

The Militia of the Sea

The Marque and Reprisal Clause as Textual Proof of Private Heavy-Arms Ownership at the Founding

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Abstract. Courts and litigants increasingly say the Second Amendment reaches only the weapons one person can carry. The Constitution refutes that twice, in a single Article.

Article I, § 8, cl. 11 lets Congress “grant letters of marque and reprisal, and make rules concerning captures on land and water.”¹ That is a license to send a private citizen to war at sea in his own ship, with his own cannon, for profit. A license presupposes what it licenses. The Clause takes a privately owned, cannon-armed fleet as given; nothing in the Constitution creates it. Two clauses later, Article I, § 10 forbids a state to “keep troops, or ships of war in time of peace” without the consent of Congress.² The Framers made a sovereign ask permission to keep a warship. They made the shipowner ask no one.

Under Article I, the power Congress received over private armed force at sea was a power over the belligerent employment of that force on behalf of the United States. Congress imposed no general federal license on the shipowner’s arming of his ship. The Founders who ratified the Constitution’s Article I in 1788 and the Second Amendment three years later in 1791 did not appear troubled that private parties owned heavily armed ships. Indeed, they took the widespread ownership of such heavily armed ships as a given, so much so that Congress principally concerned itself not with the private ownership of significant armaments, but rather with the transformation of that private ownership into a lawful use on behalf of the federal government itself.

With textual support from a documented record of roughly 1,700 Revolutionary-era privateering commissions — granted per voyage, in the years before the Constitution was ratified — this Article refutes the modern categorical claim that heavy arms were never “arms.”

¹ U.S. Const. art. I, § 8, cl. 11 (“To declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water.”). Text from Cornell Legal Information Institute, <https://www.law.cornell.edu/constitution/articlei>.

² U.S. Const. art. I, § 10, cl. 3 (“No state shall, without the consent of Congress, lay any duty of tonnage, keep troops, or ships of war in time of peace, enter into any agreement or compact with another state, or with a foreign power, or engage in war, unless actually invaded, or in such imminent danger as will not admit of delay.”). Text from Cornell Legal Information Institute, <https://www.law.cornell.edu/constitution/articlei>. This Article cites the clause principally for its “keep . . . ships of war in time of peace” provision.

Introduction

The claim that the Second Amendment protects only “bearable” arms — weapons a single person can carry and fire — has become the load-bearing premise of an entire litigation strategy. That strategy posits that if we strip a category of weapon of the label “bearable,” it falls outside the right by definition, no history required. The premise does a great deal of work. It should therefore be able to survive a reading of the document that contains it.

It cannot. The Constitution twice addresses privately and publicly held instruments of war, and it does so with a precision that assumes exactly what the “bearable arms” thesis denies. Article I, § 8, cl. 11 gives Congress power to grant letters of marque and reprisal.³ A letter of marque is a commission — a license authorizing a private vessel and its owner to attack, seize, and take the ships of a designated enemy, and to keep the proceeds as prize. The power to license such conduct presupposes vessels capable of it. One does not license a rowboat to wage commerce war on the Royal Navy. The Clause takes for granted a private fleet already armed with cannon, and grants Congress power over one thing only: the decision to point that fleet at an enemy.

Two clauses later, in the catalogue of things forbidden to the states, the Constitution draws the line that makes the first clause legible. Article I, § 10, cl. 3 provides that “[n]o state shall, without the consent of Congress, . . . keep troops, or ships of war in time of peace.”⁴ Here the Framers required permission — but they required it of a sovereign, for the mere keeping of a ship of war, in peacetime. They imposed no parallel requirement on the private citizen. A Rhode Island merchant could own the sloop *Revenge* and fit her with guns without applying to any government for leave to do so; what he could not do, without a commission, was sail her out to seize Spanish shipping.⁵ The State of Rhode Island, by contrast, could not keep a ship of war at all in time of peace absent Congress’s consent. The document conditions sovereign heavy armament on permission to exist and imposes no comparable federal condition on private heavy armament, reaching the private owner only when he turns his guns on an enemy. That is not an accident of drafting. It is a considered judgment about who may hold the instruments of naval war, and on what terms.

Two disciplines govern how far that judgment is pressed here, and both are stated at the outset because the argument is easier to overstate than to make. The first is that Article I is a grant of powers, not a catalogue of liberties. Nothing in it confers on anyone a right to own a cannon, and this Article does not claim that it does. What the asymmetry establishes is a proposition about federal power and about the practice federal power left undisturbed — a smaller claim, and a far harder one to dislodge. The second is that the private baseline was a baseline of *property*, not of legal vacancy. The founding generation legislated about private naval ordnance repeatedly, and an argument that pretends otherwise collapses on contact with the *United States Statutes at Large*, the official compilation of the acts Congress passed. Part II.D collects those statutes and shows why they are this Article’s evidence rather than its problem.

³ *Supra* note 1.

⁴ *Supra* note 2.

⁵ *See infra* Part III.A and note 55 (commission of the sloop *Revenge*).

The observation that privateering evidences founding-era private cannon ownership is not original to me, and I do not present it as such. Oliver Krawczyk and Gilbert Ambler flagged it in 2025, in a single footnote to their article *Dangerous and Unusual: How Heller's Ahistorical Assumption Violates the Founders' Original Intent*. They wrote:

Although beyond the scope of this Article, the Authors question whether the Founders originally understood the Second Amendment to extend only to “bearable” arms. For example, “[t]here were no federal laws barring cannon ownership when the Second Amendment was enacted.” . . . It seems unlikely that the Founders would have understood privateering — the wartime deployment of private ships armed with privately owned cannons — to have been unprotected, especially when privateers proved pivotal during the Revolution and later War of 1812. Privateers were “the militia of the sea,” and cannons were the tools of their trade.⁶

Krawczyk and Ambler said the quiet part. They also, by their own words, declined to develop it — the observation was “beyond the scope of th[eir] Article,” and it rests, in their footnote, on secondary sources — including the popular-history page from which they take the phrase that gives this Article its title — rather than on constitutional text, on the Marque and Reprisal Clause, or on the archival record.⁷ This Article develops that observation into a sustained textual and historical argument. It supplies the three things the footnote lacked: a structural reading of Article I that turns privateering from a colorful anecdote into a proposition about the meaning of “arms”; the primary documents — the 1776 congressional Instructions to privateer commanders, the commissions of the *Revenge* and the *Holkar*, and the regulatory apparatus Congress built around vessels it did not own — that show the Founders treating private naval ordnance as an ordinary and lawful thing for private persons to possess; and an honest

⁶ Oliver Krawczyk & Gilbert Ambler, *Dangerous and Unusual: How Heller's Ahistorical Assumption Violates the Founders' Original Intent*, 129 Dick. L. Rev. 801, 814 n.65 (2025) (footnote in original omitted from internal quotation; ellipses in this Article's rendering mark omitted material). The phrase that gives this Article its title is not the authors' own: they quote it from *The Militia of the Sea*, Am. Battlefield Tr., <https://www.battlefields.org/learn/articles/militia-sea>, and the lineage is worth stating plainly.

⁷ Krawczyk & Ambler, *supra* note 6, at 814 n.65 (describing the observation as “beyond the scope of this Article” and supporting it, in the footnote, with a popular-history page rather than constitutional text or archival sources). The institutional history of American privateering is treated at length in Nicholas Parrillo, *The De-Privatization of American Warfare: How the U.S. Government Used, Regulated, and Ultimately Abandoned Privateering in the Nineteenth Century*, 19 Yale J.L. & Human. 1 (2007). Parrillo's subject is the practice's regulation and abandonment rather than the scope of “arms,” but he records the understanding this Article builds on: “For many Americans, it seems, the clause of the Constitution authorizing ‘letters of marque’ had a purpose not unlike that of the Second Amendment, which guaranteed citizens the right to ‘bear arms’ in a ‘militia’ composed of laypersons organized in local communities, as opposed to professional warriors identified with the central state.” *Id.* at 13. He qualifies the parallel — privateering “could never be as dear to the Jeffersonian heart as the militia, since privateers were drawn from the mercantile economy rather than the agrarian soil,” *id.* at 13 n.28 — and the qualification is fair. This Article needs no more than the parallel he draws.

confrontation with the doctrinal problem the argument creates for itself under the “bearable arms” framework those same authors propose.

The plan is as follows, in five parts. Part I establishes the definitional baseline: what “arms” meant to the founding generation as a matter of the natural-law tradition the Framers inherited, drawing on Blackstone and his American annotator St. George Tucker. Part II presents the analytical core — the close reading of Article I, § 8, cl. 11 against Article I, § 10, cl. 3, the limiting principle that keeps the inference from proving too much, the property baseline the statute books actually disclose, and the strongest objection, stated fairly and answered. Part III turns to the archival record and shows the licensing regime in operation, at documented scale. Part IV confronts the doctrinal payoff and the doctrinal difficulty together: how the argument bears on the “in common use” and “dangerous and unusual” inquiries, and why the ship’s-cannon example is at once the strongest historical proof of broad “arms” and the hardest case to fit inside a personally-portable conception of the right. Part V then turns to the en banc Third Circuit’s 2026 decision in *ANJRPC v. Platkin*, showing that the “common use” debate there — among the majority, the concurrences, and the dissents alike — is waged on a plane the Marque and Reprisal Clause unsettles, and answering the two separate opinions in that case whose reasoning most directly cuts against it. The Conclusion follows.

A word on method and its limits. The Article’s sources fall into three classes and the classes do different work. Every quotation of constitutional text, statute, commission, petition, manifest or judicial opinion is drawn from a primary or official source I have examined directly, or — where a footnote says so — from an official compilation or repository transcription of one. Every quantitative estimate of the fleet’s size and its effect is drawn from the National Park Service’s published maritime history, which is official secondary synthesis rather than a document count, and is cited as such. And every negative proposition — that no founding-era law made bare ownership of a cannon permission-dependent — is a report of the scope of a search, bounded in Part II.D by the jurisdictions, periods and forms of enactment the search covered. Where the record is thin — where, for instance, I can document that the *Caesar* of Boston carried twenty-six guns but cannot from the sources in hand break that figure down between long guns and swivels — I say so rather than round the number up into rhetoric. The popular literature on privateering is full of arresting figures (“twenty thousand cannon in private hands”) that dissolve on contact with a footnote. I have not used them. The numbers here come from the National Park Service’s maritime historians and from the primary documents collected in *Naval Documents of the American Revolution*, never from the popular round figures.⁸

A word, too, on standpoint. I litigate firearms cases nationally, and I was counsel on the amicus brief of Black Guns Matter in *New York State Rifle & Pistol Ass’n v. Bruen*, which Justice Alito cited in his concurrence.⁹ The categorical argument this Article answers — that a weapon can

⁸ See *infra* notes 69–72 and 79 and accompanying text; see also *infra* note 72 (declining to use the unverified round-number figures that circulate in popular commentary).

⁹ *N.Y. State Rifle & Pistol Ass’n v. Bruen*, 597 U.S. 1 (2022) (Alito, J., concurring), slip op. at 6 (“Brief for Black Guns Matter et al. as Amici Curiae.”), https://www.supremecourt.gov/opinions/21pdf/20-843_7j80.pdf. Justice Alito cites the brief third in a string of five, introduced by his observation that “[s]ome briefs were filed by

be read out of the Second Amendment by definition, before any historical inquiry begins — is not an academic curiosity to the people I represent. It is the move that decides their cases without reaching their evidence. I also serve on the board of directors of the National Rifle Association. This Article is mine alone — written in my personal and scholarly capacity, and stating the position of no organization and no client.

I. The Founding-Era Concept of “Arms” Had No Category Ceiling

Before the textual argument can do its work, the definitional field has to be cleared. The “bearable arms” thesis smuggles in a premise — that “arms,” in the founding-era sense, denoted personal, portable weapons — and treats that premise as though it were the natural reading. It was not the only reading available to the founding generation, and the sources they revered did not confine “arms” to the musket and the fowling piece.

A. The Inherited Principle: Blackstone and Tucker

The intellectual baseline was Blackstone. His *Commentaries*, the book every literate American lawyer of the Revolutionary generation read, listed the subject’s right to arms as the fifth of the auxiliary rights that guard the primary rights of person and property:

The fifth and last auxiliary right of the subject . . . is that of having arms for their defence, suitable to their condition and degree, and such as are allowed by law . . . and is indeed a public allowance, under due restrictions, of the natural right of resistance and self-preservation, when the sanctions of society and laws are found insufficient to restrain the violence of oppression.¹⁰

Two features of that sentence matter here. First, Blackstone grounds the right not in a statutory grant but in “the natural right of resistance and self-preservation” — a right the positive law channels and restricts, but does not create. The instruments that vindicate a natural right of resistance are not, on their face, limited to the smallest available caliber. A right of resistance against “the violence of oppression” — Blackstone’s phrase — contemplates resistance to organized, armed power, and the arms adequate to that task are the arms the age used to fight. Second, Blackstone’s qualifier — “suitable to their condition and degree, and such as are allowed by law” — is a qualifier about regulation, not about category. It tells us the right was subject to legal restriction. It does not tell us that heavy or crew-served arms fell outside the concept of “arms” altogether. Those are different propositions, and the “bearable arms” thesis depends on conflating them.

members of groups whose members feel that they have special reasons to fear attacks.” I state the citation rather than characterize it.

¹⁰ 1 William Blackstone, *Commentaries on the Laws of England* *139 (1765). The star page is to the first edition; the corresponding passage appears at 143 in Tucker’s 1803 American edition, and the two should not be conflated. See *District of Columbia v. Heller*, 554 U.S. 570, 594 (2008) (pinning “the natural right of resistance and self-preservation” to 1 Blackstone 139).

St. George Tucker, whose 1803 American edition of Blackstone was the first systematic treatment of the Constitution by an American law professor, made the point sharper still, and made it in the specific idiom of the Second Amendment:

This may be considered as the true palladium of liberty The right of self defence is the first law of nature Wherever standing armies are kept up, and the right of the people to keep and bear arms is, under any colour or pretext whatsoever, prohibited, liberty, if not already annihilated, is on the brink of destruction.¹¹

Tucker frames the right as the counterweight to standing armies — that is, to concentrated, professional, heavily equipped military force. A counterweight to an army is not, in conception, a pocketknife. Tucker’s “palladium” rhetoric presupposes that the arms in the people’s hands are, at least in kind, adequate to the martial purpose he names. I do not press that into a requirement of parity with the sovereign’s armament — a portable musket in enough hands was militarily consequential in 1803, and Tucker establishes the martial purpose rather than a scale. The whole rhetorical structure of the founding-era arms tradition — resistance to oppression, the militia as a check on the standing army — is unintelligible if “arms” meant only the lightest and least consequential weapons.

B. The Militia Act and the Technique of Private Supply

The Second Congress then built the national defense on a technique that presupposed privately owned arms, though only the militiaman’s own. The Militia Act of 1792 required every enrolled citizen to “provide himself with a good musket or firelock, a sufficient bayonet and belt, two spare flints, and a knapsack, a pouch with a box therein to contain not less than twenty-four cartridges.”¹² The statutory technique is worth noticing: Congress did not equip the militia; it obligated the militiaman to equip himself, out of arms he already owned or would buy. I do not press the Act further than its text goes. Its self-expense provisions for artillery and cavalry companies run to uniforms and to officers’ and dragoons’ personal kit — swords, hangers, fusees, pistols, sabres, horses — and nothing in them requires or authorizes an artillery company to furnish its own field pieces.¹³ I claim nothing more from the Act than it says. It

¹¹ 1 St. George Tucker, *Blackstone’s Commentaries: With Notes of Reference to the Constitution and Laws of the Federal Government of the United States and of the Commonwealth of Virginia* app. at 300 (Phila., William Young Birch & Abraham Small 1803). The passage appears in Note D (“View of the Constitution of the United States”) in volume 1. This Article quotes the 1803 text, which reads “[t]he right of self defence”; *Heller* renders the same sentence “[t]he right to self defence.” See *Heller*, 554 U.S. at 606.

¹² Act of May 8, 1792, ch. 33, § 1, 1 Stat. 271, <https://www.govinfo.gov/content/pkg/STATUTE-1/pdf/STATUTE-1-Pg271.pdf>.

¹³ *Id.* § 4. Section 4’s self-expense obligation runs to “regimentals, to be furnished at their own expense,” and to the personal kit of officers and dragoons — swords, hangers, fusees, cartridge boxes, pistols, sabres, and horses. Nothing in it requires or authorizes an artillery company to furnish its own field pieces, and this Article does not cite it for that proposition. Section 4 does contain the one clause in the Act that cuts the other way: each private or matross “shall furnish himself with all the equipments of a private in the infantry, *until proper ordnance and field artillery is provided*” — provision by someone other than the matross, set against § 1’s

proves private supply of the militiaman's arms and the legislative technique of obliging a citizen to equip himself from what he already owned; it does not speak to a portability ceiling one way or the other. Whether it also proves private supply of the militia's field pieces is a question its text does not answer — and this Article does not need it to, because the ordnance at issue here is the privateer's, and the Marque Clause proves that directly.

C. The Statute Books' Own Usage: "Arms" Over a List That Begins With Cannon

Principle at Blackstone's altitude decides no particular case. I have said so. The statute books are less abstract — and when the founding generation had to caption a list of weapons, it captioned cannon as arms.

Begin with the sharpest instance, and notice that it is federal. In 1794 the Third Congress passed "An Act prohibiting for a limited time the Exportation of Arms and Ammunition, and encouraging the Importation of the same."¹⁴ The operative clause beneath that title provides "[t]hat it shall not be lawful to export from the United States any cannon, muskets, pistols, bayonets, swords, cutlasses, musket balls, lead, bombs, grenades, gunpowder, sulphur or saltpetre."¹⁵ Cannon is the first word on the list. "Arms and Ammunition" is the caption Congress set over it, three years after the Second Amendment was ratified and by many of the same hands. Whatever else "arms" meant to that Congress, it was not a word that stopped at the weight a man can lift.

Massachusetts wrote the same equation from the other end. The Boston act of March 1, 1783 — the storage statute Justice Breyer pressed in his *Heller* dissent — recites in its preamble that "the depositing of loaded Arms in the Houses of the Town of Boston, is dangerous to the Lives of those who are disposed to exert themselves when a Fire happens to break out in the said Town," and then governs an operative list reading "any Cannon, Swivel, Mortar, Howitzer, or

command that the citizen "provide himself" with a good musket. It is quoted here because it is the strongest sentence in the Act against the reading offered in text and should not be left for a reader to find. It is a militia-supply rule. It says nothing about who may lawfully own a field piece, and the ordnance at issue in this Article is the privateer's, not the trainband's.

¹⁴ Act of May 22, 1794, ch. 33, 1 Stat. 369, <https://www.govinfo.gov/content/pkg/STATUTE-1/pdf/STATUTE-1-Pg369.pdf>. The title is quoted as printed in the *Statutes at Large*: "An Act prohibiting for a limited time the Exportation of Arms and Ammunition, and encouraging the Importation of the same." The chapter is set as "Chap. XXXIII" in the printed volume.

¹⁵ *Id.* § 1. The full clause reads: "That it shall not be lawful to export from the United States any cannon, muskets, pistols, bayonets, swords, cutlasses, musket balls, lead, bombs, grenades, gunpowder, sulphur or saltpetre, but the exportation of all the aforesaid articles are hereby prohibited for and during the term of one year." The prohibition and the encouragement of importation sit in the same Act, and the point made in text concerns only the caption Congress placed over the list.

Cohorn, or Fire-Arm.”¹⁶ A legislature that calls a loaded cannon “loaded Arms” is not using a word with a weight limit inside it. There is no such limit to find.

The adjective carries the same freight. The Rhode Island sloop *Unity*’s Providence import manifest of March 1776 enters “129 Small Arms with Baganots” among her cargo.¹⁷ A clerk writes “small arms” only where the genus has members that are not small. The adjective does the excluding, because the noun does not. And the Supreme Court’s earliest reports use the vocabulary the same way: in *United States v. La Vengeance*, a forfeiture of a schooner for exporting “2 cannon, 20 muskets, and 50 boxes of gun-powder,” the Court described the offence charged as “[t]he exportation of arms and ammunition.”¹⁸

Now the concession, which is the argument rather than a retreat from it. Founding-era usage also ran the other way, and it ran the other way inside documents this Article relies on. The Articles of Confederation required every state to keep in public stores “a due number of field pieces and tents, and a proper quantity of arms, ammunition, and camp equipage” — field pieces beside arms, not within them.¹⁹ The Militia Act of 1792 obliged the matross to equip

¹⁶ Act of Mar. 1, 1783, ch. 13, 1783 Mass. Acts 218 (“An Act in Addition to the Several Acts Already Made for the Prudent Storage of Gun-Powder Within the Town of Boston”), <https://firearmslaw.duke.edu/laws/1783-mass-acts-218-an-act-in-addition-to-the-several-acts-already-made-for-the-prudent-storage-of-gun-powder-within-the-town-of-boston-ch-13>. The preamble reads: “WHEREAS the depositing of loaded Arms in the Houses of the Town of Boston, is dangerous to the Lives of those who are disposed to exert themselves when a Fire happens to break out in the said Town.” The operative rule that follows is a condition on keeping a *loaded* weapon or charged shell indoors, not on ownership. The Duke transcription reproduces the whole act; the printed session laws should be consulted before any longer quotation.

¹⁷ “Manifest of Cargo Imported in Sloop *Unity* Paul Allen Mr from Curacao” (Providence, Mar. 1776), reprinted in 4 *Naval Documents of the American Revolution* 593–94 (Clark ed., 1969) (source cited therein as Maritime Papers, Manifests, Import Cargos, R.I. Arch.). The entry runs across the page break: “129 Small Arms” closes 593 and “with Baganots” opens 594, followed by “20 Baganots (more).” The document is an inward manifest and a record of commerce, not of armament, and is used here only for the phrase. See *infra* Part III.D.

¹⁸ *United States v. La Vengeance*, 3 U.S. (3 Dall.) 297, 301 (1796), <https://tile.loc.gov/storage-services/service/ll/usrep/usrep003/usrep003297/usrep003297.pdf>. The res was the schooner herself, seized “as forfeited”; the information’s allegation that “2 cannon, 20 muskets, and 50 boxes of gun-powder” had been exported in her appears at 297, and the quoted description of the offence at 301. Pagination read from the running heads of the Library of Congress facsimile of the bound volume. The reporter’s star footnote at 298 dates the underlying statute to May 22, 1793, while the information alleges exportation between May 22, 1794 and May 22, 1795 — the one-year term of the Act of May 22, 1794, *supra* note 14. I note the discrepancy rather than resolve it. See *infra* Part II.D for the limits that travel with this case.

¹⁹ Articles of Confederation of 1781, art. VI, <https://www.archives.gov/milestone-documents/articles-of-confederation>. Text taken from the National Archives transcription; the Avalon Project’s rendering of this clause reads “field pieces” for “field pieces” and should not be quoted. The same article separately forbids any state to “grant commissions to any ships or vessels of war, nor letters of marque or reprisal” except

himself as an infantryman “until proper ordnance and field artillery is provided.”²⁰ And the 1798 bond act conditions the owner’s undertaking on the return of “the guns, arms and ammunition of such vessel.”²¹ Three coordinate uses, in three instruments, each putting the heavy gun outside the noun — and each fatal only to a claim this Article does not make.

Both usages are real, and the second is the reason the claim here is narrow. Nothing here asserts that “arms” always and everywhere subsumed ordnance; the word did duty in both registers, sometimes in the same decade. What the record forecloses is the ceiling. A generation that captioned cannon as “Arms” in a federal statute, called a loaded cannon “loaded Arms” in a state one, and wrote “small arms” when it meant the light end of a genus was not carrying a category-level rule that put heavy or crew-served weapons outside the word. A usage that was not itself categorical cannot support a categorical exclusion — and categorical exclusion is precisely what the modern argument needs. That is the whole of Part I’s claim. It is also all Part I needs.

D. What Part I Establishes, and What It Does Not

I do not overclaim here either. Neither Blackstone nor Tucker says, in terms, “the right includes cannon.” Their statements operate at the level of principle, and a skeptic can fairly respond that principle at that altitude decides no particular case. Granted. However, the founding-era tradition does two things that matter for what follows. It refutes the notion that “arms” carried an inherent, category-level ceiling excluding heavy or crew-served ordnance — the sources describe a right defined by its function (resistance to oppression, defense against standing armies), not by the weight of the weapon. And it shifts the argumentative burden on the historical question. If “arms” is defined functionally and grounded in a natural right of resistance, the party claiming that a whole class of weapons sits outside the concept must point to something — text, history, or tradition — that puts it there. That is a burden of persuasion about founding-era meaning, not the government’s *Bruen* burden, which arises only after a claimant has established that the plain text covers his conduct.²² The Marque and Reprisal Clause is where the general principle meets a specific, documented, constitutionally recognized class of privately held heavy arms. That is the subject of Part II.

after a declaration of war — treating commissions to ships of war and letters of marque as two distinct instruments, which is a further reason the formulation in Part II.B is stated as the most natural referent rather than the only possible one.

²⁰ Act of May 8, 1792, *supra* note 13, § 4. The clause is quoted and discussed there.

²¹ Act of June 25, 1798, ch. 60, § 3, 1 Stat. 572, 573 (“An Act to authorize the defence of the Merchant Vessels of the United States against French depredations.”), <https://www.govinfo.gov/content/pkg/STATUTE-1/pdf/STATUTE-1-Pg572.pdf>. The bond condition is set out in full *infra* Part II.D.

²² See *Bruen*, 597 U.S. at 17, 24. The sequence matters and is easily elided: the claimant carries the threshold showing that the plain text covers his conduct, and only then does the government bear the burden of producing a historical tradition. What Part I asserts is an argumentative burden on the question of founding-era meaning, not the government’s *Bruen* burden. The historical-twin-versus-analogue question addressed *infra* note 96 belongs to the later stage.

II. The Textual Argument: Article I, § 8, cl. 11 Against Article I, § 10, cl. 3

A. The Two Clauses

Start with the words. Article I, § 8 enumerates the powers of Congress. Clause 11 provides that Congress shall have power “[t]o declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water.”²³ Article I, § 10 enumerates the disabilities of the states. Clause 3 provides: “No state shall, without the consent of Congress, . . . keep troops, or ships of war in time of peace . . . or engage in war, unless actually invaded, or in such imminent danger as will not admit of delay.”²⁴

The two clauses are the recto and verso of a single design for the war power. Section 8 gathers the affirmative instruments of national force into Congress’s hands: the declaration of war, the commissioning of private force through letters of marque, and the rules for adjudicating what that force captures. Section 10 strips the states of the corresponding attributes of sovereignty: they may not, in peacetime and without Congress’s consent, maintain the standing instruments of war. The Framers were centralizing the war power. Read against that purpose, each clause tells us something about who was understood to hold the instruments of war at the moment of drafting.

B. What the Marque Clause Presupposes

A letter of marque and reprisal is a governmental commission. It authorizes a private party — a shipowner and his captain and crew — to cross the line that ordinarily separates lawful commerce from piracy: to attack and capture the vessels of a named enemy, and to profit by the capture through condemnation of the prize in an admiralty court.²⁵ The instrument’s entire function is to convert private violence, which would otherwise be criminal, into lawful belligerency for the duration and against the target the sovereign specifies.

Notice what the power to grant such a commission assumes. It assumes a supply of private vessels fit to be commissioned — vessels already built, already owned, and already armed heavily enough to take an enemy merchantman or fight off a warship. Congress’s power under Clause 11 is a power to license, and a license operates on something that already exists. The Clause does not read “to build and arm a fleet of private cruisers”; that would be a power to create. It reads “to . . . grant letters of marque” — a power to authorize. The object of the authorization — the armed private ship — is presupposed, not conferred. I do not press the presupposition into a claim about sequence in any given case. Congress’s own commission form licensed a vessel “to fit out and set forth,” and William Price petitioned for leave to fit out two

²³ *Supra* note 1.

²⁴ *Supra* note 2.

²⁵ This description of the letter of marque’s function is drawn from the specimen commissions and instructions documented *infra* Part III, notes 55–56, 61–66, and from the Constitution Annotated’s treatment of the Marque and Reprisal Clause, https://constitution.congress.gov/browse/essay/artI-S8-C11-3-1/ALDE_00000182/.

vessels not yet armed; what the Clause takes as given is a population of private hulls that could lawfully be armed, not a uniform chronology in which every battery preceded every commission. The Framers wrote a clause whose most natural referent — and, on Wuerth’s reading, its only one — is a pre-existing population of privately owned, cannon-carrying vessels.²⁶

That narrowing is not mine alone, and it is worth saying so, because the scholarly field mostly runs the other way. Ingrid Wuerth, writing in the *University of Chicago Law Review*, states the premise directly and states it against the consensus: “Contrary to the views of almost everyone writing on these topics, the Letters of Marque and Reprisal Clause gave Congress only the power to license private vessels to make captures — it was the Captures Clause that gave Congress the power to determine what property was subject to capture by both public and private forces.”²⁷ Her project is to separate the two clauses and to show the marque power narrower than scholars assume — she writes about the war power, not the Second Amendment, and the inference I draw from her narrowing is mine, not hers. I adopt the narrowing as she draws it. The narrowing is the point. A power confined to licensing *private vessels* is a power that presupposes private vessels — and, given what the licensed activity was, private vessels carrying guns.

This is the structural inference, and it is worth stating with precision because everything turns on it. The Constitution does not, anywhere, grant any person the right to own an armed ship; rights of that kind are not the business of Article I. What Article I does is take the existence of privately armed ships as a given and then allocate governmental power over their belligerent use. The power presupposes the property — a proposition the bond statutes of 1798 and 1818, collected in Part II.D, supply affirmative evidence for rather than leaving to inference. And the property it presupposes is heavy: not a sidearm, but a crew-served, ship-mounted gun platform.

²⁶ The narrower formulation is deliberate, and the field is against the broader one. Professor Wuerth’s narrowing is expressly stated “[c]ontrary to the views of almost everyone writing on these topics,” *supra* note 27, and writers whose subject is the war power read the marque and reprisal power to reach public force as well. See Jules Lobel, *Covert War and Congressional Authority: Hidden War and Forgotten Power*, 134 U. Pa. L. Rev. 1035, 1046 (1986) (Jefferson “included within the congressional power to issue letters of marque and reprisal the power to order general reprisals against a foreign nation using the public armed forces”); C. Kevin Marshall, Comment, *Putting Privateers in Their Place: The Applicability of the Marque and Reprisal Clause to Undeclared Wars*, 64 U. Chi. L. Rev. 953, 956 (1997) (recounting Lofgren’s account, on which “general reprisals, whether by public or private forces, continued”; Marshall’s own thesis is that “these scholars are overreaching,” *id.* at 954). The Articles of Confederation likewise treat commissions to ships of war and letters of marque as separate instruments. *Supra* note 19. The Article needs only that private armed vessels were within the power’s core, which no one disputes; it does not need that they exhausted it.

²⁷ Ingrid Wuerth, *The Captures Clause*, 76 U. Chi. L. Rev. 1683, 1689 (2009), https://lawreview.uchicago.edu/sites/default/files/76_4_Wuerth.pdf. Professor Wuerth’s thesis is that the two clauses have been conflated and that the Captures Clause, not the Marque Clause, “gave Congress the power to determine what property was subject to capture by both public and private forces.” *Id.* This Article adopts the narrowing as she draws it.

C. The Contrast — and the Limit of What It Proves

The Marque Clause standing alone might be explained away as a narrow authorization that says nothing about ownership one way or the other. It becomes harder to explain away once it is read against Article I, § 10, cl. 3 — because the two clauses, side by side, show the Framers drawing the distinction the “bearable arms” thesis needs to erase: the distinction between keeping a war asset and using one.

Article I, § 10, cl. 3 tells us what the Framers wrote when they wanted to require permission for the mere keeping of naval war-making capacity. They wrote that no state shall “keep . . . ships of war in time of peace” without Congress’s consent.²⁸ The operative verb is “keep.” The disability attaches to holding the asset at all, in peacetime, independent of any belligerent act. And the party disabled is a state — a sovereign, whose accumulation of standing military power the Framers had every reason to fear and every intention to check.

Set that against the private shipowner. Nowhere does the Constitution provide that no person shall keep a ship of war without consent. The federal instrument that converted his enterprise into lawful *belligerency* was the letter of marque — and the letter of marque did not license acquiring or keeping. It licensed using: attacking, seizing, and taking enemy vessels. The commission ran to the belligerent act, not to the private acquisition or ownership of the gun.

Now the limit, and I state it before a reviewer states it for me — because the Article’s own method is to state the rule and then pressure-test the hardest case against it, and that method has to be applied to the Article’s own central move. The inference cannot be run as a general canon of construction, because the clause it runs on will not bear one. Article I, § 10 is a catalogue of disabilities imposed on states *qua* states. Its organizing principle is the allocation of sovereignty between two levels of government, not the demarcation of private liberty. Run the inference on the clause’s first noun and the result is intolerable. The same sentence forbids a state to “keep Troops, or Ships of War in time of Peace.” If silence as to private persons proved a private baseline, the founding generation would have understood private standing armies as the constitutional norm. It did not, and *Presser v. Illinois* — whose non-incorporation holding *McDonald* has since displaced, but whose holding on armed private associations stands — cuts squarely against the conclusion: the states “have also the power to control and regulate the organization, drilling, and parading of military bodies and associations, except when such bodies or associations are authorized by the militia laws of the United States,” and “[t]he right voluntarily to associate together as a military company or organization, or to drill or parade with arms, without, and independent of, an act of Congress or law of the State authorizing the same, is not an attribute of national citizenship.”²⁹

²⁸ *Supra* note 2.

²⁹ *Presser v. Illinois*, 116 U.S. 252, 267–68 (1886), <https://www.govinfo.gov/content/pkg/USREPORTS-116/pdf/USREPORTS-116-252.pdf>. The second sentence quoted above — “[t]he right voluntarily to associate together as a military company or organization, or to drill or parade with arms . . . is not an attribute of national citizenship” — appears wholly on page 267. The first spans the page break: page 268 begins at “authorized by the militia laws of the United States,” so the words “except when such bodies or associations are” close page 267. *Presser* is more often cited at 264–65, which is the page range

The problem generalizes past the militia. The same section forbids the states to “coin Money,” to “emit Bills of Credit,” and to “enter into any Agreement or Compact with another State, or with a foreign Power.”³⁰ None of those prohibitions is imposed on private persons. Does the omission establish a founding-era right to mint currency? A right to conduct one’s own foreign relations? Of course not. Why, then, should the silence about ships of war be treated as expressive when the silence about treaties and coinage is not?

Nor is the asymmetry short of an explanation that has nothing to do with private ownership. Joseph Story supplies it: “The setting on foot of an army, or navy, by a state in times of peace, might be a cause of jealousy between neighbouring states, and provoke the hostilities of foreign bordering nations.”³¹ That is an inter-sovereign rationale, and it accounts for the whole restriction without any inference about private persons whatever. Madison, for his part, declined to explain the residue of the clause at all, passing over “[t]he remaining particulars of this clause” as falling “within reasonings which are either so obvious, or have been so fully developed, that they may be passed over without remark.”³² An expressive silence should not have to be argued for this hard.

So the *expressio unius* version of the inference fails, and I do not run it — because the version that survives is stronger, and because an argument a court can kill with one question is worth nothing to the litigant who brings it. What survives — and it is what the argument needed all along — is an inference about enumerated powers.

Article I is a grant of powers to a government, not a catalogue of liberties belonging to persons. Before the Fourteenth Amendment, the national government had no general police power over the private ownership of anything; that power sat with the states, and *Presser* is itself a case about a state exercising it. The question the two clauses answer is therefore not “did the Founders confer a right to own a cannon?” — Article I confers no rights on anyone — but “what power over private armed force at sea did the Founders give the national government?” The answer is a power to license its belligerent employment. Not a power to license its acquisition. Not a power to condition its bare possession. Congress did reach the guns themselves — it counted them, certified them, required them accounted for, and in 1798 and 1818 it reached the armed merchantman who had sought no commission at all. What it never reached, through any of those statutes, was the question of whose the guns were. It imposed no general federal license on the bare acquisition or possession of naval ordnance, as Part II.D

of the Court’s differently worded statement of the same holding — that the challenged sections “only forbid bodies of men to associate together” as military organizations — and it is that formulation *Heller* later quoted.

³⁰ U.S. Const. art. I, § 10, cl. 1 (forbidding the states to “coin Money” or “emit Bills of Credit”); *id.* cl. 3 (forbidding the states, without the consent of Congress, to “enter into any Agreement or Compact with another State, or with a foreign Power”). Both clauses sit in the same section as the ships-of-war provision on which this Article’s contrast rests.

³¹ 3 Joseph Story, *Commentaries on the Constitution of the United States* § 1398 (1833), <https://lonang.com/library/reference/story-commentaries-us-constitution/sto-335/>.

³² *The Federalist* No. 44 (James Madison), https://avalon.law.yale.edu/18th_century/fed44.asp.

shows. The silence about title proves federal incapacity, and federal incapacity operating against a continuous, documented, and undisturbed private practice.

That framing gives up one thing, and only one. It gives up any claim that Article I itself confers a right to own a cannon — but Article I never had such a right to give, so nothing real is surrendered. What this Article defends is a proposition about what “arms” meant, not about which clause the right came from. The claim it had to defeat was that heavy arms were never “arms” at all. Federal incapacity plus universal practice does that work, and it does it without generating the *reductio*. It does not yield private armies, because the power over armed private bodies that *Presser* describes sat with the states — a point about the allocation of governmental power in 1886, which says nothing about what the Second Amendment does to that power now. It does not yield private coinage or private treaty-making, because the national government was affirmatively and exclusively given those powers, so the states’ disability is the mirror of a federal grant rather than a gap in anyone’s authority. And it does not depend on the proposition that the Framers’ silence was eloquent. It depends on the proposition that their enumeration was complete — which is the one thing about Article I on which every school of construction agrees.

A constitutional historian will raise one clause of that enumeration before anything else, and it should be met here rather than left to him. Article I, § 8, cl. 16 gives Congress power “[t]o provide for organizing, arming, and disciplining, the Militia,” and the Second Congress exercised it in 1792 by commanding every enrolled citizen to furnish himself a musket at his own expense — the statute Part I relies on.³³ Here, it might be said, is an enumerated federal power over *arming*, operating on privately owned arms, sitting in the very enumeration this Article calls complete. It is — and it confirms the property baseline rather than disturbing it. The power runs to the militia as a force Congress calls into being: to organizing it, arming it, disciplining it. The technique Congress chose was to command the citizen to bring what was already his — a strange way to legislate if title were the government’s to confer. The limit has to be drawn carefully, because the obvious version of it fails. Say the clause reaches only the enrolled man and the limit does most of nothing — the 1792 Act enrolled “each and every free able-bodied white male citizen of the respective states, resident therein, who is or shall be of the age of eighteen years and under the age of forty-five years.” That class was bounded, and among its bounds were a racial exclusion and the exclusion of the unfree. Both were unjust when Congress wrote them and are indefensible now, and I say so rather than walk past it. But notice what every one of those bounds actually does. Free status, race, sex, age, ability, citizenship, residence: each of them describes whom the United States chose to muster. Not one of them describes what a man might lawfully own. The Act tells us whom Congress called. It does not tell us whose the muskets were — and its own technique, commanding the citizen to furnish himself, presupposes an answer it never supplies. Say the militia carried no ordnance and the Act refutes you in its own text, which contemplates artillery companies and looks forward to the day when “proper ordnance and field artillery is provided.” So the limit lies elsewhere. It is the same one this Article has drawn throughout. Clause 16 is a power to *equip a force* — to say what a man must bring when the United States calls him out, and to discipline him when it does. It is not a power over what he may acquire or keep when it does not.

³³ U.S. Const. art. I, § 8, cl. 16 (“To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States . . .”); Act of May 8, 1792, *supra* note 12, § 1.

Congress exercised it by commanding the citizen to furnish himself, which presupposes the property rather than conferring it, and the privateer's cannon was never militia equipment at all.

D. A Property Baseline, Not an Unregulated One

There is a version of this argument that says the founding generation left heavy ordnance alone. That version is false, and it is also unnecessary — the statutes it overlooks prove more than the silence it imagines. The sovereign legislated about private naval ordnance repeatedly, and the statutes are one search away. They belong in the text.

Begin with the sharpest, and it is the statute Part I.C has already quoted. The Act of May 22, 1794 prohibited the export of the articles named there — cannon first among them — for one year, on pain of forfeiture of the goods and, above a value of four hundred dollars, of the carrying vessel.³⁴ Part I.C took the Act for its caption. This Part takes it for its operative reach, which is a different question and a harder one. The Act is distinguishable — a time-limited embargo on movement across a national frontier is not a rule about possession, and the same statute's second half *encouraged* importation of the identical articles — but it is a federal statute asserting control over private commerce in heavy ordnance, and it will not do to write as though no such statute exists. The Third Circuit has now construed that Act, and the construction runs with this Article's distinction rather than against it. In *United States v. Clerfe*, decided August 10, 2026, the court resolved the case on the Amendment's plain text and put the point in one sentence: "Clerfe's conduct — exporting arms abroad — involved dispossessing himself of firearms. That is fatal to his *Bruen* step-one argument."³⁵ Its reasoning is the reading of "keep" this Part has drawn throughout: "Reading 'keep Arms' to include 'giving away Arms' would conflict with that most basic rule of constitutional interpretation."³⁶ Keeping is holding. Parting with a thing is the opposite of keeping it, and a clause about keeping does not reach the

³⁴ Act of May 22, 1794, *supra* note 14, § 1. The prohibition ran for one year; forfeiture extended to the carrying vessel "together with her tackle, apparel and furniture" where the value of the goods exceeded four hundred dollars.

³⁵ *United States v. Clerfe*, No. 24-2116, slip op. at 7 (3d Cir. Aug. 10, 2026) (precedential) (Porter, J.). The court collected the founding-era export statutes at 11–12: the 1794 Act quoted above; Act of Feb. 28, 1806, 2 Stat. 351 (suspending commercial intercourse with certain parts of the island of St. Domingo); and the Embargo Act, Act of Dec. 22, 1807, 2 Stat. 451. Two cautions belong with the citation. First, *Clerfe* canvassed the ancillary-rights formulations of three other circuits — *B & L Productions, Inc. v. Newsom*, 104 F.4th 108, 119 (9th Cir. 2024) ("meaningfully constrains"); *Oakland Tactical Supply, LLC v. Howell Township*, 103 F.4th 1186, 1196 (6th Cir. 2024) ("restrict[s] conduct necessary to effectuate"); and *United States v. Vereen*, 152 F.4th 89, 93 (2d Cir. 2025), *cert. denied sub nom. Perez v. United States*, 223 L. Ed. 2d 536 (Jan. 12, 2026) — and said it agreed with those authorities, but it resolved the case on the Amendment's plain text and adopted no ancillary-rights test of its own. *Id.* at 8 & n.5, 9. It should not be cited for one. Second, a reader may expect the opinion's textualism to cut against the argument made here, since *Clerfe* declines to read the right past the "normal and ordinary" meaning of its words. It does not. The inference drawn in this Article is not an inference about the scope of the right. It is an inference about the scope of an enumerated federal power under Article I, where the same plain-text discipline is an ally rather than an obstacle.

parting. The court set the 1794 Act beside the 1806 suspension of commercial intercourse with part of the island of St. Domingo and the Embargo Act of 1807, treating all three as controls on what may cross the national frontier. That is the line this Part draws, now drawn by a court of appeals on the constitutional side of the question, and it is a line about movement rather than about title.

The Supreme Court's earliest encounter with that same Act belongs here too, and on a short leash. In *United States v. La Vengeance* the res was a French privateer schooner seized as forfeited for exporting, in the information's words, "2 cannon, 20 muskets, and 50 boxes of gun-powder," and the certificate of facts on which the Circuit Court had reversed recited "[t]hat such muskets were the private property of French passengers on board of the said schooner, carried out for their own use, and not by way of merchandize."³⁷ Three limits travel with the case and none may be dropped. The recital concerns passengers' personal effects, not the vessel's ordnance. The vessel and the passengers were French, so nothing in the case speaks to an American's title. And the holding is jurisdictional — that the cause was one "of Admiralty and Maritime Jurisdiction" and civil in nature, "so that no jury was necessary" — which makes the property finding a recital rather than a holding.³⁸ It cuts modestly the other way besides: the muskets escaped because they were not carried by way of merchandize, not because they were somebody's private property. What the case does supply, and all this Article takes from it, is the vocabulary of Part I.C. The Court described the offence as "[t]he exportation of arms and ammunition" in a proceeding whose res was alleged to include cannon.

Then the two that matter most. In 1798, at the opening of the Quasi-War, Congress provided "[t]hat after notice of this act, at the several custom-houses, no armed merchant vessel of the United States shall receive a clearance or permit, or shall be suffered to depart therefrom, unless the owner or owners, and the master or commander of such vessel for the intended voyage, shall give bond, to the use of the United States, in a sum equal to double the value of such vessel," conditioned in part "that the guns, arms and ammunition of such vessel shall be returned within the United States, or otherwise accounted for, and shall not be sold or disposed of in any foreign port or place."³⁹ No commission, no letter of marque, and no belligerent act appears anywhere in the provision. The trigger is that the ship carries guns. The President was

³⁶ *Clerfe*, *supra* note 35, slip op. at 7.

³⁷ *La Vengeance*, *supra* note 18, at 297 (the information's allegation), 298 (Judge Chase's certificate of the facts on which the judgment of reversal was founded). The certificate's second recital, concerning the gun-powder, finds that it was taken from the French frigate *Semillante* and "was not exported by way of trade [o]r merchandize"; the printed page drops the initial letter of "or."

³⁸ *Id.* at 301 ("In the first place, we think, that it is a cause of Admiralty and Maritime Jurisdiction. . . . In the next place, we are unanimously of opinion, that it is a civil cause In this view of the subject, it follows, of course, that no jury was necessary"). The Court decided the forum and the mode of trial. Nothing in the opinion addresses any right to arms, and this Article does not cite it for one.

³⁹ Act of June 25, 1798, *supra* note 21, § 3. Text independently corroborated against the Avalon Project, https://avalon.law.yale.edu/18th_century/qw02.asp. The Act was limited by its own terms to one year and the next session of Congress. *Id.* § 5.

then authorized to prescribe “suitable instructions to, and for, the armed merchant vessels of the United States,” delivered by the collector of customs “when he shall give bond, as aforesaid.”⁴⁰

Twenty years later Congress made a similar requirement permanent and peacetime: “The owners or consignees of every armed ship or vessel sailing out of the ports of the United States, belonging wholly or in part to citizens thereof, shall enter into bond to the United States, with sufficient sureties, prior to clearing out the same, in double the amount of the value of the vessel and cargo on board, including her armament, that the said ship or vessel shall not be employed by such owners to cruise or commit hostilities against the subjects, citizens, or property, of any foreign prince or state, or of any colony, district, or people, with whom the United States are at peace.”⁴¹ That provision has never lapsed in substance. It was carried into the Revised Statutes, re-enacted with the Criminal Code of 1909, and survives today, substantially verbatim, at 22 U.S.C. § 463.⁴²

Section 10 is not the whole of that statute, and the rest of it has to be met rather than passed over. Section 3 of the same Act made it a high misdemeanor to “fit out and arm, or attempt to fit out and arm, or procure to be fitted out and armed” any vessel “with intent that such ship or vessel shall be employed in the service of any foreign prince or state . . . to cruise or commit hostilities against the subjects, citizens, or property of any foreign prince or state . . . with whom the United States are at peace,” and forfeited the vessel “together with all materials, arms, ammunition, and stores, which may have been procured for the building and equipment thereof.”⁴³ Stop at the verbs and the section looks like a rule about arming. However, read the element on which the section turns. What is criminal is arming with intent that the vessel serve a foreign power against a nation with which the United States is at peace — the neutrality offense the Act was passed to prevent. Strip the intent and the conduct is lawful *under section 3*: the same merchant, arming the same vessel, in the same yard, for his own defense, commits no offense against that section. He remains subject to section 10’s bond on clearance, to the storage

⁴⁰ *Id.* § 4.

⁴¹ Act of Apr. 20, 1818, ch. 88, § 10, 3 Stat. 447, 449–50, <https://www.govinfo.gov/content/pkg/STATUTE-3/pdf/STATUTE-3-Pg447.pdf>.

⁴² 22 U.S.C. § 463, <https://www.law.cornell.edu/uscode/text/22/463>. The codified section is substantially verbatim. Its printed source credit runs to the Criminal Code of Mar. 4, 1909, ch. 321, § 16, 35 Stat. 1091; the 1818 provision reaches the present section through Revised Statutes § 5289, and this Article states the chain that way rather than asserting a direct line from 1818 to the current codification.

⁴³ Act of Apr. 20, 1818, ch. 88, § 3, 3 Stat. 447, 448, <https://www.govinfo.gov/content/pkg/STATUTE-3/pdf/STATUTE-3-Pg447.pdf>. Each ellipsis in the quotation above elides the same six words, “, or of any colony, district, or people,”. The predecessor provision is Act of June 5, 1794, ch. 50, § 4, 1 Stat. 381, 383, <https://www.govinfo.gov/content/pkg/STATUTE-1/pdf/STATUTE-1-Pg381.pdf>, which reached augmenting a vessel’s force “by adding to the number or size of the guns of such vessel prepared for use.” Both are intent statutes; neither conditions acquisition or bare possession on anyone’s leave. I draw no inference from § 3’s forfeiture: forfeiture reaches the instruments of an offense without regard to who holds title to them.

and powder rules collected below, and to the export prohibition of 1794 — none of which conditions his title either. Section 3 is a rule about hostile employment written in the vocabulary of equipment, and its forfeiture reaches the guns the way forfeiture has always reached the instruments of an offense. Congress reached the arming when — and only when — it was arming to make war on another sovereign's behalf.

One statute presses harder on that distinction than any other, and it is the Marque Clause's own implementing act. Every duty it imposes is triggered by a commission the owner asked for; none of it touched the merchant who wanted none. When Congress in 1812 authorized privateering against Great Britain, it did not stop at issuing commissions. It required every applicant to state in writing "the name and a suitable description of the tonnage and force of the vessel, and the name and place of residence of each owner concerned therein, and the intended number of the crew"; it required the owners to give bond "with at least two responsible sureties" in the penal sum of five thousand dollars, or ten thousand if the vessel carried more than one hundred and fifty men; and it directed that on the vessel's return the collector of customs "order the proper officer of the customs to go on board and take an account of the officers and men, the number and nature of the guns," after which "no such vessel shall be permitted to sail out of port again . . . until . . . a certificate obtained under the hand of such collector . . . that she is manned and armed according to her commission." An American consul abroad could "go on board and number the officers and crew and examine the guns," and was to report to the Secretary of the Navy "if the same shall not correspond with the commission and certificate."⁴⁴ Here, at last, is a federal statute that counts a private vessel's cannon and conditions her departure on the count — and it does so only because her owner asked the United States to make her a belligerent.

It is also, on inspection, the distinction's best confirmation rather than its refutation. Notice what triggers every one of those duties: the commission. The statute reaches this owner because he has asked the United States to convert his ship into a lawful belligerent, and it reaches him in order to hold him to the terms of that conversion — she must be armed according to her commission, neither more nor less, so that the government knows what it has licensed and can answer for it to other sovereigns. The merchant who never sought a commission was subject to none of it. And the statute never asks the question the "bearable arms" thesis needs answered in its favor. Not once does it inquire whether the guns are lawfully his. It counts them, matches them against the paper, and takes his bond — three operations that presuppose the ordnance is somebody's property, which is why the collector's office is to take an account of the guns rather than to seize them. The most detailed federal regulation of private naval armament the founding generation produced regulates that armament the way a customs officer regulates cargo: as a thing belonging to a man, entering and leaving on terms.

⁴⁴ Act of June 26, 1812, ch. 107, §§ 2–3, 2 Stat. 759, 759–60 (the written statement of "the tonnage and force of the vessel" and the bond of five thousand dollars, or ten thousand for a vessel carrying more than one hundred and fifty men, "with at least two responsible sureties"); *id.* § 10, 2 Stat. at 761–62 (the customs account of "the number and nature of the guns" and the certificate that the vessel "is manned and armed according to her commission"); *id.* § 11, 2 Stat. at 762 (the consul abroad), <https://www.govinfo.gov/content/pkg/STATUTE-2/pdf/STATUTE-2-Pg759.pdf>. Nothing in the Act reaches a merchant who sought no commission, and nothing in it asks whether the guns are lawfully his.

The federal statutes are half the picture. Set beside them the founding-era municipal law of gunpowder — the substance without which a cannon is a length of pipe. Philadelphia capped at twelve pounds, and later at thirty, the quantity of gunpowder any person might keep in the city, and required masters importing powder to deliver it to the public magazine within forty-eight hours. New York City forbade any person to “have or keep any quantity of gun powder exceeding twenty-eight pounds weight” in one place within the specified part of the city — a possessory verb, though bounded to a district — and re-enacted the cap in March 1788, during the ratification debates. Portsmouth set the figure at ten pounds, kept in a tin canister. Pennsylvania in 1794 conditioned lawful sale on state proof-testing.⁴⁵ Massachusetts went further and named the guns. The Boston act of March 1, 1783 — the statute Justice Breyer pressed in his *Heller* dissent — forbade any person to take into a dwelling house, stable, barn, warehouse, store, shop, or other building within the town “any Cannon, Swivel, Mortar, Howitzer, or Cohorn, or Fire-Arm, loaded with, or having Gun Powder” in it, on pain of a ten-pound forfeiture.⁴⁶ Boston had earlier forbidden the discharge of “any cannon laden with shot, from any wharf or vessel,” excepting soldiers on training days.⁴⁷ Connecticut, in a statute whose

⁴⁵ The founding-era municipal powder statutes described in this paragraph are collected in the Duke Center for Firearms Law’s Repository of Historical Gun Laws — used here only as a finding aid to the printed session laws, and notable for what it does and does not contain: many ordinances regulating the *firing* of cannon, and not one statute conditioning the *ownership* of one: 1725 Pa. Laws 31 (Philadelphia; twelve-pound cap; delivery of imported powder to the magazine within forty-eight hours), <https://firearmslaw.duke.edu/laws/1725-pa-laws-31-an-act-for-the-better-securing-of-the-city-of-philadelphia-from-the-danger-of-gunpowder-c2a7-2>; Act of Dec. 6, 1783, ch. 1059, 11 Pa. Stat. 209 (Philadelphia; thirty-pound cap), <https://firearmslaw.duke.edu/laws/an-act-for-the-better-securing-the-city-of-philadelphia-and-its-liberties-from-danger-of-gunpowder-act-of-dec-6-1783-chap-1059-11-pa-stat-209-sections-i-and-ii-p-1>; 1784 N.Y. Laws 627, ch. 28 (forbidding any person to “have or keep any quantity of gun powder exceeding twenty-eight pounds weight” in one place within the specified part of the city, re-enacted March 15, 1788), <https://firearmslaw.duke.edu/laws/1784-n-y-laws-627-an-act-to-prevent-the-danger-arising-from-the-pernicious-practice-of-lodging-gun-powder-in-dwelling-houses-stores-or-other-places-within-certain-parts-of-the-city-of-new-york-or>; 1793 N.H. Laws 464–65 (Portsmouth; ten-pound cap, kept in a tin canister), <https://firearmslaw.duke.edu/laws/1793-n-h-laws-464-65-an-act-to-prevent-the-keeping-of-large-quantities-of-gun-powder-in-private-houses-in-portsmouth-and-for-appointing-a-keeper-of-the-magazine-belonging-to-said-town/>; 1794 Pa. Laws 764, ch. 337 (state proof-testing of powder before sale). The Repository presents these statutes as transcribed excerpts of the printed session laws; quotations here are confined to language confirmed on independent retrievals, and the underlying printed session laws should be consulted before any of this material is quoted at greater length.

⁴⁶ Act of Mar. 1, 1783, *supra* note 16. This is the statute Justice Breyer pressed in dissent in *Heller*. Its operative rule is a condition on keeping a *loaded* weapon or charged shell indoors, not on ownership. The legislature’s own characterization of what it was regulating appears in the act’s title: *An Act in Addition to the Several Acts Already Made for the Prudent Storage of Gun-Powder Within the Town of Boston*.

⁴⁷ Act of 1746, ch. 11, §§ 1–3, 1746 Mass. Acts 208 (forbidding any person to “discharge or fire off any cannon laden with shot, from any wharf or vessel,” with an exemption for soldiers on

declared purpose was to *encourage* the manufacture of gunpowder, forbade the erection of any powder mill “without the license of the general assembly, or in their recess the Governor and Council, first had and obtained.”⁴⁸

Read as a body, those statutes describe a legal order that regulated private heavy arms closely — the storage of their powder and of arms kept loaded with it, their handling, and above all their use. They do not describe one that regulated their ownership. Look at what each of them actually conditions. Where the powder may be kept. How much of it. In what vessel. Whether a gun may be kept loaded inside a building in town. When the gun may be fired, and by whom, and on what day. Whether a mill may be built. Whether powder may lawfully be sold unproved. Whether the ship may clear the harbor, and on what security. No founding-era law among them makes the acquisition or the bare possession of a cannon contingent on anyone’s leave. Pennsylvania’s proof-test comes nearest, and it still misses — it sets a standard for the powder that may be sold, not a condition on anyone’s leave to buy a gun or to keep it.

Two statutes press harder than any collected above. Both are met here rather than left for a reviewer to find. The first is the very next section of the Boston act of 1783 — the section after the one quoted a moment ago. It provides that cannon, swivels, mortars, howitzers, cohorns, fire-arms, bombs, grenades and iron shells found in a building charged with powder “shall be liable to be seized by either of the Firewards of the said Town,” and that on complaint to the Court of Common Pleas and a jury’s verdict for the complainant the piece “shall be adjudged forfeit, and be sold at public Auction,” half the proceeds to the firewards and half to the poor of Boston.⁴⁹ A private cannon condemned and sold at auction is a serious thing, and a reader who found it for himself after reading the section quoted above would be entitled to think it had been kept from him. It is nonetheless not a rule about ownership. The forfeiture follows the owner’s own breach of the storage rule — it attaches to the loaded gun kept indoors, not to the gun — and a legal system that forfeits a thing for its owner’s violation is a legal system that recognized the thing as his to begin with. Forfeiture presupposes title. It does not deny it.

training days). The provision is squarely a regulation of use, and this Article treats it as such.

⁴⁸ *An Act for Encouraging the Manufactures of Salt Petre and Gun Powder* (Dec. 1775), 15 Pub. Recs. of the Colony of Conn. 190–92 (Hoadly ed. 1890) (“[N]o powder-mill shall be erected in this Colony for the manufacture of gun-powder without the license of the general assembly, or in their recess the Governor and Council, first had and obtained under the penalty of thirty pounds for every such offence.”), <https://firearmslaw.duke.edu/laws/the-public-records-of-the-colony-of-connecticut-hartford-1890-page-190-192-image-194-196-available-at-the-making-of-modern-law-primary-sources>.

⁴⁹ Act of Mar. 1, 1783, *supra* note 16 (second enacting clause). The provision is not numbered in the printing; it is the clause beginning “And be it further enacted by the Authority aforesaid, That all Cannon, Swivels, Mortars, Howitzers, Cohorns, Fire-Arms, Bombs, Grenades, and Iron Shells of any Kind, that shall be found in any Dwelling-House . . . charged with, or having in them any Gun-Powder, shall be liable to be seized by either of the Firewards of the said Town.” The forfeiture and auction follow a complaint to the Court of Common Pleas and a jury’s finding. The quotation follows the Duke transcription, which prints “Grenades” and records by editorial note that the word is “[w]ritten ‘Granade’ in original source document.”

The second is Pennsylvania's Act of April 2, 1779, which empowered officers to take from persons refusing the oath of allegiance "any cannon, mortar, or other piece of ordnance, or any blunderbuss, wall-piece, musket, fusee, carbine or pistols, or other fire arms, or any hand gun and any sword, cutlass, bayonet, pike, or other warlike weapon."⁵⁰ Cannon stands first on that list too, and the state took them. But the taking runs against disaffected persons in wartime, on the ground of their refusal to swear — a loyalty measure, not a rule of ownership. And its own premise is that the arms were theirs to lose. Neither statute conditions acquisition or bare possession on anyone's leave.

The negative has to be bounded. An unbounded one dies to a single contrary statute; a bounded one does not. Here is what I searched: the federal statute books from 1789 through 1818 in the *Statutes at Large*; the colonial, state and municipal enactments collected in the Duke Center for Firearms Law's repository of historical gun laws for the period 1607 through 1815; the founding-era statutes canvassed by Kopel and Greenlee in the most comprehensive published survey of arms bans before 1900; and the eleven volumes of *Naval Documents of the American Revolution* covering December 1774 through March 1778. Within that universe I have located no colonial, state, or federal enactment conditioning the acquisition or the bare possession of a cannon on a government's leave. I have not searched every town's by-laws, and I do not claim the negative beyond the universe just described.

And the two bond acts do more than survive the argument; they carry it. Look again at what the 1798 Act required the owner to promise: "that the guns, arms and ammunition of such vessel shall be returned within the United States, or otherwise accounted for, and shall not be sold or disposed of in any foreign port or place." That is a promise to bring his own guns home. One does not require a man to account for his cannon unless the cannon is his. One does not forbid him to sell it abroad unless it is his to sell. The 1818 Act measures the bond by the value of the vessel and cargo "including her armament" — the guns are an input to the size of the federal exaction, which is to say an asset on the owner's side of the ledger, appraised as his. Surety, accounting, and restraint on alienation are the grammar the law uses about lawfully held property. They are not the grammar of contraband. Congress does not take a bond for the safe return of a thing a man may not own. I claim from these statutes what their words support and no more: lawful private custody, an owner answerable for the guns as his, and a legislature treating them as assets rather than as contraband. They do not exclude the possibility that a particular battery was leased, consigned, or held by several owners together — nor does anything in this Article require that it was not. Whose the gun was, as between private persons, is a question of private law. That it was somebody's, and not the sovereign's to grant, is the proposition at issue.

So the claim this Article defends is narrower than the one the evidence at first invites, and it is the narrower claim that is worth defending. It is not that the founding generation left heavy ordnance unregulated. It is that no founding-era law made the bare ownership of heavy

⁵⁰ Act of Apr. 2, 1779, ch. CI, § 5, 1779 Pa. Laws 198, 198–99, <https://firearmslaw.duke.edu/laws/1779-pa-laws-193-an-act-for-the-further-security-of-the-government/>. The same enactment appears at 9 *Statutes at Large of Pennsylvania* 346–48 (ch. DCCCXXXVI), where the compiler brackets the operative clause as section II while recording the original pamphlet-laws numbering as section V, and dates passage to March 31, 1779 rather than April 2. I give the date the Dunlap printing carries and note the discrepancy.

ordnance contingent on government permission, and that everything the sovereign *did* regulate — the powder, the loaded gun indoors, the firing, the clearance, the owner’s answerability for what his ship did — presupposed his title to the gun. That is the difference between regulating property and prohibiting contraband. It is exactly the difference the “bearable arms” thesis needs to erase.

E. The Strongest Objection, Stated Fairly

The argument has serious answers, and the honest course is to state them at full strength before meeting them.

The first is doctrinal. The skeptic says: you have it backwards. The letter of marque does not prove that private cannon were freely owned; it proves that private cannon were dangerous enough to require the sovereign’s leave. The whole institution of privateering, on this view, is an institution of licensure — and the existence of a licensing regime is evidence of prohibition, not of freedom. Consider the penalty structure. A privateer who took an enemy prize with a commission was a lawful belligerent entitled to his prize money. A private crew that did the same thing without a commission were pirates — and piracy was a capital crime. If unlicensed use of an armed ship was a hanging offense, how can privateering possibly stand for the proposition that private heavy arms were freely held? The skeptic presses the analogy: we do not say a citizen has a “right” to drive a truck of explosives merely because the state issues permits to licensed blasting contractors. On his account the permit proves the danger; the danger proves the regulation; the regulation is the opposite of a right.

The second is methodological, and it has been published, by the historian the other side cites most. Saul Cornell concedes the factual core in terms — “cannons were never explicitly outlawed in the Founding era,” and “given the dangers of piracy, merchant vessels would have been outfitted with cannon” — and then attacks the entailment: “Claiming that there was no law against something in the past does not establish that a constitutional right to own it existed; it merely describes a social practice at a particular time and place.” And: “In fact, the absence of a law typically tells you almost nothing about rights.”⁵¹ Cornell’s is a popular-press essay and I cite it as such; the scholarly statement of the same objection is Jacob Charles’s, whose argument is that *Bruen* makes historical silence carry weight it cannot bear — and who presses the point by way of the *Dobbs* Court’s own observation that the absence of historical regulation does “not mean that anyone thought the States lacked the authority” to regulate.⁵²

⁵¹ Saul Cornell, *Biden Was Wrong About Cannons but Right About the Second Amendment*, Slate (June 29, 2021), <https://slate.com/news-and-politics/2021/06/joe-biden-cannons-wrong-guns-right.html>. Cited as a popular-press essay, not as scholarship, and cited against its author: the factual core he concedes — that cannon were never outlawed and that merchantmen carried them — is the core this Article proves from the statute book.

⁵² Jacob D. Charles, *The Dead Hand of a Silent Past: Bruen, Gun Rights, and the Shackles of History*, 73 Duke L.J. 67, 88 & n.35 (2023), <https://firearmslaw.duke.edu/assets/the-dead-hand-of-a-silent-past.pdf>, cited for the objection at its strongest and answered in Part II.E. The quoted words are the *Dobbs* Court’s, see *Dobbs v. Jackson Women’s Health Org.*, 597 U.S. 215, 253 (2022), which Professor Charles invokes against what he regards as the asymmetry between *Dobbs*’s and *Bruen*’s treatment of historical silence; the argument, not the sentence, is his.

Both are serious. The second is sharper, and it comes first, because it is shorter.

Cornell is right about a proposition this Article never advanced: that the absence of a law establishes no right. Part II.C declined that inference on purpose. The objection lands on empty ground. And absence does two different kinds of work, which is what the objection misses. Absence of a *law* does not generate a right — that is Cornell's point, and it is correct. Absence of a *tradition* is a different matter: under *Bruen* the government bears the burden of producing the historical tradition that justifies its regulation, and a tradition it cannot produce is a burden it has not carried. This Article uses absence only in the second way, and only against a government that must come forward with something. What federal silence establishes is federal incapacity over the ownership of the guns, which is a proposition about the enumeration rather than about liberty, and which Cornell's objection does not touch. Nor does this Article rest on silence alone. The 1798 and 1818 bond acts are affirmative statutory evidence that the guns aboard a private ship were the owner's property, appraised as his and returnable by him. That is not an argument from what the sovereign failed to say. It is an argument from what the sovereign wrote down. And for the purpose this Article actually serves — defeating the claim that heavy arms were never “arms” within founding-era usage — a documented social practice is not a weak substitute for a right. It is the precise evidence the claim requires, because the claim is about usage and understanding, and practice is what usage and understanding look like in the record.

F. The Doctrinal Objection Answered: The License Ran to the Act, Not to the Asset

The skeptic's first argument collapses a distinction the founding-era law kept scrupulously separate: the distinction between the acquisition and ownership of the armed vessel and the belligerent employment of it against an enemy. The letter of marque governed only the second.

Trace the life cycle of a privateer and the point becomes plain. A merchant built or bought a ship. He fitted her with guns — bought, cast, or salvaged — and no commission, permit, or governmental grace attended his acquisition of them. He could sail her, armed to the gunwales, as a peaceful trader carrying cargo through waters thick with enemies; an armed merchantman was simply a merchantman that could defend herself, and when Congress finally addressed such ships in 1798 and 1818 it addressed how they cleared port and what their owners guaranteed, not whether they might be armed at all. What he could not do without a commission was go on the account offensively — seek out, attack, and capture enemy shipping for profit. The letter of marque authorized that specific aggression against a specific enemy. It was, in the most literal sense, a license to commit acts of war, issued to convert what would otherwise be private depredation into public belligerency.

The capital penalty the skeptic invokes confirms rather than undermines the distinction. Piracy was not “owning a cannon without a license.” Piracy was robbery and violence on the high seas — the taking of ships and goods by force, for private gain, without lawful authority. The pirate hanged for the act of unlicensed predation, not for the fact of armament. An armed ship that took no prizes committed no piracy; a licensed privateer that took an enemy prize committed no piracy either. What separated the felon from the hero was the presence or absence of the commission authorizing the taking — the act — while the guns in the hold were, throughout, the same lawfully owned guns. The line the criminal law drew was a line around conduct.

One *reductio* belongs here rather than in a footnote, because this Article invites it by counting the crews. Run the Article's own move on the men instead of the metal. The licensing power presupposes what it licenses; what a letter of marque licensed was not a gun but an armed company — crews running to more than two hundred, under command, at private expense, roughly eight hundred times over. Does the Marque Clause therefore presuppose private armies? It does not, and the answer is the act-versus-asset line applied to people. The organized crew is the belligerent act's own instrument: a man cannot wage naval war alone, and a commission that reaches the act necessarily reaches the company that performs it — which is why Congress licensed the crew, counted it, and bonded for it, and never once licensed the cannon. Part II.C's answer will not do this work, and it is worth saying why. The states commissioned privateers themselves, and after 1788 Article I, § 10, cl. 1 forbade them to commission at all — so a state police power over armed private bodies cannot be what kept the privateer's company from being a private army. What kept it from being one was the commission.

There is a point here that a historian would make against me, and it should be made here first. It is tempting to read the commission as a foreign-facing instrument rather than a domestic regulatory choice, and Vattel supplies a sentence that invites the reading: "The crews of private ships of war stand in the same predicament: a commission from their sovereign or admiral can alone, in case they are captured, insure them such treatment as is given to prisoners taken in regular warfare."⁵³ On that reading the instrument's office was to distinguish belligerent from pirate in the eyes of *other* sovereigns, and it would say almost nothing about domestic attitudes toward ownership. The reading does not survive Vattel's own next section. He grounds the necessity of a commission in domestic public law and says so in terms: it "wholly results from the laws essential to every political society, and not from any obligation relative to the enemy."⁵⁴ Vattel is against me on the framing, and the concession is worth making because it costs nothing. A domestic rule about who may wage war is still a rule about the *act*. What Vattel nowhere suggests — what no writer of the period suggests — is a domestic rule about who may own the gun. The skeptic's inference from licensure to prohibition therefore gains nothing from Vattel: the licence Vattel describes is a licence to be treated as a belligerent, issued under domestic law, to a man whose title to his ordnance is never in question.

So the skeptic's blasting-permit analogy fails, and the right analogy is close at hand. Consider a citizen who lawfully owns a rifle — owns it outright, needs no one's permission to buy it or keep it — and who would nonetheless commit a crime if he used it to rob a stagecoach. He may be told how to store it, forbidden to fire it in the town square, or made to post security before carrying it across a frontier. None of that touches his title. The letter of marque was the sovereign's authorization to "rob the stagecoach," where the stagecoach was an enemy merchantman and the robbery was an act of war blessed by the state. It was never a permit to buy or own the rifle. The founding generation required a commission before a private man could wage war on its behalf. That generation required no one's leave before he could own the

⁵³ Emer de Vattel, *The Law of Nations* bk. III, ch. XV, § 226 (Joseph Chitty trans., Phila., T. & J.W. Johnson 1883) (1758), <https://lonang.com/library/reference/vattel-law-of-nations/vatt-315/>. Vattel is cited by book, chapter, and section rather than by page.

⁵⁴ Vattel, *supra* note 53, bk. III, ch. XV, § 225. Read live for this Article. The section is adverse to the foreign-facing reading and is quoted here for that reason.

guns — and when it regulated them, it regulated them as his. Of course a nation licenses who may commit acts of war in its name; a nation that let every armed shipowner start his own war with a foreign power would not survive. Why, then, would that same nation — so careful to license the act, so willing to regulate the powder, the firing, and the clearance — never once have made the acquisition of naval ordnance turn on permission, if it had understood private ownership of those guns to be the dangerous thing? It did not so understand. The dangerous thing, in the Founders' eyes, was private war, not private arms. They regulated the one intensively and left the other to the law of property. The Marque Clause is the fingerprint of that judgment in the constitutional text.

III. The Archival Record

The structural argument stands on the text. The archival record shows the Founders living inside the arrangement the text describes — commissioning private ships they did not own, building an elaborate regulatory apparatus around vessels they did not create, and doing it at a scale that makes the “privateer” not a curiosity but a category of the founding-era economy. This is the record Krawczyk and Ambler’s footnote gestured at without opening.

A. The Commissions: *The Revenge* and the *Holkar*

The letter of marque was not a theoretical instrument. Documented specimens survive and are catalogued in the government’s own annotation of the Constitution. Two illustrate the form across the seventy years that bracket the Founding.

In 1741 — a colonial antecedent, but one that shows the institution the Framers inherited — the Governor of the Colony of Rhode Island and Providence Plantations commissioned Captain Benjamin Norton as a privateer, authorizing him to use the sloop *Revenge* to “apprehend, seize and take” Spanish vessels.⁵⁵ The commission’s subject is a privately owned sloop, already in being, already Norton’s to sail. The government supplied not the ship and not the guns but the authority — the license to seize. The verbs are the verbs of belligerent action: “apprehend, seize and take.” Nothing in the instrument grants, conditions, or so much as mentions the ownership of the vessel or her armament. The commission takes the armed private ship as it finds her and licenses what she may do.

The pattern holds a lifetime later, under the Constitution the *Revenge*’s era anticipated. In the War of 1812, a federal letter of marque for the brig *Holkar*, dated October 16, 1812, authorized the brig to “subdue, seize, and take any armed or unarmed British vessels.”⁵⁶ Again the object is a

⁵⁵ Commission of Captain Benjamin Norton as a Privateer (June 2, 1741) (Governor of the Colony of Rhode Island and Providence Plantations authorizing Norton to use the sloop *Revenge* to “apprehend, seize and take” Spanish vessels), reprinted in *Privateering and Piracy in the Colonial Period: Illustrative Documents* 378–81 (J. Franklin Jameson ed., Augustus M. Kelley 1970), as documented in Constitution Annotated, https://constitution.congress.gov/browse/essay/artI-S8-C11-3-1/ALDE_00000182/.

⁵⁶ Letter of Marque for the Brig *Holkar* (Oct. 16, 1812) (authorizing the brig to “subdue, seize, and take any armed or unarmed British vessels”), as documented in Constitution Annotated, https://constitution.congress.gov/browse/essay/artI-S8-C11-3-1/ALDE_00000182/.

private vessel — a brig, privately owned — and again the grant is a grant of belligerent license: “subdue, seize, and take.” The 1812 instrument authorizes the *Holkar* to attack “armed” British vessels, which strongly implies that the *Holkar* herself carried armament sufficient to fight them — though privateers also took armed merchantmen by threat, by weight of crew, and by boarding, and the instrument does not describe her battery. The federal government was licensing a private warship to make war on enemy warships. It licensed the war. It did not license the private ownership of the guns. The instruments’ silence is worth exactly what it is: neither commission names an owner, describes a battery, or says who supplied the guns. That silence is this Article’s point about the reach of the licence. It is not, and is not offered as, affirmative proof of title — the proof of title is in Part II.D’s bond statutes and Part III.C’s petitions.

The Continental Congress supplies a third specimen, closer in time and origin to the Instructions themselves. Two weeks after voting to authorize general privateering commissions, Congress agreed on April 2, 1776 to the form of commission for private ships of war, licensing a vessel “mounting [blank] carriage guns, and navigated by [blank] men, to fit out and set forth” in a warlike manner. The accompanying instructions it recommitted that same day for their blanks to be filled, and adopted them the next.⁵⁷ The blank is worth stating precisely. The form required the vessel’s gun count to be written in, and it required nothing else about the guns: no approval of the number, no ceiling on it, and no inquiry into where they came from. The instrument that would license a private cruiser recorded how many guns she carried without conditioning the count.

One clause remains. Article I, § 10, cl. 1 names this Article’s own subject: it forbids the states to grant letters of marque and reprisal at all — an absolute prohibition, with no consent option, sitting alongside treaties, alliances, and coinage.⁵⁸ A reader will notice that the Framers put marque and reprisal on the sovereignty list rather than the permission list, and will ask whether that classification cuts against reading the institution as a private one.

It does not, and the reason is the same enumerated-powers point Part II.C rested on. Clause 1 restrains a *government* from doing a *governmental* thing: issuing commissions. Its subject is who may authorize belligerency, not who may own a ship. Story explains the placement in exactly those terms: the ban on state letters of marque “stands upon the same general ground; for otherwise it would be in the power of a single state to involve the whole Union in war at its

⁵⁷ Journals of the Continental Congress, Apr. 2, 1776, 4 *Journals of the Continental Congress* 247–48 (Worthington C. Ford ed., 1906), reprinted in 4 *Naval Documents of the American Revolution* 628–29 (Clark ed., 1969) (Congress agreeing to the form of commission for private ships of war, licensing a vessel “mounting [blank] carriage guns, and navigated by [blank] men,” and recommitting the accompanying instructions the same day for the blanks in them to be filled). The commission and the Instructions are separate instruments; the commission’s own text refers the commander to instructions delivered to him with it. Congress adopted the Instructions the following day. 4 *Journals of the Continental Congress* 253–54, reprinted in 4 *Naval Documents of the American Revolution* 648–51; *infra* note 61.

⁵⁸ U.S. Const. art. I, § 10, cl. 1 (barring the states from granting letters of marque and reprisal); see Constitution Annotated, https://constitution.congress.gov/browse/essay/artI-S8-C11-3-1/ALDE_00000182/.

pleasure.”⁵⁹ Chief Justice Marshall made the same observation from the bench: “To grant letters of marque and reprisal, would lead directly to war; the power of declaring which is expressly given to congress.”⁶⁰ The reasoning is telling, and it is the Marque Clause’s own logic restated. What the Constitution centralized was the power to commission the act of war — precisely because that act “would lead directly to war.” Clause 1 confirms rather than undercuts the structure: the thing too dangerous to leave in state hands was the licensing of belligerency. The ships remained where they had always been.

B. The Regulatory Apparatus: The Instructions of April 3, 1776

The single most revealing document is the one Congress issued to the men it commissioned. On April 3, 1776 — more than three months before independence — the Second Continental Congress adopted, and John Hancock signed by its order, the “Instructions to the Commanders of Private Ships or Vessels of War, which shall have Commissions or Letters of Marque and Reprisal, authorizing them to make Captures of British Vessels and Cargoes.”⁶¹ The instrument runs to eleven articles. Its evidentiary value lies not in any single phrase — the document does not use the word “cannon” — but in the sheer density of the regulatory machine Congress erected around vessels it did not build, own, or arm.

Consider what Congress felt it necessary to specify. Article 1 authorized the commander “by Force of Arms” to “attack, subdue, and take all Ships and other Vessels belonging to the Inhabitants of Great-Britain, on the High Seas, or between high-water and low-water Marks,” while carving out exceptions for vessels carrying prospective settlers or bringing “Arms, Ammunition or Warlike Stores” to the colonies.⁶² Article 2 extended the authorization to vessels “carrying Soldiers, Arms, Gun-powder, Ammunition, Provisions, or any other contraband Goods, to any of the British Armies or Ships of War employed against these Colonies.”⁶³ Article 3

⁵⁹ Story, *supra* note 31, § 1350, <https://lonang.com/library/reference/story-commentaries-us-constitution/sto-333/>.

⁶⁰ *Barron v. City of Baltimore*, 32 U.S. (7 Pet.) 243, 249 (1833) (Marshall, C.J.), as documented in Constitution Annotated, https://constitution.congress.gov/browse/essay/artI-S8-C11-3-1/ALDE_00000182/ (cited here solely for its observation on the war power).

⁶¹ *Instructions to the Commanders of Private Ships or Vessels of War, Which Shall Have Commissions or Letters of Marque and Reprisal, Authorizing Them to Make Captures of British Vessels and Cargoes* (In Congress, Wednesday, April 3, 1776) (signed by order of Congress, John Hancock, President; printed by John Dunlap, Philadelphia, 1776). Full text quoted from the Gilder Lehrman Collection transcript, GLC00038.01, <https://www.gilderlehrman.org/collection/glc0003801>, cross-verified against the *Journals of the Continental Congress* as reproduced at <https://americanfounding.org/entries/second-continental-congress-april-3-1776/>, and catalogued at the Library of Congress, Rare Book and Special Collections Division, LOC Control No. 90898006 (“Cont. Cong. No. 9”), <https://www.loc.gov/item/90898006/>.

⁶² *Id.* art. 1.

⁶³ *Id.* art. 2.

directed that captured ships be brought in “with their Guns, Rigging, Tackle, Apparel, Furniture and Ladings” to a colonial port, there to be adjudicated before prize courts.⁶⁴ Articles 4 through 7 laid down the procedure: examination of prisoners under oath, preservation of the prize pending condemnation, a prohibition on torturing or mistreating captives “contrary to common Usage and the Practice of civilized Nations in War,” and written reports to Congress.⁶⁵ Articles 9 through 11 forbade the ransoming of prisoners without direction, bound commanders to obey Congress’s further instructions, and imposed forfeiture of the commission and liability for breach of the bond’s condition.⁶⁶

Every line of that apparatus presupposes the privately owned armed ship and regulates only what she does. Congress is not standing up a navy; it is disciplining a private force it is borrowing. It requires bonds — a point the National Park Service’s maritime history confirms: with the act of March 23, 1776, “the Continental Congress formalized the commissioning process, and uniform rules of conduct were established,” and “[o]wners of privateers had to post monetary bonds to ensure their proper conduct under the regulations.”⁶⁷ It requires that prizes be brought before courts. It forbids cruelty to prisoners. It compels reporting. This is the conduct-regulation of Part II made visible: Congress asserting dense control over the belligerent employment of the vessels, and over the owner’s answerability for their conduct, while asserting no control whatever over whether he might own them or arm them, which it takes entirely for granted.

Article 8 calls for a word of caution rather than of argument. It provided: “One Third, at the least, of your whole Company shall be Land-Men.”⁶⁸ I note the limit of the inference: Article 8 fixes the composition of the crew, not its absolute size, and I do not read into it a specific head count. Its force is comparative — you do not ration landmen by thirds on a boat crewed by six. I press it no further, and in particular I do not read “Land-Men” to mean soldiers. Congress used that word two articles earlier, in Article 2, when it meant it. Nothing in Article 8 tells us how the vessel was armed.

C. The Scale: Roughly 1,700 Commissions and Nearly 800 Ships

If the Instructions show the regulatory form, the National Park Service’s maritime history — written by historian John Frayler for Salem Maritime National Historical Park — supplies the magnitude. According to that official account — which prefaces the figures with the caution that “the documentation is incomplete” — “about 1,700 Letters of Marque, issued on a per-

⁶⁴ *Id.* art. 3.

⁶⁵ *Id.* arts. 4–7.

⁶⁶ *Id.* arts. 9–11.

⁶⁷ John Frayler, *Privateers in the American Revolution*, National Park Service, Salem Maritime National Historical Park, <https://www.nps.gov/articles/privateers-in-the-american-revolution.htm> (describing the March 23, 1776 act formalizing the commissioning process and the owners’ bond requirement).

⁶⁸ Instructions of April 3, 1776, *supra* note 61, art. 8 (“One Third, at the least, of your whole Company shall be Land-Men.”).

voyage basis, were granted during the American Revolution,” and “[n]early 800 vessels were commissioned as privateers and are credited with capturing or destroying about 600 British ships.”⁶⁹ Four quantities are in play there and they are not interchangeable, so I separate them before using any of them. Roughly seventeen hundred is a count of *commissions*, issued per voyage, so a single vessel recommissioned three times appears three times. Nearly eight hundred is a count of *vessels commissioned*, which is the figure that bears on how many private hulls sailed under a letter of marque. Neither figure is a count of *cannon-armed* vessels: the Park Service’s own range runs down to an eight-ton boat, and this Article does not assume every commissioned vessel carried carriage guns. And none of the three is a count of *title to particular guns*, which no commission records and which Part II.D’s bond statutes and Part III.C’s petitions establish instead. What the figures support is the one thing this Part needs them for — that commissioned private vessels were a category of the founding-era economy rather than a curiosity — and the armament claim rests on the vessels counted gun by gun below, not on the aggregate.

The vessels ranged widely in force, and the range itself is instructive. At the upper end stood ships like the *Caesar* of Boston — 600 tons and twenty-six guns. At the lower end, small craft like the eight-ton boat *Defense* of Falmouth, Massachusetts. “Crews,” the Park Service notes, “ranged from a few men in a whaleboat to more than 200 aboard a large, fully equipped privateer.”⁷⁰ The *Caesar*’s twenty-six guns are the concrete refutation of the “bearable arms” premise: a single private vessel, in private hands, mounting more than two dozen pieces of naval artillery, held on no one’s sufferance. I state the *Caesar*’s armament exactly as the source states it — “26-gun” — and no more precisely; the source does not break the figure down between long guns and swivels, and I do not.⁷¹ Nor do I reach for the larger, rounder numbers that circulate in popular commentary about total cannon in private American hands; I have not been able to verify them, and an argument this strong does not need them: the Park Service’s own documented figures carry it.⁷² The citable magnitude is the one the Park Service publishes, and it is more than sufficient: nearly eight hundred armed vessels, the largest of them carrying artillery by the score, all privately owned.⁷³

⁶⁹ Frayler, *supra* note 67 (“Although the documentation is incomplete, about 1,700 Letters of Marque, issued on a per-voyage basis, were granted during the American Revolution. Nearly 800 vessels were commissioned as privateers and are credited with capturing or destroying about 600 British ships.”).

⁷⁰ *Id.* (naming the 600-ton, 26-gun ship *Caesar* of Boston and the 8-ton boat *Defense* of Falmouth, Massachusetts, and observing that “[c]rews ranged from a few men in a whaleboat to more than 200 aboard a large, fully equipped privateer”).

⁷¹ *Id.* The source characterizes the *Caesar* as a “26-gun” ship and does not disaggregate that figure between long guns and swivel guns; this Article states the figure exactly as given and draws no more precise inference.

⁷² The popular and commentary literature sometimes asserts far larger, rounded totals for privately held cannon at the Founding (e.g., “20,000 cannon”). Those figures were not verified for this Article and are not relied upon. Only the National Park Service’s documented figures are used. Cf. Frayler, *supra* note 67.

The volume-level record supplies what the Park Service's round figures cannot: named vessels, batteries stated gun by gun, crew counts, and the private men who paid for them. Massachusetts privateer-commission petitions from 1776 disclose the schooner *Hope*, forty-seven tons, "Armed with Five three Pounders and Ten Swivels" and "Navigated By 45 Men," her petitioners named — Watson and Spooner, Samuel Jackson and John Grey, "in the Town of Plymouth, In behalf of themselves & Others Owners";⁷⁴ the brigantine *Reprisal*, seventy tons, eight three-pounder carriage guns and ten swivels, seventy men, fitted out "at the joint & proper Expence" of her six owners;⁷⁵ the brig *Hawke*, eighty tons, ten four-pounders, ten swivels, and fifty muskets, eighty men;⁷⁶ and the sloop *Satisfaction*, ninety tons, fourteen four-pounders and twelve swivels, a hundred men — a paper commission the record confirms was made good: four months later the *Satisfaction* was at sea and had just brought in a prize brig loaded with nine hundred hogsheads of salt.⁷⁷ Four vessels, four batteries counted out piece by piece, and in every case a private owner named and a private purse. Three of the four are

⁷³ See David B. Kopel & Joseph G.S. Greenlee, *The History of Bans on Types of Arms Before 1900*, 50 J. Legis. 223 (2024) (Part VI.E, "Cannons," at 366–68), <https://scholarship.law.nd.edu/cgi/viewcontent.cgi?article=1774&context=jleg>. Kopel and Greenlee locate no colonial, state, or municipal ban on the private possession of a cannon before 1900. What they find instead is a body of nineteenth-century ordinances restricting where a cannon might be *fired*, and one 1881 Pennsylvania statute — a general deadly-weapons provision listing "any cannon, revolver, pistol or other such deadly weapon" — forbidding sales to buyers under sixteen, from which they infer that "sales of cannons to persons sixteen and older were legal." *Id.* at 366–67 (citing Act of June 10, 1881, No. 124, 1881 Pa. Laws 111, 111–12). They characterize the record as showing a "near-complete absence of any other restrictions in the nineteenth century." *Id.* at 368. Of the founding period itself they write that "the laws of the colonial and Founding eras presumed personally owned cannons." *Id.* at 366. As the authors conclude, those local rules "indicate both that private citizens possessed cannons and that they were common enough to place limitations on where they could be fired." *Id.* at 368. That is consistent with what Parts II and III establish: the federal license ran to the belligerent act, and what regulation there was ran to the manner of use, never to whether a private person might own the gun.

⁷⁴ Petition for Commission for Walter Hatch to Command the Massachusetts Privateer Schooner *Hope*, 6 *Naval Documents of the American Revolution* 998 (Morgan ed., 1972) (Sept. 26, 1776) (source cited therein as Mass. Arch., vol. 165, 286). The petitioners describe themselves as "in the Town of Plymouth, In behalf of themselves & Others Owners." The document states no occupation for any of them, and the co-owners it refers to are not named. The Council's corresponding entry, at 997, records that a commission issued on bonds given by Walter Hatch, Simeon Sampson and Samuel Nutting.

⁷⁵ Petition for Commission for John Wheelwright to Command the Massachusetts Privateer Brigantine *Reprisal*, 6 *Naval Documents of the American Revolution* 1053–54 (Morgan ed., 1972) (Sept. 30, 1776) (petition of Job Prince, Samuel White, Jacob Fowle, Andrew Cabot, John Coffin Jones, and Benjamin Hitchborne, owners).

⁷⁶ Petition for Commission for Jonathan Oakes to Command the Massachusetts Privateer Brig *Hawke*, 7 *Naval Documents of the American Revolution* 15–16 (Morgan ed., 1976) (Nov. 2, 1776) (petition of Uriah Oakes and William Shattuck, owners).

petitions for commission, and they state the force the owners proposed to sail with rather than a post-voyage inventory; the *Satisfaction* is the one whose paper the record confirms was made good. That limit does not touch what they establish. In each, the vessel and her battery are described as the owners' own, and the owners are named. The privateer *Yankee Hero* was already converting the abstraction into practice within days of Congress's vote, delivering a captured prize into Newburyport in March 1776.⁷⁸ Multiply that pattern of private ownership across nearly eight hundred commissioned vessels, and the "category of the founding-era economy" this Part opened with stops being a metaphor.

The damage they did measures the enterprise's scale rather than its armament. The Park Service estimates that American privateers inflicted roughly \$18 million in losses on British shipping by war's end — "just over \$302 million in today's dollars," in the Park Service's phrase, though the page names no base year for the conversion.⁷⁹ I draw no inference about gun counts from that figure. The losses fell on British merchant shipping, and commerce raiding against lightly armed merchantmen is precisely the work that does not require heavy armament. What the figure establishes is that the private fleet was consequential enough to be worth licensing, counting, and bonding. The armament is established by the batteries counted above.

D. What the Record Does Not Show

Candor requires marking the record's edges. The sources establish the institution, its regulatory form, and its scale, but they leave gaps a longer treatment should close. What the record in hand does not resolve is the composition of the *Caesar's* battery. The Park Service characterizes her as a "26-gun" ship and does not break that figure down between long guns and swivels, and I have found no document that does.⁸⁰ The multivolume *Naval Documents of the American Revolution*, whose fourth volume brackets Congress's April 3, 1776 authorization, is dense at every other level of the record.⁸¹ So is the residual gap's second half: the commission petitions

⁷⁷ Petition for Commission for John Stevens to Command the Massachusetts Privateer Sloop *Satisfaction*, 7 *Naval Documents of the American Revolution* 33 (Morgan ed., 1976) (Nov. 4, 1776) (petition of Tristram Dalton, Joseph Russell, Joseph Barrell, and Job Prince, owners); *Boston Gazette* (Mar. 3, 1777), reprinted in 8 *id.* at 20 (*Satisfaction*, Capt. John Stevens, brings in a prize brig laden with 900 hogsheads of salt).

⁷⁸ William Littledale to the Massachusetts Council (Newburyport, Mar. 18, 1776), reprinted in 4 *Naval Documents of the American Revolution* 389 (Clark ed., 1969) (source cited therein as Mass. Arch., vol. 138, 302) (referring to the snow *James*, Littledale master, as having been "brot into this port" as a prize by the privateer *Yankee Hero*).

⁷⁹ Frayler, *supra* note 67 (estimating roughly \$18 million in damage to British shipping by war's end, on the order of \$302 million in current dollars).

⁸⁰ See *supra* note 71.

⁸¹ 4 *Naval Documents of the American Revolution* (Naval Hist. Div., Dep't of the Navy, William Bell Clark ed., 1969). Text personally retrieved and read, Parts 3 and 4 of 7 (covering Mar. 17–Apr. 17, 1776), at https://www.ibiblio.org/anrs/docs/E/E3/ndar_v04p03.pdf and https://www.ibiblio.org/anrs/docs/E/E3/ndar_v04p04.pdf.

collected in Part III.C state the batteries their owners proposed to sail with, and, except in the *Satisfaction*'s case, the record does not follow the vessel to sea to confirm that the guns went aboard as proposed. A delegate's diary shows the Instructions were not written in a vacuum. Richard Smith recorded that on March 18, 1776 the Congress "was again in Comee on the privateering Business," and that after "an able Debate" leave was to be given "to commission Privateers and Letters of Marque to cruize on British Property" — New Hampshire, Massachusetts, Rhode Island, Connecticut, New York, Virginia and North Carolina for it, Pennsylvania and Maryland against.⁸² Congress agreed to the companion commission form two weeks later, on April 2, 1776 — the day before it adopted the Instructions themselves — licensing a vessel "mounting [blank] carriage guns, and navigated by [blank] men, to fit out and set forth" in a warlike manner: Congress's own standard instrument required the number of guns to be stated and required nothing further about them, neither a separate authorization for the battery nor any inquiry into where it came from.⁸³ The volume's day-to-day record shows what filled that blank, and who asked to fill it. On or about April 1, 1776, William Price — "of the City of Philadelphia Mariner last Warr Lieutenant of the Ship of Warr *Britania*" — proposed to the Pennsylvania Committee of Safety "the fitting out two good sailing sloops or schooners each to mount twelve six or four pounders with swivels and men in proportion," and offered to command one himself.⁸⁴ I draw nothing from the document beyond the armament it contemplates. Price was proposing that the Committee fit the vessels out, not seeking leave to fit out his own, and the petition is therefore evidence of what a twelve-gun cruiser was understood to require rather than of any private title. The act-versus-asset distinction this Article defends does not rest on it. The privateer *Yankee Hero* was already at sea and already at work: by March 18, 1776, she had brought the captured snow (a two-masted, square-rigged vessel) *James* into Newburyport as a prize.⁸⁵ And the ordinary commerce of the period ran alongside the licensed captures. The Rhode Island sloop *Unity* entered at Providence from Curaçao in March 1776 carrying, among her commercial cargo of cloth, paper, twine and medicines, "129 Small Arms with Baganots," twenty more bayonets, sixty pistols, forty-eight cutlasses, four swivel guns, and 3,080 pounds of powder.⁸⁶ None of that resolves the *Caesar*'s battery. I have since completed

⁸² Diary of Richard Smith, Mar. 18, 1776, reprinted in 4 *Naval Documents of the American Revolution* 398 (Clark ed., 1969) (source cited therein as Richard Smith's Diary, LC). This is a delegate's private diary rather than the official Journal, and it is cited as such; Smith records the vote and adds that he and Samuel Chase alone objected to excepting Ireland from the authorization.

⁸³ *Supra* note 57.

⁸⁴ William Price to the Pennsylvania Committee of Safety, reprinted in 4 *Naval Documents of the American Revolution* 617–18 (Clark ed., 1969) (source cited therein as Committee of Safety, Navy Papers, Pa. Arch.). The editors note that the date is approximate. The word "leave" does not appear in the document; it appears on the same printed page in the separate petition of William Dunlap. Price "humbly proposes to this Honourable board the fitting out" of the vessels and asks only that, "if agreeable," he be given the command of one.

⁸⁵ *Supra* note 78.

⁸⁶ Manifest of Cargo Imported in Sloop *Unity*, *supra* note 17 (listing, among the sloop's commercial cargo, "129 Small Arms with Baganots," "20 Baganots (more)," 60 pistols, 48

that survey: the remaining parts of Volume 4 and the seven volumes that follow it, covering the war's naval record from December 1774 through March 1778.⁸⁷ Neither the *Caesar* nor the eight-ton *Defense* of Falmouth appears there under those names, and the search sharpened rather than closed the gap: every vessel named *Defence* in that record is a state naval vessel — Connecticut's, Maryland's, or South Carolina's — never the small private craft the Park Service describes, a distinction the sources themselves draw by consistently pricing the vessel's fitting-out to a state treasury rather than a private purse.⁸⁸ The Continental correspondence records the same practice from the government's side, and it records it as a complaint. John Langdon, Continental Agent at Portsmouth, wrote to Josiah Bartlett in September 1776 that the Rhode Island furnace owners with whom he had been negotiating for Continental guns "have cast considerable number of Cannon for private Ships, thro the Summer, some of which are Nine Pounds."⁸⁹ The Continent's own agent could not get cannon cast at a price he thought honest, and the reason he gives is that the founders had spent the season casting them for private ships. The letter is evidence of a private market in heavy ordnance, and of nothing about who owned the Continental guns. And the Instructions themselves proved no dead letter: within six months of adoption the Massachusetts Council ordered a thousand copies of them printed.⁹⁰ I have

cutlasses, 4 swivel guns, and 3,080 pounds of powder).

⁸⁷ 4 *Naval Documents of the American Revolution* (William Bell Clark ed., 1969); 5—9 *id.* (William James Morgan ed., 1970, 1972, 1976, 1980, 1986); 10—11 *id.* (Michael J. Crawford ed., William S. Dudley asst. ed., 1996, 2005), all parts, personally retrieved and reviewed 2026-07-13, at <https://www.ibiblio.org/anrs/ndar.html> (American Naval Records Society electronic edition). Those eleven volumes are the full run carried in that edition and cover December 1, 1774 through March 31, 1778. Volumes 12 and 13, published in 2013 and 2019, take the record forward from April 1778 and were not consulted; they fall outside the period this survey covers.

⁸⁸ 6 *Naval Documents of the American Revolution* 17 (Morgan ed., 1972) (Connecticut General Assembly directing that a captured sloop's guns and rigging be drawn from "the Brigantine *Defence* now under [Capt. Seth Harding's] Command," her property having passed "to this State"); 8 *id.* at 933 (libel describing "Samuel Smedley, commander of the armed brigantine *Defence*, owned by 'the State of Connecticut'," Mar. 1777); 6 *id.* at 978 n.2 (Maryland Council of Safety records referring to "the Maryland state ship *Defence*"); 9 *id.* at 964 (British Vice-Admiralty deposition of her captain, Thomas Pickering: "the said armed Brigantine *Defence* was fitted out by the State of South Carolina", Sept. 1777).

⁸⁹ John Langdon to Josiah Bartlett, Portsmouth, Sept. 14, 1776, 6 *Naval Documents of the American Revolution* 815, 816 (Morgan ed., 1972) (source cited therein as John Langdon Letter Book). The quoted sentence is at 816. Its subject is the Rhode Island furnace owners, not Langdon: he is reporting what they had been doing while quoting him a rising price, from one hundred pounds per ton upward, for the Continent's guns. Langdon's own note at the foot of the letter records that "[t]he above wrote to Mr Hancock also, as President of Marine Committee at the same time."

⁹⁰ Journal of the Massachusetts Council, Watertown, Sept. 26, 1776, 6 *Naval Documents of the American Revolution* 997 (Morgan ed., 1972) (ordering 1,000 copies of the "General Instructions agreed upon in Congress April 3d last to the Commanders of private Ships or Vessels of War" printed).

grounded the archival case entirely on sources whose full text I could read and quote. Where the National Archives indexes Revolutionary-era naval material only at the microfilm-reel level — Record Groups 45 and 360, described in the finding aids by reel ranges such as “Area 7: September—December 1776” rather than by transcribed text — I have set it aside rather than characterize records I have not read line by line; the account here rests on documents I have examined in full. One further gap belongs on the record. The chartered artillery companies of the period — the Ancient and Honorable Artillery Company, the Newport Artillery Company, the guns associated with John Hancock’s cadets — are often invoked as specimens of private ordnance. I do not invoke them. Each is entangled with a colony or a state in some degree — by the provenance of its guns, by the legislature that bought them, or by the militia code that preserved the company’s standing — and I have not carried the documents far enough to attach a particular circumstance to a particular company. A reviewer would be right to press that ambiguity, and the honest course is to concede it before he does. The concession takes nothing from the argument — its evidence of private ordnance is the privateer fleet, not the trainbands — and it spares a litigant from building on an example the other side would dismantle in a footnote. These gaps do not touch the argument’s spine, which rests on constitutional text, on the two federal bond statutes, and on the undisputed existence and scale of the licensed private fleet. They bear only on how richly the archival illustration can be developed, and I would rather name them than paper them over.

IV. The Doctrinal Payoff — and the Doctrinal Difficulty

A. Why the Marque Clause Matters to the Modern Inquiry

The modern Second Amendment inquiry, as the Supreme Court has framed it, turns on text as informed by history and tradition, not on judicial interest-balancing. “[W]hen the Second Amendment’s plain text covers an individual’s conduct, the Constitution presumptively protects that conduct. To justify its regulation, the government may not simply posit that the regulation promotes an important interest. Rather, the government must demonstrate that the regulation is consistent with this Nation’s historical tradition of firearm regulation. Only if a firearm regulation is consistent with this Nation’s historical tradition may a court conclude that the individual’s conduct falls outside the Second Amendment’s ‘unqualified command.’”⁹¹ The Court has already told us what “arms” reaches as a textual matter: the right “extends, *prima facie*, to all instruments that constitute bearable arms, even those that were not in existence at the time of the founding.”⁹² The Court reaffirmed as much in 2026, holding the

⁹¹ *N.Y. State Rifle & Pistol Ass’n v. Bruen*, 597 U.S. 1, 17 (2022) (quoting *Konigsberg v. State Bar of Cal.*, 366 U.S. 36, 50 n.10 (1961)). Text retrieved directly from the Court’s opinion via Cornell Legal Information Institute, <https://www.law.cornell.edu/supremecourt/text/20-843>.

⁹² *District of Columbia v. Heller*, 554 U.S. 570, 582 (2008). Text retrieved directly from the Court’s opinion via Cornell Legal Information Institute, <https://www.law.cornell.edu/supct/html/07-290.ZO.html>. A word on what this Article does and does not dispute about “bearable arms.” Read as a floor — the right extends *at least* to every bearable arm — the formulation is *Heller*’s own and is not questioned here; it is the reading that makes bearability a sufficient condition for *prima facie* coverage. What this Article contests is the ceiling reading, on which an arm that is not bearable is for that reason not an “arm” at all. The distinction is the same one drawn

threshold textual question to be whether a law “concern[s] any form of ‘Arms,’ i.e., any weapon customarily used for offensive or defensive purposes.”⁹³ Only at the margin does the Court’s own gloss narrow that scope — and it narrows it by reference to the “historical tradition of prohibiting the carrying of ‘dangerous and unusual weapons,’” a tradition the Court has linked to arms “in common use at the time.”⁹⁴ Common use operates in that framework as a sufficient condition for protection — an arm in common use is protected — not an exclusive gate that expels whatever is not yet in common use; the categorical exclusion this Article answers depends on the impermissible second reading, not the first. Whatever the precise verbal formula, the burden that framework places on a categorical argument — “this kind of weapon was never within ‘the right’ at all” — is a burden of historical demonstration, not of definitional assertion.⁹⁵

That standard was reaffirmed, not loosened, two years later. In *United States v. Rahimi*, the Court held that the Fifth Circuit had erred by reading *Bruen* to require a “historical twin” rather than a “historical analogue.”⁹⁶ The burden this Article assigns the categorical exclusion is measured against that confirmed standard, not against some stricter one neither case imposes.

infra Part IV.A as to common use: a sufficient condition for coverage is not an exclusive gate.

⁹³ *Wolford v. Lopez*, 609 U.S. ___, 146 S. Ct. 2032, 225 L. Ed. 2d 494, No. 24-1046, slip op. at 7 (U.S. June 25, 2026) (Alito, J., for the Court), https://www.supremecourt.gov/opinions/25pdf/24-1046_nmio.pdf (framing the plain-text inquiry as whether a law “concern[s] any form of ‘Arms,’ i.e., any weapon customarily used for offensive or defensive purposes”); *see also id.* at 3 (“‘Arms,’ we explained, refers to implements used for offense or defense.”). The functional definition supports the reading offered here, and it is the guardrail language of the opinion — “any weapon customarily used for offensive or defensive purposes” — that does the work. *Wolford* did not have a crew-served or non-portable weapon before it and decided nothing about one, and this Article does not read the opinion as having settled the question.

⁹⁴ *Bruen*, 597 U.S. at 21 (quoting *Heller*, 554 U.S. at 627 (first citing 4 W. Blackstone, *Commentaries on the Laws of England* 148–49 (1769); then quoting *United States v. Miller*, 307 U.S. 174, 179 (1939))). Both passages retrieved directly from the Court’s opinions via Cornell Legal Information Institute, <https://www.law.cornell.edu/supremecourt/text/20-843> and <https://www.law.cornell.edu/supct/html/07-290.ZO.html>.

⁹⁵ The “dangerous and unusual” gloss does not rescue the categorical exclusion. Blackstone condemned “riding or going armed with dangerous or unusual weapons” as a terror to the public peace under the Statute of Northampton — a restraint on the manner of carrying arms, not on owning them. 4 William Blackstone, *Commentaries* *148–49. And *Bruen* answers the objection on the facts it addressed: a colonial “dangerous and unusual” characterization did not justify a modern restriction on the public carry of arms in common use today. That holding does not resolve every challenge involving such an arm, and it is not offered here as though it did. *Bruen*, 597 U.S. at 47, <https://www.law.cornell.edu/supremecourt/text/20-843> (“even if these colonial laws prohibited the carrying of handguns because they were considered ‘dangerous and unusual weapons’ in the 1690s, they provide no justification for laws restricting the public carry of weapons that are unquestionably in common use today”). Private cannon, in any event, were never subject to a possession ban — only to the manner-of-use, safe-keeping, and powder-quality requirements collected *supra* Part II.D. *See* Kopel & Greenlee, *supra* note 73.

Into that framework the Marquee Clause lands with real force against one particular move — the categorical argument that “arms,” as the founding generation used the word, simply did not include heavy or crew-served weapons, so that such weapons fall outside the right a priori, without any need to identify a historical tradition of regulating them. That argument is a claim about founding-era usage and understanding. And it is exactly the claim the record refutes. A generation that wrote into its fundamental law a power to license the belligerent use of privately owned, cannon-armed warships — that gave the national government no power to license the acquisition of those warships, while requiring congressional consent for a state’s mere keeping of a ship of war — and that, when it did legislate about private naval ordnance, legislated about it as the owner’s property, did not understand “arms” to stop at the weight a man can carry. The constitutional text presupposes private ownership of the heaviest ordnance of the age, and the statute books confirm the title the text presupposes. Whatever else is true, the categorical premise that “arms” excluded such weapons by definition is not.

That is a narrower and sturdier claim than the one the argument is sometimes stretched to support, and the narrowing is deliberate. The Marquee Clause does not establish that every heavy weapon is constitutionally protected, or that no heavy weapon may be regulated, or that the modern citizen has a right to a crewed naval gun; each of those is a question for the historical inquiry, which is exactly the inquiry the categorical exclusion is built to avoid. It establishes something antecedent to all of those questions: that the definitional exclusion — “not an ‘arm’ at all” — is historically false. Once the categorical exclusion falls, heavy arms enter the ordinary framework, where restrictions stand or fall on the presence or absence of a historical tradition — rather than being read out of the Amendment before the inquiry begins.

B. The Hardest Problem, Confronted

Now the difficulty, stated as an adversary would state it, because the argument is worth little if it cannot survive its best refutation.

A hostile court will say: your own best evidence cuts against you. The Second Amendment, as the governing cases read it, protects arms that an individual can keep and bear — weapons that are personal and portable, that a single person carries and wields. A ship’s cannon, on that view, is the antithesis of that. It is crew-served — it takes a gun crew to load, run out, aim, and fire — and vessel-mounted, bolted to a carriage on a deck rather than carried on the person. It is, the objection concludes, exactly the kind of weapon the individual-right cases were at pains to distinguish from the musket in the citizen’s hands. Far from proving that “arms” reaches heavy ordnance, the ship’s cannon marks the outer boundary the doctrine already polices: keepable and bearable on one side, crew-served and platform-mounted on the other. The privateer’s gun, the court will say, proves only that the government could license collective armed force at sea, not that any individual had a personal right to a cannon. The Marquee Clause is about the war power, housed in Article I; it is not about the personal right, housed in the Second Amendment; and to read the one into the other is to confuse a grant of national authority with a guarantee of individual liberty.

⁹⁶ *United States v. Rahimi*, 602 U.S. 680, 701 (2024) (holding that the Fifth Circuit erred in part by reading *Bruen* to require a “historical twin” rather than a “historical analogue”).

A federal court of appeals has already run that objection, and run it in its sharpest form — as a reason to abandon the premise that generates the conclusion. In *Cases v. United States*, the First Circuit wrote that an objection “to the rule of the *Miller* case as a full and general statement is that according to it Congress would be prevented by the Second Amendment from regulating the possession or use by private persons not present or prospective members of any military unit, of distinctly military arms, such as machine guns, trench mortars, anti-tank or anti-aircraft guns, even though under the circumstances surrounding such possession or use it would be inconceivable that a private person could have any legitimate reason for having such a weapon. It seems to us unlikely that the framers of the Amendment intended any such result.”⁹⁷ That is the intellectual ancestor of the military-utility ceiling this Article takes up in Part V, it has not been overruled, and it is precisely the reductio this Article’s argument invites — if heavy military arms are “arms,” then heavy military arms are protected, and that cannot be right, so heavy military arms must not be “arms.” The reductio fails at its second step, and the answer is the same narrowing that governs everything else here, and it is worth stating flatly because it disposes of a great deal. The inference *Cases* found intolerable is not the inference this Article draws. This Article’s claim is definitional, not protective. To hold that a trench mortar is an “arm” is to hold that a restriction on it must be justified by historical tradition rather than assumed away by category; it is not to hold that the restriction fails. *Cases* reasoned backward from an unacceptable protective conclusion to a narrowed rule of protection. I put it no higher than that: the passage rejects military utility as a sufficient condition for coverage, and whether the court also meant to narrow the lexical meaning of “arms” is not shown by the sentences quoted. Either way the narrowing was unnecessary, because the protective conclusion never followed. A definitional holding decides which inquiry a court must run. It does not decide the answer.

The closest real adverse authority in the modern cases is not hypothetical either, and candor requires naming it. Five circuits — every one of them before *Wolford* — have already rejected Second Amendment challenges to machine-gun restrictions on exactly the ground the hostile court invokes here — that machine guns are not in common use and therefore fall outside the right regardless of *Heller*’s textual sweep.⁹⁸ That line of cases turns on the common-use question

⁹⁷ *Cases v. United States*, 131 F.2d 916, 922 (1st Cir. 1942), cert. denied sub nom. *Velazquez v. United States*, 319 U.S. 770 (1943),

<https://law.justia.com/cases/federal/appellate-courts/F2/131/916/1511728/>. *Cases* has not been overruled. Note that the court’s objection at 922 was that a military-utility test would sweep in too much — “in the so called ‘Commando Units’ some sort of military use seems to have been found for almost any modern lethal weapon” — and that the militia-nexus reasoning *Heller* later recast sits at 923. *Heller* does not cite *Cases*. Its methodological move — treating *Miller*’s military-utility language as unworkable and substituting deference — sits uneasily with *Bruen*’s insistence on historical analogues, and this Article relies on it for nothing affirmative.

⁹⁸ *United States v. Alsenat*, 174 F.4th 45 (11th Cir. 2026); *Hollis v. Lynch*, 827 F.3d 436, 448–50 (5th Cir. 2016), abrogated on other grounds by *United States v. Diaz*, 116 F.4th 458 (5th Cir. 2024); *United States v. Henry*, 688 F.3d 637 (9th Cir. 2012); *Hamblen v. United States*, 591 F.3d 471 (6th Cir. 2009); *United States v. Fincher*, 538 F.3d 868 (8th Cir. 2008). A word on the posture of these five, because a citator run on the string returns a flag that does not mean what it appears to mean. *Diaz* displaced the Fifth Circuit’s pre-*Bruen* means-end precedents; it did not disturb

— a different question from the one this Article presses, and one on which this Article takes no position. Its argument is that the categorical, definitional exclusion fails; whether a particular arm survives the separate common-use inquiry is a matter it does not reach and does not need to. So the concession is cheap. A court that accepted every word of Parts II and III could still reach the common-use question — but it would have to *reach* it, on the history, rather than skip it by category. Whatever supports those decisions, it is not the categorical exclusion refuted here. They must be defended on common use or not at all.

This is the objection to take seriously, and I will not pretend it has no bite. The tension between a vessel-mounted, crew-served gun and a right the modern cases define around personal keeping and bearing is real. Three responses meet it: the first preserves the Article’s core claim whatever one concludes about bearing; the second unsettles the “bearable” premise the objection assumes; and the third confronts the bearing question head-on.

First, the Article I argument was never offered as a substitute for the personal-right analysis; it was offered to defeat a specific definitional claim, and against that claim it holds regardless of the crew-served point. The categorical argument I am answering says “heavy/crew-served weapons were not ‘arms’ as the Founders used the word.” The Marque Clause and the bond statutes disprove that by showing the Founders legislating around privately owned heavy ordnance as an ordinary fact of property. Whether such ordnance sits inside or outside the personal right is a further question; but the definitional claim — “not an ‘arm’ at all” — is refuted either way. The crew-served objection concedes the very thing the definitional argument needs: that these guns were arms, held privately, and that the sovereign’s concern ran to their employment and their safe keeping rather than to whether a man might own them.

Second, the “bearable” line is contestable at its own root, and the Marque Clause is a reason to contest it. Krawczyk and Ambler — whose framework the objection borrows — themselves “question whether the Founders originally understood the Second Amendment to extend only to ‘bearable’ arms,” and cite privateering as their reason to doubt it.⁹⁹ I should be candid about the shape of that support: their article’s affirmative thesis is itself a bearability thesis, and a ship’s cannon is not bearable in the sense their framework uses. They raised the question in a footnote while building on the ceiling in the text — an honest tension, and one they flagged rather than buried. What their footnote establishes is that the ceiling is contested by authors who themselves build on it — and whose own project is to widen the right, not narrow it. That is enough for the modest use I make of it. The crew-served objection does not state settled law resisting my argument; it states one contested threshold that my argument gives independent reason to doubt.

Hollis’s machine-gun holding, which was reached at step one, and the Fifth Circuit has since said so — “*Diaz* swept away only those cases that relied on means-end scrutiny. . . . Not so with *Hollis*,” which “remains binding precedent.” *United States v. Wilson*, No. 24-10633, slip op. at 5, 11 (5th Cir. Jan. 12, 2026). *Hamblen* and *Henry* have likewise been treated as binding after *Bruen* in their own circuits. *Fincher*’s standing has been questioned in a separate opinion and I do not represent it as settled. This Article takes no position on the correctness of any of them. See *infra* note 114.

⁹⁹ Krawczyk & Ambler, *supra* note 6, at 814 n.65 (“the Authors question whether the Founders originally understood the Second Amendment to extend only to ‘bearable’ arms”).

Third — and here the objection gives up more than it knows — the premise that a crew-served gun cannot be borne is not one the text supports. *Heller* tells us that “to ‘bear’ meant to ‘carry,’” adopting the definition of the protected activity as to “wear, bear, or carry . . . upon the person . . . for the purpose . . . of being armed and ready for offensive or defensive action in a case of conflict.”¹⁰⁰ Nothing in that definition requires that the arm be one a single person can carry unaided. A gun worked by a crew is carried — borne — no less than a burden carried by several hands is carried. The privateersmen of Part III were scores of men to a vessel, working guns no one of them could have moved.¹⁰¹ Whether that is bearing in *Heller*’s own sense is a question the cases have not reached; what matters here is that nothing in *Heller* answers it in the negative.

Nor would recognizing it convert the right into a collective one. The Court held the right “is exercised individually and belongs to all Americans,”¹⁰² and confined the martial idiom — “bear arms” as “serve as a soldier” — to the single construction “bear arms against,”¹⁰³ which is not this one. To say that several citizens may jointly carry an arm too heavy for one would not be to say the right belongs to the group rather than to the citizens who compose it. I stop there, and deliberately short of the affirmative claim. Whether the naval gun is *borne* within the Amendment’s meaning is a question no court has decided; what Parts II and III establish is that it was *kept* — privately owned, appraised as the owner’s, and accounted for as his.

I mark the limit honestly, because there is one — but it is a limit on what the courts have so far said, not on what the text will bear. The modern cases have taken their measure of “bear” from the paradigm before them, the lone citizen carrying a handgun, and no court has yet had occasion to hold that an arm borne by a crew is borne within the Amendment’s meaning. I do not paper over the hardest words in *Heller*’s own gloss: the definition it adopts speaks of carrying an arm “upon the person or in the clothing or in a pocket,”¹⁰⁴ and a vessel-mounted gun answers to none of that. But those words describe the paradigm before the Court — the citizen and his handgun — not a holding that what several carry together is not carried; the Justices had no crew-served arm in view, and resolved nothing about one. That question is open, and I leave it open rather than resolve it in my own favor. The claim I make is the

¹⁰⁰ *Heller*, 554 U.S. at 584 (“At the time of the founding, as now, to ‘bear’ meant to ‘carry,’” and adopting the definition to “wear, bear, or carry . . . upon the person or in the clothing or in a pocket, for the purpose . . . of being armed and ready for offensive or defensive action in a case of conflict with another person” (quoting *Muscarello v. United States*, 524 U.S. 125, 143 (1998) (Ginsburg, J., dissenting))). Text retrieved via Cornell Legal Information Institute, *supra* note 92.

¹⁰¹ See *supra* Part III.C (the crew counts stated in the Massachusetts commission petitions — forty-five men in the schooner *Hope*, seventy in the brigantine *Reprisal*, eighty in the brig *Hawke*, a hundred in the sloop *Satisfaction* — and the National Park Service’s observation that crews ran to “more than 200 aboard a large, fully equipped privateer”). Nothing in the record collected there discloses which hands worked which gun, and no such division is asserted here.

¹⁰² *Heller*, 554 U.S. at 581.

¹⁰³ *Id.* at 586 (“bear arms” “unequivocally bore that idiomatic meaning only when followed by the preposition ‘against’”).

¹⁰⁴ See *supra* note 100 (the definition *Heller* adopts, quoting *Muscarello*).

negative one: nothing in *Heller* or its successors forecloses joint bearing, the Justices had no crew-served arm before them, and the burden of shutting that door runs to whoever would shut it. I do not claim the founding record proves the arm was borne. I claim it proves the arm was owned — and that the definitional argument of Part IV.A needs nothing further.

C. Where That Leaves the Argument

The net doctrinal contribution, stated without overreach, is this. The Marque and Reprisal Clause, read against Article I, § 10, cl. 3 and against the statute books of the same generation, does one thing decisively and leaves a second open. It is decisive against the categorical, definitional exclusion of heavy or crew-served arms from the founding-era meaning of “arms”: the Founders contemplated and tolerated private ownership of the heaviest ordnance of their age, gave the national government no power to license its acquisition, and regulated everything else about it as an incident of the owner’s property. That defeats the a-priori move and forces heavy-arms restrictions into the ordinary text-history framework, where they must be defended by tradition rather than assumed away by definition. What it leaves open is the bearing question. The objection that a crew-served gun cannot be borne is not answered here; it is met with the observation that no court has decided it, that *Heller*’s pocket-and-clothing language describes the paradigm before that Court rather than a holding about arms served by several hands, and that the burden of closing the question runs to whoever would close it. The definitional exclusion falls either way, because it turns on keeping and not on bearing.

What remains genuinely open — and I neither claim nor concede otherwise — is whether the modern cases, built around the lone citizen and his handgun, will take the step the text permits and treat jointly borne arms as borne within the Amendment. That is a question of doctrinal development, not of founding-era meaning; and it is open in both directions, foreclosed in neither. On the definitional question — whether heavy arms were “arms” at all — the record is decisive. On bearing, it is not, and I do not pretend otherwise. A litigator who claimed that question already won would be caught claiming more; I claim only that the founding record places the arm inside “keep,” and that nothing yet decided places it outside “bear.”

V. The “Common Use” Conversation in *ANJRPC v. Platkin* — and the Founders’ Contrary Understanding

On July 17, 2026, the en banc Third Circuit struck down New Jersey’s ban on AR-15-pattern rifles and large-capacity magazines, holding the banned arms “in common use for lawful purposes” and so within the Second Amendment.¹⁰⁵ The result was correct, and nothing here

¹⁰⁵ *Ass’n of N.J. Rifle & Pistol Clubs, Inc. v. Att’y Gen. N.J.*, Nos. 24-2415, 24-2450 & 24-2506 (3d Cir. July 17, 2026) (en banc), slip op. (Majority Op.) at 26–44, <https://www2.ca3.uscourts.gov/opinarch/242415p.pdf>. The en banc court divided as follows: Freeman, J., filed the Opinion of the Court, joined by Chagares, C.J., and Hardiman, Bibas, Porter, Matey, Montgomery-Reeves, and Bove, JJ., and joined in part by Phipps, J.; Matey, J., filed a concurring opinion, joined by Mascott, J.; Phipps, J., filed an opinion concurring in part and concurring in the judgment; Montgomery-Reeves, J., filed a concurring opinion; Mascott, J., filed an opinion concurring in part and concurring in the judgment; Chung, J., filed an opinion concurring in part and dissenting in part; Shwartz, J., filed a dissenting opinion, joined by

quarrels with it.¹⁰⁶ What warrants attention is the vocabulary in which the divided court fought. Across the majority, the concurrences, and the dissents alike, the “common use” inquiry proceeded on one shared plane: whether a semi-automatic rifle is enough like the weapon an ordinary person carries personally, for self-defense or for hunting, to earn the constitutional label. No opinion reached the constitutional text this Article reads, or the prior question that text forces — whether “the arms the people commonly hold” was ever, at the Founding, a category defined by personal portability and the needs of individual self-defense. Judge Chung comes nearest, and Part V.C takes her up. It was not. And the answer four of the fifteen judges gave in dissent — joined in substance by a fifth, concurring in part — that arms too militarily capable for “ordinary self-defense needs” fall outside the right, is not merely narrow. It is refuted by the constitutional text the same generation wrote a few years earlier, and it is in tension with the only decision of the Supreme Court, before *Heller*, to address which arms the Amendment reaches.

Krause, Restrepo, and Smith, JJ.; Krause, J., filed a dissenting opinion, joined by Restrepo and Smith, JJ.; and Smith, J., filed a dissenting opinion. Because each opinion is separately paginated from page 1, the internal cites below are to the page of the particular opinion cited (e.g., “Shwartz, J., dissenting, at 11”). This Article refers to the case by the short name it carried in the district court, *ANJRPC v. Platkin*; the caption on appeal names the Attorney General of New Jersey by office rather than by name.

¹⁰⁶ The en banc mandate has not issued, and it will not issue for some time. On the motion of the Attorney General, the Superintendent of the State Police, and the Gloucester and Ocean County Prosecutors, the full en banc court stayed the mandate on August 4, 2026: “Issuance of this Court’s mandate is stayed pending the Supreme Court’s disposition of movants’ anticipated petition for writ of certiorari or until the . . . time for filing such a petition has expired.” Should certiorari be granted, “the stay of this Court’s mandate shall remain in place pending the Supreme Court’s final disposition on the merits.” Order of Aug. 4, 2026, *ANJRPC v. Att’y Gen. N.J.*, Nos. 24-2415, 24-2450 & 24-2506 (3d Cir.) (Freeman, J., for the court, all fifteen judges of the en banc court present). The ellipsis elides a duplicated “until the” in the order as issued. The docket records the motion as filed July 31, 2026 and judgment as entered July 17, 2026; those dates are taken from the docket rather than from the order, which states neither. Thirteen days before the Third Circuit’s decision, the Supreme Court granted certiorari on the common-use question as it applies to rifles — “[w]hether the Second and Fourteenth Amendments guarantee the right to possess AR-15 platform and similar semiautomatic rifles” — in *Viramontes v. Cook County*, No. 25-238 (cert. granted June 30, 2026), consolidated for one hour of argument with *Grant v. Higgins*, No. 25-566 (Connecticut). Both petitions were granted only as to the question presented in No. 25-238, which does not reach magazines, while *ANJRPC* resolved both the rifle ban and the magazine ban; the questions overlap without being identical. This Article’s argument does not depend on *ANJRPC*’s survival. It rests on the constitutional text and the archival record set out in Parts II and III, and it applies with equal force whatever standard the Supreme Court adopts in *Viramontes* and *Grant*.

A. The Shared Frame: “Common Use” as the Individually Borne, Self-Defense Weapon

Begin with the ground the whole court shared. The majority defined the test as whether a weapon is “in common use for lawful purposes at the time of the modern restriction,” paired with its mirror image, that “a weapon that is ‘dangerous and unusual’ cannot be in common use for lawful purposes.”¹⁰⁷ It treated self-defense as the paradigmatic lawful purpose and added hunting, holding that “weapons commonly used for hunting fall under the protection of the Second Amendment.”¹⁰⁸ The concurrences kept to the same axis. Judge Matey framed the threshold as bearability — “[i]f the arm is bearable, then it is presumed to reside within the liberty protected by the Second Amendment” — and asked, as the operative question, whether “the bearable arm [is] in common use.”¹⁰⁹ Bearable, individually held, for self-defense: that is the frame, stated by the decision’s most historically minded opinion.

The dissents accepted that frame and drew it tighter — and it is in the tightening that the incompatibility surfaces. Judge Shwartz, writing for four judges, concluded that “the objective features of AR-15s and LCMs render them disproportionate to ‘ordinary self-defense needs’ and thus outside the scope of the Second Amendment’s protection.”¹¹⁰ Judge Krause made the premise explicit: the banned weapons “are not proportional to the needs of ordinary self-defense but, rather, are designed to penetrate the steel helmets of enemy soldiers and maximize combatant casualties on the battlefield.”¹¹¹ She anchored the exclusion in *Heller*’s treatment of “weapons that are most useful in military service — M-16 rifles and the like,” which the Court acknowledged “may be banned,” set against its counterpoint that the handgun is the quintessential self-defense weapon.¹¹² Nor was the position confined to the dissenters. Judge Chung, concurring in part and dissenting in part, wrote that she agreed “with my dissenting colleagues that ‘in common use’ does not include weapons ‘most useful in military service,’ meaning a type of weapon one would expect to be used for modern warfare.”¹¹³

Two things about that alignment should be said plainly, because they cut against the court this Part relies on. The military-utility ceiling is not an eccentric position: five other circuits have rejected the all-bearable-arms reading of Step One that the *ANJRPC* majority adopted, so on this question the Third Circuit is the outlier rather than the consensus. And eight days before *ANJRPC*, the Seventh Circuit upheld Illinois’s comparable ban on a full trial record, reasoning

¹⁰⁷ *ANJRPC*, slip op. (Majority Op.) at 27–28.

¹⁰⁸ *Id.* (Majority Op.) at 27.

¹⁰⁹ *Id.* (Matey, J., concurring) at 7, 9.

¹¹⁰ *Id.* (Shwartz, J., dissenting) at 11 (quoting *N.Y. State Rifle & Pistol Ass’n v. Bruen*, 597 U.S. 1, 71 (2022)).

¹¹¹ *Id.* (Krause, J., dissenting) at 1.

¹¹² *Id.* (Krause, J., dissenting) at 8 (quoting *District of Columbia v. Heller*, 554 U.S. 570, 625, 627 (2008), and noting the Court’s acknowledgment that such weapons “may be banned”).

¹¹³ *Id.* (Chung, J., concurring in part and dissenting in part) at 7.

that AR-15s “are dangerous not only in the sense that all firearms are dangerous but also relative to the semiautomatic handguns that *Heller* confirmed are protected.” This Article’s argument does not depend on the Third Circuit having the better of that split, and it would be worth no less if the Supreme Court resolved the split the other way — the founding-era record is the same record either way.¹¹⁴ Set the opinions side by side and a common denominator emerges, with one qualification that has to be stated. The qualification is that the majority’s rule is not confined to self-defense: it asks whether a weapon is in common use for lawful purposes, and it expressly counts hunting. Subject to that, the arms every opinion had in view — and the resemblance by which each measured protection — were those a single person bears in his own hands. The four dissenting judges, joined in substance by Judge Chung, added one filter — the arm must not be too military, too far beyond “ordinary self-defense needs.” That filter is where the founding record and the modern doctrine part company.

B. The Military-Utility Ceiling Is the One Line the Marque Clause Forecloses

Take the military-utility move at its strongest. An arm leaves the people’s protected arms, its proponents say, when its objective features make it a weapon of war — “designed to . . . maximize combatant casualties,” “most useful in military service,” “disproportionate to ‘ordinary self-defense needs.’” Call it the military-utility ceiling: the more an arm is suited to organized combat rather than to stopping a burglar, the less it belongs to the citizen.

That ceiling is a claim about what the founding generation understood the people’s arms to be — and it is precisely the claim Article I refutes. This Article has shown, from the text, that the Marque and Reprisal Clause presupposes a standing population of privately owned, cannon-armed warships, and gave the national government no power to license their acquisition.¹¹⁵ The privateer’s armament was no hunting tool and no home-defense sidearm. A twenty-six-gun

¹¹⁴ See *ANJRPC*, slip op. (Krause, J., dissenting) at 13 & n.7 (observing that the majority’s Step One reading “diverges from five of our sister circuits that have considered the same question,” and collecting *United States v. Gomez*, 159 F.4th 172, 177–78 (2d Cir. 2025); *Bianchi v. Brown*, 111 F.4th 438, 447–52 (4th Cir. 2024) (en banc); *Bevis v. City of Naperville*, 85 F.4th 1175, 1192–94 (7th Cir. 2023), cert. denied sub nom. *Harrel v. Raoul*, 144 S. Ct. 2491 (2024); *United States v. Alaniz*, 69 F.4th 1124, 1128 (9th Cir. 2023); and *Hanson v. District of Columbia*, 120 F.4th 223, 232 (D.C. Cir. 2024)). On the Seventh Circuit’s intervening decision, see *Barnett v. Raoul*, Nos. 24-3060, 24-3061, 24-3062 & 24-3063, 2026 WL 1982951 (7th Cir. July 9, 2026) (reversing the district court’s permanent injunction and remanding with directions to enter judgment for the defendants, thereby sustaining the Protect Illinois Communities Act) (“AR-15s, in other words, are dangerous not only in the sense that all firearms are dangerous but also relative to the semiautomatic handguns that *Heller* confirmed are protected.”). Judge Brennan dissented. The decision issued eight days before *ANJRPC*, which quotes it. An amended opinion said to have issued July 20, 2026 has not been located, and the quoted sentence is taken from the opinion of July 9. See *ANJRPC*, slip op. (Shwartz, J., dissenting) at 13. Every decision collected *supra* note 98 predates *Wolford*, as do the five decisions Judge Krause collects in the passage cited above; *Barnett* is the exception, having issued on July 9, 2026, two weeks after *Wolford*. The *ANJRPC* majority reads *Wolford* as holding that common use has no bearing on the Step One definition of “Arms.” No court has yet held that *Wolford* abrogates any of them, and the Supreme Court now has the question in *Viramontes* and *Grant*. This Article takes no position on their correctness; it notes only that the reasoning underlying both strings is under active pressure.

ship was engineered to dismast frigates and sink ships of the line — to maximize the destruction of an enemy’s navy. Measured against Judge Krause’s own test, the ship’s cannon is not a hard case; it is the paradigm of the arm “designed to . . . maximize combatant casualties,” the antithesis of a weapon proportioned to “ordinary self-defense needs.”

The ceiling also inverts the one Supreme Court decision that squarely addressed which arms the Amendment reaches before *Heller*, and the inversion passes unremarked by every opinion in the case. *United States v. Miller* is not missing from the *ANJRPC* debate; it is the debate’s foundation. The majority opens its common-use discussion by naming *Miller* as the first decision to use the phrase, and Judge Chung builds a lettered section on the proposition that “in common use” is derived from *Miller*’s reading of the Amendment’s text.¹¹⁶ What no opinion notices is the direction in which *Miller* ran the criterion. It made military utility the *qualifying* test, not the disqualifying one. The Court declined to protect a short-barreled shotgun precisely because nothing showed “that possession or use of a ‘shotgun having a barrel of less than eighteen inches in length’ at this time has some reasonable relationship to the preservation or efficiency of a well regulated militia,” adding that “it is not within judicial notice that this weapon is any part of the ordinary military equipment or that its use could contribute to the common defense.”¹¹⁷ Read the sentence for what it says. The weapon lost because the record did not show it was military. An arms theory that expels a weapon for being too militarily useful does not merely sit uneasily with *Miller*; it runs the case backwards.

I take the caveat with the holding, as candor requires and as *Heller* requires. The same passage of *Miller* supplies the common-use limit: militiamen “were expected to appear bearing arms supplied by themselves and of the kind in common use at the time,” and *Heller* read that clause as the source of the modern common-use inquiry.¹¹⁸ So *Miller* cannot be quoted for military

¹¹⁵ See *supra* Part II; U.S. Const. art. I, § 8, cl. 11.

¹¹⁶ *ANJRPC*, slip op. (Majority Op.) at 24–25 (“The first Second Amendment case in which the Court used the phrase ‘in common use’ was *United States v. Miller*, 307 U.S. 174 (1939).”); *id.* (Chung, J., concurring in part and dissenting in part) at 2–4 (§ A.1, headed “The phrase ‘in common use’ is derived from the” text of the Second Amendment, and resting on *Miller*: “In *United States v. Miller*, the Supreme Court examined the text of the Second Amendment and, based upon that text, concluded that the Second Amendment protected weapons” of the kind in common use). The point in text is not that the opinions overlook *Miller*. It is that none of them remarks the direction in which *Miller* ran the criterion — Judge Chung reads the same passage as marking the outer bound of what is protected.

¹¹⁷ *United States v. Miller*, 307 U.S. 174, 178 (1939), <https://tile.loc.gov/storage-services/service/l1/usrep/usrep307/usrep307174/usrep307174.pdf>. Both quoted sentences appear on page 178 of the official reporter; the militia-composition and common-use sentences quoted *infra* note 118 appear on page 179. The pagination was confirmed against the Library of Congress facsimile of the bound volume and against the Supreme Court’s own later pin cites to this passage. See *Heller*, 554 U.S. at 622 (citing “307 U.S., at 178”).

¹¹⁸ *Miller*, 307 U.S. at 179 (“These show plainly enough that the Militia comprised all males physically capable of acting in concert for the common defense,” and that “ordinarily when called for service these men were expected to appear bearing arms supplied by themselves and of the kind in common use at the time.”); see *Heller*, 554 U.S. at 595, 624–25 (reading *Miller*’s

utility alone; it conditions protection on both military relationship and common use, and a litigant who takes the first half without the second is doing what this Article accuses the other side of doing. The point stands on the narrower ground. Whatever else *Miller* did, it did not treat military capability as a disqualification. *Heller* later read *Miller* as the source of the common-use limit rather than of a military-utility test. But recasting a criterion is not inverting it, and no case has explained how a standard the Supreme Court once used to *include* arms came to be used to exclude them.

One decision states the contrary proposition in the same register, and it deserves better than the glancing treatment it gets elsewhere in this Part. *Bevis v. City of Naperville* found “a long tradition, unchanged from the time when the Second Amendment was added to the Constitution, supporting a distinction between weapons and accessories designed for military or law-enforcement use, and weapons designed for personal use.”¹¹⁹ If that is right, Part I.C is wrong. It is not right, and the sentence itself shows why. Read it for what it claims. It claims a tradition supporting a *distinction* — not a tradition of putting the military side of that distinction beyond private hands, which is the proposition the ceiling actually needs. Those are different things. The court’s authority for a state-only category is *Staples v. United States*, a 1994 *scienter* decision, and what a twentieth-century regulatory classification can establish about eighteenth-century usage is taken up below. Its founding-era citation touching ordnance is one — the 1746 Boston act forbidding the discharge of a cannon within the town, which exempts soldiers on training days. A rule about firing, in a town. Part II.D collects it here as evidence for the position taken in this Article. No founding-era law excluding ordnance from private ownership appears anywhere in the opinion, and the dissent says so in terms.

Now apply the ceiling to the privateer’s gun, and the *reductio* writes itself. We do not read the First Amendment to protect the pamphlet but not the printing press because the press is the more powerful instrument; we do not read the Fourth to shield the sealed letter but not the ledger because the ledger holds more.¹²⁰ Of course we do not. Why, then, would the generation that wrote the power to license the private cannon into Article I be understood, a breath later in the Second Amendment, to have placed the militarily capable arm outside the citizen’s right — when their own Constitution made private ownership of the most militarily capable arms of the

“common use” clause as the source of the modern limitation); *Bruen*, 597 U.S. at 21 (same, citing *Miller*, 307 U.S. at 179).

¹¹⁹ *Bevis v. City of Naperville*, 85 F.4th 1175, 1202 (7th Cir. 2023), *cert. denied sub nom. Harrel v. Raoul*, 144 S. Ct. 2491 (2024). The founding-era statute the opinion cites on cannon is Chapter 11, An Act to Prevent the Firing of Guns Charged with Shot or Ball in the Town of Boston, §§ 1–3, in 3 *The Acts and Resolves of the Province of the Massachusetts Bay 1742–1756*, at 309 (1878) — the discharge statute collected *supra* Part II.D. The dissent makes the point in terms: such regulations “differ, however, from a categorical ban of a class of weapons from private ownership.” *Id.* at 1225 (Brennan, J., dissenting). The word “ordnance” does not appear in the opinion.

¹²⁰ The cross-amendment analogies illustrate one principle: a constitutional right defined by a protected activity is not confined to the least powerful instrument of that activity. *Cf. supra* Part I (arms defined by function, not by weight).

age the ordinary state of affairs, by the hundreds?¹²¹ The proximity is what makes the point binding rather than merely interesting. The Marque and Reprisal Clause was ratified in 1788; the Second Amendment was proposed in 1789 and ratified in 1791.¹²² This is the same drafting generation, legislating about the same subject — arms and the people who hold them — within thirty-six months. When that generation wanted to require permission for the mere keeping of naval war-making power, it knew how to say so, and it said so of the states, in the very same Article.¹²³ It gave the national government no such power over the private owner of a cannon-armed ship, and when it did reach him, in 1798 and again in 1818, it reached him as a proprietor: bond, surety, and an accounting for guns that were his.¹²⁴ A reading of the Second Amendment that expels an arm for being too much a weapon of war is therefore not a neutral gloss on “common use.” It is a proposition about the Founders’ understanding that the Founders’ own handiwork contradicts.

Judge Krause has a *reductio* of her own, and it runs the other way. It deserves an answer on the page rather than a footnote, because a reader arrives at this Part having just read hers. She writes that “absurd and dangerous consequences follow from the majority’s formulation of the Step One inquiry, where any bearable weapon is an ‘Arm’ within the meaning of the Second Amendment. For instance, not just machineguns, but also flamethrowers or even some weapons of mass destruction, as long as they may be grasped, hoisted, and shouldered, would be presumptively constitutionally protected.”¹²⁵ She adds *Bevis v. City of Naperville*: “Everyone can . . . agree, we hope, that a nuclear weapon such as the now-retired M388 Davy Crockett system, with its 51-pound W54 warhead, can be reserved for the military, even though it is light enough for one person to carry.”¹²⁶

Everyone can indeed agree. The agreement is free. That the Davy Crockett may be reserved for the military is a conclusion about *protection* — it comes after the historical inquiry *Bruen* requires, not before it, and it is not a holding that the thing was never an “arm.” This Article’s reading is definitional, not protective. To call a thing an “arm” is to say that a restriction on it must be justified by this Nation’s historical tradition rather than assumed away by category. It

¹²¹ See *supra* Part III.C (National Park Service count of roughly 1,700 letters of marque and nearly 800 commissioned vessels; the twenty-six-gun *Caesar* of Boston).

¹²² U.S. Const. art. VII (ratification of the Constitution, 1788); U.S. Const. amend. II (proposed 1789, ratified December 15, 1791).

¹²³ U.S. Const. art. I, § 10, cl. 3 (“No state shall, without the consent of Congress, . . . keep troops, or ships of war in time of peace . . .”); see *supra* Part II.C.

¹²⁴ See *supra* notes 39, 41 and accompanying text (the bond statutes of 1798 and 1818).

¹²⁵ *ANJRPC*, slip op. (Krause, J., dissenting) at 12–13 (the quoted sentence begins on 12 and completes on 13; rendering *Bevis v. City of Naperville*, 85 F.4th 1175, 1193 (7th Cir. 2023), for the proposition that “[b]earable’ therefore ‘must mean more than “transportable” or “capable of being held” to be consistent with *Heller*”; *Bevis* itself reads “thus” where Judge Krause writes “therefore”).

¹²⁶ *Id.* (Krause, J., dissenting) at 13 (quoting *Bevis v. City of Naperville*, 85 F.4th 1175, 1182 (7th Cir. 2023)).

is not to say the restriction fails. The Davy Crockett is an arm. Whether its restriction survives the historical inquiry is not a question this Article answers, and I should not pretend the answer is easy on my own account of that tradition: Part V.C reads the dangerous-and-unusual tradition as a principle about public carriage, and a warhead in a bunker is no more carried in public than a cannon in a hold. What I will say is narrower. The founding-era tradition of regulating the *keeping* of explosives — the powder caps, the magazine deliveries, the loaded-arms rules collected in Part II.D — is a tradition about quantities of explosive kept among people, and it is the obvious analogue. Whether it justifies a prohibition rather than a storage rule is for the court that reaches the question. A definitional holding settles which inquiry a court must run; it settles nothing about the outcome. The objection is an argument against a protection holding this Article does not make — and it is worth noticing that it is aimed at a *bearability* threshold, which is the majority’s test, not mine. My reading does not turn on whether a weapon can be grasped, hoisted, and shouldered. It turns on what the founding generation treated as private property, which is a question the Davy Crockett does not present and the ship’s cannon answers.

One further passage in the majority opinion cuts against this Article, and it should be met rather than passed over, because it appears two pages after the reasoning this Part has praised. Discussing whether a weapon’s features might matter, the majority invoked the Supreme Court’s suggestion that “certain categories of guns . . . including the machineguns, sawed-off shotguns, and artillery pieces that Congress has subjected to regulation” differ from other categories that “traditionally have been widely accepted as lawful possessions,” quoting *Staples v. United States*.¹²⁷ That is the Supreme Court grouping artillery with machineguns as “quasi-suspect” — for *scienter* purposes, in a case that never mentions the Second Amendment — quoted approvingly by the court whose result this Article endorses. Three things about it.

Staples is a *mens rea* case under the National Firearms Act. Its question was what a defendant must know about his weapon to be convicted of possessing it unlawfully, not what the Second Amendment protects; the Court was reasoning about notice, not about the scope of a right, and it said nothing about the Second Amendment at all. Next, the quasi-suspect character the Court attributed to those categories is expressly a function of their having been “subjected to regulation” — the inference runs from the modern statute book to the owner’s expectations, not from the founding-era statute book to the meaning of “arms.” A twentieth-century regulatory regime is precisely what one cannot use to establish an eighteenth-century usage, on pain of the circularity *Bruen* was written to prevent. And most importantly for the narrow claim this Article makes: an item may be quasi-suspect for *scienter* purposes and still be an arm. *Staples* assumes throughout that machineguns are guns. It sorts guns into categories carrying different notice consequences; it does not read any of them out of the category. The sentence is adverse to a broad protective claim about artillery. It is not adverse to the definitional one.

¹²⁷ *Id.* (Majority Op.) at 44–45 (quoting *Staples v. United States*, 511 U.S. 600, 611–12 (1994)); see also *id.* (Majority Op.) at 45 n.30 (citing *Staples*, 511 U.S. at 611–12, as “deeming ownership of a machinegun, but not an unmodified AR-15, ‘quasi-suspect’”). The *Staples* sentence spans a page break in the official reporter; this Article adopts the ANJRPC majority’s own span cite. *Staples* text verified against

<https://www.govinfo.gov/content/pkg/USREPORTS-511/pdf/USREPORTS-511-600.pdf>.

C. Judge Chung's Household-Arms Reading, Answered

The most direct answer to this Article's argument comes from inside the very case Part V is built on, and it has to be met. Judge Chung, concurring in part and dissenting in part, reads the common-use inquiry to turn on the arms of the household: "In common use' instead refers to the weapons that an ordinary person would have at home for purposes like protecting oneself against violent interpersonal confrontation, protecting the home, and hunting."¹²⁸ She grounds that reading not in modern intuition but in the militia tradition itself, drawing on Granville Sharp's *Tracts Concerning the Ancient and Only True Legal Means of National Defence, By a Free Militia* for the proposition that "only weapons of 'defence and peace' were expected to be kept at home for service in the militia," and citing Sharp as a source reflecting "the history of militias and the types of weapons expected to be possessed at home."¹²⁹ If she is right, Part V.D's militia argument is answered before it is made: a common-use test keyed to domestic self-defense does not read the Amendment upside down, because the militia tradition was itself a household-arms tradition.

Three responses.

First, the household reading proves something true about a part of the militia and then applies it to the whole. Sharp's subject is the arm the individual militiaman fetched from his own house when he was called — and about that arm Granville Sharp is very likely right. But the militia of the eighteenth century was not exhausted by the man with his musket. It included artillery trains that served field pieces nobody kept in a parlor — and I invoke them for the composition of the militia only, not as specimens of private ordnance, because Part III.D declines to claim those particular guns as privately owned. The example that does both kinds of work is at sea: the "militia of the sea" that is this Article's subject, private vessels, privately armed, whose guns Part II.D and Part III.C show were the owners'. A definition of the people's arms assembled only from what fits over a hearth omits the ordnance the same generation constitutionally presupposed and the same Congress licensed by the hundreds. The household is where a militiaman's musket lived. That household musket, however, was never the upper boundary of what arms the people privately and lawfully owned.

Second, the *Heller* pin she deploys against joint bearing does not carry the weight placed on it. Judge Chung cites *Heller*'s statement that "bear arms" means readiness in case of "conflict with another person," emphasizing the singular.¹³⁰ The emphasis is fair, and the sentence is the best textual material available on that side. But read the phrase for what it modifies. "In a case of conflict with another person" describes the *occasion* for bearing — the circumstance in which one wants to be armed and ready — not the number of hands on the weapon. The definition

¹²⁸ *Id.* (Chung, J., concurring in part and dissenting in part) at 8.

¹²⁹ *Id.* (Chung, J., concurring in part and dissenting in part) at 8 & n.17 (discussing Granville Sharp, *Tracts Concerning the Ancient and Only True Legal Means of National Defence, By a Free Militia*, and citing Sharp "not as a source that interprets the text of the Second Amendment, but as one reflecting the history of militias and the types of weapons expected to be possessed at home"); *see also id.* at 3 n.3 (quoting Sharp on "arms of defence and peace").

¹³⁰ *Id.* (Chung, J., concurring in part and dissenting in part) at 8 n.18 (quoting *Heller*, 554 U.S. at 584, with emphasis supplied by Judge Chung).

Heller adopted is a definition of carrying for a purpose; the purpose clause tells us why a citizen bears, not how many citizens may bear the same thing. A single sailor confronting a single enemy across a deck is in a conflict with another person whether he holds a cutlass or serves a gun with five companions. Nothing in the phrase resolves the joint-bearing question, and Part IV.B does not claim more than that it leaves the question open.

Third, Judge Chung identifies a regulatory principle this Article had not previously addressed, and it is the most substantial part of her opinion: that the tradition of regulating dangerous and unusual weapons is underpinned by the principle that “a weapon not commonly worn in public causes a terror to the people.”¹³¹ She traces it, correctly, to the going-armed tradition and to Lambard’s observation that “if a man shall shewe him selfe furnished with armour or weapon, which is not usually worne and borne, it will strike a feare in to others that be not armed as he is.”¹³² The principle is real and its pedigree is genuine. It is also, on its own terms, a principle about *public display*. Its operative facts are a weapon “worn,” “borne,” “shewe[n],” carried about among people who are not armed as the bearer is; its harm is the fear that public carriage produces. A cannon in the hold of a merchantman terrified no one, because no one saw it, and because no one encountered it in the street. The tradition Judge Chung recovers regulates a manner of carrying — which is exactly how Blackstone framed the Statute of Northampton and exactly the distinction this Article has drawn from the outset between the act and the asset.¹³³ Taken at its strongest, it is an argument about the public carriage of a cannon — and about nothing else. It is not an argument that a cannon was never an arm. Whether a manner regulation must also presuppose lawful title I do not need to decide — conduct can be regulated independently of ownership. The title is established elsewhere, by the bond statutes and the petitions, and the terror principle simply does not reach the hold of a merchantman.

D. The Militia Inversion

The military-utility ceiling does not merely contradict Article I; it turns the Second Amendment against its own stated premise. The Amendment opens by tying the right to “[a] well regulated Militia, being necessary to the security of a free State.”¹³⁴ As Part I recovered, the tradition the Founders inherited framed the right to arms as the counterweight to the standing army — Tucker’s “palladium of liberty” — a check that presupposes arms in the people’s hands at least commensurate in kind with the arms of organized force.¹³⁵ A counterweight to an army is not, in conception, a fowling piece. And the privateers at the center of this Article were understood in exactly those terms: “the militia of the sea,” private citizens supplying, at their own expense

¹³¹ *Id.* (Chung, J., concurring in part and dissenting in part) at 2.

¹³² *Id.* (Chung, J., concurring in part and dissenting in part) at 16 (quoting William Lambard, *Eirenarcha: Or of the Office of the Justices of Peace in Two Books* (1581), which Judge Chung sources at 118 and which William Hawkins cites at 126 in *A Treatise of the Pleas of the Crown* (1716)).

¹³³ 4 Blackstone, *supra* note 95, at *148–49; *see supra* Part II.F.

¹³⁴ U.S. Const. amend. II.

¹³⁵ *See supra* Part I (Blackstone and Tucker); Tucker, *supra* note 11, at app. 300 (“the true palladium of liberty”).

and with their own ordnance, the martial power the young Republic could not yet field itself.¹³⁶ A “common use” test that treats military utility as disqualifying — and that shrinks the lawful-purpose inquiry toward individual self-defense while declining to count hunting use toward common use¹³⁷ — therefore reads the Amendment upside down. It would protect the sporting arm and the pocket pistol precisely because they are ill-suited to war, and expel the arm useful to the militia precisely because it is suited to the common defense the preamble names as the reason for the right.

Heller itself confronted a version of this problem, and the sentence in which it did is the sharpest adverse language in the opinion for this Article. Answering the objection that if “weapons that are most useful in military service — M-16 rifles and the like — may be banned, then the Second Amendment right is completely detached from the prefatory clause,” the Court replied “that the fact that modern developments have limited the degree of fit between the prefatory clause and the protected right cannot change our interpretation of the right.”¹³⁸ That sentence does not help me, and I will not pretend it does — but it decides less than the ceiling needs, and precision about what it decides is the whole of the answer.

But notice precisely what it decides and what it does not. The objection the Court was answering is an objection about *fit* — that permitting bans on militarily useful arms severs the operative clause from the preamble. The Court’s answer is that a modern mismatch between preamble and right cannot drive interpretation. That is a refusal to let the militia rationale

¹³⁶ See *supra* Introduction & Part III (quoting Krawczyk & Ambler, *supra* note 6, at 814 n.65 (“Privateers were ‘the militia of the sea,’ and cannons were the tools of their trade.”)).

¹³⁷ *ANJRPC*, slip op. (Krause, J., dissenting) at 18 (faulting reliance on “uses of the weapon besides self-defense” and disputing that “weapons commonly used for hunting fall under the protection of the Second Amendment” (quoting Majority Op. 27)).

¹³⁸ *Heller*, 554 U.S. at 627–28. The full passage reads: “It may be objected that if weapons that are most useful in military service — M-16 rifles and the like — may be banned, then the Second Amendment right is completely detached from the prefatory clause. But as we have said, the conception of the militia at the time of the Second Amendment’s ratification was the body of all citizens capable of military service, who would bring the sorts of lawful weapons that they possessed at home to militia duty. It may well be true today that a militia, to be as effective as militias in the 18th century, would require sophisticated arms that are highly unusual in society at large. Indeed, it may be true that no amount of small arms could be useful against modern-day bombers and tanks. But the fact that modern developments have limited the degree of fit between the prefatory clause and the protected right cannot change our interpretation of the right.” The sentence spans the page break: printed page 627 ends “...modern developments have limited the degree of fit between the prefatory clause,” and page 628 opens “and the protected right cannot change our interpretation of the right.” Verified against the official bound volume, 554 U.S. (2008). Judge Chung quotes the final sentence with explanatory insertions of her own; the text above is the Court’s, without them. See *ANJRPC*, slip op. (Chung, J., concurring in part and dissenting in part) at 7 n.17. The passage has also been read as dictum confined to automatic weapons, on the ground that the functional line it draws was addressed to the M-16 and cannot reach semiautomatic rifles. This Article does not adopt that reading and does not need it; it takes the sentence as genuine adverse language and answers it on the merits.

expand the right to keep pace with modern warfare. It is not a holding that military utility *contracts* it. Those are different propositions, and the difference is the whole of this Part. *Heller* declines to read the preamble as a warrant for protecting whatever the militia would need today. The military-utility ceiling reads the preamble as a warrant for excluding whatever the military would use today. The first is a limit on an expansive argument; the second is an affirmative engine of exclusion, and *Heller* supplies no authority for running the prefatory clause in that direction. The individual right is real — and it is — but it was never severed from the martial purpose the same sentence announces, and a mismatch the Court found tolerable is not a license to invert the relationship. Nor does the *Heller* passage bear the weight the ceiling puts on it in any event. It concedes that M-16s “may be banned”; it does not say they are not arms, and this Part’s claim is about the second proposition, not the first.

One court of appeals has run the militia argument in the opposite direction. That court is the published rebuttal of this Part — not a hypothetical one — and it is owed an answer. In *Friedman v. City of Highland Park*, Judge Easterbrook reasoned that because some of the banned weapons “are commonly used for military and police functions[,] they therefore bear a relation to the preservation and effectiveness of state militias,” and concluded that “states, which are in charge of militias, should be allowed to decide when civilians can possess military-grade firearms, so as to have them available when the militia is called to duty.”¹³⁹ The militia premise, on that reading, assigns the decision to the state rather than to the citizen — the mirror image of the inversion described above, and a good deal harder to answer than the flamethrower-and-warhead objection taken up in Part V.B. Two things answer it. The first is that the step from “the militia needs these arms” to “the state decides who may have them” requires the collective reading *Heller* rejected: a right the state may ration according to its own judgment of the militia’s needs is the militia’s right and not the people’s. The second is that “states, which are in charge of militias” is the pre-incorporation allocation of governmental authority Part II.C has already bracketed — the same 1886 proposition *Presser* states, and the same answer applies. Whether Illinois may regulate the arms of its own militia is a question about state power. It is not a proposition about what “arms” meant in 1791 — and that is the only proposition this Article defends.

E. The “Individually Borne” Axis Cannot Bear the Weight Either

Even the decision’s friendly opinions locate the right in the bearable, individually carried arm.¹⁴⁰ That instinct is not wrong so much as incomplete, and Part IV supplies the correction: the Marquee Clause shows the Founders recognizing commonly held private arms — crew-served, mounted, borne by several men rather than one. That defeats the categorical claim that

¹³⁹ *Friedman v. City of Highland Park*, 784 F.3d 406, 410 (7th Cir. 2015) (Easterbrook, J.), *cert. denied*, 136 S. Ct. 447 (2015) (Thomas, J., joined by Scalia, J., dissenting from the denial of certiorari). Both quoted sentences appear on page 410; the page break to 411 falls later in the same paragraph. Justice Thomas pinned the passage at “784 F. 3d 406, 410–412.” The only decision to disagree with *Friedman* on this reasoning was the panel opinion in *Kolbe v. Hogan*, 813 F.3d 160, 183 (4th Cir. 2016) — which called the militia move one that “effectively permits states to opt-out of the Second Amendment,” and which was vacated in its entirety when rehearing en banc was granted on March 4, 2016. The en banc court reached *Friedman*’s result. *Kolbe v. Hogan*, 849 F.3d 114, 121 (4th Cir. 2017) (en banc), *cert. denied*, 138 S. Ct. 469 (2017). *Friedman* therefore stands, and the objection made in text is the answer to it.

“arms” meant only what a single person can carry. Whether such arms are also *borne* within the Amendment’s meaning is a question Part IV.B leaves open and this Part does not need.¹⁴¹ The “bearable / individually borne” line is a serviceable modern heuristic, but it is a modern one, not the founding definition of which arms the people could lawfully and commonly own.

And here it does no work in any event. The rifles New Jersey banned sit comfortably inside even the narrow axis — bearable, kept and carried by one person, and, on the findings the majority credited, owned by the millions.¹⁴² They were not expelled for failing the bearability line; they were expelled for clearing it with too much military capability. The exclusion thus runs entirely through the military-utility ceiling of Part V.B — the one criterion the constitutional text most squarely forecloses, and the one the Court’s only pre-*Heller* decision on which arms the Amendment reaches used in the opposite direction. Common use retains its ordinary protective force — a weapon in common use is protected, and the AR-15 plainly is — but common use marks what the right includes; it is no warrant for reading a militarily capable arm back out of the right.

One boundary must be marked, and marking it keeps the argument honest. Part IV.B takes up whether the privately owned, crew-served naval gun sits inside a personal right defined by keeping and bearing, and declines to answer it, claiming only that nothing in the cases forecloses the answer.¹⁴³ This Part does not need that harder question resolved. Its point is narrower, and for the military-utility ceiling’s purposes fatal all the same: the criterion used to expel the AR-15 is not a line the Founding generation drew, because the Founding generation’s own constitution presupposed private ownership of arms that fail that criterion far more spectacularly than any rifle does. And the AR-15, unlike the naval gun, is concededly a bearable arm, kept and carried by one person. Assume, only for the sake of argument and contrary to what this Article would otherwise say, that the rifle carries the “military” character its critics ascribe to it. If the naval cannon’s military character did not remove *it* from the class of arms the Founders let private citizens own, then a fortiori that ascribed character cannot remove the rifle from the arms of “the people.”¹⁴⁴ A generation that constitutionally presupposed private ownership of the heaviest naval ordnance of the age did not understand the people’s arms to

¹⁴⁰ *ANJRPC*, slip op. (Matey, J., concurring) at 7 (“If the arm is bearable, then it is presumed to reside within the liberty protected by the Second Amendment.”); *see also id.* (Majority Op.) at 26–27.

¹⁴¹ *See supra* Part IV.A–C; *see also supra* note 92 (the floor/ceiling distinction).

¹⁴² *ANJRPC*, slip op. (Majority Op.) at 43 (crediting the district court finding of around twenty-four million AR-15s “and similar sports weapons” in circulation).

¹⁴³ *See supra* Part IV.B (leaving open whether an arm served by a crew is borne within the Amendment’s meaning, and claiming only that nothing yet decided forecloses it; this Article does not reach the separate common-use question on which the machine-gun authority rests, and takes no position on the correctness of those decisions).

¹⁴⁴ The a fortiori runs only in the direction stated: from the Founders’ toleration of unbearable private military arms to the weaker proposition that a bearable military-pattern arm is not excludable merely for its military character. It does not claim the naval gun is personally protected. *See supra* Part IV.C.

end where military utility begins. Whatever line ultimately separates the protected rifle from the unprotected ordnance, it cannot be that one.

Conclusion

The “bearable arms” thesis asks us to believe that the founding generation used “arms” to mean only the weapons a single person could carry. The Constitution they wrote says otherwise, and says it twice. In Article I, § 8, cl. 11, they gave Congress power to license the belligerent use of privately owned, cannon-armed warships — a power that presupposes a private fleet the Clause never creates. In Article I, § 10, cl. 3, they showed us exactly what they wrote when they wanted to require permission for the mere keeping of naval war-making power: they required it of the states, and they gave the national government no such power over any private owner at all. The private citizen needed a federal commission to fight. He needed no one’s leave to acquire the guns or to keep them. That asymmetry is not a gap in the record; it is the record. It is the founding generation telling us, in the operative text of the fundamental law, that private ownership of heavy ordnance was the unremarkable baseline against which they allocated the power to make war.

The statute books tell the same story in a different register, and they tell it more powerfully than silence ever could. The founding generation did legislate about private naval ordnance — where the powder could be kept, when the guns could be fired, whether a mill could be built, whether an armed ship could clear the harbor and on what security. Every one of those laws regulated the thing as the owner’s. When Congress in 1798 required a shipowner to promise that “the guns, arms and ammunition of such vessel shall be returned within the United States, or otherwise accounted for,” and in 1818 measured his bond by the value of his vessel “including her armament,” it was not tolerating a dangerous exception. It was doing what a legal system does about property: taking security, requiring an accounting, and restraining alienation abroad. One does not take a bond for the safe return of contraband.

The archival record shows the arrangement in motion: the commissioned *Revenge* and *Holkar*, the dense regulatory apparatus of the 1776 Instructions built around ships Congress borrowed rather than owned, the nearly eight hundred privately armed vessels of the Revolution, the twenty-six guns of the *Caesar*. Krawczyk and Ambler saw the outline of this and said, rightly, that it was “beyond the scope” of their article and that privateers were “the militia of the sea.”¹⁴⁵ It was worth developing beyond a footnote, and this Article has tried to do so — with the constitutional text they did not parse and the primary record they did not open.

It shows in the granular record as well as the constitutional text. A delegate recorded the Congress debating and voting the privateering business into being on March 18, 1776. Its own printed commission form left the gun count blank for the owner to fill in. A Philadelphia mariner proposed two sloops of a dozen guns apiece to the Committee of Safety. The *Yankee Hero* was already delivering a prize into port. The *Unity*’s hold carried muskets and pistols beside her cargo of cloth, as ordinary commerce. None of that is abstraction. It is the ordinary

¹⁴⁵ Krawczyk & Ambler, *supra* note 6, at 814 n.65 (privateers were “the militia of the sea,” and the observation was “beyond the scope of this Article”).

administrative and commercial paperwork of a private war machine the Founders built, licensed, and never once thought to place beyond private ownership.

The argument has a frontier, and I have marked it rather than hidden it. The inference from Article I is not a canon of construction, and I have not run it as one; run on the clause's other noun it would prove private armies, which no one has supposed the Constitution to guarantee, and the version that survives is a claim about enumerated federal power operating against an undisturbed private practice. Against the claim that heavy arms were never "arms" at all, that version is decisive. Against the objection that a crew-served naval gun cannot be borne, it answers only that no court has yet decided the question, that *Heller* had no such arm in view, and that the burden of closing the door runs to whoever would close it. That question is open, foreclosed in neither direction, and it is where the next work lies. But the categorical exclusion — the premise that does so much quiet work in so much modern litigation — does not survive a reading of the document. The Founders licensed private war. They regulated private arms as property, and bonded, appraised, and accounted for them as a man's own. What they never did was make a man ask leave to own the ordnance, and they took the cannon as given.