American jurisprudence operates on the notion that the words of our statutes carry their ordinary meanings unless they’re explicitly defined otherwise by the statute itself. But plain meaning isn’t always evident, so lawyers and judges may consult dictionaries and grammars for help, particularly those linguistic authorities that come down on the right side of the issue.

A recent study shows that the justices of the U. S. Supreme Court are relying on dictionaries more than ever to interpret our laws. They’ve looked up almost 300 words in the past decade (Kirchmeier and Thumma 2010), not technical terms but ordinary ones like also, if, and of, whose meaning is not as plain as one might think. In one week alone, Chief Justice Roberts consulted five different dictionaries (Liptak 2011). When was the last time you did that?

In a recent landmark case, the Court considered evidence from both dictionaries and grammars as it parsed the meaning of the Second Amendment, the one about the right to bear arms. But when the language authorities didn’t support the interpretation the justices were looking for, the court dismissed them as irrelevant and immaterial.

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 that amendment. Because the Court of Appeals had used some grammatical arguments to strike down the gun ban, the District’s Attorney General asked me to prepare an amicus brief on the linguistics of the Second
Dennis Baron, “Guns and Grammar,” 2

Amendment, explaining its 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 ban guns. I recruited the linguists Dick Bailey and Jeff Kaplan to assist in this effort.

Opponents of the gun ban presented their own grammatical analysis of the Second Amendment to support their claims. But the linguistic evidence was not dispositive. In a 5-to-4 vote, the Supreme Court split along ideological rather than grammatical lines: the majority ruled that the District’s ban on handguns was unconstitutional, and the minority, reading the same twenty-seven word amendment, came to the opposite conclusion.

Let’s take a look at the linguistic arguments put forth by both sides in this precedent-setting case. The Second Amendment, adopted with 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 and early printed versions of the right-to-bear-arms amendment. It was originally the fourth of twelve amendments proposed. The ten that passed form the Bill of Rights.

For over 150 years, American courts interpreted this sentence as establishing the right of the people to possess arms when serving in the militia. This “collective rights” interpretation was affirmed in three Supreme Court decisions. But in 1960, opponents of
gun control began asserting an alternate, individual rights interpretation, which ignored the militia clause and stressed every American’s right to tote a gun regardless of military service. They even started calling this new reading the “standard model,” as if the older collective rights model had never existed (Bogus 2000b).

England has had strict weapons control since the 14th-century, when regulations began stipulating that guns were for the wealthy, not the peasants or the middle class (Schwoerer 2000). Even the English Bill of Rights of 1689, the statute often cited by American gun lobbyists as guaranteeing everyone’s right to bear arms, limited such ownership to Protestants, provided they belonged to the right social class, and acknowledged the role of the law in further regulating weapons: “that the subjects which are Protestants may have arms for their defence suitable to their conditions and as allowed by law.”

In March, 2007, the U.S. Circuit Court of Appeals for the District of Columbia embraced the new individual rights model and ruled that D.C.’s handgun ban was unconstitutional (Parker v. District of Columbia 2007). Judge Charles Silberman wrote in his opinion that the first clause of the Second Amendment, the “militia clause,” was merely prefatory, a bit of constitutional throat-clearing that had no bearing on the amendment’s “operative” second clause. And that operative second clause, “the right of the people to keep and bear arms, shall not be infringed,” prevented the city of Washington from banning handguns.

Opponents of gun control have argued that there are linguistic reasons for dismissing the first part of the Second Amendment as merely “prefatory” or “preambulatory,” even though 18th-century readers would never have seen it that way. In
addition, they reinterpret the meanings of the phrase *bear arms* and the word *militia* in ways that support their cause but go against the sense those words had in the federal period, and continue to have today.

In support of the District of Columbia’s appeal to reverse that lower court ruling, we 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 is tied to military contexts, not to 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.

**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 18th-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 et al. v. District of Columbia* 2007). Silberman’s argument that prefatory material is not pertinent reflects the conclusion that Nelson Lund reaches in his own discussion of the Amendment’s “preambulatory” absolute (Lund 2007). Lund 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 conforms the two clauses and 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]

But while it is true that the second comma divides the sentence syntactically, it is certainly not the case that such punctuation divides the unimportant from the significant parts of a sentence, either in the 18th century or today, and an examination of absolutes in English shows that they should not be delinked.

**So what’s an absolute when it’s at home?**

The grammarian C. T. Onions writes that this type of phrase is called *absolute* “[Lat., *absolutus* = free] because…it *seems* to be free of the rest of the sentence” (Onions 1904,
Seems is the operative word here. Grammatical independence is not semantic independence. The opposite of independence is governance. As Bishop Lowth put it in his influential grammar of 1762, “Government, is when a word causeth a following word to be in some case, or mode” (Lowth 1762, 95). In Lowth’s day, English absolutes took the nominative, also called the ungoverned case, and so appeared to be grammatically independent. But that’s because Modern English nouns had lost most case markings. In Old English, the nouns in absolutes took the dative (cf. the Latin ablative absolute), marking the subordination of the absolute to the main clause of the sentence. The grammatical independence of the absolute is apparent, not real, the accident of a morphological change, not a syntactic or semantic one. William Ward (1767) shows just how important the absolute is when he tells us it’s the equivalent of a whole sentence, and Goold Brown (1880, 536) says that it “is often equivalent to a dependent clause commencing with when, while, if, since, or because.”

Using this analysis, we can express the interdependence of the two parts of the Second Amendment this way: ‘Since 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.’

Onions finds that although absolutes were relatively rare in earlier periods of English, by the 17th century the absolute had become thoroughly naturalized, offering “an important . . . resource [to] all writers . . . for the purpose of expressing subordinate conceptions” (Onions 1904, 69).

Americans had probably seen their share of absolutes long before they read the Second Amendment. They might even have been tested on it in grammar school in some federalist version of “No Child Left Behind.” But even without formal schooling, 18th-
century Americans 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.

The absolute was certainly familiar to James Madison, who drafted the Second Amendment and who often used absolute constructions in his essays and correspondence. Madison would not have used absolutes if he suspected that his readers might find them odd, ambiguous, or unimportant.

That the Second Amendment is the only one of the first ten with a causal phrase further suggests the militia clause is important, not just decorative. Even Lund acknowledges as much when he calls it the amendment’s most significant grammatical feature, though he then proceeds to tell us how insignificant it really is (2007, 12).

**A well-regulated militia**

Hedging their bets, gun rights advocates argued in *Heller* that, even if the “militia clause” does have some significance, they would read the word *militia* as referring to everybody. Supporters of gun control interpret *militia* more narrowly as the members of the National Guard, the military force that evolved from the 18\(^{th}\) -century American state militias.

According to the Constitution, the militia consists only of those eligible to serve. In the framers’ day, that included able-bodied, free white males, typically aged 16–45, not the entire group of men, women and children.
Madison considered *militia* to refer to such a subset. In *Federalist 46* he addressed the concerns of antifederalists by proposing a militia of half a million citizen soldiers (out of a population of close to 4 million in 1790), whose presence would prevent any excesses of a federal government or its standing army of 24,000 (Madison 1788, *Federalist 46*). But in practice the militia serves as an extension of the military, not a force for keeping it in check.

The Second Amendment was revised and sharpened several times before it was finally passed, and in that process a provision was discarded which dealt with conscientious objectors—Quakers who, though they may have hunted for food, consistently refused to bear arms. The final version offered for ratification retained its emphasis on the well-regulated militia, a further reason not to dismiss the importance of the Second Amendment’s absolute construction.

**To keep and bear arms**

Also in dispute in *Heller* is the meaning of the phrase *bear arms*.

*Bear arms* (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.

In his legal dictionary, John Cowell (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.” However, while arms may be
anything from Saturday night specials and brass knuckles to broken beer bottles 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]

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 (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, Huntings, Meetings or any other occasion whatsoever.
This act bans “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 wanted a Bill of Rights attached to the Constitution, and who tried unsuccessfully to extend bear arms in their version of the Second Amendment to include not just protecting the state, but also hunting and 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]

But even their proposal 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 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).

What’s important for Constitutional interpretation is the fact that the final version of the 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.

Nineteenth- and twentieth-century dictionaries confirm that *bear arms* refers to military service. 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 redefined the phrase more generally as “to carry or possess arms,” with the Second Amendment cited to illustrate the definition.

But despite the insistence of gun rights advocates, the idiom does not stretch comfortably to accommodate this meaning. In oral arguments in *Heller*, Justice Souter challenged Solicitor General Paul Clement on the meaning of *bear arms*.

When Clement interpreted *bear arms* as ‘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 wasn’t convinced. He asked, “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 the point: “Well, I will grant you this, that ‘bear arms’ in its unmodified form is most naturally understood to have a military context.” Or, as the historian Garry Wills (1995) puts it, “One does not bear arms against a rabbit.”

**The Heller Decision**

But apparently Justice Scalia, who likes to hunt, can do just that. Writing the majority opinion in *Heller*, Scalia dismissed the Linguists’ Brief because as he sees it, *bear arms* only has a military context in the full phrase, *bear arms against* (Washington, D.C., 2008, Opinion, 12). But he adds that even *bear arms against* isn’t limited to soldiering: “The fact that the phrase was commonly used in a particular context does not show that it is limited to that context” (15). Scalia then characterized our historical arguments as “unknown this side of the looking glass (except, apparently, in some courses on Linguistics)” (15) and “worthy of the mad hatter” (16).

[That’s like the best rejection slip I ever got.]

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.

[Washington, D.C., 2008; Stevens Dissent, 16]
Stevens added 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 acknowledged that, although 18th-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, “the inherent right of self-defense has been central to the Second Amendment right” (Washington, D.C., 2008, Opinion, 56)—this reasoning from the same Mad-Hatter justice who told an audience at Hastings just last year that the notion of an implicit Constitutional right to privacy is “a total absurdity” because, after all, there is no mention of privacy in the Constitution.

As 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 as part of a living constitution. 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, which is reserved for what liberal judges do so recklessly, but ‘judicial engagement,’ which reflects the right way to make the law mean what it is supposed to mean.]

The ruling in Heller has made it more difficult to regulate firearms in ways that meet constitutional tests. Two years after Heller, in McDonald v. Chicago (08–1521, 2010), the Court threw out that city’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 recent Saturday, the Chicago Tribune reported 17 shootings in the city overnight (Oct. 8, 2011).

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.


Nor does Scalia echo Madison’s argument that well-armed citizens are needed to keep the federal 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.

Summation

The Heller case offers a compelling lesson in how judges create legal meaning. Although the justices make a point of citing language authorities 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 any ambiguity and fixed the legal interpretation of the Second Amendment, 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, a single sentence, and come to opposite conclusions about its meaning.

Former acting Solicitor General Walter Dellinger, who argued *Heller* for Washington, D.C., noted 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 remains ambiguous and contested both among justices of the Supreme Court, and beyond the Beltway as well.

By a one-vote margin, one interpretation of the problematic words of the Second Amendment becomes law, the other becomes a legal footnote. And that’s a lesson that linguists teach in many of our classes: 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, or other compilations of empirical data are not the only forces that drive interpretation.

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.

And speaking, of the other side of the looking glass, 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.”


In one of his comedy routines, Eddie Izzard says, “the National Rifle Association says that, ‘Guns don't kill people, people do,’ but I think the gun helps.” 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., and everywhere else in the country, will help.
Works cited

Address. 1787. The address and reasons of dissent of the minority of the Convention of the State of Pennsylvania, to their constituents. Early American Imprints, ser. 1, no. 20619.


Cowell, John. 1701. The interpreter of words and terms, used either in the common or statute laws of this realm, and in tenures and jocular customs. London.


Freeman, Samuel. 1805. The town officer, or, The power and duty of selectmen, town clerks ... and other town officers: as contained in the laws of the Commonwealth. 6th ed., Boston.


Madison, James. 1788. Federalist 46. www.yale.edu/lawweb/avalon/federal/fed46.htm

Martin, Josiah. 1776. North-Carolina, St. By His Excellency Josiah Martin, His Majesty's captain-general, governor, and commander in chief in and over the said province. A proclamation. April 7. Early American Imprints, series 1, 14949.


Murray, Lindley. 1795. *English grammar, adapted to the different classes of learners.* London.


[www.nybooks.com/articles/1720](http://www.nybooks.com/articles/1720)