1776), in 1 THE PAPERS OF THOMAS JEFFERSON *supra* note 661, at 213, 216 (emphasis omitted).

⁶⁶⁶ See THE DECLARATION OF RIGHTS AND GRIEVANCES (U.S. 1774), <http://usconstitution.net/intol>.

⁶⁶⁷ 1 PAPERS OF JOHN ADAMS, *supra* note 660, at 158, 162.

⁶⁶⁸ The original agreement permitted citizens to leave Boston on the condition that they took no firearms or ammunition among their possessions. In response, the Provincial Congress resolved to permit those wishing to live in Boston to do so on the same condition and even to send out for their effects later. Letter From James Warren (May 7, 1775), in 3 PAPERS OF JOHN ADAMS 3, 6 n.8 (Robert J. Taylor ed., 1979).

Both Thomas Jefferson and John Dickinson's drafts attest to this fact.⁶⁶⁹ The inhabitants that wished to depart Boston entered into a treaty with Thomas Gage. The terms agreed upon required those persons who were departing to deposit their arms with the local magistrate.⁶⁷⁰ Gage violated this agreement by seizing these arms and other personal effects from the magistrate.⁶⁷¹ This is what the Declaration of Independence referred to as being "in defiance of the obligation of treaties, which even savage nations esteem sacred."

Not even John or Samuel Adams—who were always critical of Gage's actions—made any mention of the seizure of arms as a violation of a right to "have arms." This is significant because it is John Adams' legal and political works that Individual Right Scholars quote as support for their stance.⁶⁷² For example, Adams represented the British soldiers that participated in the Boston Massacre.⁶⁷³ It is claimed that his

⁶⁶⁹ Dickinson wrote:

The inhabitants of Boston being confined within that Town by the General their Governor & having in order to procure their Dismission entered into a Treaty with him, it was stipulated (*between the*) that the said Inhabitants having deposited their Arms with their own Magistrates, should have (*free*) Liberty to depart, (*out of said town*) taking with them their other Effects. They accordingly delivered up their Arms, but in open violation of Honor, in Defiance of the Obligations of (*a*) Treat(y)es, which even savage Nations esteem sacred, the Governor ordered the Arms deposited aforesaid that they might be preserved for their owners, to be seized by a Body of (*armed men*) soldiers.

John Dickinson, John Dickinson's Composition Draft (1775), in 1 THE PAPERS OF THOMAS JEFFERSON *supra* note 661, at 204, 210. Thomas Jefferson wrote:

The inhabitants of the town of Boston in order to procure their enlargement having entered into treaty with (*a certain Thomas Gage, principal instigator of these enormities*) General Gage their Governor (*to procure their Enlargement*), it was stipulated that the said inhabitants, having first deposited their arms with their own magistrates (*their own arms* [and] *military stores*) should have free liberty to depart out of the said town, taking with them their other (*goods* [and]) effects. Their arms (*and military stores*) they accordingly delivered in, and claimed the stipulated license of departing with their effects, But in open violation of plighted faith & honor, in defiance of the sacred obligation of treaty which even savage nations observe, their arms (*and warlike stores*), deposited with their own magistrates to be preserved as their property, were immediately seized by a body of armed men under orders from the said (*Thomas*) General [Gage].

Thomas Jefferson, Jefferson's Fair Copy for the Committee (1775), in 1 THE PAPERS OF THOMAS JEFFERSON, *supra* note 661, at 199, 201-02 (third alteration in original).

⁶⁷⁰ See *supra* note 669.

⁶⁷¹ The main grievance was that "provisions and merchandise were added to the list" on top of arms. Not to mention, "arbitrary searches were made of all containers, and sometimes passports were so drawn as to separate families." Letter From Joseph Palmer (June 19, 1775), in 3 PAPERS OF JOHN ADAMS, *supra* note 668, at 27, 29 n.2.

⁶⁷² HALBROOK, FOUNDERS', *supra* note 567, at 25-26; HALBROOK, THAT EVERY MAN BE ARMED: THE EVOLUTION OF A CONSTITUTIONAL RIGHT 58 (2d ed. 1994) [hereinafter HALBROOK, ARMED].

⁶⁷³ JOHN ADAMS, ADAMS' ARGUMENT FOR THE DEFENSE (Dec. 3-4, 1770), in 3 LEGAL PAPERS OF JOHN ADAMS 242, 248 (L. Kinvin Wroth & Hiller B. Zobel eds., 1965).

closing argument affirms that individuals had a right to own arms.⁶⁷⁴ In his closing argument Adams states, “Here every private person is authorized to arm himself, and on the strength of this authority, I do not deny the inhabitants had a right to arm themselves at that time, for their defence.”⁶⁷⁵

Many assumptions are made from this quotation without putting it into the context of Adams’ closing argument. First, Individual Right Scholars omit the remainder of the quote,⁶⁷⁶ which stated, “[T]he inhabitants had a right to arm themselves at that time, for their defence, not for offence, that distinction is material and must be attended to.”⁶⁷⁷ Second, Adams was talking about the legality of self-defense in the English Riot Act.⁶⁷⁸ He gives a lengthy and detailed account of how it was lawful to “repel force with force,” especially when an armed mob is approaching.⁶⁷⁹

Citing William Hawkins’ *Pleas to the Crown*, Adams stated: “[T]he killing of dangerous rioters, may be justified by any private persons, who cannot otherwise suppress them, or defend themselves from them; in as much as every private person seems to be authorized by the law, to arm himself for the purposes aforesaid.”⁶⁸⁰ Adams was not saying that individuals have a right to own arms. Rather, he was stating that when individuals are compelled to defend themselves, they “may be justified” in using the “arms” that are available.⁶⁸¹ This is made clear by Adams’ use of “at that time.” Most importantly, though, Adams cited the Riot Act. He made no reference to the 1689 Declaration of Rights’ “have arms” provision. He is merely paraphrasing Hawkins’ statement that “justifiable homicide in the due advancement of public justice.”⁶⁸²

⁶⁷⁴ HALBROOK, FOUNDERS’, *supra* note 567, at 25-26; HALBROOK, ARMED, *supra* note 672, at 58.

⁶⁷⁵ 3 LEGAL PAPERS OF JOHN ADAMS, *supra* note 673, at 248.

⁶⁷⁶ HALBROOK, FOUNDERS’, *supra* note 567, at 25.

⁶⁷⁷ 3 LEGAL PAPERS OF JOHN ADAMS, *supra* note 673, at 248.

⁶⁷⁸ *See id.* at 247-48.

⁶⁷⁹ *Id.* at 247.

⁶⁸⁰ *Id.* at 247-48 (citing WILLIAM HAWKINS, 1 A TREATISE OF THE PLEAS OF THE CROWN 74 (London, E. Nutt 1716)).

⁶⁸¹ *Id.*

⁶⁸² This portion of Hawkins reads:

If those who are engaged in a Riot, or a Forcible Entry, or Detainer, stand in their Defence, and continue the Force in Opposition to the Command of a Justice of Peace, & c. or resist such Justice endeavoring to arrest them, the killing of them may be justified (a): and so perhaps may the killing of dangerous Rioters by any private Persons, who cannot otherwise suppress them or defend themselves from them, inasmuch as every private Persons seems to be authorized by the Law to arm himself for the Purposes aforesaid.

HAWKINS, *supra* note 680, at 71.

Adams did not view arms ownership as right.⁶⁸³ He viewed it as a societal allowance. While Adams' legal knowledge made him an advocate for self-defense, nothing proves that he viewed arms ownership as a right to accomplish that end. In fact, if the Individual Right Theorists are correct, why did Adams not describe Gage's taking of arms in the *Declaration of the Causes and Necessity for Taking Up Arms* as infringing on their right to "have arms"? Not even the radical James Warren mentioned Gage's seizure of arms in such a fashion.⁶⁸⁴

Even if the main focus of the *Declaration of the Causes and Necessity for Taking Up Arms* grievance was the seizure of arms, James Macpherson's response did not describe it as a constitutional grievance. In his pamphlet entitled *The Rights of Great Britain Asserted Against the Claims of America*, Macpherson places the *Declaration of the Causes and Necessity for Taking Up Arms* grievance in its proper historical context.⁶⁸⁵ While the seizure of arms was certainly listed as part of a larger grievance, it did not violate the guarantee that "Protestants Subjects may have arms for their defence." That limited right was being exercised by the colonists.

The 1775 pamphlet *Resistance No Rebellion* addressed this and the "fifth auxiliary right" that the "have arms" provision affirmed. It was a right that was exercised twice against the Stuart monarchy. The first time was against Charles I's "despotic measures, totally contrary to the laws of the land, and wholly inconsistent

⁶⁸³ See JOHN ADAMS, A DEFENCE OF THE CONSTITUTIONS OF THE GOVERNMENT OF THE UNITED STATES OF AMERICA 475 (Da Capo Press 1971) (1787-1788). "Individual right" proponents also argue that Adams' *Defence of the Constitution of Government of the United States of America* supports their stance. They believe Adams viewed arms ownership as a right because he recognized the propriety of "arms in the hands of citizens, to be used . . . in private self-defence." *Id.* This is another quotation that Individual Right Scholars take out of context. Adams was actually articulating a principle that undercuts the "individual right" theory. He believed "arms in the hands of citizens, to be used at individual discretion" would be "to demolish every constitution, and lay the laws prostrate, so that liberty can be enjoyed by no man—it is a dissolution of government." *Id.* There were two exceptions to this rule that society may allow. These were (1) "private self-defence" and (2) through the militia "by partial orders of towns, counties, or districts of a state." *Id.* While the former allowance—self-defence—was not articulated as a right—fundamental, natural, or constitutional—the latter was described as "the fundamental law." As many proponents of the militia believed, Adams felt that "[t]he arms of the commonwealth should be lodged in the hands of that part of the people which are firm to its establishment." *Id.*

⁶⁸⁴ See 1 PAPERS OF JOHN ADAMS, *supra* note 660, at 3, 4.

⁶⁸⁵ Macpherson wrote:

The assertions of the Congress concerning transactions within the town of Boston, are as utterly devoid of truth, as their account of what happened in the country. The hostile intentions of those WITHIN, were as apparent as the rebellion of their brethren WITHOUT was certain. The great law of self-defence must therefore have justified General Gage for having deprived the former of arms, which they almost avowedly intended to raise against all legal authority. After the skirmish at Lexington and Concord, all supplies from the country were cut off from the town of Boston. Many of the inhabitants desired to remove, with their effects. Their request was granted; but it was at the same time demanded, that they should deliver up their arms.

MACPHERSON, *supra* note 657, at 74.

with the rights and freedom of the subject.”⁶⁸⁶ This forced “the people to have recourse to that resistance, which they had an unquestionable right to make use of, whenever it became absolutely necessary for the defence and preservation of their constitution.”⁶⁸⁷

The second time occurred during the Glorious Revolution. James II’s despotic acts “roused up the resentment of the nation, and obliged the people to make use of their right to resistance, in defence of their laws, liberties and religion; when they called over the Prince of Orange.”⁶⁸⁸ The American Colonies were justly entitled to this right:

That all English subjects have a right to resist any attempt, to subvert and set aside their laws, rights and the constitution; and that is their undoubted duty to do so—That the people of England did, at the happy Revolution, resist the tyrannical attempt of King James to subvert and destroy their laws, rights, and liberties.⁶⁸⁹

This is why the colonists had taken up arms. As the *Declaration of the Causes and Necessity for Taking Up Arms* stated, it was “in defence of the Freedom that is our Birthright . . . for the protection of our Property” that they had “taken up Arms.”⁶⁹⁰ The Olive Branch Petition similarly justified the colonists’ actions, stating that the government’s “measures and proceeding to open hostilities for enforcing them, have compelled us to arm in our own defence.”⁶⁹¹ This is a description that mirrors the language of the “have arms” provision—“arms for their defence.”⁶⁹²

⁶⁸⁶ RESISTANCE NO REBELLION: IN WHICH THE RIGHT OF THE BRITISH PARLIAMENT TO TAX THE AMERICAN COLONIES IS FULLY CONSIDERED, AND FOUND UNCONSTITUTIONAL 21-22 (1775).

⁶⁸⁷ *Id.*

⁶⁸⁸ *Id.* at 22.

⁶⁸⁹ *Id.* at 48. When the Boston Assembly gave instructions regarding the vote for independence, its representatives were reminded that they were on “the verge of a glorious Revolution.” Instructions of the Town of Boston to Their Representatives (1776), in 6 AMERICAN ARCHIVES: FOURTH SERIES 556, 556 (Washington, M. St. Clair Clarke & Peter Force 1846). In much the same light, Brunswick, Massachusetts legitimized its support for autonomy due to “their attachment to the system of legal Government established by the glorious Revolution.” John Ker, Address of the General Assembly of the Church of Scotland to the King (1776), in 6 AMERICAN ARCHIVES: FOURTH SERIES, *supra*, at 604, 604. Buckingham County, Virginia reminded its delegates regarding the vote for autonomy, that it was by the Glorious Revolution, “and the choice of the people, that the present royal family was seated on the throne of Great Britain.” *Id.* So it was that the Glorious Revolution came to be revered as the most important political ideal of American independence; when government becomes defective “or deviates from the end of its institution, and cannot be corrected, [be] that the people may form themselves into another avoiding defects of the former.” *Id.*

⁶⁹⁰ John Dickinson, John Dickinson’s Composition Draft (1775), in 1 THE PAPERS OF THOMAS JEFFERSON, *supra* note 661, at 204, 218.

⁶⁹¹ Second Petition From Congress to the King (July 8, 1775), in 1 THE PAPERS OF THOMAS JEFFERSON, *supra* note 661, at 219, 220.

⁶⁹² A better example can be found in Robinson Morris’s pamphlet *Considerations*. He states, “We possess a great and fine country; we have the most noble and beneficial dependencies; we have a fleet; we have an army; we have several hundred thousands, and

Even with this history readily available to them, Individual Right Theorists will argue that the Founding Fathers wanted to prevent the future seizure of arms that occurred in the American Revolution. To them, the Second Amendment was drafted to protect against such an event. It fixed any disparity between the “having of arms” and the right of resistance by stating that people’s right to “keep and bear Arms, shall not be infringed.” On its face, this argument would seem to make sense, but the Amendment makes a distinct reference to a “well organized militia.” The Supreme Court majority in *Heller* rationalized that such language helps explain the right and does not determine it.⁶⁹³ In other words, the majority determined that the right was separate and distinct from a “well organized militia.” It felt that the Founders’ terminology “keep and bear Arms” was a more precise and affirmative way to state “Protestant subjects may have arm for their Defence.”⁶⁹⁴

There is little denying that the two constitutional guarantees are similar. What separates the two is that the Second Amendment was not restricted by England’s socio-economic and hierarchal structure.⁶⁹⁵ In addition, it was a right that “shall not be infringed.” This is strong language that indicates just how limited the right is and its undoubted connection to a “well regulated militia.”⁶⁹⁶ Nevertheless, the *Heller* majority felt that “bearing arms” was synonymous with the carrying of arms, and “keeping arms” was another way of affirming gun ownership.⁶⁹⁷ The thirteen colonies’ use of these terms in their respective statutes undercuts this interpretation.⁶⁹⁸

perhaps a million of men capable of bearing arms in their own defence.” ROBINSON MORRIS, *CONSIDERATIONS* (1774), *reprinted in* *ENGLISH DEFENDERS OF AMERICAN FREEDOMS 1774-1778*, *supra* note 243, at 49, 89.

⁶⁹³ *District of Columbia v. Heller*, 128 S. Ct. 2783, 2801 (2008) (“The prefatory clause does not suggest that preserving the militia was the only reason Americans valued the ancient right; most undoubtedly they thought it even more important for self-defense and hunting.”).

⁶⁹⁴ *Id.* at 2798.

⁶⁹⁵ The Founders agreed with the writings of such seventeenth and eighteenth-century political philosophers as Algernon Sidney, James Harrington, David Hume, John Toland, John Trenchard, Walter Moyle, Andrew Fletcher, and Robert Viscount Molesworth—all of who agreed that the militia should consist of the free body of a nation’s people. See CHARLES, *SECOND AMENDMENT*, *supra* note 14, at 107-12; *IDEAL COMMONWEALTHS*, *supra* note 419, at 183, 183; DAVID HUME, *IDEA OF A PERFECT COMMONWEALTH*, *reprinted in* *ESSAYS: MORAL, POLITICAL, AND LITERARY* 512, 525 (Eugene F. Miller ed., 1985); Lawrence Delbert Cress, *Radical Whiggery on the Role of the Military: Ideological Roots of the American Revolutionary Militia*, 40 J. HIST. IDEAS 43, 47 (1979).

⁶⁹⁶ See CHARLES, *SECOND AMENDMENT*, *supra* note 14, at 8.

⁶⁹⁷ *Heller*, 128 S. Ct. at 2791-99.

⁶⁹⁸ The use of the phrase “bear arms” was only distinctly used in militia laws. There is not one instance of “bear arms” appearing in any self-defense, gun, hunting, or slave law. It is true that the Pennsylvania minority had proposed a “bear arms” provision that includes hunting, but this amendment never reached the floor of Congress or the Constitution’s drafting committee. There is also no proof that it even reached the floor of the Pennsylvania Ratifying Convention. Moreover, the Supreme Court and Individual Right Theorists only selectively incorporate the language of that proposal. See CHARLES, *SECOND AMENDMENT*, *supra* note 14, at 17-27, 39-40. The Supreme Court did not report one instance of the use of “keep arms” in a colonial law. The phrase can be found in many different forms in militia laws. The keeping

This includes the examples of Drayton's *Charge to the Grand Jury* and the Declaration of Independence. Both use "bear arms" in its proper military context.⁶⁹⁹ The *Heller* majority believes that the use of "bear arms" in examples such as these were technical in meaning, but are they?⁷⁰⁰ It is more sensible to argue that the phrase "keep and bear arms" was incorporated to remove any confusion that the "have arms" provision conveyed. To further clarify the right—so it would not be abused—it is just as rational to argue that the same is true with the phrase "well regulated militia," for these words and phrases were common only in the colonies' militia laws or in State constitutions.⁷⁰¹ It was England's 1757 Militia Act which

of arms did not necessarily mean that one owned or possessed the arms. It was verbage to describe the maintaining or servicing of military arms. *See id.* at 27-34.

⁶⁹⁹ Drayton accused Parliament and the king of passing a law "to make slaves of the crews of such vessels, and to compel them to *bear arms* against their conscience, their fathers, their bleeding country." 1 AMERICAN ELOQUENCE: A COLLECTION OF SPEECHES AND ADDRESSES, BY THE MOST EMINENT ORATORS OF AMERICA, *supra* note 619, at 50, 52. The charge even made the grievances in the Declaration of Independence. THE DECLARATION OF INDEPENDENCE (U.S. 1776). It dually accused the king of constraining "our fellow Citizens taken Captive on the high Seas to *bear Arms* against their Country, to become the executioners of their friends and Brethren, or to fall themselves by their Hands." 1 AMERICAN ELOQUENCE: A COLLECTION OF SPEECHES AND ADDRESSES, BY THE MOST EMINENT ORATORS OF AMERICA, *supra* note 619, at 50, 52. Both grievances do not make sense other than to interpret the use of "bear arms" in its military context. Even Lord Dunmore's Proclamation used "bear arms" in the proper military context. On November 7, 1775, he ordered "every Person capable of bearing Arms, to resort to his Majesty's STANDARD." John Earl, A Most Disagreeable but Absolutely Necessary Step, in 4 REVOLUTIONARY VIRGINIA: THE ROAD TO INDEPENDENCE, 334, 334 (Robert L. Scribner & Brent Tarter ed., 1978). He further declared that "all inden[tured] Servants, Negroes, or others, free that are able and willing to bear Arms." *Id.* The promise of freedom was meant to extend to only those who could perform military service—a fact that American opponents made sure to address. Spotsylvania County Committee, Assembled Freeholders Choose a Committee, in 4 REVOLUTIONARY VIRGINIA: THE ROAD TO INDEPENDENCE, *supra*, at 417, 419 n.18. Many viewed Dunmore's Proclamation as a trick to lure slaves. John Johnson thought it would be used to "subject many of these poor Wretches to the Loss of Life, [and] most severe punishment." John Johnson, Portsmouth Virginia, to Unidentified Addressee: An Intercepted Letter, in 4 REVOLUTIONARY VIRGINIA: THE ROAD TO INDEPENDENCE, *supra*, at 414, 415 (citation omitted). An address to the people of Williamsburg stated, "To none . . . is freedom promised, but such as are able to do Dunmore service." A Few Anonymous Remarks on Lord Dunmore's Proclamation, in 4 REVOLUTIONARY VIRGINIA: THE ROAD TO INDEPENDENCE, at 459, 461; *see also* PATRICK CHARLES, WASHINGTON'S DECISION: THE STORY OF GEORGE WASHINGTON'S DECISION TO REACCEPT BLACK ENLISTMENTS IN THE CONTINENTAL ARMY 52 (C. Thomas Long ed., 2005). It was argued that slaves be "flattered with their freedom, if they be able to bear arms." A Few Anonymous Remarks on Lord Dunmore's Proclamation, in 4 REVOLUTIONARY VIRGINIA: THE ROAD TO INDEPENDENCE, *supra*, at 459, 461.

⁷⁰⁰ District of Columbia v. Heller, 128 S. Ct. 2783, 2802 (2008).

⁷⁰¹ The terminology was likely borrowed from the English militia laws. In the House of Lords during the debates of the 1756 Militia Bill, the Earl of Stanhope stated, "[T]he only proper military force of a free country is a well regulated and well disciplined militia." 15 COBBETT, *supra* note 150, at 152. The language would become part of the 1757 Militia Act that was passed by the English government. It stated, "Whereas a well-ordered and well-disciplined Militia is essentially necessary to the Safety, Peace and Prosperity of this Kingdom." 30 Geo. 2, c. 3 (1757) (Eng.). In an Amelia County Committee address in

stated, “Whereas a well-ordered and well-disciplined Militia is essentially necessary

response to Dunmore’s seizure of gunpowder and neglect of the militia law, it was stated that the militia should “be properly and regularly disciplined, and that the patrollers in every neighborhood be constantly kept on duty.” Amelia County Committee, Preparations for Armed Conflict (May 3, 1775), in 3 REVOLUTIONARY VIRGINIA: THE ROAD TO INDEPENDENCE, *supra* note 603, at 82, 83. Similar language was used in the colonies’ militia laws and constitutions: “Whereas a well-regulated Militia, is the proper and natural Defence of a free State.” Act of 1778, ch. 20 Del. Laws (for better regulating a militia within this state), *microformed on* William S. Hein & Co. (HEIN); “Whereas a well regulated Militia is the proper and natural Defence of a free State, and as the Laws heretofore made for the Regulation thereof, are found to be inadequate for the good Purposes thereby intended.” Act of Feb. 5, 1782, Del. Laws (establishing a militia within the state), *microformed on* William S. Hein & Co. (HEIN); “Whereas a well regulated militia is the proper and natural defence of every free State: And as the several laws enacted by the Legislature of this state for the regulation of the militia thereof have been found to require material alterations; in order to which it has been thought more advisable to revise the whole system.” Act of June 18, 1793, ch. 36, 1793 Del. Laws (establishing a militia in this state), *microformed on* William S. Hein & Co., (HEIN); “That a well regulated Militia is the proper, natural and safe Defense of a free government.” DECLARATION OF RIGHTS AND FUNDAMENTAL RULES art. XVIII (Del. 1776), *available at* <http://www.lonang.com/exlibris/organic/1776-ddr.htm>; “Whereas a well ordered and well disciplined militia is essentially necessary to the safety, peace, and prosperity of this province.” Act of Mar. 25, 1765, Ga. Laws 33, 33 (providing for better ordering the militia of this province), *microformed on* William S. Hein & Co. (HEIN); “It is evident from the experience of ages, that to be prepared for war, is the greatest security of peace of a nation; and that a well organized Militia ought to be considered among the first objects of a free people.” Act of Feb. 2, 1798, Ga. Laws 21 (providing more effectual training to the Militia of this state), *microformed on* William S. Hein & Co. (HEIN); “Whereas the defence and safety of republican states must greatly depend on their militia which cannot be well organized and disciplined without arms and experienced officers.” Act of Feb. 18, 1799, Ga. Laws 76 (altering and amending the militia law of this state, and to provide arming the militia thereof), *microformed on* William S. Hein & Co., Inc. (HEIN); “That a well-regulated militia is the proper and natural defence of a free government.” MD. CONST. of 1776 art. XXV, *available at* <http://www.nhumanities.org/ccs/docs/md-1776.htm>; “Whereas it is a Duty and Interest of every State, to have the Militia thereof properly armed, trained and in compleat Readiness to defend against every Violence or Invasion whatever.” Act of March 2, 1781, Mass. Laws (for forming and regulating the Militia within the Commonwealth of Massachusetts), *microformed on* Redgrave Information Resourced Corp. (RIR); “A well regulated militia is the proper, natural, and sure defence of a state.” N.H. CONST. of 1784 art. XXIV, *available at* <http://www.lonang.com/exlibris/organic/1784-nhr.htm>; “Whereas it is necessary, in this time of danger, that the militia be well regulated and disciplined.” Act of Apr. 14, 1757, ch. 1, 1757 Va. Laws (for better regulating and disciplining the militia), *microformed on* William S. Hein & Co. (HEIN); “[D]ue regulation of the Militia is absolutely necessary for the defence of this country.” Act of May 9, 1723, ch. 2, 1723 Va. Laws (providing for the settling and better regulation of the militia), *microformed on* William S. Hein & Co., Inc. (HEIN); “Whereas the defence and safety of the Commonwealth depend upon having its citizens properly armed and taught the knowledge of military duty, and the differently laws heretofore enacted being found inadequate for such purposes, and in order that the same may be formed into one plain and regular system.” Act of Jan. 1, 1786, ch. 1, 1786 Va. Laws 1 (amending and reducing into one act, the several laws for regulating and disciplining the militia, and guarding against invasions and insurrections), *microformed on* Redgrave Information Resourced Corp. (RIR); “That a well regulated militia, composed of the body of people trained to arms, is the proper, natural, and safe defence of a free State.” DECLARATION OF RIGHTS art. XIII (Va. 1776), *available at* http://avalon.law.yale.edu/18th_century/virginia.asp.

to the Safety, Peace and Prosperity of this Kingdom.”⁷⁰² Virginia followed this language in its 1757 Militia Act when it proclaimed, “Whereas it is necessary, in this time of danger, that the militia of this colony should be well regulated and disciplined.”⁷⁰³ It should be stressed that the Constitution was written by the best legal minds America had to offer. They undoubtedly understood how the phrases “well regulated militia” and “keep and bear arms” were incorporated in their legal system. This was in the militia laws.

Moreover, the Constitutional Convention debated the inclusion of the “well regulated” language, which shows that the language was not just explanatory rhetoric. Eldridge Gerry was not pleased with the Amendment reading that a well regulated militia was the “best security of a free state.”⁷⁰⁴ He feared that although this insinuated that a militia was the “best security,” it also admitted that a standing army was a secondary choice.⁷⁰⁵ He moved that it should read, a “well regulated militia, trained to arms,” because this would make it the federal government’s duty to ensure that the militia was maintained.⁷⁰⁶ Although the motion was not seconded, the language, reading “being the best security of a free state,” eventually would be removed. The words “necessary to the” were put in place of “the best,” making the Amendment imply what Gerry wanted it to—that a well regulated militia was the only security of a free State.⁷⁰⁷

This limited interpretation of the Second Amendment is supported by the events that occurred during the infamous Shays’ Rebellion—the same rebellion that has been credited in aiding the formation of the United States Constitution.⁷⁰⁸ What has been lost in the history of the event is the 1780 Massachusetts Constitution. It explicitly protected the “right of the people to keep and bear arms for the common

⁷⁰² 30 Geo. 2, c. 25, § 1 (1757) (Eng.).

⁷⁰³ Ch. III, 7 LAWS OF VA. 93, 93 (Hening 1820) (enacted 1757).

⁷⁰⁴ THE COMPLETE BILL OF RIGHTS: THE DRAFTS, DEBATES, SOURCES, AND ORIGINS 188-89 (Neil H. Cogan ed., 1997). The Earl of Stanhope stated a similar phrasing in the House of Lords during the debates of the 1756 Militia Bill. Stanhope stated, “[T]he only proper military force of a free country is a well regulated and well disciplined militia.” 15 COBBETT, *supra* note 150, at 706. The language would become part of the 1757 Militia Act that was passed by the English government. It stated, “Whereas a well-ordered and well-disciplined Militia is essentially necessary to the Safety, Peace and Prosperity of this Kingdom.” 30 Geo. 2, c. 3 (1757) (Eng.).

⁷⁰⁵ The debates of the Second Amendment support the idea that they were trying to suppress the idea of standing armies. The colonists’ disdain for standing armies was reiterated many times in eighteenth-century documents, including a letter by John Cartwright. He wrote, “As for troops, a country containing millions of inhabitants, never can want any: let them rely upon the natural, the best resource—a national militia; but, for heaven’s sake! [N]ever more let the face of a British soldier be seen in North America.” John Cartwright, Letter X (Apr. 14, 1774), in ENGLISH DEFENDERS OF AMERICAN FREEDOMS 1774-1778, *supra* note 243, at 182, 186.

⁷⁰⁶ THE COMPLETE BILL OF RIGHTS, *supra* note 704, at 188.

⁷⁰⁷ *Id.* at 175.

⁷⁰⁸ Matthew Spalding, *The Formation of the Constitution*, in THE HERITAGE GUIDE TO THE CONSTITUTION 7 (2005); EDMUND S. MORGAN, THE BIRTH OF THE REPUBLIC 1763-89, at 135-36 (3d ed. 1994).

defence.”⁷⁰⁹ Despite this protection, the insurgents were forced to turn over their arms for a period of three years⁷¹⁰—a seizure that neither Benjamin Lincoln, James Madison, George Washington, nor any of the Founding Fathers, viewed as an infringement on a right to “have” or “keep and bear arms.”⁷¹¹ In fact, the right to “keep and bear arms” was defined by the Massachusetts legislature during the rebellion. In *An Act for the more speedy and effectual suppression of tumults and insurrections in the commonwealth*, the Massachusetts legislature resolved:

Whereas in free government, where the people have a right to keep and bear arms for the common defence, and the military power is held in subordination to the civil authority, it is necessary for the safety of the state that the virtuous citizens thereof should hold themselves in readiness, and when called upon, should exert their efforts to support the civil government and oppose attempts of factitious and wicked men who may wish to subvert the laws and constitution of their country.⁷¹²

The Act’s use of “keep and bear arms” clearly limits the right to service in the militia and in defense of the State. Although the Massachusetts constitutional protection did not expressly mention the militia, it was inherently understood, for the “bearing of arms” was eighteenth-century language in reference to the military use of arms.⁷¹³ The use of this language in all the colonies’ militia laws supports this.

⁷⁰⁹ MA. CONST. of 1780 art. XVII.

⁷¹⁰ On February 16, 1787, the Massachusetts government passed the following into law: That they shall keep the peace for the term of three years . . . and that during that term of time, they shall not serve as Jurors, be eligible to any town office, or any other office under the Government of this Commonwealth, and shall be disqualified from . . . giving their votes for the same term of time, for any officer, civil or military, within this Commonwealth, unless such persons, or any of them, shall after the first day of May, seventeen hundred and eighty-eight, exhibit plenary evidence of their having returned to their allegiance . . .

. . . .

That it shall be the duty of the Justice before whom any offender or offenders aforesaid may deliver up their arms, and take and subscribe the oath aforesaid . . . and it shall be the duty of the Justice to require such as shall take and subscribe the oath of allegiance, to subjoin their names, their places of abode, and their additions, and if required, to give to each offender who shall deliver up his arms . . . a certificate of the same under his seal . . . and it shall be the duty of such Major-General or commanding officer, to give such directions as he may think necessary, for the safe keeping of such arms, in order that they may be returned to the person or persons who delivered the same, at the expiration of said term of three years, in case such person or persons shall have complied with the conditions above-mentioned, and shall obtain an order for the re-delivery of such arms, from the Governour.

Disqualifying Act, ch. 6, 1787 Mass. Laws, *microformed on* Redgrave Information Resources Corp. (RIR).

⁷¹¹ See CHARLES, SECOND AMENDMENT, *supra* note 14, at 84-87.

⁷¹² Act of Feb. 20, 1787, ch. 9, 1787 Mass. Laws 564 (providing for the more speedy and effectual suppression of Tumults and Insurrections in the Commonwealth), *microformed on* Redgrave Information Resources Corp. (RIR).

⁷¹³ See CHARLES, SECOND AMENDMENT, *supra* note 14, at 23-27, 85-86.

Meanwhile, the Second Amendment expressly mentions a “well-regulated militia,” yet, the Supreme Court did not interpret that right as being limited to the militia. This is understandable given the Court’s reliance on Joyce Lee Malcolm’s research on the English “have arms” provision. Generally, any court that starts its legal interpretation with inaccurate information will end up with a conclusion much different than the original intent. One would think Article VI, Section 4 of the Articles of Confederation, the Constitution’s, removes any doubt on this issue. It read:

[N]or shall any body of forces be kept up, by any State in time of peace, except such number only as, in the judgement of the United States, in Congress assembled, shall be deemed requisite to garrison the forts necessary for the defence of such State; but every State shall always keep up a *well-regulated and disciplined militia*, sufficiently armed and accoutred, and shall provide and constantly have ready for use, in public stores, a due number of field-pieces and tents, and a proper quantity of arms, ammuniton, and camp equipage.⁷¹⁴

The Articles’ use of the language “well regulated and disciplined” mirrors the prefatory language of the Second Amendment and may have been the latter’s inspiration. The Supreme Court, however, failed to take notice of this connection.

XI. CONCLUSION

The idea that individuals have an Anglo-American constitutional right to “have arms” for personal self-defense is one of the greatest historical myths of all time. While Individual Right Scholars, supporters, and lobbyists have convinced the majority of Americans that such a right existed during the Founding and pre-Founding eras, much of the credit should be given to the contemporary understanding of the phrase “keep and bear arms.” Modern state constitutions have used the language to protect an individual’s right to possess arms for self-defense. There is no denying that some state constitutions undoubtedly protect such a right. It is within each state’s constitutional structure to do so. This fact, however, should not influence our interpretation of the Founders’ understanding of the right.

There exists no substantiating historical or legal evidence that Englishmen—of all classes—had an affirmative right to “have arms” for personal defense. The legal allowance to “have arms”—for all purposes—was based upon hierarchal and socio-economic status.⁷¹⁵ It cannot be stressed enough that the 1689 Declaration of Rights “have arms” provision did not apply to all laws respecting firearms.⁷¹⁶ It was not intended to be a blanket provision covering game and gun laws.⁷¹⁷ It was meant to serve only two purposes. The first purpose was to speak to the philosophical principle and the limited right of the people to rebel when all forms of redress against a tyrannical government had been exhausted⁷¹⁸—what Blackstone understood as the

⁷¹⁴ ARTS. OF CONFEDERATION. art. VI, § 4 (emphasis added).

⁷¹⁵ See *supra* pp. 363-65.

⁷¹⁶ See *supra* pp. 356-83.

⁷¹⁷ See *supra* pp. 386-403.

⁷¹⁸ See *supra* pp. 382-83, 387-88.

“fifth auxiliary right.”⁷¹⁹ However, as history shows, individuals did not necessarily need to possess the arms to exercise this right.⁷²⁰ The second purpose of the “have arms” provision was an allowance through the militia to possess certain armaments to defend the realm against invasion and to check unlawful standing armies⁷²¹—an interpretation supported by the works of Granville Sharp, St. George Tucker, and Samuel Adams.⁷²² In any case, it was an allowance that was intended to be regulated by Parliament “suitable to [an individual’s] condition and as allowed by law.”⁷²³

Furthermore, “arms for their defence” did not speak to individual self-defense.⁷²⁴ It was terminology that referred to defending the realm. Although “individual right” supporters can repetitively claim it spoke of an unfettered right to “have arms” for personal defense, repetition of the same opinion without substantiated historical evidence does not make it a fact. Their analysis of the history of the “have arms” provision is full of assumptions and opinion—maybe more so than facts. They even go so far to state that a parliamentary debate on the Gordon Riots of 1780 proves that all individual’s had a right to own guns.⁷²⁵ Not only was this debate non-contemporaneous with the adoption of the English “have arms” provision, but Individual Right Scholars understand neither the political climate of that debate nor the history because they take it out of context.⁷²⁶

In closing, the historical evidence shows that the Supreme Court majority in *Heller* and the *Nordyke* court were misled by Individual Right Scholars’ interpretation of the English “have arms” provision. Whether it will be reexamined by the Supreme Court in *McDonald v. City of Chicago* is another issue. Both the Ninth Circuit and the Seventh Circuit Court of Appeals certainly felt the history was still subject to litigation, and Supreme Court precedent supports this practice. It is well-established that the Supreme Court may reexamine constitutional history when recent scholarship shows historical disparities with the Court’s past decisions. Not to mention, this constitutional issue should be reexamined because the first step in deciding whether a right is incorporated through the Due Process Clause of the Fourteenth Amendment is whether it is “fundamental to the American scheme of justice.”⁷²⁷ In determining this test, the Supreme Court has traditionally examined

⁷¹⁹ See *supra* pp. 416-20.

⁷²⁰ See *supra* pp. 408-11; 30 Geo. 2, c. 25, § 32 (1757) (Eng.). The Founding generation also practiced this principle. Some states controlled and distributed the militia arms. CHARLES, SECOND AMENDMENT, *supra* note 14, at 73-79. Moreover, the federal government considered taking similar steps in enforcing its constitutional power to organize the militia, including collecting and storing all the militias’ arms. *Id.* at 76-79.

⁷²¹ See *supra* pp. 384-86. For American militia right, see *supra* pp. 433-34.

⁷²² For Granville Sharp see *supra* pp. 410-18. For St. George Tucker, see *supra* 417-21. For Samuel Adams see *supra* pp. 424-34.

⁷²³ See *supra* pp. 353-54, 403-04.

⁷²⁴ See *supra* pp. 371, 387-92, 414-16.

⁷²⁵ For the debates, see 21 WILLIAM COBBETT, THE PARLIAMENTARY HISTORY OF ENGLAND FROM THE EARLIEST PERIOD TO THE YEAR 1803, at 726, 726-54 (London, T.C. Hausard 1813).

⁷²⁶ SCHWOERER, DECLARATION OF RIGHTS, *supra* note 23, at 207, 222-24.

⁷²⁷ *Duncan v. Louisiana*, 391 U.S. 145, 149 (1968). See also *Smith v. Alright*, 321 U.S. 649, 665-66 (1944); *Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 575

the Anglo-American tradition of the right being asserted. Given that the Court only briefly touched upon this in *Heller*, it is highly probable it will be addressed again. If this happens, the weight of the historical evidence shows what the Court should do—not incorporate the Second Amendment through the Fourteenth Amendment’s Due Process Clause and possibly overturn *Heller*.

This history is also significant in understanding the Second Amendment as a “privilege and immunity” of the citizens of the United States, for the privilege of all citizens to defend the country predates even the 1689 Declaration of Rights and continued up to the Reconstruction.⁷²⁸ Although the Second Amendment may not have bound the states,⁷²⁹ the Founders were in agreement that the people must participate in defending the nation to understand liberty.⁷³⁰—a privilege that the Supreme Court has twice identified the Second Amendment as protecting. This prevented a standing army and the creation of a soldier class of citizens who felt they were superior to the citizens and liberties they protected.⁷³¹

It must be noted that, by the Reconstruction Era, there were some in Congress who viewed the Second Amendment as protecting the right to defend the home and property.⁷³² However, the Second Amendment was most frequently brought up in

(1985); *Coolidge v. New Hampshire*, 403 U.S. 604, 611 (1971); *Burnham v. Superior Court of California*, 495 U.S. 604, 611 (1985).

⁷²⁸ See 21 ANNALS OF CONG. 2420-21 (1809); 23 ANNALS OF CONG. 1023 (1812); 28 ANNALS OF CONG. 779 (1814); CONG. GLOBE, 36th Cong., 1st Sess. app. at 523 (1854) (“By enrolling the slaves in the militia, and yielding to their Constitutional right ‘to keep and bear arms’ . . . Congress would convert those foes into friends.”); CONG. GLOBE, 34th Cong., 1st Sess. app. at 482, 1070, 1078, 1090-91, 1122 (1856); CONG. GLOBE, 34th Cong., 3d Sess. 73 (1857); Letter of Joseph Tallmadge (Dec. 29, 1809), in 1 AMERICAN STATE PAPERS: MILITARY AFFAIRS 263, 266-67 (Walter Lowrie & Matthew St. Clair Clarke eds., Washington, Gales & Seaton 1832); On the Subject of the Organization and Discipline of the Militia of the United States (Feb. 27, 1827), in 3 AMERICAN STATE PAPERS: MILITARY AFFAIRS 597, 600 (Asbury Dickins & John W. Forney eds., Washington, Gales & Seaton 1860); Report of the board of officers relative to the militia (Nov. 28, 1826), in 3 AMERICAN STATE PAPERS: MILITARY AFFAIRS, *supra* at 388, 389; Application of New York for Amendments to the Militia System of the United States (Dec. 24, 1833), in 5 AMERICAN STATE PAPERS: MILITARY AFFAIRS 240, 241 (Asbury Dickins & John W. Forney eds., Washington, Gales & Seaton 1860).

⁷²⁹ In 1863, Mr. Bayard described the Second Amendment “as a to guard the States.” CONG. GLOBE, 37th Cong., 3d Sess. 729 (1863).

⁷³⁰ CHARLES, SECOND AMENDMENT, *supra* note 14, at 111-14; *Presser v. Illinois*, 116 U.S. 252, 265 (1886) (The Amendment prevents the states from “prohibit[ing] the people from keeping and bearing arms, so as to deprive the United States of their rightful resource for maintaining the public security[.]”); *United States v. Schwimmer*, 279 U.S. 644, 650 (1929) (Citing the Second Amendment, the Court held “the common defense was one of the purposes for which the people ordained and established the Constitution.”).

⁷³¹ *Id.* at 34-39, 111-14.

⁷³² Mr. Nye stated, “As citizens of the United States [Freedmen] have equal right to protection, and to keep and bear arms for self-defense.” CONG. GLOBE, 39th Cong., 1st Sess. 1073 (1866). Mr. Pomeroy stated that Freedmen “should have the right to bear arms for the defense of himself and family and his homestead.” *Id.* at 1182. Meanwhile, Mr. Davis stated that the Founding Fathers “were for every man bearing his arms about him and keeping them in his house, his castle, for his own defense.” *Id.* at 371; see also AKHIL REED AMAR, AMERICA’S CONSTITUTION: A BIOGRAPHY 325-26, 390-91 (2005).

congressional debates on whether the Reconstruction states could maintain a militia,⁷³³ granting Freedmen the right to vote,⁷³⁴ the disarming of Freedmen veterans or soldiers,⁷³⁵ and the organization of the United States militia itself⁷³⁶—all of which

⁷³³ In defending against disarming the unlawful militias in the South, Mr. Saulsbury voted against such a proposition because the Constitution “does not give power to Congress to disarm the militia of the State, or destroy the militia of a State, because [of the] . . . second amendment.” CONG. GLOBE, 39th Cong., 1st Sess. 914 (1866). No one questioned Saulsbury’s interpretation of the Second Amendment. Mr. Wilson, however, thought the disarming of southern militias in this instance lawful, despite the Second Amendment, because Congress has “the power to disarm ruffians or traitors, or men who are committing outrages against law.” *Id.* at 915. In other words, Congress had the power to disarm unlawful militias that were not in support of the Constitution or just government. Such militias were engaged in rebellion, as occurred in Shays’ Rebellion. CHARLES, SECOND AMENDMENT, *supra* note 14, at 83-87, 95. When Congress readdressed the issue of unlawful militias in 1868, Mr. Buckalew and Mr. Warner turned to the Second Amendment as protecting the right of the states to organize their militias. CONG. GLOBE, 40th Cong., 3d Sess. 83-85 (1868). No one questioned either Buckalew or Warner’s interpretation of the Second Amendment. *Id.* at 80-86. Mr. Willey expressed similar sentiments in 1867. CONG. GLOBE, 39th Cong., 2d Sess. 1848-49 (1867). For the other 1867 debates on this issue, see *id.* at 1574-79.

⁷³⁴ In 1864, Mr. Holman defended the right of black soldiers to bear arms in service of the militia when he stated, “[T]he right to bear arms is the peculiar right of the free citizen in a free Republic.” CONG. GLOBE, 38th Cong., 1st Sess. 1995 (1864). Holman went on to state black soldiers have a “high appreciation of the right to bear arms for the defense of his country.” *Id.* In 1866, Mr. Salusbury stated, “Those races who bear arms to defend a Republic must be allowed to participate in its Government.” CONG. GLOBE, 39th Cong., 1st Sess. 145 (1866). Mr. Farnsworth stated:

[W]e compel them to bear arms in support and defense of the Government, and also to that other important fact, that we tax them for the support of Government . . . [yet] that man has no right to a voice in the choice of his rulers, and has no lot or part in the Government.

Id. at 206. Thomas Williams stated, “He counts in the representation. He pays taxes, and must bear arms if necessary, and he has done it. No sensible man now pretends to doubt that he is a citizen, or can doubt it in view of these considerations.” *Id.* at 792. Mr. Pomeroy stated, “The ‘right to bear arms’ is not plainer taught or more efficient than the right to carry ballots.” *Id.* at 1183. In a report to defend the rights of Freedmen, the Address of the Swiss Conventions read:

But what would most disturb all our hopes would be to see those freedmen who had spilled their blood for the defense of the Union . . . [to be] deprived of those rights which are, in all republican Governments, the appanage of those brave men who are called to bear arms for their country.

Id. at 2801. In debating the Fourteenth Amendment, Mr. Barry stated, “The colored man having won the right to bear arms for the Republic, his claim to the elective franchise was but a logical sequence.” CONG. GLOBE, 42d Cong., 1st Sess. app. at 266 (1871).

⁷³⁵ Congress was upset with the disarming of black Union soldiers and not allowing Freedmen to serve in militias. Mr. Clarke stated, “[T]he brave black soldiers of the Union, disarmed and robbed by this wicked and despotic order . . . Many of these brave defenders of the nation paid for the arms with which they went to battle.” CONG. GLOBE, 39th Cong., 1st Sess. 1839 (1866). On May 23, 1866, it was reported to Congress:

More than twenty-five thousand colored men of Kentucky have been soldiers in the Army of the Union. . . . [I]n many instances [they] are scourged, beaten, shot at, and driven from their homes and families. Their arms are taken from them by the civil

discussed the limited nature of the Second Amendment in connection to the defense of the country. Thus, few will deny the Reconstruction Congress viewed the right to defend the nation as a privilege and immunity of United States citizens.⁷³⁷ Meanwhile, to argue that the Reconstruction Congress viewed “having arms” to defend the home as a “privilege and immunity” is less certain. This is due to the fact that there is substantial evidence in the congressional record that the Fourteenth Amendment’s framers were more concerned about the equal protection of arms laws⁷³⁸ rather than impeding on states’ and localities’ police power to regulate overall arms possession.⁷³⁹

authorities and confiscated for the benefit of the Commonwealth. The Union soldier is fined for bearing arms. Thus the right of the people to keep and bear arms as provided in the Constitution is infringed.

Id. at 2774 (alterations in original). In 1866, the Committee of Reconstruction reported that in South Carolina:

[P]ersons of color constitute no part of the militia of the State, and no one of them shall, without permission in writing from the district judge or magistrate, be allowed to keep a fire-arm . . . [and] not a pistol, musket or other fire-arm or weapon appropriate for purposes of war.

Ex. Doc. No. 118, CONG. GLOBE, 39th Cong., 1st Sess. 7 (May 23, 1866).

⁷³⁶ In debating the appropriations of arms to the militias, Mr. Nye stated that the Second Amendment protects “the right of the citizen to bear arms and the duty of the Government to furnish them when organized regularly as militia of the States.” CONG. GLOBE, 40th Cong., 2d Sess. 4325 (1868).

⁷³⁷ In 1861, Mr. Breckinridge stated, “The President has not only guaranteed, by his action, the right to bear arms, but he has invited the patriotic citizens of the United States to bear arms for the only noble purpose for which men can take arms—in defense of the Constitution and liberties of the people.” CONG. GLOBE, 37th Cong., 1st Sess. 1473 (1861).

⁷³⁸ Mr. Grinnell stated, “A white man in Kentucky may keep a gun; if a black man buys a gun he forfeits it and pays a fine of five dollars, if presuming to keep in his possession a musket which he has carried through the war.” CONG. GLOBE, 39th Cong., 1st Sess. 651 (1866). Mr. McKee stated, “We have one code for the white man, another for the black. Is this Justice?” *Id.* at 653. Mr. Trumbull stated, “The moment that any State does justice and abolishes all discrimination between whites and blacks in civil rights, the judicial functions of the Freedmen’s Bureau cease.” *Id.* at 941. Mr. Raymond stated, “[W]e have colored aliens enjoying advantages that native colored persons cannot enjoy; the one class may be made citizens by act of Congress and the other is absolutely debarred from it. Is it possible that the Constitution ever intended a distinction so invidious?” *Id.* at 1266. Mr. Harlan stated:

If the fangs of slavery had not originally pierced the Constitution, then, in the first days of the Union, when citizens were sent out to claim dominion over the unpeopled Territories . . . those governments once admitted as States, it would have been to organize their militia and bear arms, irrespective of color.

CONG. GLOBE, 40th Cong., 2d Sess. 1078-79 (1868).

⁷³⁹ Henry Brannon listed the right “to keep and bear arms” as a privilege of the citizens of the United States, but stated that it “does not grant the right to carry a weapon” nor does it “impair the state power of regulation and police in this respect.” HENRY BRANNON, A TREATISE ON THE RIGHTS AND PRIVILEGES GUARANTEED BY THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES 65, 92 (Cincinnati, W.H. Anderson & Co. 1901) (1873).

Not to mention, by 1868, only seventeen⁷⁴⁰ of the thirty-seven state constitutions protected some form of an “individual right” to “keep and bear arms.” This means that more than half the states did not view arms ownership in a light that supports the Individual Rights Scholars stance and did not view arms to defend the home as a right. Needless to say, incorporating a right to “have arms” for personal self-defense through the Privileges and Immunities Clause is not as strong of a case as Individual Right Scholars proclaim it is.⁷⁴¹ Even the constitutional commentators, after the

⁷⁴⁰ ALA. CONST. of 1867 art. I, § 28; CONN. CONST. of 1818 art. I, § 17; FLA. CONST. of 1868 art. I, § 22; GA. CONST. of 1868 art. I, § 14; IND. CONST. of 1851 art. I, § 32; KAN. CONST. of 1859, Bill of Rights, § 4; KY. CONST. of 1850 art. XIII, § 25; MICH. CONST. of 1850 art. XVIII, § 7; MISS. CONST. of 1868 art. I, § 15; MO. CONST. of 1865 art. I, § 8; N.C. CONST. of 1868 art. I, § 24; OHIO CONST. of 1851 art. I, § 4; OR. CONST. of 1857 art. I, § 21; PA. CONST. of 1838 art. IX, § 21; R.I. CONST. of 1842 art. I, § 22; TEX. CONST. of 1868 art. I, § 13; VT. CONST. of 1793 ch. I, art. IX. This is looking at each state’s constitution in a light most favorable to the “individual right” stance. However, out of these seventeen states, arguably eleven of these “bear arms” provisions could be interpreted as merely a militia right. See FLA. CONST. of 1868 art. I, § 22 (“[R]ight to bear arms in defence of themselves and the lawful authority of the State.”); GA. CONST. of 1868 art. I, § 14 (“[R]ight of the people to keep and bear arms shall not be infringed.”); IND. CONST. of 1851 art. I, § 32 (“[R]ight to bear arms for the defence of themselves and the State.”); KY. CONST. of 1850 art. XIII, § 25 (“[R]ight of the citizens to bear arms in defence of themselves and the State shall not be questioned.”); MO. CONST. of 1865 art. I, § 8 (“[R]ight to bear arms in defence of themselves and of the lawful authority of the State cannot be questioned.”); N.C. CONST. of 1868 art. I, § 24 (“[R]ight of the people to keep and bear arms shall not be infringed.”); OHIO CONST. of 1851 art. I, § 4 (“[P]eople have the right to bear arms for their defense and security.”); OR. CONST. of 1857 art. I, § 21 (“[P]eople shall have the right to bear arms for the defence of themselves and the State.”); PA. CONST. of 1838 art. IX, § 21 (“[R]ight of the citizens to bear arms, in defence of themselves and the State, shall not be questioned.”); R.I. CONST. of 1842 art. I, § 22 (“[R]ight of the people to keep and bear arms shall not be infringed.”); VT. CONST. of 1793 ch. I, art. IX. (“[P]eople have a right to bear arms for the defence of themselves and the State.”). For determining whether a state’s constitution possesses an “individual right” one should look at the state’s laws, constitutional conventions, and legislative history. See CHARLES, SECOND AMENDMENT, *supra* note 14, at 129-77.

⁷⁴¹ There were certainly members of Congress that viewed the Second Amendment as protecting an “individual right,” however, this has been overemphasized by Individual Right Scholars. Similar to their arguments on the English “have arms” provision, Individual Right Scholars ignore historical context in other areas of the legislative record to support their stance. See HALBROOK, ARMED, *supra* note 672, at 107-53. For instance, Individual Right Scholars argue the 1866 Freedman’s Bureau Act proves that the Reconstruction Congress wanted to secure a right to possess arms in the home. Randy E. Barnett, *Was the Right to Keep and Bear Arms Conditioned on Service in an Organized Militia?*, 83 TEX. L. REV. 237, 269 (2004) (reviewing H. RICHARD UVILLER & WILLIAM G. MERKEL, *THE MILITIA AND THE RIGHT TO ARMS, HOW THE SECOND AMENDMENT FELL SILENT* (2002)). However, the drafters may have been primarily concerned with protecting a militia right. The pertinent Freedman’s Bureau Act section states that citizens shall “have full and equal benefit of all laws and proceedings concerning personal liberty, personal security, and the acquisition, enjoyment, and disposition of estate, real and personal, including the constitutional right to bear arms.” 14 STAT. 176-77 (1866). Notice how the text “constitutional right to bear arms” is separated from the text “personal security.” *Id.* This is significant because Mr. Raymond also separated the Second Amendment from self-defense when he stated before Congress: “He has a defined status; he has a country and a home; a right to defend himself and his wife and children; a right to bear arms; a right to testify in the federal courts; he has all those rights that tend to

ratification of the Fourteenth Amendment, did not view the Second Amendment as protecting a right to possess arms in defense of the home.⁷⁴²

To its credit, the “individual right” argument of incorporation through the Privileges and Immunities Clause is substantially stronger than through the Due Process Clause, for while the history of the Anglo-American allowance to “have arms” shows that incorporation through the Due Process Clause is futile, depending on the Supreme Court’s interpretation of the Reconstruction’s history and weighing the interests of federalism, the Court majority could go either way on the Privileges and Immunities Clause.

elevate him.” CONG. GLOBE, 39th Cong., 1st Sess. 1266 (1866). This separation of text implies that the drafters were protecting the limited militia right. It must be remembered that Freedmen were often exempt from serving in the militia. CHARLES, SECOND AMENDMENT, *supra* note 14, at 58-60. Not to mention, it was the unlawful rebel militias that were preventing Freedmen Union soldiers and militia from maintaining their arms. *See supra* note 735. It is likely that it was this constitutional right to bear arms that Congress was protecting.

⁷⁴² BRANNON, *supra* note 739, at 65, 92; JOSEPH STORY, 2 COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 558-677 (Thomas M. Cooley ed., 1873) (failing to mention the Second Amendment as privilege and immunity of United States citizens); THOMAS COOLEY, GENERAL PRINCIPLES OF CONSTITUTIONAL LAW 270-71 (Boston, Brown, Little & Co. 1880) (stating that the Second Amendment “implies the right to meet for voluntary discipline in arms, observing in doing so the laws of public order”); THEOPHILUS PARSONS, THE PERSONAL AND PROPERTY RIGHTS OF THE CITIZEN OF THE UNITED STATES 188-89 (Hartford, S.S. Scranton & Co. 1878) (classifying the Second Amendment as a military right and duty); ALEXANDER PORTER MORSE, A TREATISE ON CITIZENSHIP 166, 179 (Boston, Little, Brown & Co. 1881) (“The right to bear arms is a matter of state regulation.”); JOSEPH STORY, A FAMILIAR EXPOSITION OF THE CONSTITUTION OF THE UNITED STATES 264-65 (Boston, Lawbook Exch. 1999) (1871) (classifying the Second Amendment as a militia right); ROGER FOSTER, 1 COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 249 (Boston, Boston Book Co. 1895) (declaring disbanding of state militias as a violation of the Second Amendment); GEORGE S. BOUTWELL, THE CONSTITUTION OF THE UNITED STATES, AT THE END OF THE FIRST CENTURY 359 (Boston, D.C. Heath & Co. 1895) (discussing how the Second Amendment prevents the federal government from depriving States of public security).