No. 08-1521

In The
Supreme Court of the United States

OTIS McDONALD, *et al.*,

Petitioners,

v.

CITY OF CHICAGO, ILLINOIS, *et al.*,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF FOR ENGLISH/EARLY AMERICAN HISTORIANS AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

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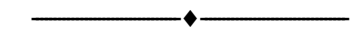
INTEREST OF *AMICI CURIAE*[1]

Amici Curiae are scholars and professional historians whose collective expertise covers the following areas: the history of Stuart England, the Restoration, the 1689 Glorious Revolution, the American Revolution, the Early Republic, American legal history, American Constitutional history, and Anglo-American history. Each has earned one or more advanced degrees in history, political science and/or law. The depth of knowledge they bring to the Court's inquiry in this case is reflected in the biographical information provided in the accompanying Appendix.

Amici Curiae have an interest in the Court having a well-informed and accurate understanding of the Anglo-American tradition to "have arms" from which the Second Amendment originated.



SUMMARY OF ARGUMENT

The ultimate question in this case is whether the Second Amendment is a right that is "deeply rooted in

[1] No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae*, or their counsel, made a monetary contribution to its preparation or submission. The parties have received at least 7 days written notice from *amici* pursuant to the blanket consents on file herein.

this Nation's history and tradition" and "necessary to the Anglo-American conception of ordered liberty that we have inherited" such that it applies to the states through the Fourteenth Amendment's Due Process Clause. *Duncan v. Louisiana*, 391 U.S. 145, 149 (1968).

In *District of Columbia v. Heller*, 128 S.Ct. 2783, 2798-99 (2008), the Court examined the English Declaration of Rights of 1689, correctly finding that the right to "have arms" in Article VII is the basis of the right enshrined in the Second Amendment. The Court also correctly recognized that the Second Amendment right to bear arms was an individual right to have and use arms for "self preservation and defense" as in its English predecessor. However, contrary to discredited scholarship upon which *Heller* relied, the right to "have arms" embodied in the English Declaration of Rights did not intend to protect an individual's right to possess, own, or use arms for private purposes such as to defend a home against burglars (what, in modern times, we mean when we use the term "self-defense"). Rather, it referred to a right to possess arms in defense of the realm. Accordingly, the right to own or use arms for private purposes is not a right deeply rooted in our nation's tradition, and should not be incorporated as against the states by the Fourteenth Amendment.

The "have arms" provision in the English Declaration of Rights, which was later codified as the Bill of Rights, provided two protections to the individual. First, the right to "have arms" gave certain persons

(qualified Protestants) the right to possess arms to take part in defending the realm against enemies within (i.e., Catholics) as well as foreign invaders. Second, the grant of a right to "have arms" was a compromise of a dispute over control of the militia that gave Parliament concurrent power (with the sovereign) over arming the landed gentry. It allowed Parliament to invoke its right of "self-preservation" and "resistance" should the sovereign usurp the laws, liberties, estates, and Protestant religion of the nation.

The Court "throughout its history has freely exercised its power to reexamine the [historical] basis of constitutional decisions." *Smith v. Allwright*, 321 U.S. 649, 665-66 (1944). *See also Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 574-75 (1993); *United States Term Limits v. Thornton,* 514 U.S. 779, 788-800 (1995). That the *Heller* decision is recent only weighs in favor of quick action by the Court to correct its error of historical interpretation. *South Carolina v. Gathers*, 490 U.S. 805, 825 (1989) (Scalia, J., dissenting) (overruled by *Payne v. Tenn.*, 501 U.S. 808 (1991)).

As set forth below, reconstructing the historical meaning of the right to "have arms" deserves better than Petitioners' selective reading and mischaracterization of Blackstone's reference to the "natural right of resistance and self-preservation," the 1768 Boston Town Council's militia resolve, and the grievance against Thomas Gage expressed in the *Declaration of the Causes and Necessity for Taking Up*

Arms. In order to understand what the right to "have arms" meant to the Founders, we must examine Parliament's purpose in codifying the right to "have arms," and review the political protection this right afforded, as well as what Blackstone and St. George Tucker meant by the "natural right of resistance and self-preservation," based on contemporaneous use of those terms. The evidence compiled by scholars discussed herein shows that the Second Amendment gave individual United States citizens the right to take part in the militia to defend their political liberties and to restore their Constitution should, as Blackstone wrote, "the sanctions of society and laws [be] found insufficient to restrain the violence of oppression." It is this right of "self-preservation" and "resistance" that the Boston Town Council invoked in 1768 and the American colonies exercised when they rebelled against England.

Nothing in this brief challenges the fact that eighteenth-century Americans valued the concept of a well-armed citizenry. Nor do the English and Early American Historians express a view here on policy or the wisdom of state laws concerning gun ownership or use of guns for defense of the home. *Amici* simply urge that the Court base its decision on a well-informed study of historical facts, which demonstrates that armed self-defense of the home by individuals acting for private interests was not the right enshrined in the Second Amendment.

ARGUMENT

I. THE SUPREME COURT SHOULD RE-EXAMINE PRIOR FINDINGS IN LIGHT OF SOUNDER SCHOLARSHIP WHEN INTERPRETING RIGHTS IN THE CONSTITUTION

The Court has in the past reexamined the historical underpinnings of its rulings where appropriate. *See*, *e.g.*, *United States Term Limits v. Thornton*, 514 U.S. 788-800 (1995) (examining historical analysis in prior decision and considering new scholarship bearing upon the interpretation of U.S. Const. art. I, § 2, art. I, § 3, cl. 7 (Qualifications Clauses)). In *Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 575 (1993), Justice Souter's concurrence recommended that the Court reconsider the rule of *Employment Div. v. Smith*, 494 U.S. 872, 874 (1990), based on "recent scholarship raising serious questions about the *Smith* rule's consonance with the original understanding and purpose of the Free Exercise Clause." Such reconsideration does not conflict with principles of *stare decisis*. *Id*. Moreover, that the *Heller* decision is recent weighs in favor of such an undertaking, as the opinion has not yet acquired the stature that accompanies age. *See South Carolina v. Gathers*, 490 U.S. 825 (noting that "the respect accorded prior decisions increases, rather than decreases, with their antiquity, as the society adjusts itself to their existence, and the surrounding law becomes premised upon their validity. The freshness of error not only deprives it of the respect to

which long-established practice is entitled, but also counsels that the opportunity of correction be seized at once, before state and federal laws and practices have been adjusted to embody it.").

In this case, the Court is called upon to examine the Anglo-American tradition of the right enshrined in the Second Amendment in order to determine whether that right is "fundamental to the American scheme of justice" and hence, incorporated under the Due Process Clause to the states. *Duncan v. Louisiana*, 391 U.S. 145 (1968). The Court should undertake its examination of the origins of the Second Amendment afresh in order to properly decide the question presented here.

II. THE ALLOWANCE OF A RIGHT TO "HAVE ARMS" SET FORTH IN THE 1689 DECLARATION OF RIGHTS WAS THE PRECURSOR TO THE SECOND AMENDMENT

A. *Heller* Recognized This Historical Fact and Its Critical Importance to Interpreting the Second Amendment

Heller correctly found that the English right to "have arms" was an expression of the same right that has "long been understood to be the predecessor to our Second Amendment." *Heller*, 128 S.Ct. at 2798. The Court also correctly noted "the historical reality that the Second Amendment was not intended to lay down a 'novel principl[e],' but rather codified a right

'inherited from our English Ancestors'[.]" *Id*. at 2801-02. Moreover, the Court's ultimate conclusion that this was an "individual" right that related to "defensive purposes" was not, strictly speaking, inaccurate. Where the Court erred was by interpreting the quoted terms in a manner divorced from their historical context, reading "individual" to mean "private," "defence" to mean "defense against harm by private individuals acting for private purposes" and equating "self-preservation" with the modern usage of the term "self-defense." In doing so, the Court relied heavily on the scholarship of Joyce Lee Malcolm.[2] The overwhelming consensus among leading English historians, however, is that Malcolm's work is flawed on this point.[3] The origins of the Second Amendment in the English right to "have arms" demonstrate that this right of self-preservation/self-defense gives individuals the right to collectively defend their public interests against organized assault or tyranny, not only in case of a foreign invasion, but, in 1689, in the event of a Catholic plot to overthrow English Protestants. Moreover, the right of "self-preservation"

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[2] JOYCE LEE MALCOLM, TO KEEP AND BEAR ARMS: THE ORIGINS OF AN ANGLO-AMERICAN RIGHT (1994).

[3] *See, e.g*., LOIS G. SCHWOERER, THE DECLARATION OF RIGHTS, 1689, at 74-78 (1981); Lois G. Schwoerer, *To Hold and Bear Arms: The English Perspective*, 76 CHI.-KENT L. REV. 27 (2000); TIM HARRIS, REVOLUTION: THE GREAT CRISIS OF THE BRITISH MONARCHY, 1685-1720, at 343 (2006); David T. Konig, *Why the Second Amendment Has a Preamble: Original Public Meaning and the Political Culture of Written Constitutions in Revolutionary Americ*a, 56 UCLA L. REV. 1295 (2009).

was to be exercised not by individuals acting privately or independently, but as a militia organized by their elected representatives, whether Parliament, the Boston Town Council, or otherwise.

B. The Meaning of the Terms "Self-Defense" and "Self-Preservation" in the Time Period Leading Up to the English Bill of Rights

The doctrines of "self-defense" and "self-preservation" referenced in the debates leading to the 1689 Declaration of Rights surfaced earlier in the 1642 English Civil War,[4] during which the King and Parliament struggled over the division of governmental power, especially with respect to control over the militia.[5] The interest at stake, however, was not protection of the bodily "self" that we think of when we use these terms today. Rather, the "self" referred to by these speakers was the public "self" – the collection of rights that lay at the heart of an Englishman's identity, which were intended to be protected by his elected representatives in Parliament. (Thus, the word "people" was also frequently used interchangeably with "Parliament.") Following

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[4] J.G.A. POCOCK, THE MACHIAVELLIAN MOMENT: FLORENTINE POLITICAL THOUGHT AND THE ATLANTIC REPUBLICAN TRADITION 409-10 (2003).

[5] LOIS G. SCHWOERER, NO STANDING ARMIES!: THE ANTIARMY IDEOLOGY IN SEVENTEENTH-CENTURY ENGLAND 33-50 (1974).

the work of Hugo Grotius (1583-1645),[6] numerous political pamphlets of that era show that "self-preservation" referred to the philosophical principle that the people are entitled to use force (and arms if necessary) to restore their rights should the sovereign violate the laws, liberties, religion, and estates of the realm.[7]

For instance, in *A Vindication of Psalme 105.15*, William Prynne defended Parliament's exercise of what he referred to as the right of "self-preservation" because "it is more unlawfull for Kings to plunder and make War upon their Subject[s] by way of offence, then for the Subjects to take up Armes against Kings in such cases by way of defence."[8] Similarly, in a 1643 pamphlet entitled *A Plea for Defensive Armes*, Stephen Marshall addressed

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[6] HUGO GROTIUS, *Of War Made by Subjects Against their Superiors,* THE RIGHTS OF WAR AND PEACE (1608).

[7] For further discussion *see* Patrick J. Charles, *The Right of Self-Preservation and Resistance*: *A True Legal and Historical Understanding of the Anglo-American Right to Arms*, 2010 CARDOZO L. REV. DE NOVO 18, 24-35 (2010).

[8] WILLIAM PRYNNE, A VINDICATION OF PSALME 105.15, at 1 (1642). In 1643, Prynne made a similar statement when he explained that Parliament must "defend their owne and the Subjects Liberties, persons, privileges, [etc.] against his Majesties offensive Armies which invade them." WILLIAM PRYNNE, THE THIRD PART OF THE SOVERAIGNE POWER OF PARLIAMENTS AND KINGDOMES 4 (1643). 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." *Id*.

whether "a people, especially the representative body of a State, may (after all humble Remonstrances) defend themselves against the unlawfull violence of the Supr[eme] Magistrate ... Endeavoring ... to deprive them of their lawfull Liberties."[9] Marshall knew, of course, that the existing law of the realm gave the power to array the militia to the sovereign. However, he argued that Parliament could lawfully array the militia to "take up these Defensive arms" for the "benefit of preservation[.]"[10] Another tract entitled *The Cause of God and of these Nations* described the removal of Charles I from the throne as an "[a]ction for *self-preservation*" because the King had "forfeited the *security* we might have laid upon him[.]"[11]

Use of the rhetoric of "self-preservation" and "defense of themselves" in this fashion was not limited to the pamphleteers. During the papist scare of 1643 members of Parliament repeatedly cited "self-preservation" as justification for Parliament to call upon the county militias. For instance, Warwickshire's militia was arrayed "in the mutual Preservation and Defence of themselves, and the Peace of the said Cities and Counties from all Rapine, Plundering, and Spoiling of said Papists, and ill-affected Persons." In this case, Parliament appealed to those that might

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[9] STEPHEN MARSHALL, A PLEA FOR DEFENSIVE ARMES, at 3 (1643).

[10] *Id*. at 24-25.

[11] THE CAUSE OF GOD, AND OF THESE NATIONS 3 (1658).

"murmur and complain" about being arrayed. Such qualified subjects were reminded that the array was "required of them for their own Preservation, as well as for the publick Safety."[12]

During the Glorious Revolution of 1688-89, which laid the foundation for modern parliamentary democracy, the right of "self-preservation" was again invoked. Thus, Gilbert Burnet's 1688 political tract addressed whether it was "Lawful or Necessary for *Subjects*, to Defend their *Religion, Lives*, and *Liberties*."[13] Invoking the right of "self-preservation," Burnet asserted that the "common principles of all Religion bind the people to preserve themselves and their rights."[14] In another political pamphlet, Robert Ferguson supported Parliament's exercise of the political right of "self-preservation," holding that right to be superior to the 1662 Militia Act's prohibition against the taking up of arms against the sovereign.[15]

Similar to what John Locke penned in *The Second Treatise of Government*,[16] Samuel Johnson

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[12] 5 HISTORICAL COLLECTIONS OF PRIVATE PASSAGES OF STATE 102-27 (1721).

[13] GILBERT BURNET, AN ENQUIRY INTO THE MEASURES OF SUBMISSION TO THE SUPREAM AUTHORITY 2 (1688).

[14] *Id*.

[15] ROBERT FERGUSON, A BRIEF JUSTIFICATION OF THE PRINCE OF ORANGE'S DESCENT INTO ENGLAND (1689).

[16] JOHN LOCKE, THE SECOND TREATISE OF GOVERNMENT §§ 199-210, 220 (1690). *See also* Steven J. Heyman, *Natural Rights and*

(Continued on following page)

argued that "Everyman has the Right of Self-Preservation, as [e]ntire under the Civil Government, as he had in a state of Nature" when government engages in "acts of Illegal Violence ... and armed with no manner of Authority at all[.]"[17] William Denton wrote of his belief that the people are only bound to "submit to such Laws as may preserve themselves in Peace, and Godliness, and from unjust Violence, and Oppression[.]"[18] However, "if Kings Tyrannize over the People," Denton argued the people may exercise the right of "self-preservation" because such acts are "against the Law of Nature, and consequently against the Law of God; for ... all acts of Tyranny are Oppression, and sinful Justice, and therefore cannot be from God."[19]

The term "self-defence" was used in the same sense: principled rebellion of the people against tyranny. In 1649 James Howell described Parliament's rebellion against Charles I as "self-defense."[20] In a 1689 tract entitled *The History of Self-Defence in Requital to the History of Passive Obedience*, an anonymous writer asserted that "Subjects [may] lawfully defend themselves against

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the Second Amendment, 76 CHI.-KENT L. REV. 237, 241-50 (2000).

[17] SAMUEL JOHNSON, REMARKS UPON DR. SHERLOCK'S BOOK 54 (1689).

[18] WILLIAM DENTON, JUS REGIMINIS 47 (1689).

[19] *Id*.

[20] JAMES HOWELL, AN INQUISITION AFTER BLOOD 4-5 (1649).

the Encroachments of Princes upon their Laws and Liberties."[21] The author sums up the principle of lawful rebellion by stating:

> [Until there are] better Arguments for Non-resistance than we have yet seen, we must take the Liberty to say, that in order to the preserving of our Lives against a Tyrant that would take them away, we may as warrantably make use of Self-Defense[.][22]

C. The History of the Declaration of Rights Demonstrates the Nature of the Right Granted by the Second Amendment

1. Political and Historical Background of the Declaration of Rights

Article VII of the Declaration of Rights provides "That the subjects which are Protestants may have arms for their defence suitable to their conditions and as allowed by law." To interpret this provision, one must first understand the forces behind it. Joyce Lee Malcolm argued in the work relied upon in *Heller* that popular dissatisfaction with the game laws, coupled with the Stuart monarchy's widespread disarmament of Protestants, led Parliament to draft a

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[21] THE HISTORY OF SELF-DEFENCE IN REQUITAL TO THE HISTORY OF PASSIVE OBEDIENCE 22 (1689).

[22] *Id*. at 30. For additional examples, *see* Charles, *The Right of Self-Preservation*, *supra*, at 33-35.

provision that ensured Protestants a right to "have arms" for private self-defense.[23] *Amici*, based on a wealth of scholarship, disagree with Malcolm's conclusions.[24] Contrary to Malcolm's view, the "have arms" provision was the result of a political dispute over whether ultimate control over the militia[25] – the fighting force composed of qualified subjects of the realm – resided with the sovereign, or in Parliament.

Immediately prior to the 1662 Militia Act, Parliament, not the sovereign, held control over militia. The prevailing view, as reflected in a 1658 tract entitled *The Leveller* was that it was "prudent and safe for the People to be masters of their own Arms, and to be commanded in the use of them by a part of themselves, (that is their Parliaments) whose interest is the same with theirs."[26] (Notably, people were "masters of their own arms" if they were

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[23] MALCOLM, *supra*, at 116-31.

[24] *See supra* note 3 and *generally* 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 No. 3 CLEV. ST. L. REV. 351 (2009).

[25] In his treatise entitled AN ARGUMENT SHEWING, THAT A STANDING ARMY IS INCONSISTENT WITH A FREE GOVERNMENT 4 (1697), John Trenchard describes the militia as consisting "of the same persons as have the property," which is consistent with the militia statutes of the realm that required members to hold property.

[26] THE LEVELLER 9 (1658).

"formed into such a Constant military posture, by and under the commands of their Parliament.")[27]

However, when Charles II was restored to the throne in 1660, control over the militia was placed in the sovereign's hands.[28] The 1662 Militia Act proclaimed that "both or either of the Houses of Parliament cannot nor ought to pretend [to have command of the militia] ... nor lawfully may raise or levy any War offensive or defensive" against the sovereign.[29] The 1662 Militia Act thus expressly prevented Parliament from exercising the right of "self-preservation" against the tyranny of the king.[30]

The 1662 Militia Act provided for the King to appoint Lieutenants who had the power to call and assemble the militia: to "arm and array them" according to hierarchal and socio-economic status "in case of Insurrection, Rebellion or Invasion."[31] The same Lieutenants also had the power to disarm, as they were authorized 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" judged "dangerous to the Peace of

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[27] *Id*. at 8.

[28] 13 Car. 2, c. 6 (1661) (Eng.); 13 & 14 Car. 2, c. 3 (1662) (Eng.).

[29] 13 & 14 Car. 2, c. 3, § 1 (1662) (Eng.).

[30] Charles, *Right of Self-Preservation*, *supra*, at 44-56.

[31] 13 & 14 Car. 2, c. 3, § 1 (1662) (Eng.).

the Kingdome."[32] This search and seizure provision was "for the better securing the Peace of the Kingdome" and was not questioned until the employment of Catholic Lieutenants by James II.[33] Until then, the historical record provides numerous instances of governmental disarmament of various "dangerous, disaffected, and unqualified persons," both Catholic and Protestant.[34]

2. James II's Employment of Catholic Lieutenants Led to the Codification of the Parliamentary Allowance to "Have Arms" to Defend the Nation and Exercise the Right of "Self-Preservation"

Although the 1662 Militia Act placed power over the militias in the hands of the sovereign, Parliament could still rely on the Test Acts to ensure that only qualified Protestants could take part in defending the nation and their liberties, as these laws prevented Catholics from serving as Lieutenants. The Test Acts required, for example, "all and every person or persons ... admitted ... into any Office or Offices Civill or Military" to take oaths attesting to disbelief in the doctrine of transubstantiation, a central tenet of

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[32] *Id.* § 13.

[33] *Id.*

[34] Charles, *Arms for Their Defence*, *supra*, at 373-79.

the Catholic faith.[35] James II, however, who ascended to the throne in 1685, proceeded to appoint Catholics as Lieutenants in violation of the Test Act. The King's grant of power to Catholics to arm the militia and disarm persons deemed "disaffected" gave rise to a fear amongst Protestants that England would be overthrown by Catholics. It was this fear – reflected in the February 1689 Heads of Grievances – that would lead to the drafting of the Declaration of Rights' "have arms" provision.[36]

As early as 1680, Francis Winnington expressed his concern over the threat a Catholic army posed. He knew the "Militia of London" could "disarm men at discretion" if they pleased. If the militia was composed of Catholics, it was possible for papists to disarm all the Protestants at any time.[37] Despite this ongoing fear, James made clear his intent to continue the Catholic appointments. 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.[38] Members of Parliament, however, were not convinced. Thomas Clarges stated he felt a "great difference" toward such

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[35] 25 Car. 2, c. 2, § 2 (1672) (Eng.).

[36] SCHWOERER, DECLARATION, *supra*, at 22-23.

[37] 8 ANCHITELL GREY, DEBATES ON THE HOUSE OF COMMONS 165 (1769).

[38] 4 WILLIAM COBBETT, THE PARLIAMENTARY HISTORY OF ENGLAND 1369 (1808).

an action and was "afflicted greatly at this Breach of our Liberties."[39]

Another member of the House viewed the employment of Catholic Lieutenants as "dispensing with all the Laws at once."[40] 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."[41] John Maynard predicted these employments would lead to the disarming of purportedly disaffected Protestants. Citing the 1662 Militia Act, Maynard reminded the House that not only was it now illegal to take up arms against the King,[42] but that "lords-lieutenants, and deputy-lieutenants, have power to disarm the disaffected."[43] He felt that if Parliament acquiesced in the formation of an army with Catholic officers, it would be providing James II with the means of destroying England. Maynard argued that the Test Act was not a "punishment for the Papists, but a protection for ourselves."[44] (Note that here, too, Maynard's reference to "protection of ourselves" does not refer to private self-defense.)

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[39] *Id.* at 1373.

[40] *Id.* at 1374.

[41] *Id.*

[42] 13 & 14 Car. 2, c. 3, § 1 (1662) (Eng.).

[43] 4 COBBETT, *supra*, at 1374-75.

[44] *Id.* at 1375.

The burdens that creation of a standing army could cause,[45] coupled with the highly unpopular employment of Catholic Lieutenants, was a contributing factor to the Glorious Revolution and James II's removal from the throne, as well as the right to "have arms" in the 1689 Declaration of Rights.[46] What would become the Declaration of Rights was initially drafted as the Heads of Grievances by a committee chaired by George Treby. Numbers 5, 6 and 7 of the Heads of Grievances read as follows:

> 5. The Acts concerning 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. [I]t [is] necessary to the public safety that the Subjects, which are Protestants, should provide and keep arms for the common defense, and that arms, which have been seized and taken from them be restored.'"[47]

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[45] The standing army grievance was not real, but propaganda. SCHWOERER, DECLARATION, *supra*, at 71-74.

[46] The Scottish Claim of Right confirms this. *See* David T. Konig, *The Second Amendment: A Missing Transatlantic Context for the Historical Meaning of "the Right of the People to Keep and Bear Arms*," 22 LAW & HIST. REV. 119 (2004).

[47] 10 H.C. JOUR. 17 (1802).

The last portion of the seventh Grievance – "and arms that have been seized from them be restored" – was removed five days later,[48] indicating that the disarmament referenced was potential rather than factual.[49]

Contrary to Petitioners' claim, Parliament's concern as expressed by the Grievances was not with the various searches and seizures of arms conducted pursuant to the 1662 Militia Act. Rather, it was a reaction to a fear of rule by Catholic armies. This is demonstrated by the fact that at no time during any of the debates to revise the Militia Act did either House of Parliament seek to alter the search and seizure of arms provision.[50]

Indeed, disarmament of disaffected people was a remnant from the Interregnum,[51] continued upon the Restoration of Charles II, and popularly supported even following the accession of William & Mary of Orange.[52] By 1666, it was even generally accepted

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[48] SCHWOERER, DECLARATION, *supra*, at 75.

[49] Charles, *Arms for Their Defence*, *supra*, at 363-79.

[50] When the 1662 Militia Act was adopted, Parliament supported its provisions. *See* 4 Cobbett, *supra*, at 245-46. Following the Glorious Revolution, Parliament supported the search and seizure of arms provision and did not attempt to alter it. 5 Cobbett, *supra*, at 342 (William Williams was for executing "the laws as they are, and ... [for forming] the Militia as well as [the Lieutenants] can").

[51] ACTS AND ORDINANCES OF THE INTERREGNUM, 1642-1660, at 74-76, 648-50, 992-94, 1233-51 (1911).

[52] *See supra* note 49.

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."[53] This was affirmed again in 1678 after the Popish Plot.[54] 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.[55] Parliament wholeheartedly agreed with the Militia Act's search and seizure provision; Sawyer summed up its consensus on the matter by stating, "By Law, when the Kingdom is in danger, those persons who are the authors of that danger should be secured."[56]

When William and Mary assumed the throne and Parliament proposed a new militia bill, the search and seizure provision was never mentioned in debate. William of Orange sought to put the militia "into some better Posture"[57] and the House of Commons worked to accomplish this objective. The Militia bill was referred to a committee of thirty-eight members, including Richard Temple, Mr. Sacheverell, Sir

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[53] J.R. WESTERN, THE ENGLISH MILITIA IN THE EIGHTEENTH CENTURY 32 (1965).

[54] 6 ANCHITELL GREY, DEBATES OF THE HOUSE OF COMMONS 211 (1769).

[55] *Id.* at 215.

[56] *Id.* at 216.

[57] 10 H.C. JOUR. 200 (1802).

William Williams, and Mr. Boscawen,[58] each of whom had shown dissatisfaction with the disarming of the Protestant militia during the Declaration of Rights' Convention. However, these members and Parliament supported the seizure of arms, as long as the power to do so was held by loyal people (Protestants) and not by treasonous Catholics.[59]

Long after the English Bill of Rights granted the right to "have arms," disarmament pursuant to the 1662 Militia Acts continued unchecked with popular support. In 1701, William granted monetary rewards for arms seized from dangerous or disaffected persons.[60] Far from objecting to these seizures as a violation of the "have arms" provision, Parliament "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"[61] and hoped the King would "give directions" for a further search of arms.[62]

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[58] *Id*. at 102-03.

[59] The search and seizure provision remained in force until the enactment of the 1757 Militia Act which removed the search and seizure provisions, but gave arms to the militia only during drills. 30 Geo. 2, c. 25 (1757) (Eng.); 15 COBBETT, *supra*, at 738.

[60] 6 CALENDAR OF STATE PAPERS, *Domestic Series of the Reign of William III*, *1700-1702*, at 234 (1969).

[61] 5 COBBETT, *supra*, at 1236.

[62] *Id.*

The notion that the "have arms" provision was a negation of the 1671 Game Act's restrictions on gun ownership is also inaccurate. There is nothing in the drafting history of the Declaration of Rights that extended the right to "have arms" to hunting or shooting of game. None of the grievances or debates even mentions it in passing.[63] The "have arms" provision only ensured that Parliament had the power to arm loyal members of the landed gentry to participate in the militia, to defend the realm and secure the right of "self-preservation" should the sovereign usurp the English Constitution.

This right to defend the realm is what was meant by the language "arms for their defence," not armed individual self-defense of one's person, home, or property. For instance, when Parliament was calling upon the county militias for the "mutual Preservation and Defense of themselves," John Pym described it as "Preparation to take up Arms for their Defence[.]"[64] A 1642 parliamentary resolution for *Defence of Popular* used similar language when it ordered the inhabitants of Popular and Blackwell to provide "One Hundred and Fifty Pounds" to provide "Arms for their Defence[.]"[65]

Lastly, John Sadler's 1682 tract perfectly describes the significance of having "arms for their

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[63] Charles, *Arms for Their Defence*, *supra*, at 386-98.

[64] 3 COBBETT, *supra*, at 58.

[65] 2 H.C. JOUR. 855 (1802).

defence." In discussing the importance of a militia, Sadler stated, "Men ought indeed have *Arms*, and them to keep in Readiness for Defence of the King and Kingdom." Such arms "must be *Assessed by the Common Consent*" of Parliament in "Proportion [to] every Man's *Estate*, and *Fee for the Defence of the Kingdom*[.]"[66] Sadler was against placing the power to assess and array the militia in "two or three Strangers[.]" He felt it important that such power be placed in "Men but themselves" – i.e., Parliament – "to provide and bear Arms, *how*, and *when*, and *where* it shall seem good to such Commissioners[.]" Sadler explained that "all matters of History, telleth us their general Custom was; *Not to entrust any man with bearing Arms ... till some Common Council, more or less, had approved him*."[67]

III. BLACKSTONE'S ARTICULATION OF THE RIGHT TO HAVE ARMS AND THE RIGHTS OF "SELF-PRESERVATION" AND "RESISTANCE" WAS CONSISTENT WITH THE USAGE DISCUSSED ABOVE IN CONNECTION WITH THE ENGLISH BILL OF RIGHTS

The influential 18th century treatise on English common law, William Blackstone's *Commentaries*, has been cited in support of the view that the English Bill

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[66] JOHN SADLER, RIGHTS OF THE KINGDOM 143 (1682).

[67] *Id.* at 159.

of Rights "have arms" provision and the Second Amendment both grant an "individual" (or personal) right to armed self-defense. Such arguments, however, take Blackstone's words out of context. Blackstone perfectly articulated the right that the "have arms" provision sought 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 self-preservation, when the sanctions of society and laws are found insufficient to restrain the violence of oppression.[68]

Blackstone's fifth auxiliary right does not refer to armed self-defense for private purposes, contrary to Malcolm's view.[69] It is a *public* allowance (under due restrictions) of a "natural right" – and that allowance is made for a particular, *public* purpose: to "restrain the violence of oppression." This is the only interpretation that comports with Blackstone's definition of an "auxiliary right": a means of ensuring that rights "ascertained, and protected by the dead

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[68] 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 139 (1765).

[69] MALCOLM, *supra*, at 130.

letter of the laws, [would remain in force] if the constitution had provided no other method to secure their actual enjoyment."[70] The first auxiliary right (i.e., the first means by which to protect primary rights) is Parliament's exercise of its powers; the second is through the sovereign; and the third is by the courts of justice.[71] When those fail, resort may be had to the fourth auxiliary right: the right to petition Parliament or the King for the "redress of grievances." And only after *that* right is exhausted may the people resort to "have arms." Thus, in Blackstone's construct, the Declaration's guarantees – the right to petition and the allowance to "have arms" – are means by which individuals preserve and protect their liberties if Parliament, the sovereign, the courts, and their right to petition fail them.[72]

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[70] 1 BLACKSTONE, *supra*, at 136.

[71] *Id.* at 136-38.

[72] For a full discussion *see* Heyman, *supra*, at 252-60, and Charles, *Arms for Their Defence*, *supra*, at 414-18. Contemporaneous treatises interpreted the "have arms" provision similarly. *See* FRANCIS PLOWDEN, THE CONSTITUTION OF THE UNITED KINGDOM OF GREAT BRITAIN & IRELAND 158 (1802) ("To preserve these rights or liberties from violation it is necessary ... And to vindicate them, when actually violated or attacked, all British subjects are entitled in the first place to regular administration ... next to the right of petitioning the King and parliament ... and lastly to the right of having and using arms for self-preservation and defence."); JEAN LOUIS DE LOLME, THE CONSTITUTION OF ENGLAND, OR, AN ACCOUNT OF THE ENGLISH GOVERNMENT 315-24 (1775) (discussing Blackstone and the right of resistance and preservation).

In no part of his *Commentaries* does Blackstone link the right of personal security with the possession of arms, nor does he cite the Declaration of Rights' "have arms" provision in his discussion of personal security. Blackstone cites other provisions of the Declaration of Rights in, for example, his discussions on excessive fines, unreasonable bail, and dispensing with and suspending laws.[73] This demonstrates the omission was deliberate: Blackstone did not simply forget to mention "having arms" in his discussion of the right of personal security; rather, the right of personal security did not carry with it a right to use arms. Nor does Blackstone mention a right to "have arms" in connection with personal self-defense; he recognizes the general natural law principle that it is lawful to use force to repel force used against one's person or family, but nowhere mentions use of arms. Blackstone's right to "have arms" is limited to use to defend liberties "when the sanctions of society and laws are found insufficient to restrain the violence of oppression" only after Parliament, the sovereign, the courts, and the right to petition have failed.[74]

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[73] See 1 BLACKSTONE, *supra*, at 131, 138; 4 BLACKSTONE, *supra*, at 372.

[74] 1 BLACKSTONE, *supra*, at 139-40. This is further supported by Blackstone's detailed discussion of the Declaration of Rights, stating it ensures "the doctrine of resistance, when the executive magistrate endeavors to subvert the constitution." 4 BLACKSTONE, *supra*, at 433.

IV. THE FOUNDERS' UNDERSTANDING OF THE RIGHT TO "HAVE ARMS" AND THE RIGHT OF SELF-PRESERVATION WAS THE SAME AS THAT OF THEIR ENGLISH PREDECESSORS

It is this right of "self-preservation" that St. George Tucker described in his edition of *Blackstone's Commentaries*[75] and that the Founders invoked during the American Revolution. The term "self-preservation" carried the same meaning in political discourse during the Founders' era as it did during the Glorious Revolution. A 1775 tract entitled *Resistance No Rebellion* justified the colonies' rebellion by stating that the people were forced "to have recourse to that resistance, which they had an unquestionable right to make use of, whenever it become absolutely necessary for the defence and preservation of their Constitution."[76] The 1777 tract *Thoughts on the Letters of Edmund Burke* stated 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."[77] Thomas Paine stated "[w]e have several instances in the history of this country, and in many of the ages, of

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[75] Saul Cornell, *St. George Tucker's Lecture Notes, the Second Amendment, and the Originalist Methodology*, 103 Nw. U.L. REV. 406 (2009); Charles, *Arms for Their Defence*, *supra*, at 418-21.

[76] RESISTANCE NO REBELLION 21-22 (1775).

[77] ENGLISH DEFENDERS OF AMERICAN FREEDOM 1774-1778, at 199, 226 (P. Smith ed., 1972).

the people of England resisting, by force of arms ... for their own necessary defence and preservation, the support of human society and liberty, to protect themselves against all unlawful violence and tyranny[.]"[78]

An early invocation of the "right to self-preservation" in connection with the American Revolution occurred in 1768 when the Boston Town Council learned that Parliament had authorized sending British regiments from Halifax and Ireland to quell Boston's rebellious behavior.[79] The Council saw similarities in this to the issues faced by their English forefathers during the English Civil War and the Glorious Revolution. Thus, the Council issued a resolve invoking the Declaration of Rights' "have arms" provision by calling upon the Massachusetts militia to defend Boston.[80]

The Town Council's resolve has been cited as evidence that the Founders understood the "have arms" provision to refer to a right of private armed self-defense,[81] but that is incorrect. The historical evidence makes it abundantly clear that the Founders viewed their right to "have arms" as the

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[78] THOMAS PAINE, THE CRISIS: NUMBER XIV 114-15 (1775).

[79] COLIN NICHOLSON, THE "INFAMOUS GOVERNOR": FRANCIS BERNARD AND THE ORIGINS OF THE AMERICAN REVOLUTION 175 (2001).

[80] Charles, *Arms For Their Defence*, *supra*, at 425-35.

[81] STEPHEN P. HALBROOK, THE FOUNDERS' SECOND AMENDMENT: ORIGINS OF THE RIGHT TO BEAR ARMS 19-21 (2008).

auxiliary right that Blackstone described. For instance, the resolve stated its purposes as the "necessary Defence of the community that the good and wholesome Law of this Province, [which requires] every listed Soldier and other Householder ... [to be] provided with a well fix'd Firelock, Musket, Accoutrements and Ammunition."[82] The "good and wholesome Law" referred to the 1693 Militia Act then in force that required:

> 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[.][83]

Just as Parliament had called upon the militia to defend against the tyranny of Charles I and James II, the Boston Town Council asserted its right of "self-preservation" by invoking the 1693 Militia Act.

Samuel Adams' numerous editorials defending the Council's resolve support this understanding.[84]

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

[83] 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).

[84] As befits a political propagandist, Samuel Adams shifted the grounds of his argument against the British repeatedly. However, in none of his editorials did Adams assert a right of the people to armed individual self-defense. He always referred to

(Continued on following page)

For instance, in the *New York Journal,* Adams stated that the resolve was necessary for the colonists to exercise their "natural Right which the People have reserved to themselves, confirmed by the Bill of Rights, to keep Arms for their own Defence; and as Mr. Blackstone observes, it is to be made use of when the Sanctions of Society and Law are found insufficient to restrain the Violence of Oppression."[85] Similarly, in the *Boston Gazette*, Adams defended the resolve because Boston had "reason to fear, there would be a necessity of the means of self preservation against the *violence of oppression*."[86]

Blackstone's right of "self-preservation" and "lawful resistance" to the violence of oppression was invoked by other American revolutionaries. Months prior to the battles at Lexington and Concord, the Massachusetts Assembly resolved that the "great law of self-preservation" required calling upon the militia

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the "have arms" provision as effectuating a right to engage in lawful rebellion and defense of the realm. Charles, *Arms For Their Defence*, *supra,* at 421-34. James Otis made a similar observation when he paraphrased Blackstone. *See* JAMES OTIS, A VINDICATION OF THE BRITISH COLONIES (1765), *reprinted in*, 1 PAMPHLETS OF THE AMERICAN REVOLUTION 1750-1776, at 651 (Bernard Bailyn ed., 1965).

[85] Editorial, *Boston, March 17*, N.Y.J., Apr. 13, 1769, supplement at 1, column 3.

[86] 1 THE WRITINGS OF SAMUEL ADAMS 1764-1769, at 316, 318 (1968).

to "perfect[ ] themselves" in "military discipline[.]"[87] "Self-preservation" was the New York Congress' justification for taking up arms when it resolved that "the attack at Lexington," the British "point of the bayonet," and "the slaughter of their fellow subjects" caused them to "naturally fle[e] to arms for their defence."[88] The people of Hampshire County, Massachusetts similarly declared they were "obliged" to oppose England "by the law of self-preservation, to take up arms in their own defence."[89]

Judge William Henry Drayton, in his *Charge to the Grand Jury*, declared the colonies to be lawfully separated from England. He felt that the abuses by the British government were so destructive that "[n]ature cried aloud, self-preservation is the great law,"[90] which "forced [the colonies] to take up arms in [their] own defence."[91] Meanwhile, American

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[87] 1 AMERICAN ARCHIVES: DOCUMENTS OF THE AMERICAN REVOLUTION, 1774-1776, FOURTH SERIES, 1340 (Peter Force ed., 1833-46).

[88] 4 AMERICAN ARCHIVES, *supra,* at 394-95. For other examples of the American revolutionaries referring to their organized resistance as "taking up arms for their defence," *see id.* at 303, 488, 806, 1052, 1310, 1458, 1526.

[89] 6 AMERICAN ARCHIVES, *supra,* at 701.

[90] 1 AMERICAN ELOQUENCE: A COLLECTION OF SPEECHES AND ADDRESSES BY THE MOST EMINENT ORATORS OF AMERICA 50, 52 (1859).

[91] *Id.* at 51.

pamphleteer Samuel Williams stated that "self-preservation" was the "main aim" and "end" of the English Constitution.[92]

Congress similarly justified the colonists' rebellion and taking up of arms on the principle of "self-preservation." James Duane spoke before Congress, stating that the colonies must make a "vigorous preparation for our common defence" that "shall be conducted to our own self preservation[.]"[93] Congress drafted a *Letter to Great Britain* on June 27, 1775, to justify its actions, declaring that "the principles of Self preservation [no] longer permit us to neglect providing a proper defence to prevent the pernicious practices [against their] ... religion, laws, rights, and liberties of England and America."[94] A 1777 Congressional letter addressed to the *Inhabitants of the United States* proclaimed that Congress was "forced to take up arms for self-preservation" to "maintain the Religion, Liberty and Property of ourselves[.]"[95]

Personal correspondence also reflects the Founders' understanding of the "self-preservation" principle to which Blackstone referred. A May 22,

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[92] SAMUEL WILLIAMS, A DISCOURSE ON THE LOVE OF OUR COUNTRY 21 (1775).

[93] 1 LETTERS OF THE DELEGATES TO CONGRESS, 1774-1789, at 392 (Paul H. Smith ed., 1976-2000).

[94] *Id.* at 551.

[95] 7 LETTERS OF THE DELEGATES TO CONGRESS, 1774-1789, at 145, 149.

1777, letter by Philip Schuyler defended the revolutionary cause, stating, "But as the first Principle of Human Nature is Self preservation; as we are engaged in a Conflict the Event of which must Either be a perfect Establishment of our Civil & Religious Priviledges or a Total Deprivation of both[.]"[96] Meanwhile, on April 26, 1776, John Hancock described the colonies' rebellion as being "compelled unprepared hastily to take up the Weapons of Self Preservation[.]"[97] Even Rhode Island's 1775 *Rules and Regulations for the Army* declared "the great Law of Self-Preservation hath required our raising and keeping an Army of Observation and Defence, in order to prevent or repel, any further Attempts to enforce the late cruel and oppressive Acts of the British Parliament."[98]

These, and other examples that abound, make it clear that the doctrines of "self-preservation" and "resistance" to which Blackstone referred had nothing

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[96] *Id*. at 108.

[97] 3 LETTERS OF THE DELEGATES TO CONGRESS, 1774-1789, at 584.

[98] RULES AND REGULATIONS FOR THE RHODE-ISLAND ARMY 4 (1775). State and local declarations of independence justified separation from England on the principle of "self-preservation." Buckingham County, Virginia declared to "maintain their rights, they were obliged to repel force by force[.]" PAULINE MAIER, AMERICAN SCRIPTURE 227 (1998). The Cheraws District Court in South Carolina declared "self-preservation" was the cause of separation from England. *Id*. at 229-30.

to do with our modern concept of armed self-defense by private individuals.

V. THE SECOND AMENDMENT WAS DRAFTED IN THE SPIRIT OF THE DECLARATION OF RIGHTS "HAVE ARMS" PROVISION

Like the Declaration of Rights' "have arms" provision, the Second Amendment protects the right of citizens to defend their political liberties and ensures the states are able to exercise the right of "self-preservation" should the "sanctions of society and laws [be] insufficient to restrain the violence of oppression."[99] 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." The only difference between the English "have arms" provision and the Second Amendment is that the Second Amendment right is not dependent on privileges of wealth or birth.

The Founders did not limit themselves to borrowing the premise of the Second Amendment from English law. They also borrowed the Second Amendment's preamble from England's militia laws, for the Second Amendment's "well regulated militia" language was inspired by the preamble of the 1757 Militia Act, which stated, "Whereas a well-ordered

[99] 1 BLACKSTONE, *supra,* at 139.

and well-disciplined Militia is essentially necessary to the Safety, Peace and Prosperity of this Kingdom[.]"[100]

Historical records show that the Second Amendment was unrelated to any seizure of colonists' arms by British troops. Not a single document – no declaration, petition, or piece of correspondence, public or private – references any claim that the British violated the colonists' right to "have arms." No such statement appears in the Declaration of Independence, local declarations of independence,[101] Judge Drayton's *Charge to the Grand Jury*, or the writings of any American pamphleteer.[102] Moreover, there is no evidence in the Constitution's drafting debates of any correlation between the British army's seizure of arms and the right the Second Amendment affords.[103]

Briefs in support of Petitioner argue that the *Declaration of the Causes and Necessity for Taking Up*

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[100] 30 Geo. 2, c. 25 (1757) (Eng.). Similar language was used in militia laws of the colonies/states. *See* Charles, *Arms for Their Defence*, *supra*, at 450 fn. 701.

[101] Before the Continental Congress drafted the Declaration of Independence, many local declarations declared independence from England. *See* MAIER, *supra,* at 226-34; 5 AMERICAN ARCHIVES, *supra,* at 1034-35, 1046-47, 1205; 6 AMERICAN ARCHIVES, *supra,* at 556-58, 602-4, 649, 698-701, 933, 1017-21.

[102] CHARLES, *Arms For Their Defence*, *supra,* at 421-54.

[103] Paul Finkelman, *A Well Regulated Militia: The Second Amendment in Historical Perspective*, 76 CHI.-KENT. L. REV. 195, 196-236 (2000); CREATING THE BILL OF RIGHTS: THE DOCUMENTARY RECORD FROM THE FIRST FEDERAL CONGRESS (Helen Veit ed., 1991).

Arms written in response to Thomas Gage's seizure of arms from Boston's departing inhabitants proves that the Founders viewed armed self-defense by individuals for private purposes as an inalienable right. This argument misconstrues the nature of the grievance against Gage.[104] The grievance was not with the seizure of arms as a violation of a legal or natural right, but as the breach by Gage of an express agreement with respect to the colonists' property: "the obligation of treaties, which even savage nations esteem sacred."[105] Indeed, the colonists and the Continental Congress had seized the arms of loyalists and suspected loyalists on multiple occasions with no discussion, debate, or complaint of any violation of the right to "have arms."[106]

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[104] Charles, *Arms For Their Defence*, *supra,* at 443-48.

[105] DECLARATION OF THE CAUSES AND NECESSITY FOR TAKING UP ARMS (1775).

[106] For examples, *see* 5 AMERICAN ARCHIVES, *supra,* at 1638 (Congress resolved "all persons to be disarmed ... who are notoriously disaffected to the cause of America, or have refused to associate, to defend, by arms these United Colonies"); *Id*. at 244 (Maryland Council of Safety complies with these orders to disarm disaffected persons and those that do not prescribe to the oath of allegiance); 6 AMERICAN ARCHIVES, *supra,* at 1539 ("[T]hat the Arms and Ammunition of the inimical and disaffected persons ... and of such as refuse to take ... [the] oath [of allegiance], be appraised and used, and applied" according to Congress); 4 AMERICAN ARCHIVES, *supra,* at 271 (Connecticut Assembly orders any person that "shall libel or defame" Congress to "be disarmed, and not allowed to have or keep any arms").

The historical evidence, viewed as a whole, and in context, demonstrates that the Founders viewed the right to "keep and bear arms" as an individual right to defend the state and enforce political liberties. Discussing the 1780 Massachusetts Constitution provision protecting the "right of the people to keep and bear arms for the common defence," the Massachusetts legislature stated that the right to "keep and bear arms," was a right "necessary for the safety of the state" in order "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."[107]

Consistent with this is the fact the phrases "bear arms" and "keep arms" are found only in state militia laws of the era.[108] This Court stated in *Heller* that the "keep arms" was "not prevalent in the written documents of the founding period that we have found." 128 S.Ct. at 2792. However, the phrase was in fact prevalent in state militia laws and the military treatises of the period.[109] Delaware's 1782 Militia Act required every enrolled militiaman to

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[107] Act of Feb. 20, 1787, ch. 9, 1787 Mass. Laws 564.

[108] PATRICK J. CHARLES, THE SECOND AMENDMENT: THE INTENT AND ITS INTERPRETATION BY THE STATES AND THE SUPREME COURT 22-30 (2009). In connection with this work, the author read every colony and state militia, patrol, game, slave, gunpowder, and firearm law from the inception of each to 1800.

[109] *Id*. at 27-34; BARON VON STEUBEN, REGULATIONS FOR THE ORDER AND DISCIPLINE OF THE TROOPS OF THE UNITED STATES 120, 144, 146, 148 (Joseph Riling ed., 1966).

"keep the [same] arms by him at all times, ready and fit for Service" or pay a fine of twenty shillings.[110] Maryland's 1799 Militia Act restricted the "keeping" of arms when it provided that if "any private or non commissioned officer, to whom a musket is delivered, shall use the same in hunting, gunning or fowling or shall not keep his arms ... in neat and clean order ... shall [pay a fine]."[111] Meanwhile, Virginia's 1784 militia law required the slave patrols to "constantly keep the aforesaid arms, accoutrements, and ammunition ready."[112]

Conversely, the language "keep arms" or "bear arms" was not used in any laws dealing with personal self-defense, hunting, game, or private firearm ownership or use.[113] Moreover, one did not need to own or even possess arms in order to "keep" them.[114] Frequently states provided militia members with arms that these individuals were entitled to use only

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[110] AN ACT FOR ESTABLISHING A MILITIA WITHIN THIS STATE, § 6 (Del. 1782).

[111] A SUPPLEMENT TO THE ACT ENTITLED, AN ACT TO REGULATE AND DISCIPLINE THE MILITIA OF THIS STATE, § 30 (Md. 1799).

[112] 11 STATUTES AT LARGE OF VIRGINIA 478-79 (1823). *See also* 3 AMERICAN ARCHIVES, *supra,* at 1019 ("all others [in the militia] ... are by law obliged to keep Arms, to be reviewed"); 5 AMERICAN ARCHIVES, *supra,* at 1609 ("all others [in the militia] ... are by law obliged to keep arms ... who are between sixteen and fifty-five years of age").

[113] CHARLES, THE SECOND AMENDMENT, *supra,* at 17-21.

[114] *Id*. at 31-34; ROBERT J. SPITZER, GUN CONTROL: A DOCUMENTARY AND REFERENCE GUIDE 54-55 (2009).

during times of muster – similar to what was permitted by England's 1757 Militia Act.[115] "Keeping" arms referred to the obligation to *maintain* arms; that is, to maintain them in working order. In short, as the historical records show, the state and federal governments had concurrent power over the right to keep and bear arms. While the federal government had the power to arm, organize, and array the federal militia, each state possessed the right to regulate its own militia – and hence, regulate the possession of guns by individuals, as long as the state did not "prohibit the people from keeping and bearing arms, so as to deprive the United States of their rightful resource for maintaining the public security[.]"[116] *Presser v. Illinois*, 116 U.S. 252, 265 (1886).

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[115] 30 Geo. 2, c. 25 (1757) (Eng.).

[116] *See* CHARLES, THE SECOND AMENDMENT, *supra,* at 71-79, 139-53.

CONCLUSION

Based on the foregoing, we ask that the Court correct its view of the historical background of the Second Amendment as set forth in *Heller*.

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