2. Guns and Grammar: The linguistics of the Second Amendment

The Second Amendment, the one about the right to bear arms, presents a case of dueling plain meanings: the Amendment addresses either a collective right of the American people to maintain armed militias, or it guarantees every American’s right to tote a gun regardless of military service. The Supreme Court’s landmark decision in District of Columbia v. Heller (2008), which declared Washington, D.C.’s longstanding ban on handguns unconstitutional, decided which of these “plain meanings” is the legal one: the individual right to keep and bear arms. And yet the Second Amendment’s ambiguity persists, both among those who disagree with the Court’s ruling, and among those who wonder exactly what restrictions on gun ownership and use the Heller ruling might permit (after all, the First Amendment guarantees free speech, but it does not protect all speech: there are exceptions for everything from obscenity, fighting words, and defamation, to lying under oath or blaring a loudspeaker in the middle of the night in a residential neighborhood).

Heller offers an object lesson in the connection between linguistic analysis and legal meaning-making. In determining how to read the Second Amendment, the Court considered evidence from the dictionaries and grammar books and other documents of the Framers’ day as well as the present time, though the sharply-divided Court split along ideological lines as it interpreted the Amendment’s words and syntax. In a five-to-four vote, the conservative majority ruled that the District of Columbia’s handgun ban was unconstitutional, and the liberal minority, reading the same one-sentence amendment, came to the opposite conclusion.

Perhaps that’s not so much a lesson about linguistic analysis as a warning: to paraphrase the National Rifle Association’s slogan, words don’t make meaning, people do. There are many contexts in which a single sentence can have two contradictory plain meanings, but when it comes to the meaning of the Second Amendment, majority rules: the interpretation of five justices of the Supreme Court becomes the law of the land; the interpretation of the remaining four becomes a footnote. Nonetheless, though the legal interpretation of the Second Amendment is settled, at least for now, the semantic uncertainties of the amendment’s wording continue to muddy whatever plain meaning it may have. What follows is an account of how the Second Amendment’s meaning in law came to be constructed.¹

¹ In the initial case challenging the handgun ban, Parker, et al., v. District of Columbia, 2007, the appeals court judge, Charles Silberman, had used dictionaries and grammatical arguments to support his opinion. In its appeal of that decision to the Supreme Court, the District’s Attorney General asked me to prepare an amicus brief on the linguistics of the Second Amendment, explaining the Amendment’s syntax and tracing the meaning of its key words from the eighteenth century to the present, in order to support the city’s right to regulate firearms. I recruited the linguists Richard W. Bailey and Jeffrey Kaplan to assist in this effort. Opponents of the gun ban presented their own grammatical analysis of the Second Amendment to support their claims. Although this chapter has its origins in what came to be referred to as “the Linguists’ Brief,” and the outcome of the case turned on...
The Second Amendment, adopted as part of the Bill of Rights in 1791, reads,

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

Manuscript version of the right-to-bear-arms amendment. It was originally the fourth (in some numerations, the fifth) of twelve amendments proposed, the second of the ten that passed to form the Bill of Rights.

The Second Amendment seems like a big deal today, but historically that was not the case. So little attention was paid to the Amendment during the first 150 years after its ratification that Judge Stephen Reinhardt called it a “relatively obscure constitutional provision” (Silveira v. Lockyer 2002, 11). On the rare occasions when the courts addressed the Second Amendment, they understood it to establish the right of the people to possess arms connected with service in the militia.

**Before Heller**

*Aymette v. the State*

One early example of the collective rights interpretation can be found in the 1840 decision of the Tennessee Supreme Court, *Aymette v. State*. This is not a Second Amendment case. Instead, it concerns the right to bear arms in the Tennessee Bill of Rights, the first article of Tennessee’s constitution: “That the free white men of this State, have a right to keep and bear arms for their common defence” (Art. 1, sec. 26).

Aymette had been convicted of carrying a concealed weapon, a Bowie knife, in violation of a Tennessee law that makes it a misdemeanor to wear, any bowie knife, or Arkansas tooth-pick, or other knife or weapon, that shall in form, shape or size resemble a bowie knife or Arkansas tooth-pick, under his clothes, or keep the same concealed about his person.

In his appeal, Aymette claimed the law violated Tennessee’s constitutional guarantee of a right to keep and bear arms. In upholding Aymette’s conviction, the Tennessee Supreme Court ruled that the federal Bill of Rights only guaranteed a collective right to bear arms, and that the state constitution’s use of the phrase “for

more than linguistic arguments, I offer here a broader analysis of the way in which the courts interpreted the language of the Second Amendment as they established its legal meaning.
the common defence” covers weapons suitable for military purposes, not those used for private self-defense or criminal activity. In coming to this conclusion, the court cited Noah Webster’s definition of common:

> The word “common” here used [in the phrase common defence], means according to Webster; 1. Belonging equally to more than one, or to many indefinitely. 2. Belonging to the public. 3. General. 4. Universal. 5. Public. The object then, for which the right of keeping and bearing arms is secured, is the defence of the public. [Aymette v. State] (21 Tenn. [2 Humphreys] [1840], 158).

Tracing the history of weapons laws back to the English Bill of Rights, which permitted some citizens to own weapons but at the same time permitted weapons regulation, Aymette suggests that the Second Amendment also affirms the guarantee that citizens may own weapons suitable for collective, military defense:

> It was in reference to . . . this state of the English law, that the second section of the amendments to the Constitution of the United States was incorporated into that instrument. It declares that “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.” [Aymette 1840, 157]

The court goes on to specify with some energy that in contrast to this right to possess militia-style weaponry, the right to bear personal weapons, which are easily turned to crime and violence, is not guaranteed to Tennessee residents:

> They need not, for such a purpose, the use of those weapons which are usually employed in private broils, and which are efficient only in the hands of the robber and the assassin. These weapons would be useless in war. They could not be employed advantageously in the common defence of the citizens. The right to keep and bear them, is not, therefore, secured by the [Tennessee] constitution. . . . The legislature, therefore, have a right to prohibit the wearing, or keeping weapons dangerous to the peace and safety of the citizens, and which are not usual in civilized warfare, or would not contribute to the common defence. [Aymette 1840, 158-59; this case is cited in two recent Circuit Court decisions discussed in more detail below, as supporting both an individual right (U.S. v. Emerson 2001) and a collective right (Silveira v. Lockyer 2002). However, it is apparent that the Aymette decision affirms a collective rights interpretation both in the Tennessee constitution and, in passing, in the U.S. Constitution.]

Aymette even goes so far as to interpret neighboring Kentucky’s differently-worded guarantee that “the right of the citizens to bear arms in defence of themselves, and the State, shall not be questioned” to refer not to personal self-defense, but to armed communal action:
As in their constitution, the right to bear arms in defence of themselves, is coupled with the right to bear them in defence of the State, we must understand the expressions as meaning the same thing, and as relating to public, and not private; to the common, and not the individual defence. [Aymette 1840, 161]

In addition to defining common, Aymette reads the phrase bear arms as having a clear military reference. It is undeniably military in Article 1, sec. 28, of the Tennessee constitution, where the reference can only be to militia service. And so, according to the court, it must be interpreted in a military sense in sec. 26 as well. Furthermore, we are told that it would be unidiomatic to use bear arms in the context of hunting or personal self-defense:

The 28th section of our bill of rights provides, “that no citizen of this State shall be compelled to bear arms, provided he will pay an equivalent, to be ascertained by law.” Here we know that the phrase has a military sense, and no other; and we must infer that it is used in the same sense in the 26th section, which secures to the citizen the right to bear arms. A man in the pursuit of deer, elk and buffaloes, might carry his rifle every day, for forty years, and, yet, it would never be said of him, that he had borne arms, much less could it be said, that a private citizen bears arms, because he has a dirk or pistol concealed under his clothes, or a spear in a cane. [Aymette 1840, 161]

**United States v. Miller**

Almost a century later, this “collective rights” interpretation underlay the 1939 decision in United States v. Miller (307 U.S. 174), the most recent United States Supreme Court Second Amendment case before Heller.

Jack, or Jackson, Miller was a getaway driver, FBI snitch, and general all-around hood (see Frye 2008), someone who could have stepped right out of a Jimmy Cagney movie. Miller had been convicted of transporting an unregistered sawed-off shotgun across state lines in violation of federal law. In his defense, he claimed that the National Firearms Act, which banned such weapons, conflicted with his Second Amendment to keep and bear arms. A lower court agreed, reversing Miller’s conviction. Miller appealed, and a month after his bullet-riddled body was found in an Oklahoma field (Frye 2008), the Supreme Court reinstated the conviction. According to the Court, the Second Amendment must be interpreted in light of the Constitutional mandate that Congress “provide for organizing, arming, and disciplining the Militia,” and it found that Miller’s sawed-off shotgun did not come under the Second Amendment’s protection:

In the absence of any evidence tending to show 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, we cannot say that the Second Amendment guarantees the right to keep and bear such an instrument. Certainly 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. . . .

With obvious purpose to assure the continuation and render possible the effectiveness of [the militia], the declaration and guarantee of the Second Amendment were made. It must be interpreted and applied with that end in view. [Miller 1939]

As further support for the collective rights interpretation, the Miller Court cited a number of colonial and early American laws explicitly connecting gun ownership with militia service.

**United States v. Emerson**

For some sixty years, the lower courts followed the precedent in Miller and its specification that the Second Amendment must conform to the Constitution’s militia provisions. But in *United States v. Emerson* (270 F.3d 203, 2001), the Fifth Circuit Court of Appeals announced that the Second Amendment’s plain meaning supported an individual’s right to own a gun.

Timothy Joe Emerson had been charged with violating the conditions of a restraining order, issued in conjunction with his divorce proceedings, that barred him from buying a firearm. Testimony showed that Emerson owned two pistols and a variety of assault weapons, had on one occasion aimed a pistol at his wife and cocked the hammer, and had also threatened to kill his wife’s new boyfriend. Nevertheless, Emerson challenged his arrest on Second Amendment grounds, and a lower court agreed, dismissing the indictment against him. The government appealed, and the Fifth Circuit, finding that there was no Second Amendment violation, reinstated the indictment. But in his majority opinion in Emerson, Judge William Garwood took the opportunity to draft a long, tangential essay insisting that, even though Emerson shouldn’t be allowed to have a gun, the Second Amendment does support an individual right to bear arms.

Garwood’s Second Amendment digression is not binding—in his concurrence in *Emerson*, Judge Robert Parker discounted the comments as “84 pages of dicta” and criticized Garwood for grandstanding. Despite that objection, Garwood’s comments have influenced subsequent Second Amendment jurisprudence. What is interesting for us, from the perspective of linguistic analysis, is Garwood’s insistence that the Second Amendment’s “plain meaning” protects an individual right to keep and bear arms:

> [T]he history of the Second Amendment reinforces the plain meaning of its text, namely that it protects individual Americans in their right to keep and bear arms whether or not they are a member of a select militia or performing active military service or training. [Emerson 2001, 99-100]

Even so, the right to bear arms is not absolute, and the Fifth Circuit affirmed the validity of Emerson’s restraining order:
Although, as we have held, the Second Amendment does protect individual rights, that does not mean that those rights may never be made subject to any limited, narrowly tailored specific exceptions or restrictions for particular cases that are reasonable and not inconsistent with the right of Americans generally to individually keep and bear their private arms as historically understood in this country. [Emerson 2001, 101]

The ruling in Emerson presented a legal paradox: the plain meaning of the Second Amendment, as constructed in Miller, is pretty much the opposite of the plain meaning found in Emerson.

Adding to the confusion, in response to Emerson, the Department of Justice changed its interpretation of the Second Amendment. Earlier the Department, subscribing to a collective rights interpretation, had told the Emerson court,

that the Second Amendment protects only such acts of firearm possession as are reasonably related to the preservation or efficiency of the militia. [Olson 2001, 19n.]

But after Emerson appealed, Solicitor General Theodore Olson, asking the Supreme Court not to review the Fifth Circuit decision, articulated the Government’s new reading of the Second Amendment, which quotes directly from the Emerson decision:

The current position of the United States . . . is that the Second Amendment more broadly protects the rights of individuals, including persons who are not members of any militia or engaged in active military service or training, to possess and bear their own firearms, subject to reasonable restrictions designed to prevent possession by unfit persons or to restrict the possession of types of firearms that are particularly suited to criminal misuse. [Olson 2001, 19-20n.; the Supreme Court declined to review Emerson.]

Olson also told the Court that Attorney General John Ashcroft had sent a memorandum to that effect to all U.S. attorneys. Ashcroft’s memo quotes the same passage from what it calls Judge Garwood’s “scholarly and comprehensive” review of the Second Amendment supporting an individual rights interpretation, asks that all Second Amendment cases be coordinated, and concludes that the Justice Department will “vigorously enforc[e] federal law in a manner that heeds the commands of the Constitution” (Ashcroft 2001).

Silveira v. Lockyer

This conflict of interpretation—a collective right against the newly-asserted individual one—is what led Judge Stephen Reinhardt, of the Ninth Circuit Court of Appeals, to declare a year later in Silveira v. Lockyer that the Second Amendment’s plain meaning is not so plain at all:
[G]iven the history and vigor of the dispute over the meaning of the Second Amendment’s language, we would be reluctant to say that the text and structure alone establish with certainty which of the various views is correct. [Silveira v. Lockyer (312 F.3d 1052, 2002), 39]

This echoes a comment a decade earlier by retired Chief Justice Warren Burger, who had insisted that in order to interpret the Amendment, its legislative history—the purpose, setting, and objectives of the Framers—must be taken into account:

[The] Second Amendment, guarantees a “right of the people to keep and bear arms.” However, the meaning of this clause cannot be understood except by looking to the purpose, the setting and the objectives of the draftsmen. [Burger 1990, emphasis added; although Aymette also cited Noah Webster’s definition as linguistic proof, looking at the history surrounding adoption is what informs many of the early interpretations of the Second Amendment.]

For Burger, who, like the Aymette court, was very much in favor of gun control, those objectives involved an armed, well-regulated militia, a state army, not a national one: “[T]he provision concerning firearms emerged in very simple terms with the significant predicate—basing the right on the necessity for a ‘well regulated militia,’ a state army.”

Although the Miller Court indicated that sawed-off shotguns did not enjoy Second Amendment protection because they had no connection to militia service, the Court was silent on which weapons might be protected. Reinhardt notes in Silveira that,

[a]s a result of its phrasing of its holding in the negative . . . the Miller Court’s opinion stands only for the proposition that the possession of certain weapons is not protected, and offers little guidance as to what rights the Second Amendment does protect. . . . What Miller does strongly imply, however, is that the Supreme Court rejects the traditional individual rights view. [Silveira 2002, 14]

Reinhardt also cites Burger’s view that the individual right to bear arms is

one of the greatest pieces of fraud . . . on the American public by special interest groups that I’ve ever seen in my lifetime. The real purpose of the Second Amendment was to ensure that state armies—the militia—would be maintained for the defense of the state. The very language of the Second Amendment refutes any argument that it was intended to guarantee every citizen an unfettered right to any kind of weapon he or she desires.

[Cited in Silveira v. Lockyer 2002, 17, where the quotation is incorrectly conflated with Burger’s 1990 essay on the Second Amendment in Parade; the “fraud” comments were actually made
during an interview on the MacNeill/Lehrer News Hour, Dec. 16, 1991, on the 200th anniversary of the Bill of Rights. In both the essay and the interview, Burger distinguishes sporting guns from other kinds of firearms, and he makes clear his belief, bolstered by the Second Amendment, that handguns and assault weapons do not belong in the hands of ordinary citizens.]

Both Chief Justice Burger and Judge Reinhardt find that the historical record supports their reading of the plain meaning of the Second Amendment. To reach that plain meaning, Reinhardt also analyzes the Amendment linguistically by considering the sense of its words—people, keep, bear arms, and militia—along with its syntax. Reinhardt defines militia as “a state military force”:

We reach our conclusion not only because that is the ordinary meaning of the word, but because contemporaneously enacted provisions of the Constitution that contain the word “militia” consistently use the term to refer to a state military entity, not to the people of the state as a whole. [Silveira 2002, 29]

Reinhardt adds that the militia does not consist of all the people, just those eligible to serve, and that the term militia as used in the Amendment and elsewhere in the Constitution refers to the fighting force, not to its individual members.

Reinhardt argues further that people in the Amendment refers not to individuals, but to the American people as a whole:

The amendment protects the people’s right to maintain an effective state militia, and does not establish an individual right to own or possess firearms for personal or other use. This conclusion is reinforced in part by Miller’s implicit rejection of the traditional individual rights position. [Silveira 2002, 23]

However, he acknowledges that this sense of people must also be conditioned by the definition of the word articulated by the Supreme Court in United States v. Verdugo-Urquidez: “[A] class of persons who are part of a national community or who have otherwise developed sufficient connection with this country to be considered part of that community” (494 US 259 [1990], 494). Reinhardt himself is not convinced that a word must always mean the same thing in all contexts. As support for his belief that words may mean different things in different sentences, even different sentences within the same document, he quotes what James Madison said in Federalist 37:

We note that James Madison, no minor authority on the constitutional text, noted the arbitrariness of this interpretive approach. In doing so, in Federalist 37, he observed, “no language is so copious as to supply words and phrases for every complex idea, or so correct as not to include many equivocally different ideas.” The Federalist No. 37, at 197 (Clinton Rossiter, ed., 1961). Nevertheless, we are bound by the views of the Supreme Court. [Silveira 2002, 29n.]
Reinhardt further argues that if *people* must mean the same thing each time it is used in the Constitution, then *militia* cannot refer to a fighting force in some parts of the Constitution and to individual members of that force in the Second Amendment (Silveira 2002, 31; this echoes the comments of the *Aymette* court).

Reinhardt looks, too, at the words in the second clause of the Amendment (technically, it is the first clause, since the Amendment’s so-called militia clause is a phrase, not a clause, but that grammatical distinction does not appear in the legal discussions of the Amendment’s grammar, and all legal analysts assume that the Amendment has two clauses). Citing *Aymette,* he reads *keep and bear arms* as a direct reference to the militia, since “‘bear arms’ is a phrase that customarily relates to a military function” (33).

Reinhardt also considers the significance of *keep* in the phrase *keep and bear arms:*

The reason why that term was included in the amendment is not clear. . . . Certainly the right to keep arms is of value only if a right to use them exists. The only right to use arms specified in the Constitution is the right to “bear” them. Thus, it seems unlikely that the drafters intended the term “keep” to be broader in scope than the term “bear.” [Silveira 2002, 36]

In his analysis, Reinhardt also comments on the syntax of the Second Amendment, which consists of a prefatory phrase that not only states the reason for the Amendment but “also helps shape and define the meaning of the substantive provision contained in the second clause, and this of the amendment itself” (37).

But in light of the controversy surrounding the Amendment, and the *Emerson* decision a year earlier, Reinhardt supplements his linguistic analysis with historical and legislative evidence, citing the debates over the proposed amendment, the comments surrounding its ratification, and other contemporary documents supporting a reading of the Second Amendment that guarantees a collective rather than an individual right. Notably, Reinhardt reminds us that most of the constitutional debate focused on the need for an armed militia, and that only one state proposed an amendment protecting an individual right to bear arms:

[A]lone among the 13 colonies, New Hampshire . . . recommended a proposed amendment to the Constitution explicitly establishing a personal right to possess arms: “Congress shall never disarm any Citizen unless such as are or have been in Actual Rebellion.” . . . The New Hampshire proposal is significant not only because it was substantially different from the proposals to emerge from the various other state conventions (which in turn were quite similar to that ultimately enacted as the Second Amendment), but also because it suggests that an amendment establishing an individual right to bear arms would have been worded quite differently from the Second Amendment. [Silveira 2002, 54]
Finally, Reinhardt addresses the debate over an early draft of the Second Amendment which included a conscientious objector provision—a provision that was deleted from the final version of the Amendment:

The fact that the overwhelming majority of the debate regarding the proposed Second Amendment related to the conscientious objector provision demonstrates that the congressmen who adopted the amendment understood that it was concerned with the subject of state militias. A right not to bear arms due to conscientious objection can only mean a right not to be compelled to carry arms that the government seeks to make one bear—to perform military service that one is unwilling to perform. There is no possible relevance of the term “conscientious objection” to a constitutional amendment guaranteeing a private right to possess firearms. [Silveira 2002, 57]

**Parker and the DC gun law**

In 2005, the city of Washington, D.C., was sued in federal court on the grounds that its 32-year-old ban on handguns violated the Constitutional guarantee of the right to bear arms. The U.S. District Court dismissed the suit, but on appeal the D.C. Circuit Court of Appeals struck down the city’s gun ban (*Parker, et al., v. District of Columbia*, 2007). The District then appealed that decision to the Supreme Court, where the case became *District of Columbia v. Heller.*

The debate between the individual rights and collective rights interpretations of the Second Amendment came into play in *Parker.* Significantly, for our purposes, the appeals court relied on linguistic analysis, among other things, to reach its decision about the Amendment’s meaning.

In his opinion for the DC Circuit, Judge Silberman notes that the lower court dismissed Parker’s initial complaint because

the Second Amendment, at most, protects an individual’s right to “bear arms for service in the Militia” . . . . And, by “Militia,” the court concluded the Second Amendment referred to an organized military body—such as a National Guard unit.

*Parker v. District of Columbia* (2007), 5

The opening words of the Second Amendment, “A well regulated militia, being necessary to the security of a free state,” are frequently called the “militia clause.” In
1960, to counter the collective rights interpretation, which stressed the connection between a right to bear arms and service in the militia, opponents of gun control began asserting an alternate, individual rights interpretation that ignored the militia clause and stressed every American’s right to own a gun regardless of military service. In a rhetorical coup, proponents of the individual rights theory even started calling this new reading the “standard model,” as if the older, collective rights model had never existed (Bogus 2000b; in Silveira (2002), an unsuccessful challenge to California’s assault weapons ban, the Ninth Circuit calls this new interpretation the “traditional individual rights” model (312 F.3d 1052 [2002], 12).

Judge Silberman uses this individual rights interpretation to rule Washington’s gun ban unconstitutional, arguing that the people referred to in the Second Amendment’s main clause are individual citizens, a reading consistent with interpretations of the people in the First and Fourth Amendments. Silberman cites definitions of keep and bear from the dictionaries of Samuel Johnson (1755) and Noah Webster (1828), emphasizing the usefulness of early dictionaries in ascertaining what words meant to the framers:

The Oxford English Dictionary and the original Webster’s list the primary meaning of “bear” as “to support” or “to carry” . . . . Dr. Johnson’s Dictionary—which the Supreme Court often relies upon to ascertain the founding-era understanding of text . . . —is in accord.

Silberman alludes as well to newspapers and other writing of the time to maintain that, although the Second Amendment does associate bearing arms with the militia, the idiom bear arms does not refer just to soldiering:

The term “bear Arms” is obviously susceptible to a military construction. But it is not accurate to construe it exclusively so. . . . There are too many instances of “bear arms” indicating private use to conclude that the drafters intended only a military sense.

[Parker 2007, 24]

This argument, that just because a term is found in one sense doesn’t mean it can’t have other meanings, is later echoed in Justice Scalia’s opinion in Heller. It directly contradicts Justice Alito’s assertion in Taniguchi that when a word has multiple meanings, its most common meaning is its “plain meaning” in the law (see above, chapter 1). Thus we have the Court on record as supporting two apparently conflicting ways of understanding word meaning: a word’s most common sense constitutes its plain, or legal meaning; a word’s less-common sense may also be its plain, or legal meaning. Such looseness in interpretive strategy suggests that ideology, predisposition, personal experience, and other non-textual factors are important determinants of legal meaning—and that should come as no surprise, because they are important factors in determining all linguistic meaning.

Silberman also stresses that the fundamental right of self defense underlies the Second Amendment. Although self defense is commonly recognized as a pre-existing, natural right affirmed by common law and later by the Amendment, there is also a long history of arms regulation in English law suggesting that self-defense is
one thing, arms possession, something else again. England has had strict weapons control since the 14th-century, when laws began stipulating that guns were for the wealthy, not the peasants or the middle class (Schwoerer 2000). The English Bill of Rights of 1689 is often cited by American gun lobbyists as guaranteeing everyone’s right to bear arms, and it is referred to as well in Parker and in Heller. But the English Bill of Rights limited weapons ownership to Protestants, provided they belonged to the right social class, and it acknowledged the role of the law in further regulating weapons: “That the Subjects which are Protestants may have Armes for their Defence suitable to their Conditions and as allowed by Law” (emphasis added).

In addition to interpreting words like “the people” and “bear arms,” Judge Silberman pointed to the syntactic structure of the amendment, which divides into a “prefatory” militia clause and an “operative” second clause: the first he viewed as a bit of constitutional throat-clearing that had no bearing on the right to bear arms. On the other hand, the meat of the amendment, the operative clause, which states, “the right of the people to keep and bear arms shall not be infringed”—prevents the District of Columbia from imposing an absolute ban on handguns. In addition, the court ruled that, of the original plaintiffs, only Dick Anthony Heller, a D.C. special police officer who had been denied a handgun permit, had standing, and so the case on appeal was renamed District of Columbia v. Heller.

**District of Columbia v. Heller**

In the appeal to the U.S. Supreme Court, opponents of gun control argued in part that there are linguistic reasons for dismissing the first part of the Second Amendment, and they interpreted the meanings of the phrase bear arms and the word militia in ways that supported their cause. In contrast, those supporters of gun control who
focused on the Amendment’s linguistics insisted that eighteenth-century readers would have seen the Second Amendment not as a two-part sentence where only the second part counts, but as a balanced and unified statement where militia refers to a select group of citizen soldiers rather than to the entire adult population, and bear arms means ‘to engage in military activity.’

In support of the District of Columbia’s appeal to reverse that lower court ruling, our Linguists’ Brief presented historical linguistic evidence arguing,

1. that the Second Amendment was intended to be read in its entirety;
2. that the first part of the amendment is both syntactically and semantically tied to the second;
3. that the first part of the amendment specifies the reason for the second: the right to keep and bear arms is tied directly to the need for a well-regulated militia;
4. that the phrase bear arms in the 18th century occurs primarily in military contexts, not ones that involve hunting or self defense;
5. and that the word militia refers in the federal period to an organized and trained body of citizen-soldiers, not to any and all Americans, many of whom were ineligible for militia service.

The punctuation and syntax of the Second Amendment
Reading the Second Amendment as a statement in which every word counts follows from Chief Justice John Marshall’s opinion in Marbury v. Madison (1803) that “it cannot be presumed that any clause in the constitution is intended to be without effect.” But even without that ruling, it would have been clear to eighteenth-century readers that the first part of the Amendment was bound to the second in a cause-and-effect relationship, that the right to bear arms was tied by the framers directly to the need for a well-regulated militia.

In his opinion in Parker, Judge Silberman pays particular attention to the Second Amendment’s punctuation: “The provision’s second comma divides the Amendment into two clauses; the first is prefatory, and the second operative” (Parker, 13).

Silveira, along with earlier legal commentators, had already considered the Amendment’s first words and concluded that they were integral to the Amendment’s interpretation. Furthermore, commas don’t necessarily separate wheat from chaff. Despite the popular myth that punctuation can mean the difference between life and death, or that it can at least cost one a lot of money, we should not give the Second Amendment’s punctuation undue weight. Eighteenth-century punctuation was variable, not rigid. Here are some examples from the Constitution itself. In Art. I, sec. 10, the framers write it’s for the possessive form of it:

No state shall, without the consent of the Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing it’s inspection laws (emphasis added).
This is not a scrivener’s error but a common usage of the time. Modern practice would require *its*, and a student writing *it’s* for *its* today would be marked wrong. But the framers had no problem with it.

As for Constitutional commas, their use also differs from present practice: commas serve sometimes to mark syntactic breaks, sometimes to indicate pauses for breath, and sometimes, as in Article III, sec. 1, to separate subject from verb:

The judicial Power of the United States, shall be vested in one supreme Court.

Indeed, so irregular is eighteenth-century English punctuation that Robert Lowth, the premier grammarian of the age, wrote,

the doctrine of Punctuation must needs be very imperfect: few precise rules can be given, which will hold without exception in all cases; but much must be left to the judgement and taste of the writer.

[1762, 155]

So that the doctrine of Punctuation must needs be very imperfect: few precise rules can be given, which will hold without exception in all cases; but much must be left to the judgement and taste of the writer.

The grammarian Robert Lowth had little to say about punctuation in his widely-read English grammar, except to note that its rules are imperfect, full of exceptions, and subject “to the judgement and taste of the writer” (1762, 155).

The 27th Amendment (one of the twelve original amendments, it was not ratified until 1992) contains commas, normally used today to set off nonrestrictive clauses, to set off a restrictive relative clause, and it adds what we would today consider an unnecessary comma before the final adverbial:

No law, varying the compensation for the services of the Senators and Representatives, shall take effect, until an election of Representatives shall have intervened (emphasis added).

Even constitutional amendments drafted in the twentieth century show irregular comma use. The 26th Amendment, proposed and ratified in 1971, also sets off a restrictive clause with commas, and it too adds a comma separating subject from predicate:
The right of citizens of the United States, who are 18 years of age or older, to vote, shall not be denied or abridged by the United States or any state on account of age (emphasis added; once again, students using such punctuation would be referred to the appropriate section of their usage books for correction).

These examples demonstrate that, even today, punctuation in such carefully-vetted documents as constitutions and their amendments does not always control meaning.

The text of the Second Amendment quoted on pp. 3-4 of the Parker decision contains three commas, but on p. 12 of the opinion it has only the first two commas, not the third. That sort of inconsistency should pose no problem, even for a strict constructionist, because there’s some uncertainty about the authoritative punctuation of the Second Amendment. Although a comma does separate the Amendment’s two major syntactic units, some copies of the Second Amendment sent to some of the states for ratification had a different number of commas from the “official” three-comma version as printed by the federal government (Van Alstyne 2007). Punctuation only loosely correlated with meaning in the eighteenth century, and it would not be an exaggeration to claim that the Second Amendment would mean the same thing—not just when it was written but today as well—whether it had one, two, or three commas, or none at all.

Commentators have paid more attention to the Second Amendment’s syntax than to its punctuation. For example, writing in Silveira, Judge Reinhardt comments on the Amendment’s unique structure, which includes “a prefatory clause, a syntactical device that is absent from all other provisions of the Constitution, including the nine other provisions of the Bill of Rights” (Silveira 2002, 26). That first phrase—the so-called “prefatory clause”—is what grammarians call an absolute: “a well regulated militia, being necessary to the security of a free state….” Silberman doesn’t call the “prefatory” phrase an absolute, but his argument tracks Nelson Lund’s discussion of the Second Amendment’s “preambulatory” absolute (Lund 2007). Lund, whose expertise is law, not language, and who filed an amicus brief in Heller supporting an individual rights interpretation, insists that an absolute is grammatically independent from a sentence’s main clause, and so can have no impact on the meaning of that sentence. Commenting during oral arguments in Heller, Justice Kennedy similarly disconnected the two halves of the amendment, though without dismissing the importance of a militia:

[T]here is an interpretation of the Second Amendment . . . that . . . in effect delinks them. . . . The amendment says we reaffirm the right to have a militia, we’ve established it, but in addition, there is a right to bear arms.

[Supreme Court 2008, 5-6]

Such reasoning mistakes the meaning of grammatical independence. Although it is true that the second comma divides the sentence syntactically, it is certainly not the case that such punctuation creates semantic or even syntactic independence. And the comma does not divide the unimportant from the significant parts of a sentence, either in the eighteenth century or today. An examination of
absolute constructions in English shows that, despite Justice Kennedy’s opinion, they should never be delinked.

**The grammatical absolute**

The grammarian C. T. Onions writes that a phrase is called *absolute* “[Lat., *absolutus* = free] because…it *seems* to be free of the rest of the sentence” (Onions 1904, 66; emphasis added). *Seems* is the operative word here. Grammatical independence is not semantic independence. The opposite of independence, in grammar, is governance, and that in turn is a reference to one word controlling the grammatical case of another. As Lowth put it in his influential grammar of 1762, “Regimen, or government, is when a word causeth a following word to be in some case, or mode” (Lowth 1762, 95).

 Rencontre, or government, is when a word causeth a following word to be in some case, or mode.

The grammarian Robert Lowth’s explanation of syntactic “government”: one word controls the case of another (from *A short introduction to English grammar*, 95)

In Lowth’s day, English absolutes took the nominative case, sometimes also called the ungoverned case, and so they appeared to be grammatically independent: their case was not controlled or determined by another word. But that’s because Modern English nouns had lost most case markings. In Old English, the nouns in absolutes appeared in the dative case (compare the Latin ablative absolute—nouns in Latin absolutes took the ablative case), marking the grammatical subordination of the absolute to the main clause of the sentence. By the 18th century, the independence of the absolute is merely apparent, not real, the accident of a morphological change, not a syntactic or semantic one. Henry Fowler (1906, 228) succinctly underscores the distinction between grammatical and semantic independence in observing, “There are grammatical dependence, and dependence of thought.” Fowler illustrates this by noting the clear semantic connection that frequently exists even between independent sentences separated by a full stop. In other words, syntactic connections, or disconnects, may frequently operate independent of the text’s meaning.

The grammarian William Ward (1767, 145) shows just how important the absolute is when he calls it the equivalent of a whole sentence, and he discusses absolutes both in terms of their internal dependence and their dependence on the rest of the sentence. Goold Brown, compiler of a comprehensive grammar aggregating the analyses of many earlier grammarians, similarly makes clear that the absolute “is often equivalent to a dependent clause commencing with when, while, if, since, or because” (1880, 536). Lyndley Murray (1795, 162-63), whose grammar was widely used in American schools in the late eighteenth and early nineteenth centuries, demonstrates the obvious cause-and-effect function of the absolute, even as it is “separated by commas from the body of the sentence,” with this sentence: “His
father dying, he succeeded to the estate.” In Murray’s example, the effect cannot easily be “delinked” from the cause.

Above: William Ward (1767) describes the absolute as the “equivalent to a whole Sentence.” Below: Lyndley Murray (1795), in his tenth rule of syntax, demonstrates the clear cause-and-effect function of the absolute: “His father dying, he succeeded to the estate.” In this example, the effect cannot be “delinked” from the cause.

**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.”

Expanding the Second Amendment’s reduced cause-and-effect absolute, we can express the interdependence of the Amendment’s two parts this way: ‘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.’ And absolutes were common enough in the framers’ day to be readily understood.

Twentieth-century grammarians confirm that the absolute remains a common-enough English construction, and they explain both its history and its function. Onions (1904, 69) finds that although absolutes were relatively rare in earlier periods of English, by the seventeenth century the absolute had become thoroughly naturalized, offering “an important . . . resource [to] all writers . . . for the purpose of expressing subordinate conceptions.”

He gives the following examples of modern absolutes:

- condition: I will come, *weather permitting.*
- time: *This done,* we went home.
- reason: *The signal being* (or *having been*) *given,* we set off. *It being very cold,* we made a fire.
- attendant circumstance: *She failing in her promise,* I have been diverting my chagrin. (Sheridan)

Away go the two vehicles, *horses galloping,* *boys cheering,* *horns playing loud.*
Otto Jespersen (1949, V, 46) attributes the nativization of the absolute in the seventeenth century to the influence of classical prose as a model for English writers, and Evans and Evans (1957, s.v. participles) further note that while absolutes are often associated with written rather than spoken English, absolutes occur naturally in English and some have even become common idioms: “Phrases such as that settled, everything considered, that being the case, are in frequent use.” Other common and idiomatic absolutes include all things considered, all things being equal, and present company excepted.

George Curme connects the English absolute to the Latin structure on which it is modeled, and demonstrates that English absolutes were marked as grammatically dependent in older forms of English, as they were in Latin:

the words in the dative and ablative formed an adverbial clause in which the noun was subject, the accompanying participle, adjective or noun was predicate, and the dative or ablative was the sign of subordination to the principal verb. . . . Later, when the inflections lost their distinctive case forms, the dative, no longer distinguishable as such, was construed as a nominative, an absolute nominative, since its form does not indicate any relation to the principal proposition.

[Curme 1931, v. 3, 152-53; emphasis added]

While the “form” of the absolute no longer reflects its relation to the principal proposition, speakers of English still understand the semantic relationship between the absolute and the rest of the sentence, and English writers still separate the absolute from the main clause with a comma in the same way that they would separate a dependent clause functioning as a sentence adverbial. Even though the form of the absolute no longer signals its connection to the rest of the sentence by case marking, that connection remains.

Curme gives these examples of cause-and-effect absolutes:

He being absent, nothing could be done.
My task being completed, I shall go to bed.
Mr. Smith being the toastmaster, I think we may expect an enjoyable time.

[Curme 1931, 153]

Eighteenth-century Americans had probably seen their share of absolutes long before they read the Second Amendment. They might even have been tested on the construction in grammar school in some federalist version of “No Child Left Behind.” But even without formal schooling, the citizens of the new republic would have had no trouble understanding the absolute that specifies the reason for establishing land-grant public colleges in Article 3 of the Northwest Ordinance of 1787:
Religion, morality, and knowledge, being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged.

Article 3 of the Northwest Ordinance of 1787 opens with an absolute: “Religion, morality, and knowledge, being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged.

But Nelson Lund suggests that the causative function of the absolute is not explicit, arguing that if the framers really wanted to make the cause-and-effect relationship between the militia and the right to bear arms explicit, they should have modeled the Second Amendment on the Patent and Copyright clause of the Constitution (2007, 14-15). That clause reads,

The Congress shall have Power . . . To promote the Progress of Science and the useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.

[Art. 1, sec. 8]

It is almost always possible to point out a better way for the authors of a proposition to have worded it. But one could respond to Lund that if the framers had wanted to secure an individual right to gun ownership, they would have written, “Private possession of arms being necessary to individual freedom,” or even, simply, “The right of the people to keep and bear arms shall not be infringed,” without any conditioning absolute at all. It is worth pointing out, too, that the Second Amendment is the only one with a conditioning causal phrase, a fact which suggests that the absolute is important, not just decorative. Lund is aware that the absolute of the Second Amendment is marked, or unusual; he actually calls the absolute the amendment’s most significant grammatical feature, and then proceeds to tell us how insignificant it really is (2007, 12).

The absolute was certainly familiar to James Madison, who drafted the Second Amendment and who used absolute constructions elsewhere in his writings. Here are but two of many Madisonian absolutes:

[T]he Executive power being in general terms vested in the President, all power of an Executive nature, not particularly taken away must belong to that department, that the power of appointment only being expressly taken away, the power of Removal, so far as it is of an Executive nature must be reserved.

[Letter to Edmund Pendleton, New York, June 21, 1789.]
That, being a compact among the States in their highest sovereign
capacity, and constituting the people thereof one people for certain
purposes, it is not revocable or alterable at the will of the States
individually, as the constitution of a State is revocable & alterable at
its individual will.


Madison would not have used absolutes in his essays, in his correspondence, or in
the Second Amendment, if he suspected that his readers might find the construction
odd, ambiguous, or unimportant.

But even if absolutes are not to be isolated from the rest of a sentence in form
or meaning, Nelson Lund further argues that purpose clauses of any kind are legally
irrelevant, that only operative clauses have any effect. Scalia and Garner (2012, 217)
similarly acknowledge that “a preamble, purpose clause, or recital is a permissible
indicator of meaning,” though they qualify this by adding that such prologues are
asides, “not part of the congressionally legislated or privately created set of rights
and duties.” And in his opinion in Heller, Scalia affirms that “a prefatory clause does
not limit or expand the scope of the operative clause” (Heller, 4).

However, to other readers, the fact that the Second Amendment is the only
one of the first ten with a causal phrase, a phrase put at the beginning of the sentence
to give it greater emphasis, suggests that the militia clause is important, not just
decorative. Eighteenth-century readers would have noticed it, not ignored it. Until
Justice Scalia determined in Heller that they were wrong to do so, the Supreme
Court noticed it as well.

Defining the Second Amendment’s words
Along with questions about the Second Amendment’s grammatical structure, the
Linguists’ Brief examined what some of its key words and phrases mean:

- What did the framers mean by a militia?
- What does it mean for a militia to be “well-regulated”?
- What does the word arms refer to?
- What is the meaning of bear arms?

What is a well-regulated militia?
Interpreters of the Second Amendment have skirmished over what a militia
is. Does the term refer to an organized and trained fighting force, or does it refer to
any and all individual citizens, from whom the militia is drawn? Gun rights
advocates, hoping to show that the Second Amendment invests individuals with the
right to own firearms for any purpose, argue that, if the “militia clause” does have
some significance after all, then they would like the term militia to include
everybody, not just those eligible to serve. Supporters of gun control prefer to read
the Second Amendment as connecting gun ownership specifically with militia
service. In their view, militia refers solely to the group of volunteer weekend
warriors we now find in the modern National Guard, the military force that evolved
from the eighteenth-century American state militias.
Fortunately, the Constitution itself guides us in the interpretation of *militia*. Article I, section 8 defines the militia and gives Congress the power “To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions.”

A well-regulated militia, the kind referred to in the Second Amendment, is not a band of irregulars like the Mehdi Militia, a sectarian army fighting against government troops in Iraq. It is not an impromptu posse chasing a villain with a hue and cry, as it was in medieval England. It is not a collection of disgruntled white supremacists living in rough-hewn cabins in the far west who reject government authority and refuse to pay taxes. It is not a hunt club or the patrons of a shooting range. And it is not the collective body of all Americans from whom a militia may be raised.

Instead, according to the Constitution, the militia is a military force consisting only of those eligible to serve. In the framers’ day, that included able-bodied white males ages 16 – 45 (sometimes, 50 or 60), not the entire group of men, women and children living in the United States, and more than a few of those patriots eligible to serve bought out their obligation or sought even more creative ways to avoid service. Since the ratification of the Constitution, the militia has also been a body that has been regulated well, and constitutionally, by federal authority.

The Constitutional notion of a militia seems consistent with various eighteenth-century definitions of the term. For example, Dr. Johnson’s *Dictionary* (1755, s.v.) defines *militia* as “the trainbands; the standing force of a nation” (*trainband* is a seventeenth-century term, no longer in use, for a temporary, citizen-army; while *standing force* refers to a standing or permanent army). Noah Webster’s definition more clearly captures the difference between the American version of the *militia* and a standing army (1828, s.v.):

>The body of soldiers in a state enrolled for discipline, but not engaged in actual service except in emergencies; as distinguished from regular troops, whose sole occupation is war or military service. The militia of a country are the able bodied men organized into companies, regiments and brigades, with officers of all grades, and required by law to attend military exercises on certain days only, but at other times left to pursue their usual occupations.

The *Oxford English Dictionary* confirms this reading of *militia* with a cite from Adam Smith’s *Wealth of Nations* (1776):

>[The state] may .. oblig[e] 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.*

The *OED* also defines *militia* in its specifically American context:

>In the *U.S.*: the body of able-bodied citizens eligible by law for military service. Now *hist*orical… The reconstitution of the U.S.
militias as the National Guard was substantially complete by the beginning of the 20th cent.

The *Dictionary of Americanisms* defines *militia* as, “The whole body of adult male citizens capable of bearing arms” and gives the following citations:

**1705.** Beverley *Virginia* IV.34 Every Freeman . . . from sixteen, to sixty years of age, is listed in the militia.

**1800.** Jefferson *Notes* 94 Every able bodied freeman, between the ages of 16 and 50 is enrolled in the militia.

**1890.** *Cent.* 3761/2 *Militia, . . . the whole body of men declared by law amenable to military service, whether armed and drilled or not.*

[Mathews 1951, s.v., *militia*]

These dictionaries do not define *militia* to include the total body of citizens, though the last of Mathews’ examples, from the *Century Dictionary*, suggests a broader definition of militia than is typical, those “men declared by law amenable to military service,” rather than those actually trained to serve, but even here, to be a member of the militia one must still be eligible, by law, to serve in an organized fighting force.

It is also clear that Madison, who drafted the Bill of Rights, considered the word *militia* to refer to a subgroup of American citizens, albeit a large one, rather than a collection of each and every individual American. In *Federalist 46*, Madison, addressing the concerns of antifederalists, envisioned as a worst-case scenario a militia of citizen soldiers to be deployed against a tyrant (someone, for example, like King George III):

To [this federal standing army of twenty-five to thirty thousand soldiers] would be opposed a militia amounting to near half a million of citizens with arms in their hands, officered by men chosen from among themselves, fighting for their common liberties, and united and conducted by governments possessing their affections and confidence. It may well be doubted, whether a militia thus circumstanced could ever be conquered by such a proportion of regular troops.

[Madison 1788, *Federalist 46*, emphasis added]

By describing the militia as a force that is *officered*, Madison makes clear that he is contrasting the power of a citizen army, distinct from the entire body of citizens, with that of a standing or professional one. But although the United States had only recently fought a war against an unjust government, and despite what *Federalist 46* suggests, the Constitution did not empower the militia to foment rebellion against the new American government or even to counter the force of the
American military. Instead, the militia is a military arm of both the states and the federal government which may be called upon as needed to enforce the law, not to rebel against the law. As we saw when Pres. Eisenhower called out the National Guard to undergird federal desegregation in the Little Rock schools, or when George W. Bush sent the National Guard to fight in Iraq, the job of the militia has always been to reinforce the standing army in putting down domestic disturbances and repelling foreign threats.

The Second Amendment’s militia clause is unique among the constitutional amendments, and it survived an editing process in which the Second Amendment was revised and sharpened before it was finally passed. During this editing, the clause was not cut, though another provision was discarded which exempted from militia service Quakers and other conscientious objectors who, though they may have hunted for food, consistently refused to bear arms.

**The three versions of the Second Amendment:**

Original wording, with the exemption for those “scrupulous of bearing arms”:

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.

Revision, retaining the CO exemption:

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.

Final version, tightening the phrasing and dropping the exemption, as passed by Congress:

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.
citizens rather than professional soldiers. Discussion of the following amendment, about quartering soldiers, made clear that many Americans opposed the creation of standing armies.

A version of the Second Amendment approved by the Senate shows another intermediate wording: “a well regulated militia, being the best security of a free state, the right of the people to keep and bear arms, shall net [sic] be infringed” (Journal 1789-93). The final version of the Second Amendment was rewritten one last time to read, “A well regulated Militia, being necessary to the security of a free State,” dropping the conscientious objector clause but retaining and sharpening the emphasis on the importance of the militia, a further reason not to dismiss the importance of the Second Amendment’s absolute construction.

And yet that is what Justice Scalia does in his opinion in Heller. Scalia acknowledges that the militia is a subset of Americans, but that very fact reinforces the distinction he then makes between the militia and the people:

the “militia” in colonial America consisted of a subset of “the people”—those who were male, able bodied, and within a certain age range. Reading the Second Amendment as protecting only the right to “keep and bear Arms” in an organized militia therefore fits poorly with the operative clause’s description of the holder of that right as “the people.”

We start therefore with a strong presumption that the Second Amendment right is exercised individually and belongs to all Americans.

Heller, 7

To keep and bear arms . . .
The militia clause survived rounds of editing by the framers only to be summarily deleted by Justice Scalia because of its poor fit with the “operative clause.” Another problem in interpreting the Second Amendment concerns the definition of arms, and what it means to bear them. From the discussions in oral arguments in Heller, as well as in Justice Scalia’s opinion in the case and Justice Stevens’ dissent, it’s apparent that the justices define the bearing of arms in ways that support their overall sense of what the Second Amendment guarantees, and what it does not. In this section, we’ll look specifically at how dictionaries came into play to answer some of these questions.

Given that the Second Amendment guarantees a right related to arms, the justices took care to consider what arms might mean in the framers’ day, and what the word refers to today. Along with the dictionaries of Samuel Johnson and Noah Webster, Justice Scalia cited Timothy Cunningham’s New and Complete Law Dictionary (1771), where arms is defined as “any thing that a man wears for his defence, or takes into his hands, or useth in wrath to cast at or strike another.” Variations on this definition occur in English legal texts going back to the thirteenth century. For example, Henry Bracton (ca. 1250, III: 20) writes,
non solum si quis venerit cum telis, verum etiam omnes illos dicimus armatos qui habent quod nocere potest. Telorum autem appellacione omnia in quibus singuli homines nocere possunt accipiuntur. Sed si quis venerit sine armis et in ipsa concertatione ligna sumperit, fustes et lapides, talis dicetur vis armata.

We regard as armed not only those who come with weapons, but all those who have anything that may cause injury. All things by which men may inflict injury are included in the word ‘weapons.’ If one comes unarmed, but during the course of the argument picks up sticks, staves [or] stones, it will be called armed force.

And John Cowell, echoing Bracton in his legal dictionary (1701), writes that the meaning of arms and armor extends “to any thing that a Man in his wrath or fury taketh into his hand, or wears for a defence, wherewith to cast at or strike another.”

In his dissent, Justice Stevens cited both Samuel Johnson’s definition of arms as “weapons of offence, or armour of defence” (1755) and John Trusler’s “by arms, we understand those instruments of offence generally made use of in war; such as firearms, swords, &c.” (1794).

John Trusler defines arms as “those instruments of offence generally made use of in war.” The Distinction Between Words Esteemed Synonymous in the English Language, 37 (1794).

Cunningham’s definition is general: arms include knives and guns as well as sticks and stones and anything else that can cause harm. Trusler’s is narrower, referring primarily to instruments of war. Scalia, who discounted the militia clause and found the District of Columbia’s handgun restrictions overbroad, preferred Cunningham’s definition because it’s not tied to military weapons, but covers just about anything that can be used offensively or defensively. Stevens, who read the militia clause as directly informing the amendment’s guarantee, preferred Trusler’s definition because it focuses on weapons of war suitable for militia use. None of the definitions cited refer to arms used in hunting or for target practice, though some weapons advocates insist that the Second Amendment covers these as well.

**Bearing arms**

Sometimes the justices can’t find the support they’re looking for in dictionaries, and when a judicial interpretation of a law clashes with the lexical evidence, they may reject the authority of the same dictionaries that in other cases they hold up as
repositories of wisdom and reason. In *Heller*, none of the justices thought that the Second Amendment protected a citizen’s right to own a tank or a surface-to-air missile, even though such weapons fit the definition of *arms* as ‘weapons of war.’ But they did argue over the meaning of the phrase *bear arms*, specifically, whether the amendment protects the right to bear arms only *in connection with* military service. The Court’s conservative majority decided that it did not, that it guaranteed the right to bear arms for hunting and for self-defense as well.

Dictionaries, however, show that, from the eighteenth century to the present, the phrase *bear arms* typically appears in military contexts, not ones involving individual self-defense, hunting, or sport. As the historian Garry Wills put it, “One does not bear arms against a rabbit” (an echo of *Aymette*: “A man in the pursuit of deer, elk and buffaloes, might carry his rifle every day, for forty years, and, yet, it would never be said of him, that he had borne arms”) (*Aymette* 1840 161). But Justice Scalia rejected the dictionary evidence that did not support his understanding of the Second Amendment, writing in his majority opinion that, although *bear arms* often occurred in military contexts, “the fact that the phrase was commonly used in a particular context does not show that it is limited to that context” (*Heller*, 15; see, for comparison, Justice Alito’s assertion, in *Taniguchi*, discussed above, in chapter one, that a word’s most-common meaning is its plain meaning).

*Bear arms* (a direct translation from the Latin *arma fero*) typically refers to the act of soldiering and the use of military weapons. The most pertinent American reference to *bearing arms* before the Second Amendment is its use in the *Declaration of Independence*:

> The present King of Great Britain . . . has constrained our fellow citizens . . . to bear arms against their country.

While arms may be anything from Saturday night specials and brass knuckles to kitchen knives and baseball bats, the idiomatic phrase *bear arms* has always primarily meant ‘to go for a soldier,’ as in this example from a proclamation made by Josiah Martin, the British governor of North Carolina, in 1776:

> I do hereby . . . promise, and assure, to each and every Person or Persons who shall join His MAJESTY’S Forces and *bear Arms* against the Rebels in this Province . . . a Grant . . . of Land in Proportion to their Circumstances, Merit and Pretensions.

[Martin 1776]

Far less commonly, *bear arms* may refer to individuals carrying weapons, as in this isolated example from 1645: “There shall be a cessation of bearing of armes vnto the meeting howse vpon the Lord’s daye” (*Craigie* 1938, *s.v. arm*). In oral arguments in *Heller*, Justice Scalia referred to a 1716 Parliamentary act for disarming the Scottish Highlanders to underscore his belief that ‘bear arms’ regularly refers to carrying weapons in nonmilitary contexts:
As I recall the legislation against Scottish highlanders and against Roman Catholics did use the term—forbade them to keep and bear arms, and they weren't just talking about their joining militias; they were talking about whether they could have arms.

[Supreme Court 2008, 17]

But what the Highlander statute actually says is,

that . . . it should not be lawful for any Persons . . . to have in . . . their Custody, use or bear, Broad Sword . . . Side-Pistol . . . or Gun, or any other warlike Weapons, in the Fields, or in the Way coming or going to, from or at any Church, Market, Fair, Burials, Huntsings, Meetings or any other occasion whatsoever.

This act, which does not in fact use the idiom bear arms, does ban “warlike” weapons from public gatherings, and its goal is to disarm the population in order to end organized rebellion against the crown. It hampered hunting and self-defense as well, which produced further Scottish antipathy toward England, but that was not its primary intent.

The opponents of gun control also make much of the minority view of Pennsylvania antifederalists, who like many others wanted a Bill of Rights attached to the Constitution, and who tried unsuccessfully to propose an amendment in that Bill of Rights in which bear arms would refer not just to protecting the state, but also to hunting and to self defense:

That the people have a right to bear arms for the defense of themselves and their own state, or the United States, or for the purpose of killing game.

[Address 1787, 6; emphasis added]

Seventh. That the people have a right to bear arms for the defence of themselves and their own state, or the United States, or for the purpose of killing game, and no law shall be passed for disarming the people of any of them, unless for crimes committed, or real danger of public injury from individuals; and as standing armies in the time of peace are dangerous to liberty, they ought not to be kept up; and that the military shall be kept under strict subordination to and be governed by the civil powers.

The 7th Amendment proposed by the Pennsylvania antifederalist minority

But even this proposal for a Seventh Amendment—which was not discussed or adopted—recognizes the need to regulate weapons for the public good: “No law shall be passed for disarming the people or any of them, unless for crimes committed, or real danger of public injury from individuals.”
Pennsylvania ratified the federal Constitution without a Bill of Rights, but it did write one into its own state constitution in 1790: “The right of the citizens to bear arms for the defence of themselves and the state shall not be questioned.” Similar language is found in Ohio’s 1802 constitution (Davis 1823, 91; 179). Whether the Pennsylvania and Ohio state constitutions, which appeared after the Second Amendment was drafted, but before it was adopted, seek to remedy a Constitutional defect by applying the right to bear arms to individuals, or they simply wish to extend the notion of bearing arms beyond its normal military use, such specification was unusual and did not reflect the ordinary meaning of the phrase to bear arms, as it appears, for example, in the Massachusetts constitution: “The people have a right to keep and to bear arms for the common defence” (Freeman 1805, 11). Freeman elaborates further in his discussion of the civil rights and liberties of Massachusetts citizens:

The fifth auxiliary right of the subject, that I shall at present mention, is that of having arms for their defence, suitable to their condition and degree, and such as are allowed by law. Which . . . 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.

[Freeman 1805, 473]

Freeman’s words echo those of the English Bill of Rights and emphasize both governmental control of arms and the value of community self defense, which he explains in the language of a just revolution, not the language of keeping one’s home and person safe from criminal attack: It is “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” (Freeman 1805, 473). This is much the same sentiment that Madison expressed in Federalist 46, where he argued that armed citizens would serve in only the most extreme case as a check on a federal government that had become so tyrannical it could be stopped in no other way. As Garry Wills (1995) and others have noted, no constitution comes with a self-destruct clause. No one in the eighteenth century, and no responsible citizen today, thinks that the Second Amendment authorizes armed resistance to a democratically-constituted government.
What’s important for Constitutional interpretation is the fact that the final version of the Second Amendment, while it recognizes the connection between arms and a well-regulated militia, makes no mention of bearing arms “for the defense of [individuals] . . . or for the purpose of killing game,” and so the Pennsylvania minority opinion was either ignored or rejected by the framers of the federal Constitution, and by the states. Supporters of an individual right to bear arms may argue that the Constitution implies such a right, or that its silence on the subject means that the existence of a prior natural right to own weapons was so obvious to everyone that there was no need to mention it in the Amendment. But their argument that bearing arms in hunting and self-defense is idiomatic English is not supported by textual evidence from the eighteenth century or earlier.

Nineteenth- and twentieth-century dictionaries also confirm that *bear arms* refers to military service or the sorts of communal self defense for which a militia is organized. *Webster’s New International Dictionary* (1919) defines *bear arms* as ‘to serve as a soldier,’ a definition that is repeated in *Webster’s Second New International Dictionary* (1934). And *Funk and Wagnall’s New Standard Dictionary* (1929) defines *bear arms* as, “to do military service” (s.v., *bear*, vb.). But after groups like the National Rifle Association flooded the language with prose in which *bear arms* becomes a synonym for carrying guns, *Webster’s Third* (1961, s.v. *bear*) abandoned that traditional military restriction and changed the primary definition of the phrase to the more general, ‘to carry or possess arms,’ with the Second Amendment cited to illustrate the definition. ‘To serve as a soldier’ is retained, but as a secondary definition. The first edition of the *Oxford English Dictionary* (1888) offers the more general, “To carry about with one, or wear . . . weapons of offence or defence,” adding, “*To bear arms against:* to be engaged in hostilities with.” And the most recent *OED* includes this: “fig. *to bear arms:* to serve as a soldier, do military service, fight.” Citations for *bear arms* in the latest *OED* include:

- 1663 H. COGAN tr. F. M. PINTO *Voy. & Adventures* I. 199 That all those which were able to bear arms should make themselves Amoucos, that is to say, men resolved either to dye, or vanquish. [s.v., *amok*]
- 1774 L.D. KAMES *Sketches Hist. Man* (1807) II. ii. ix. 261 In Switzerland..every male who can bear arms is regimented, and subjected to military discipline. [s.v., *regiment*, v.]
- ?1790 N. WYNDHAM *Trav. through Europe* III. 319 The public force..is composed, of the land and sea armies;..And, subsidiarily, of the active citizens, and their children of age to bear arms. [s.v., *subsidiarily*]
- 1824 F. PLOWDEN *Human Subordination* 153 In July 1803, upon the renovation of hostilities with Napoleon, some genuine Catholics thought it a favourable opportunity to address the throne to recommend to Parliament the removal of all disabilities for Catholics to bear arms. [s.v., *renovation*]
• 1834 W. Betham *Orig. & Hist. Const. Eng.* iv. 87 [Leicester] ordained that no one should bear arms, without the king’s license, on pain of life and limb. [s.v., life]
• 1855 W. H. Prescott *Hist. Reign Philip II* i. vii. 239 Philip dismissed all those of the common file, on the condition that they should not bear arms for six months against the Spaniards. [s.v., condition]
• 1916 G. B. Shaw *Androcles & Lion* i. 9 The men, if of an age to bear arms, will be given weapons to defend themselves against the Imperial Gladiators. [s.v., age]
• 2001 D. C. Gould *Times Brother Jonathan* v. 150 The proclamation was made in November 1775, freeing all black indentured servants, black birds, slaves who were able and willing to bear arms for the king to join the British Army. [s.v., blackbird]

Above: Original *Oxford English Dictionary* (1888) entry for ‘bear arms’ (s.v., arms); the phrase “ensigns of office” refers to coats of arms or other indicators of rank, not to weapons. Below, *Webster’s Third New International Dictionary* entry for the phrase.

Despite the insistence of gun rights advocates, and the occasional historical citation, the idiom *bear arms* does not stretch comfortably to accommodate nonmilitary meanings. In *oral arguments* in *Heller*, Justice David Souter challenged Solicitor General Paul Clement’s insistence that *bear arms* means ‘to carry them outside the home.’ Souter asked, ‘But wait a minute. You’re not saying that if...
somebody goes hunting deer he is bearing arms, or are you?” Clement replied, “I would say that and so would Madison and so would Jefferson.”

But Souter, pressing his point, wasn’t convinced: “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?” Clement finally conceded that was not the way they talked: “Well, I will grant you this, that ‘bear arms’ in its unmodified form is most naturally understood to have a military context.”

Justice Scalia disagreed. In the Heller opinion, Scalia argues that bear arms is military when accompanied by the preposition against, as in bear arms against. But by itself, unmodified, bear arms can simply refer to carrying weapons for self defense, and he cites in support of this an earlier dissent by Justice Ginsberg in Muscarello v. United States (1998, 143). That case turned on the meaning of the phrase carrying firearms, and in her dissent Ginsburg wrote, “[s]urely a most familiar meaning is, as the Constitution’s Second Amendment . . . indicate[s]: ‘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’” (the definition is from Black’s Law Dictionary, 143). It’s important for our analysis that, although Ginsburg cites the Second Amendment in Muscarello, she’s citing Black’s definition of carry arms, not bear arms. In contrast, Black’s definition of bear arms (not bear arms against, but just plain, unmodified bear arms) stresses the military associations of the phrase: “to carry arms as weapons and with reference to their military use.”

Nevertheless, Scalia argues in Heller that in the absence of the preposition against, bear arms can apply to any arms-carrying situation: “Without the preposition, ‘bear arms’ normally meant (as it continues to mean today) what Justice Ginsburg’s opinion in Muscarello said” (Heller 2008, 13). Even so, bear and carry work differently when it comes to packing heat. It would hardly seem idiomatic to write, “A team of G-men bore arms to track down Al Capone,” or to warn off a threatening individual by declaring, “Watch it, buster, I’m bearing arms.”

Despite this, Justice Scalia’s distinction between bear arms and bear arms against seems to have influenced our lexicographers. The latest update to Merriam-Webster’s Unabridged now contains two separate entries for these terms:
--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

[http://www.unabridgedpreview.com/unabridged/bear_arms; accessed 1/28/13]

Screenshot of the definitions of bear arms and bear arms against, from Merriam-Webster’s Unabridged Dictionary [2013]

Parsing Heller
Clearly Justice Scalia, who likes to hunt, can bear arms against rabbits, elk, and all other manner of game. Writing the majority opinion in Heller, Scalia dismissed the historical arguments of the Linguists’ Brief as “unknown this side of the looking glass (except, apparently, in some courses on Linguistics)” and “worthy of the mad hatter” (Heller 2008, 15-16).

The Court’s minority found our linguistic analysis more convincing. Justice Stevens called Scalia’s reading of the amendment “overwrought and novel” and came up with an interpretation that was the polar opposite of his colleague’s:

When each word in the text is given full effect, the Amendment is most naturally read to secure to the people a right to use and possess arms in conjunction with service in a well-regulated militia.

[Heller 2008; Stevens Dissent, 16]

Stevens adds that the Second Amendment doesn’t permit, or even discuss, gun ownership for hunting, personal self-defense, or committing crimes, even though guns are frequently used for these and other purposes.

Scalia acknowledges that, although eighteenth-century militiamen (always men) were expected to show up with their own guns, that practice is frowned on by
the military today. But that’s irrelevant, because, for him, even though it’s not mentioned in the Constitution, “the inherent right of self-defense has been central to the Second Amendment right” (Heller 2008, 56). Scalia also reads between the lines elsewhere in the opinion to bolster a new interpretation of the Second Amendment based on self-defense:

> The prefatory clause does not suggest that preserving the militia was the only reason Americans valued the ancient right; most undoubtedly thought it even more important for self-defense and hunting. . . . self-defense . . . was the central component of the right itself.

[Heller 2008, 26]

Scalia recaps nineteenth-century arguments that slaves and anti-slavery campaigners were being denied their Second Amendment right to bear arms for self defense, and he notes that the Fourteenth Amendment in part attempted to restore to former slaves the right to own weapons. Bringing us up to the present day, Scalia concludes that the D.C. handgun ban is impermissible because “the American people have considered the handgun to be the quintessential self-defense weapon” (Heller 2008, 57).

Scalia argues elsewhere that legislative history is at best ambiguous and unreliable for statutory interpretation (see, for example, Scalia and Garner 2012, 369ff.), and two years after he championed the implicit Constitutional right of self-defense he told an audience at Hastings College of Law in 2010 that an implied Constitutional right to privacy is “a total absurdity” because there is no mention of privacy in the Constitution.

As jurists and scholars including Richard Posner (2008) have observed, each side in Heller argued from a position usually adopted by the other: the liberals took an originalist position, while the conservatives preferred to read the Second Amendment loosely, as part of a living constitution where meaning can also reside in the text’s emanations and penumbras. In doing so, the Court made policy by stressing the need for personal gun ownership, not as a bulwark against a tyrannical government, but in order to fight the current epidemic of urban crime which the framers never mentioned and surely never foresaw. Conservatives have recently begun acknowledging their own special brand of judicial intervention by calling it, not activism, a term they reserve for what liberal judges do so recklessly, but ‘judicial engagement,’ which reflects the appropriate way to make the law mean what it is supposed to mean.

Even so, the overall impact of Heller on gun regulation is still unclear. A skeptical Richard Posner (2008) warns, “The only certain effect of the Heller decision . . . will be to increase litigation over gun ownership.” Posner worries that now, anyone denied a gun permit could claim a violation of his constitutional right to bear arms. A more sweeping example of post-Heller litigation is McDonald v. Chicago (561 U.S. 3025 (2010), two years later. In that decision, the Supreme Court threw out Chicago’s gun ban, at the same time incorporating the Second Amendment so that it applies to the states as well as to federal jurisdictions like the District of
Columbia. And on a Saturday some months after the *McDonald* decision, the *Chicago Tribune* reported 17 shootings in the city overnight (Oct. 8, 2011).

**Summation: Words don’t make meanings, people do**

Both English common law and American jurisprudence have always supported the public regulation of weapons, and Justice Scalia tempered his opinion in *Heller* by noting that regulation was both possible and, in some cases, even desirable:

> The Court’s opinion should not be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms.

[*Heller 2008, 54-55*]

Nor does Scalia echo Madison’s argument that well-armed citizens are needed to keep a tyrannical government in check. Though he upholds the individual right to bear arms, Scalia, who likes his guns but also wants to remain secure in his own workplace, thinks it’s fine to keep the armed citizenry in check by continuing to make visitors to the Supreme Court pass through metal detectors.

Regardless of your position in the gun control/gun rights debate, the *Heller* case offers a compelling lesson in how judges create legal meaning. Although the justices make a point of citing language authorities, along with relevant legislative history, both in their opinions and their dissents, Supreme Court decisions are not always guided by grammar books, dictionaries, or idiom. Nor do they always reflect a strict construction of what the Constitution might have meant when it was new.

The American high court has removed the major ambiguity of the Second Amendment and fixed its legal interpretation, at least for now, but the majority and minority opinions in *Heller* show that two groups of highly-educated jurists, who spend their lives interpreting the language of the law, can look at the same text, even when it’s a single, twenty-seven word sentence, and come to opposite conclusions about its meaning.

Former acting Solicitor General Walter Dellinger, who argued *Heller* for the District, reported after the decision that the justices apparently found no middle ground, no basis for compromise, as they decided the case (Charles Dyke, personal communication). That, and the closeness of the vote, suggest that the meaning of the Second Amendment, while fixed legally, remains ambiguous and contested both among justices of the Supreme Court, and beyond the Beltway as well.

That’s consistent with one lesson that linguists teach in many of our classes this side of the looking glass: words don’t make meanings, people do. Language has no existence without interpretation, and like it or not, logic, etymology, historical precedent, dictionaries, grammar books, massive online databases, or other compilations of empirical data are not the only forces that drive interpretation. This is not reassuring to anyone who insists that the letter of the law must mean one thing,
and one thing only, unambiguously, now and forever. But both language and law resist such narrow straits.

Sometimes meaning is clear and consensual: a stop sign means ‘stop,’ or at least ‘totally pause.’ Other meanings can never be nailed down: there will always be multiple interpretations of literature, sacred texts, and the law, ensuring that there will always be work for literary critics, clerics, and lawyers. And sometimes, as in *Heller*, majority rules, and language means what five justices of the Supreme Court choose it to mean, regardless of what the other four might think.

Speaking of the looking glass, as Justice Scalia did so pointedly, 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 this idiosyncratic view of language:

> 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.

In one of his stand-up routines, the comedian Eddie Izzard quips, “the National Rifle Association says that, ‘Guns don't kill people, people do,’ but I think the gun helps” (2007). In *Heller*, Justice Scalia has shown us which interpretation of the Second Amendment is to be master, and now we will have a chance to see whether all those extra guns the Court allowed in Washington, D.C., Chicago, and everywhere else in the country, will help.