

IN THE
Supreme Court of the United States

CUTBERTO VIRAMONTES, *et al.*,
Petitioners

v.

COOK COUNTY, ILLINOIS, *et al.*

EDDIE GRANT, JR., *et al.*,
Petitioners

v.

RONNELL HIGGINS, *et al.*

ON WRITS OF CERTIORARI TO THE
UNITED STATES COURTS OF APPEALS
FOR THE SEVENTH AND SECOND CIRCUITS

**BRIEF FOR AMICUS CURIAE
AMERICAN ENLIGHTENMENT PROJECT
IN SUPPORT OF RESPONDENTS**

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CONSTITUTIONAL PROVISION INVOLVED

The Preamble to the Bill of Rights states, in relevant part:

The Conventions of a number of the States, having at the time of their adopting the Constitution, expressed a desire, in order to prevent misconstruction or abuse of its powers, that further declaratory and restrictive clauses should be added: And as extending the ground of public confidence in the Government, will best ensure the beneficent ends of its institution.

The Second Amendment provides:

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.

INTEREST OF AMICUS CURIAE¹

Amicus, American Enlightenment Project, a District of Columbia non-profit, was founded on the tenth anniversary of *District of Columbia v. Heller* to address the post-*Heller* epidemic of gun violence. The Project seeks to show that *Heller* was wrongly decided, that the Second Amendment protects no individual right, and that its full text remains unconstrued.

Amicus is represented by counsel experienced in resolving unsettled legal questions. Counsel's resolution of a half-century conflict over high-seas air crashes was unanimously adopted in *Zicherman v. Korean Air Lines*, 516 U.S. 217 (1996) (Scalia, J.). In October 2015, counsel's brief led justices to conclude that "substantial contact," undecided for decades, simply means "minimum contacts." See *Foreign Sovereign Immunities Act: 'Bedlam' Redux* (Law360, Sept. 22, 2017). Months later, counsel published *2nd Amendment Still Undecided* (Law360, Jan. 11, 2016), followed by related articles, including *Court Pauses Joyriding with AR-15s* (Nat'l L. Rev., July 21, 2025), addressing issues presented here.²

¹ No counsel for a party authored this brief, and only amicus and its counsel funded its preparation and submission.

² Counsel's Second Amendment articles are available at www.americanenlightenmentproject.org/article.

INTRODUCTION AND SUMMARY OF ARUGMENT

*A disciplined citizens' militia,
being necessary to the ____ of a free polity,
the right of citizens to possess and carry
weapons commonly used for self-defense,
shall not be ____.*
— *District of Columbia v. Heller*, 554 U.S. 570,
592, 597, 600, 625 (2008)

This brief addresses the question Justice Barrett posed at argument in *Bruen*: whether *Heller* “was rightly decided.” *N.Y.S. Rifle & Pistol Ass’n v. Bruen*, 597 U.S. 1 (2022); Tr. 89 (Nov. 3, 2021). The Court should now confront that question. At minimum, *Heller* has no binding effect in these AR-15-ban cases.

Heller did not address the Amendment’s legal context, its actual antecedents, purpose, origins, or full text. It did not construe “security”; the “free State” secured; the “right of the people” as a public right; or “shall not be infringed,” the constitutional command. It construed “keep and bear Arms” under the wrong body of law. And it never construed the Amendment as a whole. A decision that did not decide those issues cannot control them now.

Through remarkable failures of the adversary system, the Court was only asked to choose between historical fictions—individual rights tied to militia service or to self-defense—that were undebated at founding, difficult to reconcile with James Madison’s conscientious-objector clause, and drew “interpretive blood from so few evidentiary turnips.” Br. of Amici

Curiae Jack Rakove, et al. 4, No. 07-290. An amicus in support of neither party in *Bruen* warned: “Historical claims based on conjecture” are “nothing more than historical fiction” and should not receive “the imprimatur of this Court.” Br. of Amicus Patrick Charles 20, No. 20-843. Resolving that false choice, the Court never addressed the Amendment’s actual text or meaning.

A similar error was avoided last Term. A single amicus showed that “regular forces” in a militia statute referred to military forces—not law enforcement, as both sides argued. The Court ordered rebriefing in *Trump v. Illinois*, No. 25A443 (Dec. 23, 2025), correcting course before precedent could distort military authority. The same course correction is warranted here.

Like that militia statute, the Amendment arose from the Anglo-American militia system: the law organizing citizen-soldiers and prescribing arms, readiness, muster, service, and discipline. It did not arise from the separate body of criminal law governing weapons offenses, affrays, and other civil disturbances on which both sides relied. Its terms were taken from militia and international law, not criminal law, and settled long before 1791.

The Amendment’s two halves, assumed to conflict, were equivalent formulations of the militia system in founding-era state constitutions. The terms “keep” and “bear arms” described public duties, not private rights, centuries before. George Mason combined both formulations into a composite militia-and-arms declaration. New York substituted that declaration

for a structural proposal, and Madison adopted it as a prudent safeguard. None of this was addressed in *Heller*. Nor did *Heller* address the terms Madison added—“security” and “infringed,” that strengthened that safeguard—leaving key text undecided.

Restoring its legal context, text, and history resolves the Amendment’s meaning: it declares and guarantees the States’ right to maintain militias as security against federal encroachment—a federalism check identified by Justice Stevens and widely recognized in the 20th century but never proved.³

This brief supplies that proof, and it shows why *Heller* should not be extended to AR-15-style rifles absent rebriefing and reconsideration.

ARGUMENT

I. *Heller’s* Entire Premise Rested on Speculation—And Was Wrong

Heller held the Second Amendment’s “central component” was an “ancient” right to arms for self-defense in the 1689 English Bill of Rights—a right “clearly” individual and having “nothing to do with” militia service. 554 U.S. at 592-93, 599, 608. That premise, which adopted historical claims from Joyce Malcolm, *To Keep and Bear Arms* (1994), was doubly wrong.

³ See 554 U.S. at 667 (Stevens, J., dissenting) (Amendment was “designed to protect the right of the States to maintain a well-regulated militia”); *id.* at 638 n.2 (collecting cases).

Malcolm acknowledged that English law recognized no ancient individual right, but rather a duty “from time out of mind,” and that the English declaration expressly “reaffirm[ed]” existing rights. She nonetheless speculated that its provision—“Protestants may have arms”—“seems to have” “very likely” created a new right, though it “seems empty rhetoric” and is “no longer a right,” having been “so gently teased from public use that most Britons have no notion of when or how” it was withdrawn. Malcolm 2, 9, 115, 119-20, 165.

Such conjecture cannot support the weight *Heller* gave it. Nor can the conjecture offered by other historians in *McDonald v. Chicago*, who, eight to one, “tell us that *Heller* misunderstood a key historical point”: that “have arms” protected a combined right of Protestants’ to bear arms and of Parliament to arm them. 561 U.S. 742, 914-16 (2010) (Breyer, J. dissenting).

That instrument, an assertion of parliamentary sovereignty containing “slight mention” of private rights,⁴ has never been judicially construed. It catalogued James II’s efforts to “extirpate the Protestant Religion and the laws and liberties of this Kingdom,” then reasserted corresponding ancient rights and liberties. Its first military provision—an objection to “keeping a Standing Army” without Parliament’s consent, and declaration that was “against Law”—restored Parliament’s right over armies. The next—causing “good subjects, being

⁴ Stephen Halbrook, *That Every Man Be Armed* 46 (1984) (citing rights to petition and bear arms, misreading latter).

Protestants, to be disarmed” while “Papists were both Armed and Imployed contrary to Law,” and declaration that “Protestants may have Arms for their Defence suitable to their Conditions and as allowed by Law”—restored Parliament’s right to regulate militia. App’x A, 1a-4a

“Armed and [E]mployed” meant armed and “in service.” *E.g.*, Malcolm 20-21; U.S. Const. art. I, § 8, cl. 16. Likewise, the remedy—specifying citizens who could “have Arms” according to “their Conditions and as allowed by Law”—derived from foundational militia acts, *infra*. “For generations citizens had been required to contribute arms to the militia according to their condition, that is, their rank and income.” Malcolm 120.

In context, the provision resolved a war-powers dispute, asserting Parliament’s rights against the crown, not a new private right. A draft declaration similarly stated: “It is necessary to the publick Safety, that the Subjects which are Protestants, should provide and keep Arms for the common Defence[.]” Malcolm 117. Three years later, Parliament rejected, 169-65, a proposal that “any Protestant may keep a Musquet in his House” notwithstanding contrary acts, because it would “arm the mob” and was “not very safe for any government.” *Id.* at 126-27. Had the declaration guaranteed a private right, Parliament’s rejection would be inexplicable.

Without its core premise—speculation in place of legal construction—little remains of *Heller*.

II. Actual Context, Antecedents, and Origins

A. The Second Amendment Must Be Construed in Its Legal Context

“Context is everything.” Antonin Scalia, *A Matter of Interpretation* 37 (1997). “Part of the statute’s context is the corpus juris of which it forms a part”—the “entire relevant body of the law for the same purpose”—“especially” when codified. Antonin Scalia & Bryan Garner, *Reading Law* 252–53, 323 (2012).

The basic error in Second Amendment jurisprudence is failure to identify its legal context. “Well regulated Militia,” “security of a free State,” and “keep and bear Arms” were centuries-old terms of militia law. *Cf. CFPB v. Cmty. Fin. Servs. Ass’n of Am., Ltd.*, 601 U.S. 416, 452–53 (2024) (Alito, J., dissenting) (explaining when “a word is obviously transplanted from another legal source” and elaborated by centuries of legal history, “it brings the old soil with it”) (citations omitted).

The parties compounded that error by “anchoring” their interpretations in irrelevant criminal law, despite contrary evidence and the controlling alternative body of law. They also exhibited “availability” bias, relying on later sources to explain ancient laws. And the evidence, frequently misread, refuted rather than supported their theories.

The analysis also confused historical research with legal construction. Justice Scalia suggested that interpreting ancient text is “sometimes better suited to the historian.” Antonin Scalia, *Originalism: The*

Lesser Evil, 57 U. Cin. L. Rev. 849, 856-57 (1989). Historical research may assist interpretation, but construction requires identifying the relevant body of law and legal meaning under rules it is a lawyer's "business to know." Oliver Wendell Holmes, *The Path of the Law*, 10 Harv. L. Rev. 457, 469 (1897).

One is the related-statutes canon: an enactment using terminology found in earlier enactments, "especially in the very same field, such as securities or civil-rights law," ordinarily carries the same meaning. Different meanings imported from another domain "should be rejected." *Reading Law*, 323. By disregarding that canon, militia law, and settled legal usage, and instead importing criminal-law meanings, *Heller* misconceived the Amendment from the outset.

Justice Barrett put the point plainly: "To strip a word from its context is to strip that word of its meaning." *Biden v. Nebraska*, 600 U.S. 477, 511 (2023) (Barrett, J., concurring). Separating the Amendment's words from their legal context, *Heller* essentially got everything wrong.

B. Antecedents: The Militia System, Not Criminal Law

The Amendment's antecedents lie in the thousand-year militia system, an institution of universal, compulsory service dating at least to the Saxon fyrd in the fifth century. Its earliest surviving enactment is the Assize of Arms of 1181. Michael Doubler, *I Am the Guard* 7-8 (2001).

The colonies inherited the institution and enacted laws “to organize and discipline the colonists in the citizen-soldier militia system.” James Whisker, *Arms Makers of Colonial America* 15–19 (1992). As *United States v. Miller* recognized, “the militia system was based on the principle of the assize of arms,” whose elements “appear in all the important enactments.” 307 U.S. 174, 178-82 (1939) (citations omitted).

Its core elements persisted through the centuries: organization of the citizen body for public defense; keeping of specified arms in readiness; bearing arms at muster and in service; and discipline, enforced through penalties. *Id.*; Doubler 7-37; Whisker 15-19. Only the particulars changed: who was enrolled, who supplied the arms, and where they were kept. Whisker 15-17.

Miller properly read the Amendment through militia law: “The signification attributed to the term Militia appears from the debates in the Convention, the history and legislation of Colonies and States, and the writings of approved commentators.” *Id.* at 179. Those sources “show plainly enough” that the militia comprised “all males physically capable of acting in concert for the common defense,” “enrolled for military discipline,” and “bearing arms supplied by themselves and of the kind in common use at the time.” *Id.* (citations omitted).

Applying that body of law, the Court unanimously held: “With obvious purpose to assure the continuation and render possible the effectiveness of such forces,” the Amendment’s declaration and guarantee “must be interpreted and applied with that

end in view.” *Id.* at 178. That directive accords with the related-statutes canon: enactments “relating to the same subject[] are to be taken together,” as “having one object in view, and as acting upon one system.” *Reading Law* 252 (citation omitted).

Miller’s directive has never been repudiated. *Heller* simply ignored it.

1. Assize of Arms

The Assize of Arms—the principal English enactment cited in *Miller*—established the elements of subsequent Anglo-American militia acts, including express duties to “keep” and “bear arms” in defense of the state. Those usages carried into state constitutions and the Amendment.

The Assize required freemen, according to rank and means, to “have” specified military arms; to “bear these arms in [the king’s] service”; and to “keep them for the service of” the king and realm, on pain of fines and imprisonment. The Statute of Winchester of 1285 extended the obligation to public peace, night-watch, and hue-and-cry, and required “every man to have in his house” arms, “according to” his means—the same vocabulary used in the 1689 declaration. Queen Mary’s militia act of 1557 required all freeman to “have,” “keep,” and “maintain” arms, according to condition, in every community. App’x A, 1a-2a.

Later English militia acts supplied other stock language. The Militia Act of 1757 declared: “Whereas a well-ordered and well-disciplined Militia is essentially necessary to the Safety, Peace and

Prosperity of this Kingdom.” 30 Geo. 2 c. 25, pmbl. (G.B.). That common prefatory phrase, with “well regulated” substituted for “well-ordered” and “free State” for “Kingdom,” anticipated state militia acts and the Amendment. App’x A., 4a, B.1, 5a-6a.

Heller cited none of these foundational statutes.

The Statute of Northampton of 1328—referenced in *Heller* and central to *Bruen*—belongs to another legal domain. It proscribed carrying “dangerous and unusual weapons” and prescribed who could carry weapons, and for what purposes, under criminal law. 554 U.S. at 626, 628 (citing 4 Blackstone 148-149 (1769)). That authority does not use “well regulated Militia,” “security of a free State,” or “keep and bear Arms,” and has little bearing on those terms’ meaning. *Cf. United States v. Rahimi*, 602 U.S. 680, 738 (2024) (Barrett, J., concurring).

English commentary confirms the distinction. Blackstone’s pertinent discussion appears in Chapter 13, “Of the Military and Maritime States”—the chapter *Miller* cited, 307 U.S. at 179. It explained that “no man should take up arms, but with a view to defend his country and its laws,” and that “it is because he is a citizen, and would wish to continue so, that he makes himself for a while a soldier.” 1 Blackstone 408–10 (1765). That discussion is not found in passages *Heller* cited concerning criminal self-defense, 554 U.S. at 594 (citing 3 Blackstone 2-4 (1768)), or offenses against the peace, *id.* at 626, 628 (citing 4 Blackstone 148-49).

Heller concluded that Blackstone’s description of the English declaration “cannot possibly” concern militia service. 554 U.S. at 594 (citing 1 Blackstone 136, 139-140). *But Blackstone described the declaration as “only declaratory, throughout, of the old constitutional law.”* 4 Blackstone 372.

Heller also misread Samuel Adams, who tied the “privilege of possessing arms” to militia duty: a privilege held “in a province where the law requires them to be equipped with arms” “as the law directs.” 554 U.S. at 594 (citing Shippen, Boston Gazette, Jan. 30, 1769). Adams likewise described Boston’s call for inhabitants “to provide themselves with arms for their defence”—a “resolution of this town to keep arms for its defence”—as the “constitutional right” of “the people,” the body politic, in an article respondents misread. Resp. Br. 19-20, No. 07-290 (citing E.A., Boston Gazette, Feb. 28, 1769). He emphasized Blackstone’s description of “have arms for their defence” as being “a public allowance, under due restrictions.” *Id.*

Heller similarly misread Granville Sharp’s reference to “arms of defence and peace” as private self-defense. 554 U.S. at 594. Sharp instead explained that English law “had always required the people to be armed”—with “arms, or instruments of war”—and “keep them always ready for defense of the kingdom,” Granville Sharp, *Tracts, Concerning the Ancient and Only True Legal Means of National Defence, by a Free Militia* 10n–19n (3d ed. 1782)). The individual right Sharp identified was: “each freeman that bears arms” held “his right of suffrage,” or “share of legislative influence” to “regulate the service.” *Id.* at 42.

Heller did not address those explanations, the tract “A General Militia, Acting by a Well-Regulated Rotation, Is the Only Safe Means of Defending a Free People,” or Sharp’s repeated references to the “ancient usage confirmed by statutes,” including militia, well-regulated, have arms, keep arms, and bear arms, *id.* at 35, 75-85—terms carried into colonial and state militia acts. *E.g.*, Whisker 15-16 (quoting statutes).

2. Articles of Confederation

The Articles of Confederation—the Nation’s first constitution—is another important enactment *Heller* did not address. Their provisions were, with less detail, “copied almost verbatim” into Article I of the Constitution. *Printz v. United States*, 521 U.S. 898, 920 n.10 (1997) (Scalia, J.).

The Articles recognized state authority to “keep up a well regulated and disciplined militia,” “armed and accoutered,” and required each State “have ready for use, in public stores” a “proper quantity of arms.” They also addressed state “security” and protected legislative rights from “infringement.” Arts. of Confed., art. III, art. VI, para. 4, art. IX, para. 4. Together, the provisions supplied the Amendment’s immediate constitutional setting.

These organic laws must be read together. The related-statutes canon required it. And “it can never be supposed,” Madison explained, that when “copied into this constitution,” “a different meaning ought to be attached to” terms from the original. *Report of*

1800. Yet no one in *Heller* construed their provisions together.

Comparison of the Articles and Constitution illuminates not only the meaning of the Amendment's terms, but the war-powers dispute that prompted it. Under the Articles, Congress "governed" and "regulated" regular forces, while the States "governed" and "regulated" their militias. Art. VI, para. 4, art. IX, para. 4. The Constitution retained federal power to "govern" and "regulate" regular forces, but no longer subject to state control, and empowered Congress to "provide for organizing, arming, and disciplining the Militia," and to "govern[]" militia when "employed in Service." Art. I, § 8, cl. 14, cl. 16. The latter left the States' existing right to govern their militias when not in federal service implied.

Antifederalists viewed that gap as existential. They sought "to restore to the state governments their powers in matters of internal police," including the power to "govern the militia." *Federal Farmer* (II), App'x F.1, 23a. Federalist assurances, for example, that when not in federal service, "Congress has no power to govern them. The states then have the sole government of them," Edmund Pendleton, Va. Ratification Convention (June 14, 1788)—were distrusted as merely verbal.

A related gap involved "security." The Articles joined the States for "their common defence, the security of their Liberties, and their mutual and general welfare." Articles, art. III. The Constitution recited those objects but expressly provided only for

“the common Defence and general Welfare,” Const. pmb.; art. I, § 8, cl. 1, leaving security of liberty to implication, broad checks, and the “guarantee to every State” of republican government. *Id.*, art. IV, § 4; 1 William Crosskey, *Politics and the Constitution* 374–77, 392–94, 505 (1953).

Antifederalists, fearing Congress’ new independent army and militia powers could remove all state authority, questioned what security remained against the federal guarantor. George Mason, objecting that the Constitution left “State Legislatures no Security,” warned Congress might “disarm, or render useless the Militia” and “govern by a standing Army,” the bane of liberty. Madison responded: “I cannot conceive that this Constitution, by giving the general government the power of arming the militia, takes it away from the state governments.” John Marshall likewise argued: “If Congress neglects our militia, we can arm them ourselves.” But Patrick Henry rejected assurances “states have the right of arming” militia, warning “implication will not save you, when a strong army” comes. If “a concurrent power” was intended, “where can be the impolicy to amend” the Constitution? Va. Ratification Convention (June 14, 16, 1788). *Cf.* Doubler 64-66.

Heller addressed none of these textual gaps. The dissents recognized “Article I contained a significant gap”: that it did not prevent Congress from disarming the militia. 554 U.S. at 655 (Stevens, J., dissenting). But they did not address the constitutional text, particularly that bearing on “regulated” and “security.”

3. State constitutions

Heller also overlooked the founders' "better school of political wisdom in the republican constitutions of their several States, which many of them had assisted to frame." *Pollock v. Farmers' Loan & Trust Co.*, 157 U.S. 429, 558 (1895).

State declarations of rights used two formulations to describe the same militia system, in three clauses dubbed "Mason Triads." The Virginia model, drafted by Mason and followed by Delaware, Maryland, and New Hampshire, began by describing a "well regulated militia" as the "safe defence of a free state." The Pennsylvania model recognized the people's right to "bear arms for defence of themselves and the state," or the "common defence" in Massachusetts, as clarified by John Adams, or simply "the state" in North Carolina. Both added identical second and third clauses warning against standing armies and requiring government by civil authority. App'x C.1, C.2, 8a-11a.

Their language "was slightly different, but the meaning was the same." Lawrence Cress, *An Armed Community*, 71 J. of Am. Hist. 22, 29 (June, 1984). Both "fundamentally declared exactly the same thing." David Young, *The Founders' View of the Right to Bear Arms* 72 (2007).

The States' own enactments equated them. States using the militia model exempted conscientious objectors from "bearing arms." Conversely, bear-arms states like North Carolina and Pennsylvania introduced corresponding militia acts declaring: "a

well regulated militia is absolutely necessary for the Defending and securing the Liberties of a free State.” App’x C.3, C.4, 11a-13a.

Heller also misread Pennsylvania’s and Vermont’s reference to “defence of themselves and the state” as a “clear” individual right. 554 U.S. at 584-85. That overlooked their companion exhortation that every citizen “is bound” to “yield his personal service when necessary,” and their conscientious-objectors exemption from “bearing arms.” App’x C.5.a, 13a-15a. A person may be exhorted to perform—and excused from—a duty, not a right. Both confirm “bear arms” referred to compulsory militia service. So does the related-statutes canon. Pennsylvania’s 1755 militia act authorized citizens willing to “defend themselves and their Country” (Pennsylvania) when “formed into regular Bodies for that Purpose” under “suitable and legal Authority.” Defending “themselves” meant collective local defense through militia service—as Samuel Adams explained—not individual self-defense. App’x C.5.b, 15a.

Heller relied on later wording—“himself and the state”—to construe use of “themselves and the state” at founding. 554 U.S. at 584-85, 602-03. The later language began with the Mississippi Constitution of 1817. *Id.* at 585 n.8. By then, even this Court had speculated about the Amendment’s meaning. *Houston v. Moore*, 18 U.S. 1, 52-53, 76 (1820) (Story, J., dissenting).

Heller likewise confused “disarming,” *e.g.*, 554 U.S. at 592-93, overlooking that militia statutes ordered the seizure of arms Catholics and other

religious minorities “have or keep in his house.” App’x D.1, 16a; Whisker 15-16, 19-20. During wartime, religious identity shifted to political allegiance. App’x D.2, 16a-19a. After Shays’ Rebellion, Massachusetts disqualified insurgents from service, prompting New Hampshire to propose its singular amendment—a check on selective federal enrollment to neutralize militia. App’x D.3, 19a. The fear was Congress’ ability to “disarm, or render useless the Militia,” as Mason said—not a generalized power to disarm individuals.

Heller also neglected John Adams, who coined “keep and bear arms,” and whose *Thoughts on Government* (1776) influenced adoption of state constitutions and accompanying militia laws. Following the Shays and Articles crises, Adams published *A Defence of the Constitutions of Government of the United States* (1787), that likewise influenced federal constitutional design and provides extensive founding-era discussion of the militia system incompatible with *Heller’s* account. *See infra* at 27.

C. Origins: Walkouts, Non-signers, and Holdouts

1. Mason’s militia-and-arms composite

Mason, a principal non-signer of Constitution, objected to the absence of a declaration of rights, including an express protection for state militia. He said such a declaration could be prepared “in a few

hours” with “the aid of the State declarations.” App’x E.1, 20a-23a.

For Virginia’s ratifying convention, Mason combined, largely verbatim, the States’ militia and arms formulations into a composite declaration—each half expressing the same militia system. *Supra* Point II.B.3. Mason took the militia language from Virginia’s constitution, which he drafted; the arms language from Massachusetts’ constitution, drafted by John Adams; and added the remaining elements of his familiar triad. App’x E.2, 25a-26a.

Mason forwarded the proposal to New York for its ratifying convention. *Id.* (editor’s note). His proposed amendments omitted Virginia’s separate structural proposal authorizing the States to organize, arm, and discipline the militia if Congress failed to do so. *Id.* That omission strongly indicates that Mason regarded his militia-and-arms composite as sufficient to restore the States’ express authority over the militia.

2. New York substituted the composite for a structural proposal

New York’s ratification convention played a central role in the Amendment’s development. Standard accounts overlook that New York transformed a structural militia proposal into Mason’s militia-and-arms composite.

New York initially considered structural proposals after *Federal Farmer*, now identified as Melancton Smith, urged a guarantee that the Militia “shall

always be kept well organized, armed, and disciplined,” according to past usages. App’x E.1, 24a-25a. Antifederalists Smith and John Lansing advanced that approach, as “explanatory” of the Constitution. Young 150. Federalists by James Duane proposed a parallel proposal, conditioned on Congress’ failure to act. App’x E.2, 28a-29a.

The disagreement centered on one phrase: Federalists regarded “past usages” of the militia as “indefinite.” Governor Clinton summarized the common aim: “the object is to keep the Militia well armed,” and directed that “the Com[mittee] will word it.” The committee replaced the structural proposals with Mason’s composite, which New York adopted. App’x E.2, 29-30a. Young 150-51. New York thus treated the composite as sufficient to restore express State authority over the militia.

3. State holdouts proposed a consensus amendment

Most States ratified without proposing a militia amendment. Of the four States that initially withheld ratification, Virginia, followed by North Carolina, proposed Mason’s militia-and-arms composite together with a structural amendment. App’x F.2, 26a-28a. New York, followed by Rhode Island, proposed only Mason’s composite, treating a corresponding structural amendment as unnecessary. App’x E.2, 29a-30a.

Thus all four holdout States adopted Mason’s militia-and-arms composite as an express safeguard of their right to maintain a militia.

4. Madison adopted the consensus amendment

After the Constitutional Convention walkouts and refusals to sign, Madison transmitted to Jefferson a summary of state proposals for “further guards to public liberty & individual rights.” Madison believed “jealousy of the subordinate Governments” provided “security” against federal overreach, but acknowledged the risk of federal “subversion of liberty” and concluded “it is prudent to guard agst. it.” App’x E.3, 31a.

By the time Madison drafted the Bill of Rights in New York City, militia proposals had narrowed to the single consensus amendment New York had substituted for structural language and deemed explanatory. Madison drew not from competing proposals, as generally assumed, but from the formulation on which non-signer Mason and all holdout States had converged.

Madison adopted the consensus amendment in New York’s form, as well as New York’s broader ordering of amendments and preface. But he made two material changes, substituting “security” for “defence” and adding “shall not be infringed.” Both terms had settled meanings in federal and state organic law and concerned state security and legislative authority. App’x E.3, 31a-32a.

Madison also added: “no person religiously scrupulous of bearing arms shall be compelled to render military service in person.” That exemption makes little sense if the Amendment protected an

individual right of self-defense, as the *Heller* majority held, or a right to serve, as the dissents supposed.

Thereafter, the House reversed the order of the Mason composite into its final militia-and-arms form. The Senate eliminated Madison’s conscience exemption and reduced “best security” to “security.” App’x E.4, 32a-33a.

Focused on Madison’s provision that the Senate rejected, the parties and *Heller* did not address the consensus amendment that Madison adopted as the “guard” against federal “subversion of liberty” he deemed prudent, or the two terms he added to clarify it.

5. Consensus amendment satisfied Antifederalist demands

Mason—whose central objection was the absence of an explicit concurrent state power over militia—recorded “much Satisfaction” with the proposed amendments, including the consensus amendment he had drafted and Madison had strengthened. App’x E.5, 33a-34a.

The resulting language closely tracks the States’ right under the Articles to “keep up a well regulated and disciplined militia, sufficiently armed,” while echoing the Article’s protection against infringement of state internal affairs. It completed the Militia Clauses’ structure by expressly securing the ability of the States—often termed “the people,” *infra* Point IV.C—to maintain an armed militia.

Heller acknowledged that ratification debate centered on “the institution of the state militia,” but assumed that concern appeared only in the unadopted structural proposal. 554 U.S. at 603. It did not recognize that the Amendment addressed the same concern through a declaratory guarantee: forbidding infringement of the States’ right to maintain their militia as security against federal neglect or abuse. As Justice Stevens later observed, the Amendment “serves the structural function of protecting the States from encroachment by an overreaching Federal Government.” *McDonald*, 561 U.S. at 897.

III. Purpose: Securing States Against the Federal Guarantor

Heller recognized the “prefatory clause announces the purpose for which the right was codified”—“A well regulated Militia, being necessary for the security of a free State”—but held that the clause “does not limit” the right, relying on authority concerning detached preambles. 554 U.S. at 578 & n.3, 599. A prefatory clause in the same sentence, however, is a “limitation” that “may not be ignored.” *Graham v. John Deere Co.*, 383 U.S. 1, 6 (1966). And the House Committee of Style inverted Mason’s and Madison’s proposed order to an ablative absolute—a dependent phrase modifying the rest of the sentence.

Moreover, the “purpose of the text” is a “vital part of its context,” itself a “primary determinant of meaning.” Reading Law 33, 167-68. The fact that the Amendment’s two halves denote the same militia

system further supports that the militia clause explains the arms clause.

Compounding its error, *Heller* did not construe “security,” explain Madison’s substitution for “defence,” or construe “security of a free State” as a whole. “Every word must be given its due force, and appropriate meaning.” *Holmes v. Jennison*, 39 U.S. 540, 570–71 (1840). Each is “affected by other provisions of the same statute.” Reading Law, 167, 252. Disregarding that canon, *Heller* missed the clause’s specific purpose.

The Articles, Constitution, and state constitutions distinguished ordinary defense from security of public liberty against usurpation. Madison’s Virginia, for example, declared that government is “instituted for the common benefit, protection, and security,” the latter secured against “maladministration” and “tyranny.” App’x G, 34a.

Addressing the constitutional gap that left security of public liberty implied, *supra* Point II.B.2. John Smilie asked: “Congress guarantees to each state a republican form of government.’ Is this a security for a free government? Can even the shadow of state governments be continued if Congress please to take away, or annihilate, the militia?” App’x G, 35a.

The Guarantee Clause resembled a treaty guarantee of another state’s integrity—an exception to the non-interference principle that one state may not infringe another’s internal affairs. But guarantees “to defend the particular constitution of a State” often proved “fatal to her liberties and to her

very existence.” 2 Robert Phillimore, *Commentaries Upon International Law* 71 (London 1855); 1 *id.* at 441. Smilie rejected the argument that the people’s ultimate power to abolish the federal government rendered a lesser check “superfluous.” App’x G, 35a.

The Second Amendment was that check. As Elbridge Gerry, another non-signer, explained, without recorded contradiction, it was “intended to secure the people”—the States—“against the mal-administration of the government”—the federal government. App’x G, 35a-36a. By preserving state militia as security for public liberty, the Amendment supplied a reciprocal guarantee against misuse of the Guarantee Clause and federal military powers.

IV. Actual Meaning: State Right Not to Be Infringed

A. *Heller* Rewrote “Well Regulated Militia” into Unsupported Abstractions

Heller concluded, in a sentence, that “well regulated” “implies nothing more than” “discipline and training.” 554 U.S. at 597. That conclusion overread its sole founding source, Virginia’s 1776 constitution, and is refuted by Virginia’s 1777 and 1779 “Act[s] for Regulating and Disciplining the Militia,” whose openings explain both terms: “forming the citizens of this commonwealth into a militia, and disciplining the same for defence thereof.” App’x H, 36a-37a. “Form” was similarly used in Pennsylvania’s 1755 militia act, *supra*, and is the plain meaning of “regulate” in the constitutional provisions concerning

regular forces and militias. *See supra* Point II.B.2; F1.

Further, treating “Regulating and Disciplining” as synonyms produces “disciplined and disciplined,” an impermissible “imbecility,” Joseph Story, *Rules of Constitutional Interpretation* 190 (1833)—not only for Virginia’s statutes, but the Articles whose phrase “well regulated and disciplined militia” governed the Amendment’s drafting. As Madison warned, terms copied into the Constitution cannot be given a different meaning.

Heller similarly recast “militia” as a “citizens’ militia,” citing no authority. 554 U.S. at 595–96. It acknowledged “militia” means “the same thing” in the Amendment and Article I’s Militia Clauses, but reasoned Article’s I’s reference to organizing “the Militia,” rather than “a Militia,” presupposed an existing body—one it equated with the demographic pool of all able-bodied men. *Id.* at 595-96, 599–600. That semantic abstraction is negated by Article I itself, which uses definite articles for institutions not in existence, including “the supreme Court.” Art. 1, § 8, cl. 9.

The relevant existing institution was the States’ militia. The Constitution itself identifies militia as “the Militia of the several States,” Art. 2, sec. 2, cl. 1; its syntax, structure, and drafting history confirm that meaning, *Silveira v. Lockyer*, 312 F.3d 1052, 1070-72, 1076-86 (9th Cir. 2002); and the Articles’ precise phrase “well regulated militia” refers to the militia of “each State.” Art. VI, para. 4. The related-

statutes canon and rule against changing copied meanings require consistent usage.

Contradicting *Heller's* assertion that the constitutional "Militia" meant an unorganized body, John Adams explained that "the sword and sovereignty go together," and described the militia as the "hand" holding the "public sword"—an institution "created, directed, and commanded by the laws, and ever for the support of the laws." *A Defence* 474–75, 487. Hamilton, chair of a post-war congressional militia committee, likewise explained that "well-regulated militia" means "uniformity in organization and discipline" for "the public defense." *Federalist* 29. That understanding was so established that in 1692, West Jersey proprietors placed "a well regulated militia" "next to" "Almighty God." Whisker 16 (citation omitted).

Heller cited no evidence that the founding generation understood "the Militia" to mean a "citizens' militia." Constitutional construction cannot rest on "metaphysical subtleties." *Houston*, 18 U.S. at 46–47 (Story, J., dissenting). Conflating "citizen soldiers" with "militia," it converted distinct terms into an oxymoron.

Absent those abstractions—"disciplined" for well-regulated, and "citizens' militia" for militia—an individual right of self-defense "fits poorly" with the Amendment, as *Heller* acknowledged. 554 U.S. at 580-81.

B. *Heller* Never Construed “*Security” of a Free State

The second phrase fares no better. *Heller* assumed that “necessary for the security of a free State” meant security “of a free polity,” not of the several States. 554 U.S. at 597. But as discussed *supra* Point III, it never construed “security.”

Heller also overlooked Madison’s substitution of “security” for “defence.” Founding constitutions, debates, and commentary used “security” to mean protection against maladministration and tyranny. Here, “security” meant a reciprocal state guarantee against misuse of militia powers by the federal guarantor. *Supra* Point III.

Omitting that text and history, *Heller* posited that a “citizens’ militia” served as the “safeguard against tyranny” when “constitutional order broke down.” 544 U.S. at 599-600. That disregards the founding record. Hamilton invoked the “axiom of our political system”: “The State governments will, in all possible contingencies, afford complete security against invasions of the public liberty by the national authority,” not citizens in “their courage and despair.” *Federalist* 28. Madison agreed that the “subordinate governments” would “repel the danger.” *Federalist* 46.

The prefatory clause is not surplusage. Like parallel language in militia enactments, it identifies the constitutional object of the right: preserving well-regulated state militias as security for public liberty against federal oppression. By disregarding context, inventing a “citizens’ militia,” and failing to construe

“security,” *Heller* did not interpret the clause; it rewrote it.

C. *Heller* Overlooked the Public Context of “Right of the *People”

Another central error is *Heller*’s assumption that, because the First and Fourth Amendments use “the people” to denote individual rights, the Second must also. But the “same words, placed in different contexts, sometimes mean different things.” *Yates v. United States*, 574 U.S. 528, 537 (2015). Its drafter, Madison, explained that “the states” and “the people” take their “true sense” from “different applications of the term.” *Report of 1800*.

Context controls. The First and Fourth Amendments address individual rights. The Second is framed by terms of militia law, and by “shall not be infringed,” an international-law term protecting sovereign rights, *infra*. In that setting, “the people” denotes a body politic, whose corresponding “right” is public.

Founding usage often treated “the people” and “State” as interchangeable—for example, “the states, or the people assembled in the state legislatures.” *Federal Farmer* (X), App’x F.1, 24a. English usage likewise called the House of Commons “the People.” State legal process was styled, as today, in the name of the “People” in New York, “Commonwealth” in Pennsylvania, “State” in North Carolina, or both in Vermont. *Compare People v. Royalton & Woodstock Tnpk. Co.*, 11 Vt. 431 (1839) with *State v. Nixon*, 18 Vt. 70, 75 (1846) (“[T]o designate the sovereign power,

we usually say—The State of Vermont;” or “by the term—The People.”).

States possess powers and rights: powers when viewed internally, as authority to legislate, tax, and punish; and rights when viewed externally, authority exercisable against another sovereign free from interference. Point IV.E. The Articles protected state “legislative right” over internal affairs against federal “infringement,” and reserved to each State every “power, jurisdiction and right” not delegated. The Ninth and Tenth Amendments divided that reservation; the Ninth’s reservation of “rights ... retained by the people” includes public rights, App’x B.2, 6a-8a, not merely unenumerated private liberties.

Recent decisions underscore *Heller’s* error. Applying the “specific context,” the Vermont Supreme Court held that its Constitution’s “right of the people to bear arms for defence of themselves and the state,” falls within “the category of rights” “exercised by the body politic, like “regulating the internal police.” *State v. Misch*, 2021 VT 10, ¶¶ 27–29 (2021). *See also Barris v. Stroud Twp.*, 310 A.3d 175, 180 n.4 (Pa. 2024) (declining to assume *Heller* correctly interpreted Pennsylvania’s identical provision).

In the Second Amendment, “right of the people” refers to a public right—not merely an unenumerated retained right, as Federalists argued, but the express right Antifederalists demanded.

D. *Heller* Construed “Keep and Bear Arms” Under the Wrong Body of Law

Despite *Miller’s* reliance on Assize-of-Arms principles—and directive that the Amendment “must be interpreted and applied with that end in view,” 307 U.S. at 178—neither the parties, the amici, nor the Court in *Heller* cited the Assize, applied its body of law, or addressed its use of “keep” and “bear arms.”

In that vacuum, *Heller* construed “keep” arms as “have” arms, dismissing any “militia-related connotation.” 554 U.S. at 582-83. It overlooked that both terms denoted militia duties and readiness in the Assize, Winchester, and subsequent militia law. Point II.B.I. Virginia’s militia act, for example, required militiamen to “constantly keep the aforesaid arms, ready to be produced.” 554 U.S. at 650 (Stevens, J., dissenting);

Heller misread Blackstone’s discussion of a 1689 English statute, providing “no Papist” may “have or keep in his House” arms, as an example of regulation of an individual right. 554 U.S. at 582. The statute instead was part of the militia settlement: it required seizure of Catholics’ arms alongside the 1689 English declaration allowing Protestants to have arms—the legislative scheme followed by the 1757 Pennsylvania militia act regulating militia membership and public control of military materiel, *supra*. App’x A, D.1; 4a, 16a.

Heller acknowledged that “bear Arms” has an idiomatic military meaning, but maintained it

“unequivocally bore” that meaning “only when followed by the preposition ‘against,’” 554 U.S. at 586—another abstraction refuted by the Assize and subsequent militia acts, none of which use “against.” *Heller* instead relied on a criminal-law case construing “carries a firearm,” *Muscarello v. United States*, 524 U.S. 125 (1998), and imported its definition of carrying a weapon. That approach treated criminal-law usage as controlling rather than rejecting it as inapposite.

Heller also recast *Miller*’s description of “arms”—“ordinary military equipment” “in common use at the time,” 307 U.S. at 179—as “weapons typically possessed by law-abiding citizens for lawful purposes.” 554 U.S. at 625. That abstraction, assumed to control these cases, appears nowhere in the Constitution. *Miller* quoted military specifications that “show plainly” what “arms” meant, and emphasized penalties for delinquency to ensure possession. 307 U.S. at 179-82. *See* Whisker 17-18 (citing examples). One originalist scholar called *Heller*’s reformulation “bizarre,” having “zero historical support,” and a “test Justice Scalia invented.” Nelson Lund, *The Second Amendment, Heller, and Originalist Jurisprudence*, 56 UCLA L. Rev. 1343, 1364, 1366-67 (2009).

The only reported decision to cite *Miller*’s reliance on the Assize recognized that “the right to keep and bear arms is meant solely to protect the right of the states to keep and maintain armed militia,” *Hickman v. Block*, 81 F.3d 98, 101-02 & n.8 (9th Cir. 1996). That conclusion accords with the prior understanding. *See supra* n.3. And it follows from the applicable canons,

which require enactments to be read in context, consistently, and as a whole.

E. *Heller* Never Construed “Shall Not Be Infringed”

Worse still, *Heller* did not construe the verb on which the Amendment rests. Instead, it transposed “infringed” to “abridged,” 554 U.S. at 599, 606—a substitution not “tolerated” in constitutional construction. *Ogden v. Saunders*, 25 U.S. 213, 267-68 (1827). Where terms “cannot, in any appropriate sense, be said to be synonymous,” treating them as if they “signify the same thing” would “defeat the obvious purposes of both.” *Houston*, 18 U.S. at 64 (Story, J., dissenting).

“Abridge” appears in the First Amendment and later amendments protecting personal rights. It derives from social-contract theory: natural rights, Hobbes explained, “may by the Civill Law be abridged.”

“Infringe,” by contrast, is found in three of four organic laws—the Articles of Confederation (providing “the legislative right of any state ... be not infringed”), Northwest Ordinance (incorporating the Articles), and the Second Amendment—to protect sovereign rights.

The term was drawn from the law of nations. The Peace of Westphalia codified principles of jurisdiction, territoriality, and non-interference against an “Infringer” of peace among nations. The Treaty of Utrecht likewise required that no nation “infringe”

the “rights of any other.” Vattel, who often supplied “the reason for using” terms in the Constitution, *Holmes*, 39 U.S. at 570-71, 616-17, explained that because nations are “free and independent,” each is entitled to “peaceable enjoyment” of its liberty and no state may “infringe upon [another’s] perfect rights.” 1 Emer de Vattel, *The Law of Nations*, prelims. § 15 (1758).

The Federalist invoked the history of the Peace of Westphalia and Dutch union in explaining federalism and the States’ “residuary and inviolable sovereignty” beyond enumerated federal jurisdiction. *Federalist* 19, 20, 39; *Printz*, 521 U.S. at 921 n.11. Divided sovereignty meant that “mutual rights and powers” would “infringe occasionally upon each other.” *Smith v. Turner*, 48 U.S. 283, 549, 553 (1849) (Woodbury, J., dissenting). “Infringement” likewise described encroachment upon public franchises and patents—“the history of America.” *Johnson v. McIntosh*, 21 U.S. 543, 574, 579-86 (1823).

The distinction between infringed and abridged appears throughout colonial protests and founding-era legal materials. See App’x H, 37a-53a. Jefferson’s *Summary View of the Rights of British America* (1774), for example, distinguished public rights—no legislature may “infringe on the rights and liberties of another”—from natural rights that law might “take[] away or abridge[].” App’x H, 40a-41a.

The exception for rights of conscience confirms the distinction. Jefferson explained that religious belief was “not the object of civil government” and “not under its jurisdiction”; restraints on belief constituted

“an infringement” of divine sovereignty. By contrast, “all other natural rights[] may be abridged ... by the law.” Thomas Jefferson, Constitutionality of Residence Bill of 1790.

The First Congress retained that distinction. Madison’s proposed First Amendment used “abridged” for civil rights and “infringed” for rights of conscience. The House altered the civil-rights language to “infringed”; the Senate restored “abridging.” By contrast, every version of the Second Amendment—from Madison’s proposal through the final text—used “infringed.” App’x H, 32a-33a.

Case law reflects the usage and distinction. *E.g.*, *New York v. United States*, 505 U.S. 144, 177, 181 (1992) (describing federal action “infringing upon the core of state sovereignty reserved by the Tenth Amendment” as contrary to federalism’s “fundamental purpose”); *Worcester v. Georgia*, 31 U.S. 515, 558-59, 568 (1832) (addressing Articles’ restriction on Congress’ power to “infringe” state legislative rights and a Georgia statute barring acts that “abridge the right or privileges of any Indian”). One Second Amendment case distinguished between “abridgment personal rights and “infringement” of political rights. *English v. State*, 35 Tex. 473, 477 (1872).

Heller addressed none of this, either. It gave “infringed” no heading or analysis, although the Amendment turns on that word.

This Court has since corrected a related misconception, holding patent infringement concerns

a “public right.” *Oil States Energy Services, LLC v. Greene’s Energy Group, LLC*, 584 U.S. 325, 334–36 (2018). But *Oil States* likewise did not consider the meaning of “infringement” or its use for public rights.

V. *Heller* Should Be Rebriefed And Reconsidered

A. *Heller* Has No Binding Effect in These Cases

That conclusion follows from ordinary principles of *stare decisis*. *Heller* is bounded first by its question presented: whether handgun restrictions “violate” the Second Amendment rights of “individuals.” Pet. Br., i (No. 07-290); 554 U.S. at 573, 635. That question assumed away the Amendment’s actual text and right, as did oral argument: “at issue this morning is the scope and nature of the individual right.” Tr. 3 (Mar. 18, 2008).

Second, *Heller* binds only as to questions decided, not terms left unconstrued or premises assumed. *Pollock*, 157 U.S. at 574-76. Other courts have recognized that a decision overlooking pivotal text “cannot stand” and has “nothing to contribute.” *E.g.*, *Fluor Corp. v. Superior Court*, 61 Cal. 4th 1175, 1182 (2015); *State v. Sandoval*, 342 Ore. 506, 512-13 (2007). Because *Heller* did not construe key constitutional terms—“security” and “infringed”—or construe the Amendment as a whole, it cannot be extended to these cases.

**B. *Heller*'s Consequences Confirm the
Need for Reconsideration**

Heller's consequences are starkly evident. "Our Nation is gripped by a level of deadly gun violence our founders never could have conceived." *Barris*, 310 A.3d at 215 (joining "ever-growing chorus" urging the Court "to reconsider its path entirely").

By constitutionalizing broad firearms possession, *Heller* magnifies the predictable consequences of anger, passion, intoxication, and impaired impulse control. *See* 554 U.S. at 694 (Breyer, J., dissenting). Its costs are measured not only in lives but are widespread.

Justice Scalia had urged overruling a "judge-invented doctrine" and "mess I helped make" once its error became "glaringly obvious." *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 814 (2014) (Scalia, J., dissenting). The same willingness to reconsider is warranted here.

CONCLUSION

The Court should direct briefing on the question Justice Barrett identified, reconsider *Heller*, and decide the Second Amendment according to its legal context, text, and meaning.

Respectfully submitted,

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APPENDIX

APPENDIX

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APPENDIX A: English Bill of Rights and Related Statutes

Assize of Arms (1181)	“He who has a knight's fee shall have a coat of mail, a helmet, a shield, and a lance . . . Moreover, all freemen of the whole realm shall have a doublet, an iron cap, and a lance.” Assize of Arms 1181, <i>translated in</i> George B. Adams & H. Morse Stephens, <i>Select Documents of English Constitutional History</i> 23 (1901).
Statute of Winchester (1285)	“[E]very man have in his house harness for to to keep the peace after the ancient assize; that is to say, 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” Statute of Winchester 1285, 13 Edw. 1, st. 2, c. 6 (Eng.), <i>translated in</i> George B. Adams & H. Morse Stephens, <i>Select Documents of English Constitutional History</i> 23 (1901).
Queen Mary's Militia Statute (1557)	“[H]ave keep and maintain in readiness . . . at their own proper costs and charges, horse, armour and weapons . . . [and that] the

inhabitants of every city, burgh,
town, parish, or hamlet . . . shall
make and have such common
armour and weapons”

An Act for the having of Horse
Armour and Weapons 1557, 4 & 5
Phil. & M. c. 2, §§ 1, 2 (Eng.).

Militia Act
(1662)

“[T]he said Lieutenants and their
Deputies . . . shall have power to
charge any person with Horse,
Arms, and Allowance . . . [and if
any persons] shall refuse or
neglect . . . to provide such Foot-
Soldiers and Arms”

An Act for ordering the Forces in
the several Counties of this
Kingdom, 14 Car. 2, c. 3, §§ 3, 4
(1662), *reprinted in* 5 The Statutes
of the Realm 358–59 (1819).

English Bill of
Rights (1689):
preamble

“Whereas the late King James the
Second by the Assistance of
diverse evil Counsellors Judges
and Ministers imploied by him did
endeavour to subvert and
extirpate the Protestant Religion
and the Laws and Liberties of this
Kingdom”

Bill of Rights, 1 W. & M. sess. 2, c.
2 (1689), *reprinted in* 6 The
Statutes of the Realm 142 (1819).

English Bill of Rights (1689):
reaffirmation of
existing rights

“And thereupon the said Lords
Spiritual and Temporal and
Commons . . . being now
assembled in a full and free
Representative of this Nation . . .
do in the first place . . . declare . . .
[a]nd they do claim demand and
insist upon all and singular the
Premises as their undoubted
Rights and Liberties”

Id. at 142.

English Bill of Rights (1689):
standing-army
grievance

“By raising and keeping a
Standing Army within this
Kingdom in Time of Peace without
Consent of Parliament.”

Id. at 142.

English Bill of Rights (1689):
standing-army
remedy

“That the raising or keeping a
Standing Army within the
Kingdom in Time of Peace unless
it be with Consent of Parliament is
against Law.”

Id. at 143.

English Bill of Rights (1689):
militia
grievance

“By causing several good Subjects
being Protestants to be disarmed
at the same time when Papists
were both Armed and Employed
contrary to Law.”

Id. at 142.

English Bill of Rights (1689): arms declaration	“That the Subjects which are Protestants may have Arms for their Defence suitable to their Conditions and as allowed by Law.” <i>Id.</i> at 143.
Militia Act (1689): arms of Catholics (disarming)	“. . . [N]o Papist or reputed Papist soe refuseing or makeing default [to make the anti-Catholic declaration] shall or may have or keep in his House or elsewhere or in the Possession of any other person to his use or at his disposition any Arms Weapons Gunpowder or Ammunition (other than such necessary Weapons as shall be allowed to him by Order of the Justices of the Peace . . . for the defence of his House or person).” An Act for the better secureing the Government by disarming Papists and reputed Papists, 1 W. & M. sess. 1, c. 15 (1689), reprinted in 6 The Statutes of the Realm 71–72 (1819).
Militia Act (1757): preamble	“Whereas a well-ordered and well-disciplined Militia is essentially necessary to the Safety, Peace and Prosperity of this Kingdom.” Militia Act 1757, 30 Geo. 2 c. 25,

pmb. (G.B.), *reprinted in* 22
Statutes at Large 83 (1766).

Militia Act
(1757): arms of
Catholics
(disarming)

“[I]f any Papist, or reputed Papist,
being so charged, shall neglect or
refuse to provide such Foot Soldier
and Arms . . . it shall and may be
lawful for the Lieutenant . . . to
provide a proper Foot Soldier, and
also proper Arms for him; and the
said Lieutenant . . . shall and may,
and are hereby authorized to seize
the Arms of such Papists or
reputed Papists to and for the
public Use”

Id. at § 30.

APPENDIX B: Colonial and State Organic Laws and Statutes

1. Well Regulated Militia

North
Carolina
(1777)

“Whereas a well regulated Militia is
absolutely necessary for the
defending and securing the Liberties
of a free State...”

An Act for Establishing a Militia in
This State 1777, N.C. Sess. Laws ch.
1, § I, p. 1.

Georgia
(1778)

“Whereas a well ordered and
disciplined militia is absolutely

necessary for the safety and defense of a free state...”

An Act for the Better Ordering and Regulating the Militia of This State 1778, Ga. Acts p. 1.

Pennsylvania (1780)	“And whereas a well regulated militia is the only safe and constitutional method of defending a free state, as the necessity of keeping up a standing army, especially in times of peace, is thereby superseded.”
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An Act for the Regulation of the Militia of the Commonwealth of Pennsylvania 1780, Pa. Laws ch. 167, § II, p. 278.

Connecticut (1782)	“Whereas the Defence and Security of all free States depends (under God) upon the Exertions of a well regulated Militia...”
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Acts and Laws Regulating the Militia 1782, Conn. Acts & Laws p. 585.

New York (1786)	“Whereas a well regulated militia is essentially necessary to the safety and defense of a free state...” An Act to Regulate the Militia 1786, N.Y. Laws ch. 25, § I, p. 38.
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2. Public Rights of the People

Pennsylvania Constitution of 1776	“That the people of this State have the sole, exclusive and inherent right of governing and regulating the internal police of the same.” Pa. Const. of 1776, art. III.
North Carolina Declaration of Rights (1776)	“That the people of this State ought to have the sole and exclusive right of regulating the internal government and police thereof.” N.C. Declaration of Rights of 1776, § II.
Vermont Constitution of 1777	“That the people of this State have the sole, exclusive, and inherent right of governing and regulating the internal police of the same.” Vt. Const. of 1777, ch. I, § IV.
Massachusetts Constitution of 1780	“The people of this commonwealth have the sole and exclusive right of governing themselves, as a free, sovereign, and independent state; and do, and forever hereafter shall, exercise and enjoy every power, jurisdiction, and right, which is not, or may not hereafter be, by them expressly delegated to the United States of America in Congress assembled.” Mass. Const. of 1780, pt. I, art. IV.

New Hampshire Constitution of 1784	“The people of this state have the sole and exclusive right of governing themselves as a free, sovereign, and independent state, and do, and for ever hereafter shall, exercise and enjoy every power, jurisdiction and right pertaining thereto, which is not, or may not hereafter be by them expressly delegated to the United States of America in Congress assembled.”
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N.H. Const. of 1784, pt. I, art. VII.

APPENDIX C: Mason Triads

1. Virginia Militia Model (Militia as Safe Defense)

Virginia Declaration of Rights of 1776, § 13	“That a well regulated militia, composed of the body of the people, trained to arms, is the proper, natural, and safe defence of a free state; that standing armies, in time of peace, should be avoided, as dangerous to liberty; and that, in all cases, the military should be under strict subordination to, and governed by, the civil power.”
	Va. Declaration of Rights of 1776, § 13.
Delaware Declaration of	“18. That a well regulated militia is the proper, natural, and safe defence of a free

Rights of 1776, §§ 18–20	state. 19. That standing armies are dangerous to liberty, and ought not to be raised or kept up without the consent of the Legislature. 20. That in all cases, and at all times, the military ought to be under strict subordination to, and governed by, the civil power.” Del. Declaration of Rights of 1776, §§ 18–20.
Maryland Declaration of Rights of 1776, arts. XXV– XXVII	“XXV. That a well-regulated militia is the proper and natural defence of a free government. XXVI. That standing armies are dangerous to liberty, and ought not to be raised or kept up, without consent of the Legislature. XXVII. That in all cases and at all times, the military ought to be under strict subordination to and governed by the civil power.” Md. Declaration of Rights of 1776, arts. XXV–XXVII.
New Hampshire Constitution of 1784, pt. I, arts. XXIV–XXVI	“XXIV. A well regulated militia is the proper, natural, and safe defence of a state. XXV. Standing armies are dangerous to liberty, and ought not to be raised or kept up without the consent of the legislature. XXVI. In all cases, and at all times, the military ought to be under strict subordination to, and governed by the civil power.”

N.H. Const. of 1784, pt. I, arts. XXIV–XXVI.

2. Pennsylvania Arms Model (Bear Arms for Defense)

Pennsylvania Declaration of Rights of 1776, art. XIII	“That the people have a right to bear arms for the defence of themselves and the state; and as standing armies in the time of peace are dangerous to liberty, they ought not to be kept up; and that the military should be kept under strict subordination to, and governed by, the civil power.”
	Pa. Declaration of Rights of 1776, art. XIII.
North Carolina Declaration of Rights of 1776, art. XVII	“That the people have a right to bear arms, for the defence of the State; and as standing armies, in time of peace, are dangerous to liberty, they ought not to be kept up; and that the military should be kept under strict subordination to, and governed by, the civil power.”
	N.C. Declaration of Rights of 1776, art. XVII.
Vermont Declaration of Rights of 1777, ch. I, art. XV	“That the people have a right to bear arms for the defence of themselves and the State; and as standing armies, in the time of peace, are dangerous to liberty, they ought not to be kept up; and that the military should be kept under strict subordination to, and governed by, the civil power.”

	Vt. Const. of 1777, ch. I, art. XV.
Massachusetts Constitution of 1780, pt. I, art. XVII	“The people have a right to keep and to bear arms for the common defence. And as, in time of peace, armies are dangerous to liberty, they ought not to be maintained without the consent of the legislature; and the military power shall always be held in an exact subordination to the civil authority, and be governed by it.”
	Mass. Const. of 1780, pt. I, art. XVII.

3. Bearing Arms Exemptions (Under Both Models)

Pennsylvania Constitution of 1776, art. VIII	“...[N]or can any man who is conscientiously scrupulous of bearing arms, be justly compelled thereto, if he will pay such equivalent”
	Pa. Const. of 1776, art. VIII.
Vermont Constitution of 1777, ch. I, art. IX	“...[N]or can any man who is conscientiously scrupulous of bearing arms, be justly compelled thereto, if he will pay such equivalent”
New York Constitution of 1777, art. XL	Vt. Const. of 1777, ch. I, art. IX. “...[T]hat all such of the inhabitants of this State being of the people called Quakers as,

from scruples of conscience, may be averse to the bearing of arms, be therefrom excused by the legislature”

N.Y. Const. of 1777, art. XL.

New Hampshire
Constitution of
1784, pt. I, art.
XIII

“No person who is conscientiously scrupulous about the lawfulness of bearing arms, shall be compelled thereto, provided he will pay an equivalent.”

N.H. Const. of 1784, pt. I, art. XIII.

4. Statutory Adaptation of the Militia Model in Bear-Arms States

Source	Text
North Carolina Militia Act (1777)	“Whereas a well regulated Militia is absolutely necessary for the defending and securing the Liberties of a free State” An Act for establishing a Militia in this State, N.C. Sess. Laws ch. I, pmbl. (1777), reprinted in 24 The State Records of North Carolina 1 (Walter Clark ed., 1905).
Pennsylvania Militia Act (1777)	“Whereas a well regulated militia is absolutely necessary for the defending and securing the liberties of a free state”

An Act to regulate the Militia of the Common-Wealth of Pennsylvania, Pa. Laws ch. DCCL, pmbl. (1777), reprinted in 9 The Statutes at Large of Pennsylvania from 1682 to 1801, at 75 (Wm. Stanley Ray ed., 1903).

Vermont
Militia Act
(1779)

“An Act for forming and regulating the Militia; and for Encouragement of Military Skill, for the better Defence of this State.”

An Act for Forming and Regulating the Militia and for Encouragement of Military Skill, for the Better Defence of This State, 1779 Vt. Acts & Resolves 18, 19–20 (Padlock & Spooner).

5. “Defense of Themselves” Counterparts and Antecedents in Bear-Arms States

a. Organic Provisions

Pennsylvania
Constitution

“That every member of society hath a right to be protected in the enjoyment of life, liberty and property, and therefore is bound to contribute his proportion towards the expense of that protection, and yield his personal service when necessary, or an equivalent thereto:

But no part of a man's property can be justly taken from him, or applied to public uses, without his own consent . . . Nor can any man who is conscientiously scrupulous of bearing arms, be justly compelled thereto, if he will pay such equivalent”

Pa. Const. of 1776, art. VIII.

North
Carolina
Constitution

“That every member of society hath a right to be protected in the enjoyment of life, liberty and property, and therefore is bound to contribute his proportion towards the expence of that protection, and yield his personal service when necessary, or an equivalent thereto”

N.C. Const. of 1776, Declaration of Rights, art. VIII.

Vermont
Constitution

“That every member of society hath a right to be protected in the enjoyment of life, liberty and property; and therefore is bound to contribute his proportion towards the expense of that protection, and yield his personal service, when necessary, or an equivalent thereto . . . Nor can any man who is conscientiously scrupulous of bearing arms, be justly compelled thereto, if he will pay such

equivalent”

Vt. Const. of 1777, ch. I, art. IX.

b. Statutory Antecedents

Pennsylvania
Militia Act of
1755

“...[T]o take into Consideration the Premises, and provide a Law for the better Ordering and Regulating such as are willing and desirous to be united for Military Purposes . . . [permitting them] to form themselves into Companies, and each Company, by a Majority of Votes in the Ballot Way, to chuse a Captain, Lieutenant, and Ensign . . . to form themselves into Regiments . . . [authorizing citizens willing] to defend themselves and their Country, and who of themselves may be willing and desirous to be formed into regular Bodies for that Purpose, under suitable and legal Authority”

An Act for the better Ordering and Regulating such as are willing and desirous to be united for Military Purposes within this Province, 1755 Pa. Laws ch. CCCCXV, pmb., § 1, reprinted in 5 The Statutes at Large of Pennsylvania 197–99 (1898).

APPENDIX D: Disqualification from Militia Service (Disarmament)

1. Disarmament on Religious Grounds

Virginia Disarming Act of 1756	“...[I]t shall not be lawful for any papist, or reputed papist, to have or keep in his house, or elsewhere, or in the possession of any other person to his use, or at his disposition, any arms, weapons, gunpowder, or ammunition . . . [unless allowed by the justices for defense of house or person] . . .” An Act for disarming Papists, and reputed Papists, refusing to take the Oaths to the Government, 1756 Va. Acts ch. XIII, § 3, reprinted in 7 Hening's Statutes at Large 35, 36 (1820).
Pennsylvania Militia Act of 1757	Ordered the seizure of arms that any Catholic “shall have in his house or elsewhere,” directing that such weapons be delivered to the “district regiment” to be kept for “public use.” Militia Act of 1757, reprinted in 5 The Statutes at Large of Pennsylvania 614 (1898).

2. Wartime Disarmament of Loyalists and Non-Associators

Continental Congress	“Resolved, That it be recommended to the several
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Resolution (1776)	assemblies, conventions, and councils or committees of safety of the United Colonies, immediately to cause all persons to be disarmed within their respective colonies, who are notoriously disaffected to the cause of America, or who will not associate, and defend, by arms, these United Colonies, against the hostile attempts of the British fleets and armies” Continental Congress Resolution (Mar. 14, 1776), reprinted in 4 Journals of the Continental Congress 1774-1789, at 205 (Worthington Chauncey Ford ed., 1906).
Massachusetts Disarming Act (1776)	Authorized local officials to disarm any person “who shall refuse to subscribe the association test,” or who was “notoriously disaffected to the cause of America,” mandating that their arms be taken and appraised for public defense. An Act for Disarming Persons Disaffected to the Cause of America, 1776 Mass. Acts ch. VII, pmbl.
Pennsylvania Non-Associator	“...[T]hat the colonel or next officer in command of every battalion of

Ordinance (1776)	militia in this state is hereby authorized, empowered and required to collect, receive and take all the arms in his district or township . . . which are in the hands of non-associators . . . to arm the volunteers” An Ordinance Respecting the Arms of Non-Associators, Pa. Const. Convention (July 19, 1776), reprinted in 5 Statutes at Large of Pennsylvania 614 (1898).
Virginia Test Act (1777)	Required all freeborn male inhabitants above sixteen to take an oath of allegiance to the Commonwealth, directing that all “recusants” refusing the oath “shall be disarmed by the commanding officer of the militia of the county” An Act to Oblige the Free Male Inhabitants of this State Above a Certain Age to Give Assurance of Allegiance to the Same, 1777 Va. Acts ch. III, reprinted in 9 Hening’s Statutes at Large 281–83 (1821).
Pennsylvania Disaffection Act (1779)	Declared it “improper and dangerous that persons disaffected to the liberty and independence of this state shall possess or have in their own

keeping, or elsewhere, any firearms,” empowering militia officers to disarm any person who refused to take the oath of allegiance.

An Act to Empower the Militia Officers to Disarm Persons Disaffected to the Independence of This State, 1779 Pa. Laws ch. DCCCLXII.

3. Post-War Insurgency Disarmament and Constitutional Ratification Proposal

Massachusetts Disqualifying Act (1787)	An Act describing the disqualifications to which persons shall bee subjected, who have been, or may bee guilty of Misprision of Treason . . . , 1787 Mass. Acts ch. VI.
New Hampshire Ratification Convention (1788)	“Congress shall never disarm any Citizen, unless such as are or have been in Actual Rebellion.” New Hampshire Form of Ratification (June 21, 1788), reprinted in 28 The Documentary History of the Ratification of the Constitution 376, 378 (John P. Kaminski et al. eds., 2017).

APPENDIX E: Drafting History and Mason Composite (1787–1789)

1. Constitutional Convention and Militia Objections (1787)

Constitutional Convention (Aug. 18, 1787) — Mason Motion for Uniform Regulation and Discipline of State Militia, With Reservation for State Officers	“Mr. Mason moved an additional power ‘to make laws for regulation and discipline of the Militia of the several States reserving to the States the appointment of the Officers’. He considered uniformity as necessary in the regulation of the Militia throughout the Union. <i>2 The Records of the Federal Convention of 1787</i>, at 330–31 (Max Farrand ed., 1911) (Notes of James Madison).
Constitutional Convention (Aug. 18, 1787) — Mason Modified Motion	“Mr. Mason—had suggested the idea of a select militia. . . . He withdrew his original motion, and moved a power ‘to make laws for regulating and disciplining the militia, not exceeding one tenth part in any one year, and reserving the appointment of officers to the States.’” <i>2 The Records of the Federal Convention of 1787</i>, at 331

	(Max Farrand ed., 1911) (Notes of James Madison).
Constitutional Convention (Aug. 18, 1787) — Sherman on Concurrent Militia Power	“Mr. Sherman, took notice that the States might want their Militia for defence agst invasions and insurrections, and for enforcing obedience to their laws. They will not give up on this point- In giving up that of taxation, they retain a concurrent power. . . .” <i>2 The Records of the Federal Convention of 1787</i>, at 332 (Max Farrand ed., 1911) (Notes of James Madison).
Constitutional Convention (Aug. 18, 1787) — Mason Motion for Concurrent Militia Power	“Col. Mason thought there was great weight in the remarks of Mr. Sherman- and moved an exception to his motion ‘of such part of the Militia as might be required by the States for their own use.’” <i>2 The Records of the Federal Convention of 1787</i>, at 332–33 (Max Farrand ed., 1911) (Notes of James Madison).
Constitutional Convention (Aug. 21, 1787) — Committee Report	“To make laws for organizing arming and disciplining then Militia, and for governing such part of them as may be employed in the service of the U- S reserving to the States,

respectively, the appointment of the officers, and the authority of training the Militia according to the discipline prescribed by the U. States.”

2 The Records of the Federal Convention of 1787, at 356 (Max Farrand ed., 1911).

Constitutional
Convention (Sept.
12, 1787) — Mason
Bill of Rights
Objection

“Mr. Mason . . . wished the plan had been prefaced with a Bill of Rights. . . . It would give great quiet to the people; and with the aid of the State declarations, a bill might be prepared in a few hours.”

2 The Records of the Federal Convention of 1787, at 587–88 (Max Farrand ed., 1911).

Constitutional
Convention (Sept.
14, 1787) — Mason
Motion on Standing
Armies

“Col: Mason, being sensible that an absolute prohibition of standing armies in time of peace might be unsafe, and wishing at the same time to insert something pointing out and guarding against the danger of them, moved to preface the clause (Art I sect. 8) ‘To provide for organizing, arming and disciplining the Militia &c’ with the words ‘And that the liberties of the people may be better secured against

	the danger of standing armies in time of peace.' Mr. Randolph ded. the motion."
Constitutional Convention (Sept. 14, 1787) — Madison Support of Mason Motion	"Mr. Madison was in favor of it. It did not restrain Congress from establishing a military force in time of peace if found necessary; and as armies in time of peace are allowed on all hands to be an evil, it is well to discountenance them by the Constitution, as far as will consist with the essential power of the Govt. on that head." <i>2 The Records of the Federal Convention of 1787</i>, at 617 (Max Farrand ed., 1911) (Notes of James Madison).
Federal Farmer II (Oct. 9, 1787).	"And therefore, unless the people shall make some great exertions to restore to the state governments their powers in matters of internal police; as the powers to lay and collect, exclusively, internal taxes, to govern the militia, and to hold the decisions of their own judicial courts upon their own laws final, the balance cannot possibly continue long; but the state governments must be annihilated, or continue to exist

for no purpose."

Letters from the Federal Farmer to the Republican (II) (Oct. 9, 1787), reprinted in 2 *The Complete Anti-Federalist* 234 (Herbert J. Storing ed., 1981).

Federal Farmer X (Jan. 7, 1788) "We must yield to circumstances, and depart something from this plan, and strike out a new medium, so as to give efficacy to the whole system, supply the wants of the union, and leave the several states, or the people assembled in the state legislatures, the means of defence."

Letters from the Federal Farmer (X) (Jan. 7, 1788), 20 *The Documentary History of the Ratification of the Constitution* 1006, 1007 (John P. Kaminski et al. eds., 2004).

Federal Farmer XVIII (Jan. 25, 1788) "First, the constitution ought to secure a genuine and guard against a select militia, by providing that the militia shall always be kept well organized, armed, and disciplined, and include, according to the past and general usage of the

states, all men capable of bearing arms; and that all regulations tending to render this general militia useless and defenceless, by establishing select corps of militia, or distinct bodies of military men, not having permanent interests and attachments in the community to be avoided.”

20 The Documentary History of the Ratification of the Constitution 1070, 1072 (John P. Kaminski et al. eds., 2004).

2. Holdout State Convergence on Mason Composite (1788–1790)

Mason arms-and-militia composite
(Sent June 9, 1788 to New York Antifederalists)

“That the people have a right to keep and to bear arms; that a well regulated militia composed of the body of the people trained to arms, is the proper, natural and safe defence of a free State; that standing armies in time of peace are dangerous to liberty, and therefore ought to be avoided, as far as the circumstances and protection of the community will admit; and that in all cases, the military should be under strict

subordination to, and governed by the civil power.”

10 *The Documentary History of the Ratification of the Constitution* 1547, 1553, 1559 n.3 (John P. Kaminski & Gaspare J. Saladino eds., 1993).

Virginia Proposed Declaration (June 27, 1788):
Composite

“That the people have a right to keep and to bear arms; that a well regulated militia composed of the body of the people trained to arms, is the proper, natural and safe defence of a free State; that standing armies in time of peace are dangerous to liberty, and therefore ought to be avoided, as far as the circumstances and protection of the community will admit; and that in all cases, the military should be under strict subordination to, and governed by the civil power.”

10 *The Documentary History of the Ratification of the Constitution* 1550, 1553 (John P. Kaminski & Gaspare J. Saladino eds., 1993).

Virginia Proposed Amendment (June

“That each State respectively shall have the power to

27, 1788):
Structural

provide for organizing, arming
and disciplining its own
Militia, whensoever Congress
shall omit or neglect to provide
for the same”

10 *The Documentary History of
the Ratification of the
Constitution* 1556 (John P.
Kaminski & Gaspare J.
Saladino eds., 1993).

North Carolina
Proposed
Declaration (Aug. 1,
1788): Composite

“That the people have a right
to keep and bear arms; that a
well regulated militia,
composed of the body of the
people, trained to arms, is the
proper, natural and safe
defence of a free state; that
standing armies in time of
peace are dangerous to liberty,
and ought to be avoided, as
punctually as the
circumstances and exigencies
of the state will admit; and
that in all cases the military
should be under strict
subordination to, and governed
by, the civil power.”

18 *The Documentary History of
the Ratification of the
Constitution* 313, 316 (John P.
Kaminski & Gaspare J.
Saladino eds., 1995).

North Carolina Proposed Amendment (Aug. 1, 1788): Structural	“That each state respectively shall have the power to provide for organizing, arming and disciplining its own militia, whensoever Congress shall omit or neglect to provide for the same” 18 <i>The Documentary History of the Ratification of the Constitution</i> 317 (John P. Kaminski & Gaspare J. Saladino eds., 1995).
New York Convention Structural Debates: Antifederalists Lansing-Smith Drafts (July 7, 10 & 17, 1788)	“That the militia should always be kept well organized, armed, and disciplined, and include, according to the past usages of the State, all the men capable of bearing arms; and ought not to be subject to martial law (except in time of war, invasion, or rebellion) and that in all cases the militia should be under strict subordination to the civil power.” 23 <i>The Documentary History of the Ratification of the Constitution</i> 2201 (John P. Kaminski et al. eds., 2009) (July 17, 1788); <i>see also</i> 22 DHRC 2112 (July 7, 1788), 2120 (July 10, 1788).

New York Convention Structural Debates: Federalist Duane Parallel Proposal (July 17, 1788)	“That each State shall have power to provide for organizing, arming, and disciplining its militia, when no provision for that purpose shall have been made by Congress, and until such provision shall have been made; and that the militia shall never be subjected to martial law but in time of war, rebellion, or insurrection.” <i>23 The Documentary History of the Ratification of the Constitution</i> 2208 (John P. Kaminski et al. eds., 2009).
Governor Clinton's Summary and Committee Substitution (July 19, 1788)	“...the object is to keep the Militia well armed [and] the Com[mitt]ee will word it.” <i>23 The Documentary History of the Ratification of the Constitution</i> 2246 (John P. Kaminski et al. eds., 2009).
New York Proposed Declaration (July 26, 1788): Composite	“That the People have a right to keep and bear arms; That a well regulated militia, including the body of the People capable of bearing Arms, is the proper, natural and safe defence of a free State. . . .

That standing Armies in time of peace are dangerous to Liberty, and ought not to be kept up, except in Cases of necessity; and that at all times the Military should be under strict subordination to the civil Power.”

23 *The Documentary History of the Ratification of the Constitution* 2327 (John P. Kaminski et al. eds., 2009).

Rhode Island
Ratification
Convention (May
29, 1790):
Composite

“That the people have a right to keep and bear arms, that a well regulated militia, including the body of the people capable of bearing arms, is the proper, natural and safe defence of a free state; that the militia shall not be subject to martial law, except in time of war, rebellion or insurrection; that standing armies in time of peace are dangerous to liberty, and ought not to be kept up, except in cases of necessity, and that at all times the military should be under strict subordination to the civil power.”

26 *The Documentary History of the Ratification of the*

Constitution 997, 999 (John P. Kaminski et al. eds., 2013).

3. Madison Adopts Consensus Amendment (1788–1789)

	“[A]mong the advocates for the Constitution there are some who wish for further guards to public liberty & individual rights.”
Madison to Jefferson (Oct. 17, 1788)	“Perhaps too there may be a certain degree of danger, that a succession of artful and ambitious rulers, may by gradual & well-timed advances, finally erect an independent Government on the subversion of liberty. Should this danger exist at all, it is prudent to guard agst. it, especially when the precaution can do no injury.”
	James Madison to Thomas Jefferson (Oct. 17, 1788), reprinted in 14 <i>The Papers of Thomas Jefferson</i> 16, 18 (Julian P. Boyd ed., 1958).
Madison's Presentation to the House (June 8, 1789)	“The right of the people to keep and bear arms shall not be infringed; a well armed and well regulated militia being the best security of a free country: but no person religiously scrupulous of bearing

arms shall be compelled to render military service in person.”

1 *Annals of Cong.* 434 (1789)
(Joseph Gales ed., 1834).

4. Congressional Refinements (August–September 1789)

House Select Committee Report (July 28 / Aug. 17, 1789)	“A well regulated militia, composed of the body of the people, being the best security of a free State, the right of the people to keep and bear arms shall not be infringed; but no person religiously scrupulous shall be compelled to bear arms.”
	House Committee of Eleven Report, 1 <i>Annals of Cong.</i> 749–51 (1789) (Joseph Gales ed., 1834).
House Floor Debate and Revisions (Aug. 20, 1789)	“A well regulated militia, being the best security of a free State, the right of the people to keep and bear arms shall not be infringed; but no person religiously scrupulous shall be compelled to bear arms in person.”
	1 <i>Annals of Cong.</i> 778–80 (1789) (Joseph Gales ed., 1834).

Senate Revisions (Sept. 4, 1789)	“A well regulated militia, being the best security of a free State, the right of the people to keep and bear arms, shall not be infringed.” <i>Journal of the First Session of the Senate of the United States of America</i> 71 (1820).
Senate Revisions (Sept. 9, 1789)	“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.” <i>Journal of the First Session of the Senate of the United States of America</i> 77 (1820).
Joint Congressional Conference Committee (September 1789)	“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.” 1 <i>Stat.</i> 97, 97–98 (1789).

5. Mason’s Satisfaction with Consensus Amendment (July–September 1789)

George Mason to Samuel Griffin	“I have received much Satisfaction from the Amendments to the new Constitution lately thrown into the House of Representatives... with some
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(July 31, 1789) small Alterations... [having objected that the plan left] State Legislatures no Security [against a federal power to] disarm, or render useless the Militia . . .
.”

George Mason to Samuel Griffin (Sept. 8, 1789), reprinted in 3 *The Life of George Mason, 1725-1792*, at 319–20 (Kate Mason Rowland ed., 1892).

APPENDIX F: Security of Public Liberty

Virginia Declaration of Rights § 3 (June 12, 1776)	“That government is, or ought to be, instituted for the common benefit, protection, and security of the people, nation, or community; of all the various modes and forms of government, that is best which is capable of producing the greatest degree of happiness and safety and is most effectually secured against the danger of maladministration.” Va. Declaration of Rights of 1776, § 3, reprinted in 7 <i>The Federal and State Constitutions, Colonial Charters, and Other Organic Laws of the States, Territories, and Colonies Now or Heretofore Forming the United States of America</i> 3813 (Francis Newton Thorpe ed., 1909).
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John Smilie, Pa. Ratification Convention (Nov. 28, 1787)	“Because the people have a right to alter and abolish government, can it therefore be inferred that every step taken to secure that right would be superfluous and nugatory?” Alexander J. Dallas' Notes of the Pennsylvania Ratification Convention (Nov. 28, 1787) (statement of John Smilie), reprinted in 2 The Documentary History of the Ratification of the Constitution 385 (Merrill Jensen ed., 1976).
John Smilie, Pa. Ratification Convention (Dec. 6, 1787)	“Congress guarantees to each State a Republican Form of Government.’ Is this a security for a free government? Can even the shadow of state governments be continued if Congress pleases to take it away?” James Wilson's Notes of the Pennsylvania Ratification Convention (Dec. 6, 1787) (statement of John Smilie), reprinted in 2 The Documentary History of the Ratification of the Constitution 509 (Merrill Jensen ed., 1976).
Elbridge Gerry, U.S. House of	“This declaration of rights, I take it, is intended to secure the people against the mal-

Representatives (Aug. 17, 1789)	administration of the Government; if we could suppose that, in all cases, the rights of the people would be attended to, the occasion for guards of this kind would be removed.”
	1 Annals of Cong. 778 (1789) (Joseph Gales ed., 1834) (statement of Rep. Elbridge Gerry on August 17, 1789).

APPENDIX G: Regulated and Disciplined Militia

	“Whereas a well ordered and well-disciplined militia is essentially necessary to the safety, peace and prosperity of this kingdom...”
Great Britain (1757)	An Act for the Better Ordering of the Militia Forces in the Several Counties of That Part of Great Britain Called England 1757, 30 Geo. II, c. 25, § I.
	“For forming the citizens of this commonwealth into a militia, and disciplining the same for defence thereof. . . .”
Virginia (1777)	An Act for Regulating and Disciplining the Militia 1777, Va. Statutes at Large ch. I, § I, 9 Hening 267.

Virginia (1779)	“For forming the citizens of this commonwealth into a militia, and disciplining the same for defence thereof. . . .” An Act for Regulating and Disciplining the Militia 1779, Va. Statutes at Large 10 Hening 83.
Articles of Confederation (1781)	“...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, ammunition, and camp equipage.” Art. of Confed. of 1781, art. VI, para. 4.

APPENDIX H: Infringed and Abridged

1. Colonial Protests of Infringements and Abridgments

James Otis, A <i>Vindication of the Conduct of the House of Representatives</i> (1762)	"The Governor and Council have therefore in this instance made an infringement upon the house, of their most darling privilege, that of originating all taxes... and when once the representatives of a people give up this privilege, the
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government will very soon become arbitrary."

James Otis, *A Vindication of the Conduct of the House of Representatives of the Province of the Massachusetts-Bay* 39–40 (Boston, Edes & Gill 1762).

Virginia House of Burgesses,
Remonstrance against the Stamp Act (1764)

"[T]he Council and Burgesses of Virginia, met in General Assembly, judge it their indispensable duty, in a respectful manner, but with decent firmness, to remonstrate against such a measure, that at least a cession of those rights, which in their opinion must be infringed by that procedure, may not be inferred from their silence, at so important a crisis."

Remonstrance of the Council and Burgesses of Virginia (Dec. 8, 1764), *reprinted in* Journal of the House of Burgesses, 1761–1765, at 301–302.

Massachusetts Assembly,
Resolutions on the Stamp Act (1765)

"Resolved... That all acts made by any power whatever other than the general assembly of this province, imposing taxes on the inhabitants, are infringements of our inherent

and unalienable rights, as men and British subjects, and render void the most valuable declarations of our charter."

Massachusetts Assembly Resolutions (Oct. 29, 1765), *reprinted in* Journal of the House of Representatives of Massachusetts 1765–1766, at 153.

Richard Bland, *An Inquiry into the Rights of the British Colonies* (1766)

"Virginia shall be free from Taxes, Customs, and Impositions whatsoever; and none shall be imposed on them without consent of the General Assembly... But whether the Act of 25th Charles 2d, or any of the other Acts, have been complained of as infringements of the rights of the colonies or not, is immaterial..."

Richard Bland, *An Inquiry into the Rights of the British Colonies* 20, 26 (Williamsburg, 1766).

Massachusetts House of Representatives, *Circular Letter* (1768)

"[T]hat all Acts made by [Parliament], imposing Taxes on the Colonies, are infringements of their natural and constitutional Rights..."

Massachusetts Circular Letter to the Colonial Assemblies (Feb. 11, 1768), *reprinted in* Journals of the House of Representatives of Massachusetts 1767–1768, at 134.

Samuel Adams, *The Boston Pamphlet* (1772)

"The natural liberty of man, by entering into society, is abridg'd or restrain'd so far only as is necessary for the great end of society... [The Committee compiles] an Enumeration of some of the most open infringements of our Rights."

Samuel Adams, *The Rights of the Colonists and a List of Infringements and Violations of Rights* 4, 13 (Boston, Edes & Gill 1772).

Thomas Jefferson, *Draft of Instructions to the Virginia Delegates* (1774)

"Let no act be passed by any one legislature which may infringe on the rights and liberties of another... [Colonial emigrants possessed a] natural right, which no law of their own had taken away or abridged."

Thomas Jefferson, *Draft of Instructions* (July 1774), *reprinted in* 1 Papers of

Thomas Jefferson 121, 125
(Julian P. Boyd ed., 1950).

Thomas Jefferson, *A Summary View of the Rights of British America* (1774) "Let no act be passed by any one legislature which may infringe on the rights and liberties of another... [They possessed a] natural right, which no law of their own had taken away or abridged."

Thomas Jefferson, *A Summary View of the Rights of British America* 5, 9 (Williamsburg, Clementina Rind 1774).

Second Continental Congress, *Address to the Inhabitants of Great Britain* (1775) "After the most valuable right of legislation was infringed, when the powers, assumed by your parliament, in which we are not represented... rendered our property precarious." *Address of The Twelve United Colonies, by their Delegates in Congress, to the Inhabitants of Great Britain* (July 8, 1775), reprinted in 2 Journals of the Continental Congress, 1774–1789, at 163, 164.

Carlisle Peace Commission, *Royal Instructions* (1778) "[To offer terms to return the colonies to their condition of 1763, provided that] the sovereignty of the mother country should not be infringed."

Bernard Bailyn, *The Ideological Origins of the American Revolution* 228 & n.6 (quoting Royal Instructions to the Peace Commission of 1778, reprinted in 1 S. E. Morison, *Sources and Documents Illustrating the American Revolution* 186, 200).

2. Organic Laws of the United States

Articles of Association (Oct. 20, 1774)	"provincial legislatures... the following acts of parliament are infringements and violations of the rights of the colonists... destructive to the freedom of American legislation... indubitable rights and liberties... cannot be... altered or abridged... without their own consent, by their representatives" Articles of Association (1774), reprinted in 2 Neil H. Cogan, <i>The Complete Bill of Rights</i> 320 (1997); see also 1 Journals of the Continental Congress, 1774–1789, at 63–73 (Worthington C. Ford ed., 1904).
Articles of Confederation (1777)	"[Congress] shall also have the sole and exclusive right and power of... regulating the trade and managing

all affairs with the Indians, not members of any of the states, provided that the legislative right of any state within its own limits be not infringed or violated...." Arts. of Confed. art. IX, cl. 4, *reprinted in* 1 U.S.C. lxvii, lxix (2012).

Remonstrance of the General Assembly of Virginia, Encl. III (Dec. 14, 1779): "When Virginia acceded to the Articles of Confederation, her rights of sovereignty and jurisdiction within her own territory were reserved and secured to her, and cannot now be infringed or altered without her consent."

Edward Carrington (1786): "interfering with the legislative rights of a state," 31 Journals of the Continental Congress 488, 488-89 (Aug. 7, 1786); *see also* "to interfere with our Legislative Rights," 32 Journals of the Continental Congress 237, 237 (Apr. 25, 1787); James Madison: "encroachments," *Vices of the Political System of the United States* (Apr. 1787), *reprinted in* 1 The Founders' Constitution 167 (P. Kurland & R. Lerner eds., 1987).

"compact between the original states and the people and the states in the said territory"
 Northwest Ordinance (July 13, 1787), *reprinted in* 1 U.S.C. lv (2012); *see also Strader v. Graham*, 51 U.S. 82, 96, 97 (1851).

Northwest Ordinance (July 13, 1787)	Ordinance for the Regulation of Indian Affairs (Aug. 7, 1786): "managing all affairs with the Indians... provided the legislative right of any state within its own limits be not infringed or violated...." 31 Journals of the Continental Congress 490, 491-493 (Aug. 7, 1786); <i>see also Cherokee Nation v. Georgia</i> , 30 U.S. 1 (1831).
U.S. Constitution (1789) as amended (1791)	"abridging the freedom of speech, or of the press... the right of the people to keep and bear arms, shall not be infringed." U.S. Const. amends. I, II.

3. Other Founding Usages (1777–1789)

Edmund Randolph & James Madison, <i>Correspondence on Admiralty Jurisdiction</i> (1782)	Disputing whether the Articles' ninth article included "a power to infringe the sovereignty of a state" over admiralty jurisdiction. Madison replied: "your ideas correspond so exactly with those I had advanced on the subject."
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	Letter from Edmund Randolph to James Madison (Apr. 19, 1782), and Reply from James Madison to Edmund Randolph (May 1, 1782), <i>reprinted in</i> 4 Papers of James Madison 148, 186.
Alexander Hamilton, <i>The Continentalist</i> , No. 6 (1782)	"the rights of jurisdiction are not infringed" Alexander Hamilton, <i>The Continentalist</i> , No. VI (July 4, 1782), <i>reprinted in</i> 3 Papers of Alexander Hamilton 99, 103 (Harold C. Syrett ed., 1962).
Thomas Jefferson, <i>Virginia Draft Constitution</i> (1783)	"The General assembly shall not have power to infringe this constitution; to abridge the civil rights of any person on account of his religious belief" Thomas Jefferson, <i>Draft Constitution for Virginia</i> (May–June 1783), <i>reprinted in</i> 6 Papers of Thomas Jefferson 294, 298 (Julian P. Boyd ed., 1952).
Continental Congress, <i>Proclamation on Indian Affairs</i> (1783)	"Whereas, by the ninth of the articles of confederation, it is... declared, that... congress... have the sole and exclusive right and power of regulating the trade, and managing all affairs with the Indians..., provided that the legislative

right of every state, within its own limits, be not infringed or violated."

Continental Congress
Proclamation (Sept. 22, 1783),
reprinted in 25 Journals of the
Continental Congress, 1774–
1789, at 602.

John Adams, *A*
Defence of the
Constitutions
(1787)

"senators being eligible by the legislatures of the several states... will be vigilant in supporting their rights against infringement by... abridgment of the rights both of electors and candidates... infringements and violations... the establishment of the legislative power"

John Adams, 3 *A Defence of the*
Constitutions of Government of
the United States of America
350, 412 (London, 1787).

Alexander
Hamilton, *The*
Federalist, No. 30
(1788)

"infringements of the articles of the Union"

The Federalist No. 30, at 189
(Alexander Hamilton) (Clinton
Rossiter ed., 1961).

Alexander
Hamilton, *The*
Federalist, No. 33
(1788)

"exceeded its jurisdiction and infringed upon that of the State?"

	<i>The Federalist</i> No. 33, at 204 (Alexander Hamilton) (Clinton Rossiter ed., 1961).
James Madison, <i>The Federalist</i> , No. 40 (1788)	“Must it of necessity be admitted that this power is infringed[?]” <i>The Federalist</i> No. 40, at 248-49 (James Madison) (Clinton Rossiter ed., 1961).
James Madison, <i>The Federalist</i> , No. 42 (1788)	"not to violate or infringe the legislative right of any state within its own limits." <i>The Federalist</i> No. 42, at 268 (James Madison) (Clinton Rossiter ed., 1961).
William Penn (Pseudonym), <i>Anti-Federalist</i> No. 73 (1788)	"It is therefore a political error of the greatest magnitude, to allow the executive power...any kind of control over the proceedings of the legislature... Does the Presidential Veto Power Infringe on the Separation of Departments?" William Penn, <i>Philadelphia Independent Gazetteer</i> (Jan. 3, 1788), reprinted in 2 The Complete Anti-Federalist 48.
Pennsylvania Minority, <i>Address</i>	"1. ... [N]either the legislative, executive, nor judicial powers of the United States shall have

*and Reasons of
Dissent* (1788)

authority to alter, abrogate, or
infringe any part of the
constitution of the several
states...."

Address and Reasons of
Dissent of the Minority of the
Convention of Pennsylvania to
their Constituents, *Whitehall*
(Dec. 18, 1787), *reprinted in* 3
The Debates in the Several
State Conventions 545
(Jonathan Elliot ed., 1836).

Tench Coxe, "An
American Citizen"
Essays (1788)

"The Senate... constitutional
powers of the state
legislatures, whose rights they
will not be disposed to
infringe...."

Tench Coxe, *An Examination of
the Constitution of the United
States of America* (Sept. 26–29,
1787), *reprinted in* Friends of
the Constitution: Writings of
the "Other" Federalists, 1787-
1788, at 18.

4. Constitutional Drafting

Charles Pinckney,
*Plan of a
Government* (May
29, 1787)

"The Legislature of the United
States shall pass no Law on the
subject of Religion, nor touching
or abridging the Liberty of the
Press nor shall the Privilege of
the Writ of Habeas Corpus ever
be suspended except in case of
Rebellion or Invasion... to revise

the laws of the several states that may be supposed to infringe the powers exclusively delegated by this Constitution to Congress & to negative & annul such as do."

Charles Pinckney, Plan of a Government, Art. 6, Art. 11 (May 29, 1787), *reprinted in* 3 The Records of the Federal Convention of 1787, at 597, 599, 604 (Max Farrand ed., 1911).

James Madison,
*Speech to the
Federal Convention*
(June 8, 1787)

"Experience had evinced a constant tendency in the States to encroach on the federal authority; to violate national Treaties; to infringe the rights & interests of each other; to oppress the weaker party within their respective jurisdictions. A negative was the mildest expedient that could be devised for preventing these mischeifs."

James Madison, Notes on the Federal Convention (June 8, 1787), *reprinted in* 1 The Records of the Federal Convention of 1787, at 164, 165 (Max Farrand ed., 1911).

James Madison,
Proposed

"The civil rights of none shall be abridged on account of

Amendments to the House of Representatives
(June 8, 1789)

religious belief or worship, nor shall be any national religion be established, nor shall the full and equal rights of conscience be in any manner, or on any pretext, infringed. The people shall not be deprived or abridged of their right to speak, to write, or to publish their sentiments... right of the people to keep and bear arms shall not be infringed; a well armed, and well regulated militia being the best security of a free country: but no person religiously scrupulous of bearing arms, shall be compelled to render military service in person."

James Madison, Amendments Proposed in the House of Representatives (June 8, 1789), *reprinted in* 1 Neil H. Cogan, *The Complete Bill of Rights* 1, 147, 217, 264 (1997).

State Ratifying Convention Debates

Virginia Ratifying Convention (Debates) (1788)	"The wisdom of Great Britain gave each state its own legislative assembly and judiciary, and a right to tax themselves. When they attempted to infringe that right, we declared war."
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Speech of John Tyler (June 25, 1788), *reprinted in* 3 The Debates in the Several State Conventions on the Adoption of the Federal Constitution 640 (Jonathan Elliot ed., 1836).

5. Constitutional Amendments

First Amendment (1791)	"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. Const. amend. I.
Second Amendment (1791)	"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." U.S. Const. amend. II.
Fourteenth Amendment (1868)	"1. ... No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property... 2. ... But when the right to vote ... is denied to any ... citizens ... or in any way abridged, the basis for representation therein shall be

	reduced....” U.S. Const. amend. XIV, § 1, § 2.
Fifteenth Amendment (1870)	"1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude." U.S. Const. amend. XV, § 1.
Nineteenth Amendment (1920)	"The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex." U.S. Const. amend. XIX.
Twenty-Fourth Amendment (1964)	"1. The right of citizens of the United States to vote... shall not be denied or abridged by the United States or any State by reason of failure to pay any poll tax or other tax." U.S. Const. amend. XXIV, § 1.
Twenty-Sixth Amendment (1971)	"1. The right of citizens of the United States, who are eighteen years of age or older, to vote shall not be denied or abridged by the United States or by any State on account of age." U.S. Const. amend. XXVI, § 1.
Equal Rights Amendment (Proposed 1972)	"1. Equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex." H.R.J. Res. 208, 92nd Cong., 86 Stat. 1523 (1972).

6. Post-Founding Usages

St. George Tucker, <i>Law Lecture Notebooks</i> (c. 1790s)	"If a State chooses to incur the expense of putting arms into the Hands of its own Citizens for their defense, it could be exercised without fear of infringing any of the powers of the federal Government." St. George Tucker, <i>Law Lecture Notebooks</i> (c. 1790s), <i>quoted in District of Columbia v. Heller</i>, 554 U.S. 570, 606 (2008).
Kentucky Resolutions (Nov. 10, 1798)	"retain to themselves the rights of judging how far the licentiousness of speech and of the press may be abridged without lessening their useful freedom... which does abridge the freedom of the press, is not law, but . . . void and of no effect." Kentucky Resolutions of 1798, § 3, <i>reprinted in</i> 4 <i>The Debates in the Several State Conventions</i> 540, 541 (Jonathan Elliot ed., 1836).
