Guns and grammar:

linguistic authority and legal interpretation in
To paraphrase the National Rifle Association’s slogan, “Words don’t make meaning, people do.”

When it comes to guns, it turns out that language means exactly what you want it to mean, neither more nor less
The Second Amendment to the U. S. Constitution was originally the fourth of the amendments that James Madison drafted:

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.

But what exactly does it mean?

Does the Second Amendment guarantee a collective right for arming some citizens for militia service?

Or does it afford an individual right to own and use weapons?
Opponents and supporters of gun control have argued about

- The punctuation of the Second Amendment
- Its grammatical structure
- And the meaning of *militia, keep, and bear arms*
The National Rifle Association wants us to think that the Second Amendment bans gun control.

Then-vice-president Dick Cheney hams it up for the press . . . or does he mean business?
So it sued the city of Washington, D.C., in federal court, claiming that the city’s law banning ownership of handguns violated the protections of the Second Amendment.

The Circuit Court of Appeals for the District of Columbia agreed, and threw out the city’s gun control law.
The District of Columbia appealed the appeals court’s decision throwing out its gun control law to the U.S. Supreme Court.

Using linguistic as well as legal and historical arguments, the city asked the Court to read the Second Amendment as the Framers of the Constitution would have understood it, part of the general discussion favoring over militias over permanent, standing armies.
In the Appeals Court decision, Judge Laurence Silberman, writing for the majority of the 3-judge panel, argued that the amendment’s second comma separated the unimportant, prefatory clause, from the amendment’s operative clause:

A well regulated militia, being necessary to the security of a free State, the right of the people to keep and bear arms, shall not be infringed.

the second comma
Washington, D.C., asked me to submit an amicus brief explaining what the 2nd Amendment meant to the framers and what it means today. Dick Bailey and Jeff Kaplan helped me to assemble what came to be called *The Linguists’ Brief*. 

IN THE

Supreme Court of the United States

DISTRICT OF COLUMBIA, et al.,

Petitioners,

v.

DICK ANTHONY HELLER,

Respondent.

On Writ of Certiorari to the
United States Court of Appeals
for the District of Columbia Circuit

BRIEF FOR PROFESSORS OF LINGUISTICS
AND ENGLISH DENNIS E. BARON, Ph.D.,
RICHARD W. BAILEY, Ph.D. AND
JEFFREY P. KAPLAN, Ph.D.
IN SUPPORT OF PETITIONERS

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No. 07-290
we argued

* that the Second Amendment was intended to be read in its entirety;

* that the first part of the amendment is syntactically tied to the second

* that the first part of the amendment specifies the reason for the second, that the right to keep and bear arms is tied directly to the need for a well-regulated militia;

* that the ordinary and customary meaning the phrase bear arms in the 18th century is tied to military contexts, not to contexts involving hunting or self defense;

* and that the word militia refers in the federal period to an organized and trained body of citizen-soldiers, or to those eligible to serve in such a body, not to any and all individual citizens.
Nelson Lund, professor of law at George Mason Univ., argued that the first half of the amendment is an absolute clause, grammatically independent of the rest of the amendment, and so all we need to pay attention to is the amendment’s main clause, which forbids gun control.

[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.
18th century grammars, the kind the Framers studied in school, say this about the absolute:

R U L E  X V .

A nominativ case, joined with a participle, often stands independent of the sentence. This is called, the case absolute.

E X A M P L E S .

The sun being risen, it will be warm. They all consenting, the vote was passed.

E X P L A N A T I O N .

The words in Italics are not connected with the other parts of the sentence. either by agreement or government; they are therefore in the case absolute, which, in English, is always the nominativ.

Noah Webster, Grammatical Institutes of the English Language, 1789

Although it is grammatically independent, grammarians recognized that absolutes were like whole sentences that had been reduced to function like adverbials.
And they all acknowledge that absolutes modify the main clause in what is often an implicit if-then or cause-and-effect relationship:

**Rule X.** The case absolute, and the infinitive mode absolute, are separated by commas from the body of the sentence; as, "His father dying, he succeeded to the estate;"

Lindley Murray, *English Grammar adapted to the different classes of learners*, 1795.
That being the case, the Second Amendment could be paraphrased to show the cause and effect relationship between its two clauses:

The amendment: A well regulated militia, being necessary to the security of a free State, the right of the people to keep and bear arms, shall not be infringed.

The paraphrase: Because a well regulated militia is necessary to the security of a free State, the right of the people to keep and bear arms, shall not be infringed.
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.

Nelson Lund also argues that even if the Second Amendment is a cause-and-effect
sentence, the cause clause is irrelevant. Only the effect counts. Consider this example:

Because the teacher was sick, the Dean canceled the class.

Perhaps the teacher is truly sick, and can’t make it to class. But,

Suppose the teacher is feigning illness?
Suppose the Dean is playing a trick on the teacher?
Suppose a student called the Dean’s office, pretending to be the teacher, and
asked that the class be canceled due to illness?

Whatever the “cause,” the class is still canceled.

So the cause is irrelevant, right? Both in Lund’s example, and, as he claims, in the
Second Amendment. It’s just a bit of extra information.
But wait, the example of the dean canceling a class is not an imperative, it’s a performative (remember the oath of office?).

Here’s another example of a performative:

Suppose a sentencing law requires a judge to say,

“Because you have been found guilty of capital murder, you shall be taken from this courtroom to a lawful place of execution where you will be put to death . . . “

But what if, before the sentence can be carried out, DNA evidence shows that the convicted person did not commit the crime?

According to Lund, he must still be executed, because the prefatory causal clause is independent of the operative main clause. It doesn’t matter if he’s later proved innocent, the poor wretch still must die.
But wait, there’s more:

the U. S. Supreme Court also ruled early on, in the case of *Marbury v. Madison* (1803) that every word in the Constitution counts:

“It cannot be presumed that any clause in the constitution is intended to be without effect”

If the Second Amendment’s absolute clause can’t be ignored, then the right to bear arms is tied directly to the maintenance of a well regulated militia.

So Lund’s example is irrelevant, right?

Does the legislative history of the amendment mean anything? The amendment went through some changes before it was passed.
Versions of the Second Amendment:

*Madison’s original wording:*

1. The right of the people to keep and bear arms shall not be infringed; a well armed and well regulated militia being the best security of a free country: but no person religiously scrupulous of bearing arms shall be compelled to render military service in person.

*As revised during debate:*

2. A well regulated militia, composed of the body of the people, being the best security of a free State, the right of the people to keep and bear arms shall not be infringed, but no person religiously scrupulous shall be compelled to bear arms.

*And as passed by Congress:*

3. 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.

Even though the amendment was revised several times, the framers saw fit to leave the militia clause in all *three* versions.
In addition to the issue of the absolute, we also have to figure out what a *militia* is, what a *well regulated militia* is, and what it means to *bear arms*.

Article I of the Constitution contains what is known as the “Militia Clause,” mandating that Congress

> “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,”

and for

> “calling forth the militia to execute the laws of the union, suppress insurrections and repel invasions.”

[U.S. Constitution, art. I, sec. 8]
The *Oxford English Dictionary* defines *militia* as

“... a military force raised from the civilian population of a country or region, esp. to supplement a regular army in an emergency, freq. as distinguished from mercenaries or professional soldiers,” and gives this example, among others:

1776 A. SMITH *Inq. Wealth of Nations* II. V. i. 300 It [sc. the state] may...oblige either all the citizens of the military age, or a certain number of them, to join in some measure the trade of a soldier to whatever other trade or profession they may happen to carry on... Its military force is [then] said to consist in a militia.
In the eighteenth century, members of the militia were expected to bring their own weapons from home.

But the citizen-soldiers brought many different kinds of guns and rifles, not all of them in working order, and their weapons required many different kinds of bullets and spare parts.

So by the early 19th-century, militia authorities had concluded that it was more efficient to provide standardized and well-maintained weapons to the militiamen, along with gunpowder, bullets, and, eventually, uniforms.
The *OED* adds, “The reconstitution of the U.S. militias as the National Guard was substantially complete by the beginning of the 20th cent.”

In other words, in the U.S. the militia *became* what we know now as the National Guard, whose symbol is a Minuteman.

Furthermore, it is no longer acceptable for militia members to bring their own weapons with them when they show up for maneuvers.
What does it mean to *bear arms*?

The vast majority of examples of *bear arms* both in the 18th century and today appear in or evoke a military context.

The *OED* defines *bear arms* as, “To carry about with or upon one, as material equipment or ornament. a. To carry about with one, or wear, ensigns of office, weapons of offence or defence. *to bear arms against*: to be engaged in hostilities with.”  

[OED, *bear*, v., 6.]

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11. iv. 92 Bear what thou borest, The heart and the form.

6. To carry about with or upon one, as material equipment or ornament.

a. To carry about with one, or wear, ensigns of office, weapons of offence or defence. *To bear arms against*: to be engaged in hostilities with.

a 1000 Beowulf 432 Seæs bærôn... beorhte frætwâ. a 1175 Lamb. Hom. 69 Crist... ðæue us wepne for to beren. c 1400 Maundev. vi. 64 Thei beren but o Scheld and o Spere. ? 1568 G. Ferrers in Arb. Garner IV. 179 Apt to bear arms. 1609 Skene Reg. Maj. 60 He bure armes, and made weir against the King. 1769 Robertson Chas. V, III. xi. 316 An ample... pardon to all who had born arms against him. 1862 Stanley Jew. Ch. (1877) I. v. 94 The staff like that still borne by Arab chiefs.
Merriam-Webster’s *New International Dictionary* (1919) defines *bear arms* as

“To serve as a soldier.”

The definition was repeated in *Webster’s Second New International Dictionary* (1934).

But after the NRA started writing so much about the Second Amendment, *Webster’s Third* (1961) changed the primary definition of *bear arms* to

‘to carry or possess arms,’

with the Second Amendment cited to illustrate the definition. ‘To serve as a soldier’ is now the secondary definition of the phrase.
In its most recent update, the *Merriam-Webster Unabridged*, *bear arms* is further analyzed into two senses, as if the definition had been written by Justice Scalia:

---bear arms
1. : to carry or possess arms <the right of the people to keep and bear arms — U.S. Constitution>
2. : to serve as a soldier

---bear arms against
: to fight against; wage war on
While gun control opponents prefer to redefine *bear arms* as “carry a gun,” the historian Garry Wills has pointed out that the expression *bear arms* is always a military term, that “One does not bear arms against a rabbit.”


In oral arguments in *Heller*, Justice Souter got the Solicitor General Paul Clement to admit that *bearing arms* is not what 18th-century hunters did:

In the eighteenth century, someone going out to hunt a deer would have thought of themselves as bearing arms? I mean, is that the way they talk?
Interestingly, in appealing *District of Columbia v. Heller* to the U. S. Supreme Court, each side used the kinds of arguments we have come to associate with the other side.

Liberal supporters of gun control, who typically interpret the Constitution loosely, as a living, breathing, evolving document, asked the Court to read the Constitution literally, to honor its original, historical meaning and intent.

But conservative supporters of a universal right to bear arms wanted the Court to abandon strict constructionism, urging it to read the Constitution’s “spirit” loosely and rule that we all need to carry weapons to protect ourselves, not from invasions and insurrections, but from common criminals, because, after all, it’s really dangerous out there.
In the end, the liberal minority on the Court parsed the Second Amendment the way Madison intended it, affirming as it did so a 1939 Court ruling that the Amendment refers to weapons for use in military situations, not civilian ones (United States v. Emerson, 270 F.3d 203, 230 n.29).

But the Court’s conservative majority abandoned its usual insistence on a literal reading of the Constitution and, in ruling the D.C. handgun ban unconstitutional, they became activist judges writing new law.

Pres. Bush, complaining at a news conference about liberal judicial activists who support gay marriage laws. But he was silent when activist Supreme Court justices like Roberts and Scalia opposed gun control.

Conservative judges make law from the bench so often now that conservative theorists now call this judicial intervention.
Lessons of the *Heller* case:

Words don’t make meanings, people do.

Five justices read the Second Amendment as affirming an individual right to own guns and forbidding handgun bans like the one in Washington, D.C.

Four justices disagreed, arguing that the Second Amendment establishes a collective right to bears arms related directly to militia service but is silent on individual gun ownership for the purposes of self-defense, hunting, and sport.

How can nine well-educated jurists read the Second Amendment and come to such completely opposite conclusions about its meaning?
What does this tell us about *how language means*?

In Supreme Court decisions, the majority rules, even when it’s a majority of one.

So the Second Amendment now means that Americans have a right to gun ownership independent of military service. At least, that’s what it means until the Court changes its mind. And if the Court didn’t change its mind from time to time, we’d still have segregated schools and water coolers.

But interpretation of language in most other situations is a much more complex process.

What does the *Heller* case suggest about how meaning is constructed in law?

In other uses of language?
in *Through the Looking Glass*, Humpty Dumpty tells Alice,

“When I use a word, it means just what I choose it to mean—neither more nor less.”

Alice protests,

“The question is, whether you can make words mean so many different things.”

But Humpty Dumpty corrects her,

“The question is, which is to be master.”
Writing well before *Heller*, historian Garry Wills concludes that the Second Amendment concerns arming the militia; it does not address the separate issue of individual weapons ownership or what restrictions may be place on owning and using such weapons.

The First Amendment guarantees freedom of speech, but that right is not absolute, as some speech does not fall under its protection: obscenity, defamation, fighting words, using a loudspeaker at full volume at night in a residential neighborhood. . . .

Wills suggests that it is absurd to compare the admitted "social costs" of adhering to gun rights with the social costs of observing the First Amendment.

> We have to put up with all kinds of bad talk in the name of free talk. So we must put up with our world-record rates of homicide, suicide, and accidental shootings because, whether we like it or not, the Constitution tells us to.

Wills’ assessment of this argument: “Well, it doesn't.”
In contrast, in his opinion in Heller, Justice Scalia said the linguistic arguments in our brief were worthy of the Mad Hatter.

But like the Mad Hatter, the Court makes words mean exactly what it wants them to mean. . .

Eddie Izzard on the Second Amendment: “the National Rifle Association says that, ‘Guns don't kill people, people do,’ but I think the gun helps.”