Overview: "Infringed or Abridged"

> The freedom of opinion is one of the inalienable rights of man, and one of the great gifts of his creator; it is a privilege which no human power ought to infringe, and no state of society unnecessarily to abridge.
> Alexander Hamilton, 1812[1]

The first amendment is stronger than the second amendment. This point sometimes gets lost in the public discourse, especially when an all-or-nothing interpretation of the second amendment is being boosted. But as Alexander Hamilton understood, there is a key difference in how the two amendments are worded.

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or *abridging* the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.[2]
>
> A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be *infringed*.

In the first amendment, Congress may not even *abridge*—lessen—the freedoms of speech, press, and assembly. In the second amendment, Congress may not go so far as to *infringe*—break or destroy—a right to bear arms.

The key difference is the difference between the word *abridge* and the word *infringe*. Anyone who looks up the words in English dictionaries used in 1789—and for centuries before 1789—can find what the framers would have found. For all the centuries leading up to the Constitutional Convention in 1787 and the first federal Congress in 1789, the English word *infringe* meant to break, to violate. It still does; we still call "breaking the law" and "violating copyright" infringements. The word *abridge* meant to limit. It still does. A difference in degree can become a difference in kind, and abridgement severe enough could become infringement, but it is essential to understand that to abridge something—a power, a privilege, even a right—was qualitatively different in 1789 from infringement.

The difference is that we can abridge a right without infringing it. As the framers understood, human rights have human limits. A society can

take customary and reasonable action against offenses and abuses. We can limit a right without destroying it, a line brightly and clearly drawn in the quotation from Hamilton.

Pointedly, the creators of the first ten amendments declined to say that the right to bear arms cannot be "abridged." If they had wanted to say so, they could have. They also had access to a large warehouse of longstanding English phrases that would have put bearing arms beyond the reach of law, if they had wanted to do so. But they chose to word the second amendment in a way that allows regulating. Congress is debarred only from violating, and the framers did not suggest that ordinances regulating weapons would violate anything. Such ordinances existed at the time. Nor does the second amendment say or imply that any and every abridgement is an infringement. That position in 1789 would have upended a century of political philosophy following Thomas Hobbes, John Locke, and David Hume among others.

For accurate understanding of the Bill of Rights, it is essential to use dictionaries and documents that existed when the Bill of Rights was written. The difference between the words *abridge* and *infringe* is findable. If this approach looks startling, it need not. One can combine political philosophy with practicality.

The framers were mostly admirable men—outside the abomination of slavery, of which they themselves knew the evil—but they were still fallible human beings, as they themselves knew. Along with a reasonable awareness of self and others, they supported reasonable self-interest. It is ridiculous to argue that they endowed the public with an unlimited, absolute right to take up arms against them. During the first federal Congress in 1789, there had already been a Shays' Rebellion, and a bloody revolution was beginning in France, inspired by the American Revolution, as members were aware. They hoped for better, not for a repeat. Witnessing events in France firsthand, Thomas Jefferson wrote to a friend, "A great political revolution will take place in your country, and that without bloodshed." "A king with 200,000 men at his orders, is disarmed by the force of the public opinion and the want of money."[3] Obviously, Jefferson's prediction was inaccurate. But his optimism accurately reflects the founders' non-avid view of bloodshed.

No records from the Constitutional Convention and the first federal Congress suggest that delegates welcomed a prospect of getting shot at by their own people. Recognizing the possibility of a future rebellion, they did as little as possible to encourage one. As the founders engaged proudly in setting up a new government—some of them having risked their lives, their fortunes, and their sacred honor for it—they left no suggestion that they looked forward to seeing it dismantled. No delegate claimed that firearms attested the vitality of basic freedoms or that unauthorized force vindicated the rights of humankind. More to the point, they did not

leave taking up arms against the new government lawful or constitutional. They did not protect taking arms against judges or members of Congress or citizens voting in an election. To the contrary, the new American government outlawed both force and fraud.

An operating principle was "just rights." Throughout the seventeenth and eighteenth centuries, the phrase "just rights" was used by the framers and their forebears, in England and America, too many times to count. The Pennsylvania Assembly wrote about "just rights" to the governor in the 1750s.[4] The Continental Congress used it to try to induce British troops to desert—mostly unsuccessfully—in the 1770s.[5] The phrase was used privately and publicly—in letters, histories, commentaries, sermons, speeches. George Washington, John Adams, Benjamin Franklin, Thomas Jefferson, and James Monroe used it in private letters. "My first wish is for a restoration of our just rights," Jefferson wrote John Randolph in August, 1775.[6] Publicly, protesting against British treatment of Ethan Allen in January, 1776, Jefferson wrote, "When necessity compelled us to take arms against Great Britain in defence of our just rights," Americans had considered their British adversaries "brave and civilized."[7] But, Jefferson said, Americans changed their good opinion when the British shipped Ethan Allen to England in chains. He proposed that a captured British general be clapped into irons to see how it felt.

In the 1770s, leading up to the American Revolution, the phrase "just rights" circulated in print every year.[8] Americans protesting measures by king and Parliament spelled out that not just any rights were being violated. Americans were not squabbling over bagatelles. They were not demanding limitless license. They were not complaining about a reasonable abridgement of natural right, necessary to join in civil society. They were protecting their *just* rights. And on the other side of the line, British authorities denied infringing anyone's just rights.

Again, a big difference between the first two amendments is that the framers did not choose "shall not be abridged" for the second amendment. One way to draw the line between just rights and arbitrary power, or between a just right and excessive license, was to differentiate between abridgement and infringement. In political philosophy, *infringe* and *abridge* could both be applied to powers. Both were applied to royal authority and prerogatives, state powers, and laws. Both were also applied to rights. They applied to individual rights, common or special liberties, and privileges.

Thus, one difference between *infringe* and *abridge* is that only abridgement can be applied positively. *Infringe* could mean breaking a law or treaty or contract as well as violating rights. *Abridge* could mean abridging power or privilege, or it could mean abridging ordinary rights to enable people to live together in society. Either way, there was good abridgement;

there was no such thing as good infringement. Abridgement of individual rights for the sake of living in human society was not infinitely elastic—a just right would be important enough to safeguard—but it did mean an acceptable give-and-take.

The two terms are logically connected, as a British writer in 1733 made clear.

> In the first place then, I shall very readily agree, that the Test Act has set the Dissenters upon a different foot from the rest of the Society: the conclusion they draw from hence is, that their natural Privileges are infringed. If they say diminished, I allow that likewise to be true, for every Man's natural Privileges (such I mean as are his Rights in a State of Nature) are no doubt abridged exceedingly by his Entrance into Society: But when infringe implies to abridge unjustly, this I deny absolutely to be their case.[9]

A full and fair discussion of the first and second amendments to the U.S. Constitution will acknowledge the differences between the two. While public discourse in 2019 may confuse abridging and infringing, the eighteenth century differentiated clearly between them, as in the statement quoted from John Perceval (1711-1770), First Lord of the Admiralty, whose family tree included a sixteenth-century dictionary author and a seventeenth-century founder of Georgia.

When Congress sent the amendments to the states for ratification in 1789, the amendments applied the words *infringe* and *abridge* to different rights. Freedom of opinion and of conscience are unalienable. As Hamilton and Perceval recognized, some rights are unalienable—not something to carry around in the hand or advertise for sale on Craigslist or sell out of the trunk of the car. Unlike the natural rights of self-defense and discipline, freedom of opinion and of conscience cannot be partly given over to society to handle (unless someone tries to expand them to include, for example, human sacrifice). They shall not be abridged. This is one of the differences between infringing and abridging. Abridgement could be in the common good; infringement cannot. Changes and trends over time may have obscured these differences in the twenty-first century, but in the age of the Constitutional Convention, writers from John Adams to Noah Webster were familiar with it.

The difference itself is simple enough: an abridgement of rights pushed far enough becomes infringement, but not every abridgement is infringement. Nor does every abridgement of lawful powers infringe the law. And yet, by the end of the twentieth century, this clear distinction became obscured in America. In fact, it became so obscured that even a prominent law professor could confuse the action words of the first and second amendments:

> Despite its plausibility as a textual matter, the narrow interpretation of "prohibiting" should therefore, be rejected, and the term should be read as meaning approximately the same as "infringing" or "abridging."[10]

Look at the difference between Alexander Hamilton, publishing in 1812, and Professor Michael W. McConnell, published in the *Harvard Law Review* in 1990. It tells the story in a nutshell: in recent years, the "infringed" of the second amendment has too often been misconstrued as a synonym for the "abridging" of the first amendment.

The nutshell is not the whole story, of course. Hence this book. This introductory chapter presents the overview. First, the two action words *infringe* and *abridge* are different English words, with different meanings. (For convenience, the words will usually be discussed as *infringe* and *abridge*. However, discussion should be understood to refer to all forms—all tenses, the infinitive, use as participles or nouns—*to infringe* and *to abridge*, *infringed* and *abridged*, *infringement* and *abridgement*, etc.). It is essential to clarify that in the eighteenth century the words *abridge* and *infringe* were distinct and separate, that they had always been distinct and separate, and that to claim that the eighteenth century considered them synonyms will always be an anachronism. The two words never meant the same thing. While it is difficult to prove a negative, the evidence is clear. From the beginning of dictionaries in English through 1789, never at any time did English define infringement and abridgement to mean the same thing.

Therefore, no matter how absolutist some weapons supporters may feel, the second amendment itself is not absolutist. This point can be supported by analysis of the words—in simplest terms, by looking at the English the writers used. A view of the right to bear arms as limitless, sweeping, and absolute is contradicted by the vocabulary in which the Bill of Rights was written. In eighteenth-century English, and earlier, 'even to the meanest intelligence' as dictionary authors rather tactlessly used to put it, *abridge* was to limit; *infringe* was to break. Historical documentation for the distinction is voluminous and unassailable. The straightforward way to find it is to use English dictionaries, including ones used by the founders themselves. This is not to say that dictionaries were the only place the two words were defined differently. Their difference shows up in public documents and private letters from the eighteenth century. But dictionaries provide valuable evidence of the customary use. Chapter 2 discusses the history of the two words in dictionaries, which also show how their usage evolved over ten centuries.

A millennium of English dictionaries is not cherry-picking. The distinction between definitions of *infringe* and *abridge* is clear and consistent in English-language dictionaries from the eighth century to the ratification of the Bill of Rights, from Old English (Anglo-Saxon) through the eighteenth century. *Infringe* was destructive; *abridge* became constructive. Every dictionary that included *infringing* defined it as violating or breaking

something, as in the famous Dr. Johnson's definition, "To violate; to break laws or contracts"; "To destroy; to hinder."[11] There are no exceptions in the entire history of English dictionaries before 1789. Dictionaries also used *infringe* to define other words for unacceptable, destructive acts—to violate, to break. Whether defined as a main entry (headword) itself, or used to define other words, *infringe* in all forms meant destruction. Either as infringement of a power, an authority—a law, a treaty, a constitution—or as infringement of a right, it remained destructive. To infringe a contract or treaty is to break it; to infringe a right is to destroy it.

The development of abridging as a concept was more complex. The linguistic history of infringement had no early turning points; abridgement had several. Before 1600, if dictionaries included the term *abridged* at all, the word referred to editing. *Abridged* meant condensed, synopsized, or shortened, as in abridged histories or abridgements of law like dictionary author and lawyer John Rastell's 1527 *Abridgment of the Statutes* of England. In the seventeenth and eighteenth centuries, and especially approaching 1789, more dictionaries in English included public-policy definitions for *abridge*. It was still a synonym for acts considered acceptable, necessary, often beneficial—to lessen, to limit, to contract. But now it went beyond editorial work. In philosophy and history, abridgement meant abridgement of power. Then it came to mean a voluntary abridgement of rights to form a society.

The difference still shows in contracts, as well as in social compact. A signed contract cannot usually be abridged; legitimate changes involve a codicil or rewriting the whole, where after-the-fact changes are breach. Abridging power or privilege, on the other hand, is not only possible but a good idea, and voluntary abridgement of individual rights to join in human society is beneficial. The consequence of voluntary abridgements of individual freedom is human society, as in the 1789 United States. However, abridgement of rights pushed to the point of infringement—as in 1774 America—was clearly a negative. When *abridge* came to refer to political acts, public policy, the difference between infringement and abridgement became overt. Infringing rights or laws was bad; abridging individual license or excess power was good. All of this is supported by Dr. Samuel Johnson's eighteenth-century dictionary.

To discuss Samuel Johnson's dictionary is not to imply that the eighteenth century used the words *infringe* and *abridge* with some abrupt innovation, unique to the era. Johnson's *Dictionary* aligned with the history of previous English dictionaries. The seventeenth and eighteenth centuries produced larger dictionaries and more dictionaries than ever before, but again, the words *abridge* and *infringe* were semantically separate before and after the period. They stayed semantically separate, from the eighth century through the next eleven centuries. While the language of the U.S. Constitution developed from English usage in its own time, the language, like the Constitution, was the development of more than a millennium.

Joining the terms

While infringed and *abridged* are and were different, in political philosophy they became logically connected. Where infringement always meant a wrong, the more subtle concept of abridgement evolved in meaning over centuries. Only in the seventeenth and eighteenth centuries, as human population increased, political philosophy branched out, and more attention was devoted in print to the concepts of rights and liberty, did abridging come to be used as Locke, Dr. Johnson, and the U.S. founders used it. As a limit but not a violation, in a careful distinction from infringing, it was juxtaposed with infringing in an English binomial—"infringed or abridged."

That the key action words in our first two amendments were a traditional binomial may need to be relearned now. Aside from a word-sleuth like Bill Bryson or a prominent scholar of U.S. history like Douglas Brinkley, most people would not recognize "infringed or abridged" as a traditional phrase. But it was. The two terms were paired in government, law, and policy, because their contrasting meanings complement each other. Rather than trace all the significant uses of *infringe* and *abridge* in English and American public documents, demonstrating their differences, in this book the trail will be narrowed to their use together as a binomial. The binomial is a good way to track their use in American public documents. To explain their difference—limited reasonably and voluntarily, versus limited to the breaking point—it is quicker and clearer to show that they became juxtaposed in political thought. Chapter 3 discusses the use of the infringe-or-abridge binomial in Britain and in America.

My theory is that such binomial phrases in English have been used, for millennia, for protection. This is the one theoretical aspect of the discussion. The dictionary definitions and the public and private documents using *infringe* and *abridge* are fact. The use of binomial phrases in legal documents from Anglo-Saxon to the present is fact, a matter of record. It is my inference that the binomial phrases used in government, law, and policy, including "infringed or abridged," were intended as protection.

Change and misunderstanding

Words change. As *abridge* changed in the eighteenth century, *infringe* changed in the nineteenth century. Previously, *infringe* had been the clearer term, and even today the dictionary definition has not entirely changed. But in the nineteenth century, usage shifted. It softened, began

to be replaced by "infringe upon," lost its force. It was never used again in constitutional amendments after the second amendment. Chapter 4 deals with the changing usage of "infringed" over time and with its replacement in constitutional amendments by "denied or abridged." The binomial "denied or abridged" had its own history in public documents in America. As with earlier, traditional binomials, the purpose was protection of rights. In the U.S., the "denied or abridged" binomial has been used unambiguously to protect the right to vote.

Regrettably, when the traditional binomial was lost, its protection was lost. Chapter 5 deals with the loss of the infringed-or-abridged binomial, and the results. One result of losing the protective binomial in English is that we have had even some federal judges misconstruing the second amendment. Somehow, recent research on the second amendment seldom mentions English vocabulary in 1789 or pre-1789 definitions of *infringe*. We have had public exhortations to look at the original Constitution and to discover the founders' intent, yet little attention has gone to eighteenth-century language where it counts most. Rather than defining terms, most debate during the last thirty years has focused on militia membership versus non-membership, individual versus collective rights, new constitutional amendments versus repealing the second amendment, etc. 'Originalism,' 'strict construction,' and a 'structural constitution' developed political influence some years ago, but those views still have not translated into a thorough look at the precise but accessible terms *abridge* and *infringe*, in the eighteenth century and earlier, in the first two amendments. Given the stakes for the public when armed force is used, it is high time to take a careful look.