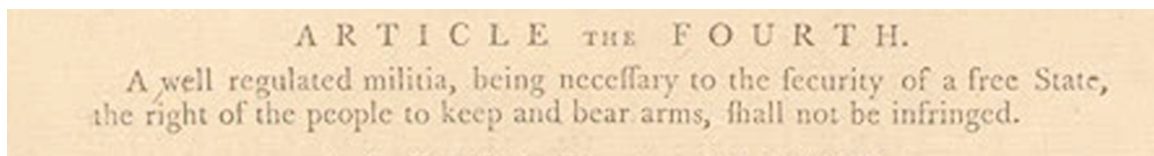
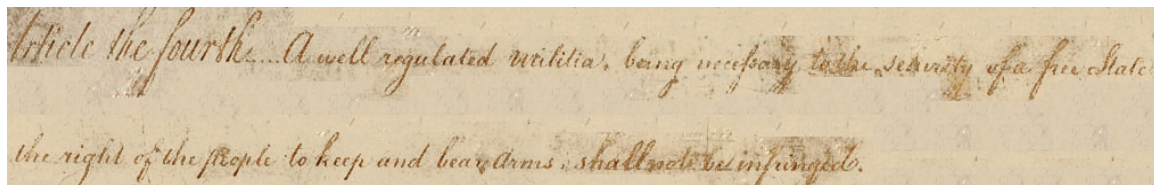


Guns and Grammar: the Linguistics of the Second Amendment

Dennis Baron

The Second Amendment to the U.S. Constitution 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 amendment

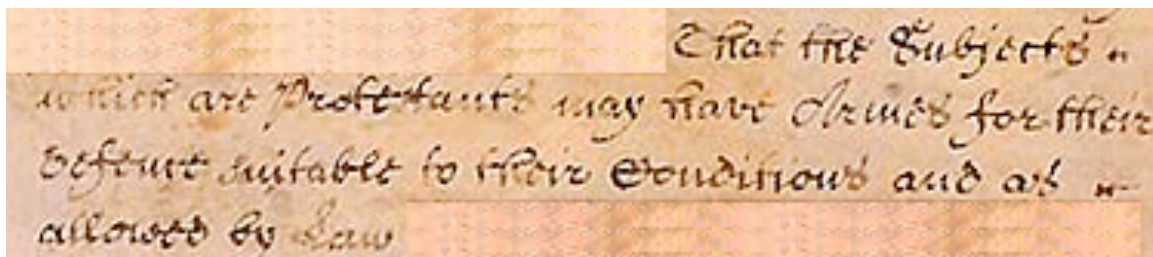
Originally the fourth of twelve constitutional amendments proposed in 1789, it was ratified by the states in 1791, along with the nine other amendments we call the Bill of Rights.

English common law had long acknowledged the importance of effective arms control, and the meaning of the Second Amendment seemed clear to the framers and their contemporaries: that the people have a right to possess arms when serving in the militia. Over the years, this “collective rights” interpretation of the Second Amendment was upheld in three Supreme Court decisions, in 1876, 1886, and most recently, in 1939 (Bogus 2000). The meaning of the Second Amendment remained uncontroversial until 1960, when a law review article using sources like *American Rifleman* asserted an additional, individual, right to bear arms for the purposes of self-defense (Hays 1960). Since that time, a growing bloc of constitutional scholars and historians has asserted that only the individual rights interpretation of the right to bear arms is correct, even calling this new reading the “standard model,” as if the original, collective rights interpretation hadn’t prevailed for more than a century (Bogus 2000b). And the majority of Americans now believe that the Second Amendment guarantees their right to tote a gun.

Over the past twenty years, the individual rights model has been used to block passage of gun control laws, or to undercut them – for example, the assault weapons ban of 1994 was allowed to expire ten years later because of pressure from gun-rights organizations.

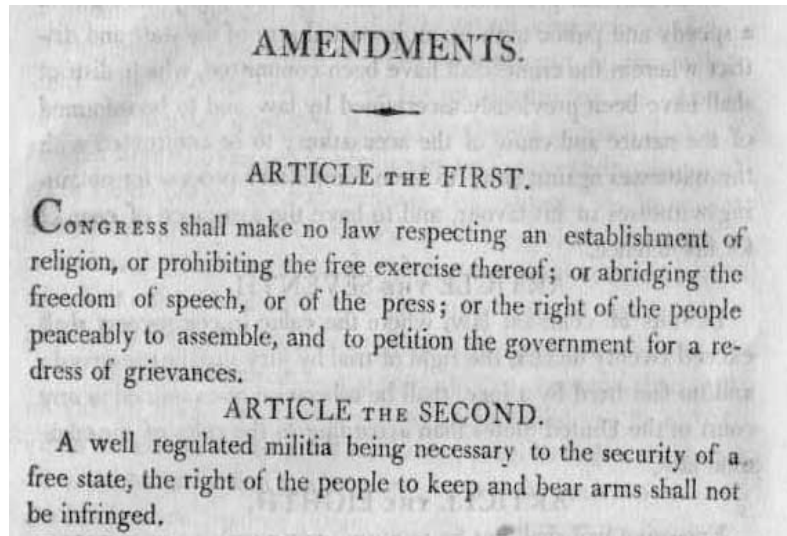
Despite the gun lobby’s insistence on a long common law tradition supporting the individual’s right to weapons, gun regulation has been a feature of English law since the

14th century, when a series of Game Laws expressly restricted weapons ownership to members of the gentry who met thresholds of income and land ownership – guns were for the wealthy, not the peasants or the lower middle class (Schwoerer 2000). Even the English Bill of Rights, presented by the House of Commons to the new monarchs William and Mary in 1689, the very statute that is often cited by gun lobbyists as guaranteeing everyone's right to own weapons, limited such ownership to Protestants, provided they were of 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*" (English Bill 1689, emphasis added; Blackstone, whose opinions are frequently considered by the justices of the U.S. Supreme Court, echoes this qualification of weapons ownership in his *Commentaries*).



detail from the English Bill of Rights

The British have continued their long tradition of relatively strict gun control, but in the United States resistance to gun regulation is on the increase. Most recently, in March, 2007, the U.S. Circuit Court of Appeals for the District of Columbia embraced the new individual rights model and ruled that Washington, D.C.'s, ban on handguns, in effect since 1976, violated the Second Amendment's guarantee of the right to keep and bear arms (*Parker v. District of Columbia* 2007). As the court saw it, the Second Amendment did not explicitly connect gun ownership with militia service. Writing the majority opinion in the case, Judge Charles Silberman ruled that the first clause of the Second Amendment, called 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 clause prevented the city of Washington from banning handguns.



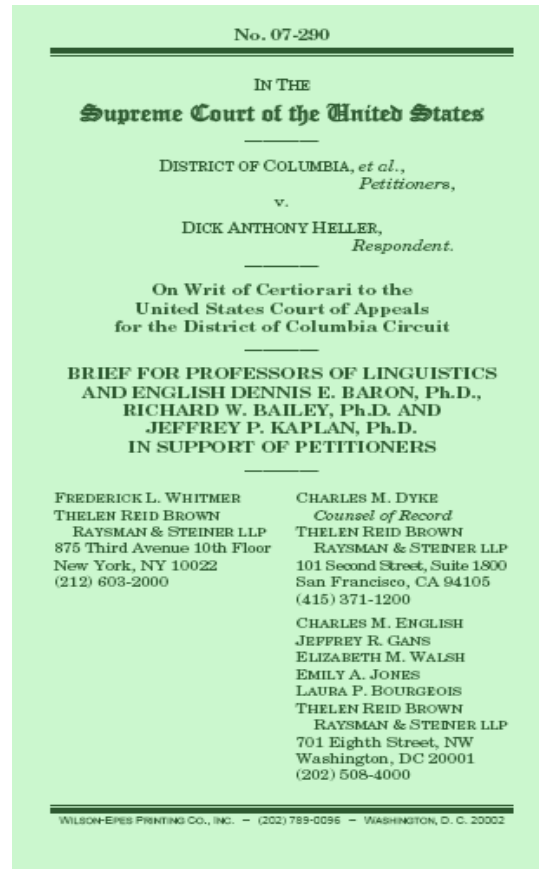
Early printed version of the first two amendments

Washington, D.C., promptly appealed this decision to the U.S. Supreme Court, which granted certiorari and heard oral arguments in the case, renamed *District of Columbia v. Heller*, on March 18 (07-290). The court will issue its decision by the end of the current term, in June.

In support of its appeal, the District solicited amicus briefs from groups supporting its position, including concerned historians, the American Academy of Pediatrics, the Brady Center to Prevent Gun Violence, the City of Chicago, groups of mayors, legislators, and district attorneys, the NAACP Legal Defense Fund, and the American Bar Association.

Because I had written an op ed essay in the *Los Angeles Times* questioning the historicity of the Appeals Court's interpretation (Baron 2007), the District's attorney general asked me to prepare an amicus brief on the linguistics of the Second Amendment, explaining the amendment's grammatical structure and tracing the meaning of its key words from the eighteenth century to the present. Toward the end of the process I finally managed to persuade two colleagues, Dick Bailey, of the Univ. of Michigan, and Jeff Kaplan, of San Diego State, to join me in the group which I then renamed *amici linguarum*, the friends of language, as we refined and submitted the brief whose final version was actually drafted by our counsel, Charles Dyke, and titled "Brief for Professors of Linguistics and English" (Baron et al 2008).

Briefs for the gun rights side dismiss our claims as incorrect or overly-fussy grammar lessons. But from the questions and discussion during oral arguments in *Heller*, it was clear that at least Justice Souter had read our brief and found it convincing. This is certainly the closest I have managed to come, in my career, to using linguistic evidence to influence public policy.



The linguists' amicus brief

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 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, that the right to keep and bear arms is tied directly to the need for a well-regulated militia;
4. that the ordinary and customary meaning of the phrase *bear arms* in the 18th century is tied to military contexts, not to contexts involving hunting or self defense;
5. and that the word *militia* refers in the federal period to an organized and trained body of citizen-soldiers, or to those eligible to serve in such a body, not to any and all Americans, most of whom were actually barred from militia service.

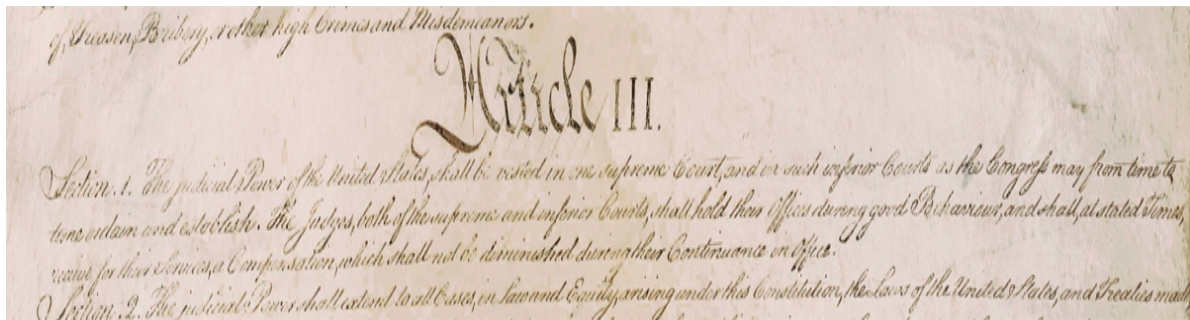
Syntax of the Second Amendment

Reading the Second Amendment as a statement in which every word counts follows from the opinion articulated by Chief Justice John Marshall: “It cannot be presumed that any clause in the constitution is intended to be without effect” (*Marbury v. Madison*, 1803). But even without that landmark ruling, it would have been clear to 18th-century readers that the first part of the Second Amendment was bound to the second part 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 Appeals Court opinion, Judge Silberman pays particular attention to the punctuation of the Second Amendment: “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). While it is true that the second comma divides the sentence syntactically, it is certainly not the case that such punctuation is necessarily used to divide the unimportant from the significant parts of a sentence, either in the 18th century or today.

Because modern punctuation practice is well regulated, we as 21st-century readers may be tempted to ascribe more to the Second Amendment’s punctuation than is warranted. Punctuation was not an important part of 18th-century writing instruction. The most popular grammars in the framers’ day were written by Robert Lowth and Lindley Murray. Though both are concerned with correcting writing mistakes, and both give a number of rules for comma use, what Lowth tells us is not very encouraging to those who look to punctuation as an exact science: “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 judgment and taste of the writer” (Lowth 1762, 155).

In addition to signaling syntactic breaks, eighteenth-century punctuation allowed for commas to be inserted as needed for breathing. Here is an example of such a pause, from Article III, section 1 of the U.S. Constitution: “The judicial power of the United States, shall be vested in one Supreme Court.”



Article III of the Constitution

The comma in that sentence does not separate prefatory material from substance. Instead, it marks a pause for breath. But times have changed. If a student put that comma in a paper today, it would be marked wrong.

The Constitution has other punctuation practices we would also consider irregular. For example, in Art. I, sec. 10, the framers write the possessive *it's* (modern practice would require *its*): “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).

Even 20th-century constitutional amendments show irregular comma use. The 18th Amendment contains commas, normally used today to set off nonrestrictive clauses, to mark instead what must be read as a restrictive relative clause: “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). So does the even more recent 27th Amendment (one of the original 12 amendments, but not ratified until 1992): “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).

While it is popularly held that the presence or absence of a comma can have a critical impact on the interpretation of a contract or a law, these examples demonstrate that, even today, punctuation in such carefully-drafted documents as constitutions and their amendments does not always reinforce meaning.

But that’s not all. Apparently, some copies of the Second Amendment sent to some of the states for ratification had a different number of commas from the “official” version as printed by the federal government (Van Alstyne 2007). Even the text of the Second Amendment quoted in the Silberman decision contains only the first two commas, not the third. But that should not pose a problem, even for a strict constructionist. Punctuation only loosely correlated with meaning in the 18th 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.

Although Judge Silberman reads it otherwise, the Second Amendment’s second comma tells us that the subsequent clause, “the right of the people to keep and bear Arms, shall not be infringed,” is the logical result of what preceded that comma, “A well regulated Militia, being necessary to the security of a free State.” That is because absolute phrases like the one at the start of the Second Amendment are commonly set off by commas and signal a cause-and-effect logical relationship.

Judge Silberman doesn’t call the “prefatory” phrase an absolute, but his argument that prefatory material is not pertinent draws on the conclusion that Nelson Lund reaches in his own discussion of the Second Amendment’s “preambulatory” absolute (Lund 2007). Lund, whose expertise is law, not language, 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, Justice Kennedy, who clearly preferred an individual rights interpretation of the Second Amendment, 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 an examination of absolutes in English shows that they should not be delinked.

So what's an absolute when it's at home?

The phrase *a well regulated militia being necessary to the security of a free State* is known in grammar as an absolute construction.

Quirk *et al.* (1985) specify that “ABSOLUTE clauses [are] so termed because they are not explicitly bound to the matrix clause [i.e., the main clause] syntactically,” adding, “the logical connection between the clauses is primarily one of reason” and “logical relationships . . . are generally clear from the context. . . . In *-ing* clauses, verbs used dynamically tend to suggest a temporal link, and stative verbs a causal link”:

Reaching the river, we pitched camp for the night. [‘When we reached the river, . . .’]

Being a farmer, he is suspicious of all governmental interference. [‘Since he is a farmer, . . .’]

[Quirk, *et al.*, 1124]

This latter example is much like the absolute in the Second Amendment, which accordingly can be read, ‘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.’

C. T. Onions noted the apparent separation of the absolute clause, while also affirming its function as “equivalent in meaning to Adverb Clauses of Time, Reason, Condition, or Concession, or to an Adverbial Phrase expressing Attendant Circumstance.” Onions further writes, “Such a group is called ‘Absolute’ [Lat., *absolutus* = free], because in construction it *seems* to be free of the rest of the sentence” (Onions 1904, 66; emphasis added).

The absolute *seems* to be free or independent, in part, because, as Murray notes, it is “separated by commas from the body of the sentence” (1795, 162-63). But grammatical independence is not semantic independence. It simply means that the noun in the absolute phrase occurs in the nominative or “common” case. The opposite of independence is governance, the situation in which the case of a noun is “governed” by another structure or by its syntactic function.

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

Bishop Lowth on ‘regimen, or government’

As Lowth put it, “Regimen, or 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, the unmarked, ungoverned case, and so appeared to be grammatically independent, so far as case assignment was concerned. But this independence is an illusion resulting from the loss of case in English. In Old English, the nouns in absolute constructions appeared in the dative (in imitation, most likely, of the

Latin ablative absolute), with the dative case marking the subordination of the absolute to the main clause of the sentence.

Onions gives this example,

OE: ēow slæpendum forstælon thone lichaman ‘[with] you sleeping,
they stole away the body’

which he compares to the Latin ablative absolute: *urbe captā*, rediit domum, ‘with the city taken, he returned home.’

2. But the most common Kind of absolute Construc-
tion is that which is the second in the Rule. This ap-
pears when a Series of Words, containing a *Participle in*
dependence on a Substantive in the Nominative Case, is
made equivalent to a whole Sentence depending on
Conjunction or Relative Adverb; as,

William Ward on the absolute

Some early grammarians acknowledged the true connection between absolutes and the rest of the sentence. William Ward (1767, 145-46)) recognizes both the grammatical and the semantic dependence of the absolute construction and explains that the absolute implies “a whole Sentence” which has a logical relationship – *if/then* or *cause-and-effect* – to the rest of the utterance: “The most common Kind of absolute Construction . . . appears when a Series of Words, containing a *Participle in dependence on a Substantive in the Nominative Case*, is made equivalent to a whole Sentence depending on Conjunction or Relative Adverb,” and Gould Brown (1880, 536) says, “The nominative put absolute with a participle, is often equivalent to a dependent clause commencing with when, while, if, since, or because.”

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 adjunct to style, to which it imparts variety and compactness. It gives life and movement to the sentence, and is the ready resource of all writers of narration and description for the purpose of expressing subordinate conceptions” (Onions 1904, 69).

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*.

Jespersen (1949, V, 46) attributes the nativization of the absolute in the 17th 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 excluded*.

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 both in older forms of English, and 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]

Although some grammarians have called it rare, the absolute construction is far from absent in prose of the federal period, and even without formal grammar study, 18th-century Americans would have had no trouble understanding 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.

But Nelson Lund argues that if the framers really wanted to make this cause-and-effect relationship 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; 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 both familiar and significant to James Madison, who drafted the Second Amendment: an examination of Madison’s letters and papers shows that in addition to the Second Amendment’s “militia clause,” he often used absolute constructions in his correspondence and other writings. A thoughtful writer like Madison would not have used the construction if he suspected that his readers might find it odd or unimportant.

The framers and their contemporaries had probably seen their share of absolutes long before they read the Second Amendment, and it’s also likely that they first encountered the absolute construction when they studied English or Latin grammar in school. They might even have been tested on it in some federal version of “No Child Left Behind.” But even without formal schooling, given normal assumptions about rational communication, it is safe to assume that readers would have found the absolute phrase in the Second Amendment noticeable and understandable, as well as intentional and meaningful.

To keep and bear arms

In addition to the question of the syntax and function of the absolute, the discussion of the meaning of the Second Amendment focuses on the interpretation of the word *militia* and the phrase *bear arms*.

Bear arms (analogous to, and perhaps initially a translation of, the Latin *arma fero*, or *arma ferre*) typically refers to the act of soldiering and the use of military weapons. Perhaps 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.

Arms themselves are weapons, and in older uses, armor as well.

John Cowell (1701, *s.v. armor, arma*) writes in his legal dictionary that the signification of *arms* and *armor*, “in understanding of Law, is extended 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 So *Armorum appellatio non utique scuta & gladios significat, sed & fustus & lapides* (‘Arms means not only shields and swords, but also sticks and stones’).”

However, while arms may be anything from Saturday night specials and brass knuckles to broken beer bottles, fistfuls of gravel, and clubs fashioned from tree limbs, 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 in the King’s Name and by his MAJESTY’S Royal Authority offer, 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 (besides the Pay, and every other Encouragement allowed by His MAJESTY to his regular Troops) a Grant or Grants of Land in Proportion to their Circumstances, Merit and Pretensions. . . .

[Martin 1776]

It’s also the metaphorical equivalent of soldiering, as when Hamlet wonders whether to take arms against a sea of troubles.

On very rare occasions, *bear arms* may also 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, Justice Scalia referred to a 1716 Parliamentary act for disarming the Scottish Highlanders to underscore his sense that ‘bear arms’ regularly refers to carrying weapons in nonmilitary contexts:

[A]s I recall the legislation against Scottish highlanders and against – 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]

What the Highlander statute actually says is

that . . . it should not be lawful for any Person or Persons . . . to have in his, her or their Custody, use or bear, Broad Sword or Target, Poynard, Whingar or Durk, Side-Pistol or Side-Pistols, 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.

‘ W H E R E A S by an Act made in the first Year of his Majesty’s Reign, intituled, *An Act for the more effectual securing the Peace of the Highlands in Scotland*, it was enacted, That from and after the first Day of November which was in the Year of our Lord one thousand seven hundred and sixteen, it should not be lawful for any Person or Persons (except only such Persons as are therein mentioned and described) within the Shires of *Dunbartain* on the North-side of the Water of *Leven*, *Sterling* on the North-side of the River of *Forth*, *Perth*, *Kincairdin*, *Aberdeen*, *Inverness*, *Nairn*, *Gromarty*, *Argyle*, *Forfar*, *Banff*, *Sutherland*, *Caithness*, *Elgin* and *Ross*, to have in his, her or their Custody, use or bear, Broad Sword or Target, Poynard, Whingar or Durk, Side-Pistol or Side-Pistols, 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, within the Parish

Detail of the Highlanders Statute of 1716

This law bans weapons which qualify as “warlike” from public gatherings, and its goal is to disarm the population – both men and women – not to prevent them from hunting or defending their homes against criminal trespass, but in order to end organized rebellion against the crown in Scotland. Its impact was to hamper hunting and self-defense as well, to be sure, an act which surely aroused further antipathy toward the crown, but that was not its primary intent.

In another example where *bear arms* may be thought to refer to nonmilitary use of weapons, the opponents of gun control make much of the minority view expressed by the antifederalist faction in the Pennsylvania convention to ratify the Constitution, who try to extend *bear arms* to include not just the defense of the state, but also hunting and self defense.

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

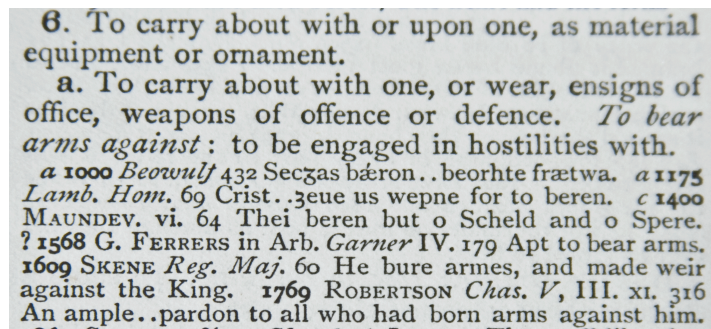
This antifederalist minority argued that it could only support ratification if the Constitution included a Bill of Rights with fourteen additional provisions, including this: “That the people have a right to bear arms for the defense of themselves and their own state, or the United States, or for the purpose of killing game.” Even this Pennsylvania “minority report,” which was rejected, recognizes the need to regulate weapons for the public good: “And 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*” (Address 1787, 6; emphasis added).

Pennsylvania ratified the Federal Constitution without a Bill of Rights, but it did include a Bill of Rights in its state constitution of 1790. That bill omitted hunting from its scope, but it did refer to personal self defense: “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 state constitution of 1802 (Davis 1823, 91; 179). However, this extension of *bear arms* to include self defense alongside the traditional civil defense is rare and suggests an attempt on the part of Pennsylvania and Ohio to broaden the customary

understanding of *bear arms*. But again, even so, the Second Amendment does *not* include such language.

The Pennsylvania and Ohio state constitutions appeared *after* the Second Amendment was drafted, and whether they seek to remedy a perceived defect in the Second Amendment by applying the right to bear arms to individual self defense, 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 used, for example, in Article XVII of the 1805 Massachusetts constitution, which reads, “The people have a right to keep and to bear arms for the common defence” (Freeman 1805, 11).

In any case, 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.



Original OED (1888) entry for *bear arms*

Nineteenth- and twentieth-century dictionaries that record the phrase agree that *bear arms* refers either to military service or to the wearing of heraldic insignia. *The Oxford English Dictionary* (1888, s.v. *bear*, vb.) defines *bear arms against* as “to be engaged in hostilities with.” Funk and Wagnall’s *New Standard Dictionary* (1929, s.v. *bear*, vb.) has “to do military service,” and *Webster’s Second New International Dictionary* (1934, s.v. *bear arms*) defines the phrase as, “To serve as a soldier.”

More recently, though, *Webster’s Third* (1961, s.v. *bear*) moved away from the military reference, perhaps in response to a broadening of *bear arms* by today’s gun rights advocates, redefining the phrase more generally as “to carry or possess arms,” with a citation to the Second Amendment: “the right of the people to keep and *bear arms* – *U.S. Constitution.*”

Although groups like the National Rifle Association are flooding the language with prose in which *bear arms* is a synonym for carrying guns, the idiom does not stretch comfortably to accommodate this meaning. In oral arguments in the *Heller* case, Justice Souter challenged Solicitor General Paul Clement on the meaning of *keep and bear arms*. Souter felt *keep and bear* was a unitary phrase, like *ordinary and customary*, while Clement read them as two separate verbs, with *keep arms* meaning ‘to store them at home,’ and *bear arms* meaning ‘to carry them outside the home.’

Souter asked Clement, “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, I would submit.” But Souter wasn’t convinced, and rephrased his question, “Somebody going out to – 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, no, it is not the way they talk: “Well, I will grant you this, that ‘bear arms’ in its unmodified form is most naturally understood to have a military context.” And Justice Souter concluded the exchange, “But it’s ‘arms’ that has the kind of the military – the martial connotation, I would have thought” (Supreme Court 2008, 36- 37). As Justice Souter knew, from the first occurrences of the phrase to today, *bear arms* does not typically refer to hunting or to personal self defense. Or, as the historian Garry Wills (1995) put it, “One does not bear arms against a rabbit.”

A well-regulated militia

Disputing the meaning of the word *militia* in the Second Amendment, legal scholars ask, does *militia* refer to an organized and trained fighting force, or does it refer to 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, even if the “militia clause” has some significance, then they would like *militia* to include everybody. 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 18th-century American state militias.

Fortunately, the Constitution itself guides us in the interpretation of *militia*. Article I, section 8 of the Constitution 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; To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress.”

It is the militia’s job, according to the Constitution, to enforce the law, suppress insurrection, and repel invaders. 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. It is not a collection of disgruntled white supremacists who reject government authority and refuse to pay taxes. It is not a hunt club. 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 their way out of 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.

This American definition of *militia* is in keeping with the word's 18th-century meaning. Dr. Johnson's *Dictionary* (1755, *s.v.*) defines *militia* as "the trainbands; the standing force of a nation" (*trainband* is a 17th-century term, no longer in use, for a temporary, citizen-army; while *standing force* refers to a standing or permanent army). Noah Webster defines *militia* (1828, *s.v.*) as,

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..oblige either all the citizens of the military age, or a certain number of them, to join in some measure the trade of a soldier to whatever other trade or profession they may happen to carry on... *Its military force is [then] said to consist in a militia.*"

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, without enlistment, 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 James Madison, who drafted the Bill of Rights, considered the word *militia* to refer to such a fighting force composed of a subgroup of American citizens, rather than to each and every individual American. In the *Federalist Papers* Madison, addressing the concerns of antifederalists, envisioned a militia of citizen soldiers whose presence would keep in check any excesses of a federal government or its standing army:

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 with that of a standing or professional one. But although the United States had just fought a war against an unjust government, the Constitution did not constitute the militia to foment rebellion against an unjust government or to threaten the army. Instead, it is a military arm of both the states and the federal government which may be called upon as needed to enforce the law. As we saw when Pres. Eisenhower called out the National Guard to enforce federal desegregation in the Little Rock schools, or when George 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 insurrections and repelling foreign threats.

The Second Amendment was revised and sharpened before it was finally passed. During this editing, the militia clause was not cut from the amendment, though another provision was discarded which dealt with conscientious objectors – Quakers who, though they may have hunted for food, consistently refused to bear arms. A version of the Second Amendment approved by the Senate shows a slightly different 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 yet again to read, “A well regulated Militia, being necessary to the security of a free State,” placing continued emphasis on the importance of the militia, a further reason not to dismiss the importance of the Second Amendment’s absolute construction.

Conclusion

In our amicus brief in the Heller case we attempted to demonstrate,

- that the Second Amendment must be read in its entirety, and that its initial absolute functions as a subordinate adverbial that establishes a cause-and-effect connection with the amendment’s main clause;
- that the vast preponderance of examples show that the phrase *bear arms* refers specifically to carrying weapons in the context of a well-regulated militia;
- that the word *militia* itself refers to a federally-authorized, collective fighting force, drawn only from the subgroup of citizens eligible for service in such a body;
- and that as the linguistic evidence makes clear, the militia clause is inextricably bound to the right to bear arms clause.

18th-century readers, grammarians, and lexicographers understood the Second Amendment in this way, and it is how linguists have understood it as well.

Even so, words don't make meanings, people do. Supreme Court decisions are not always guided by syntax, dictionary definitions, or the idiomaticity of language. Nor do they always reflect a strict construction of what we think that the Constitution meant in 1789. And despite the *Marbury v. Madison* confirmation that every word of the Constitution is there for a reason, parts of the Constitution no longer apply to contemporary life.

For example, the 3rd amendment seems pretty much dead letter law today: "No Soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law." In addition, the Supreme Court has upheld rights to privacy, for example, though privacy itself is never explicitly mentioned in the Constitution.

While we will know the Supreme Court's decision in the Heller case in the next month or two, oral arguments in Heller suggest a possible outcome in that case. At least five justices favor an individual rights interpretation of the Second Amendment: Roberts, Scalia, Alito, Kennedy, and Thomas (the latter did not ask any questions, as is his custom, but he has elsewhere indicated his support for such an interpretation). Justices Breyer, Souter, and Stevens, from their remarks and questions, seemed to favor a collective-rights view, and Justice Ginsberg may also vote with this liberal minority.

However, since both English common law and American jurisprudence have always supported the public regulation of weapons, it is less likely that the Court will invalidate all gun control. Instead, the Court is likely to decide the case narrowly, either supporting the Appeals Court invalidation of the D.C. handgun ban, in which case the District will have to rewrite its gun law, perhaps permitting regulated handgun ownership instead of an outright ban. Or the Court will remand back to the Appeals Court, instructing the court below to narrow its overly broad ruling.

In addition, though, the high court may recognize a constitutional right to gun ownership, and that in turn will make it much more difficult to regulate firearms in ways that meet constitutional tests. The First Amendment recognizes a right to free speech, but it is far from absolute: speech may still be regulated in many instances, though each regulation must be justified. Nevertheless, an individual gun-rights reading in Heller is certain to bring challenges to almost every gun control ordinance on the books, and although anyone entering the Supreme Court building will still have to go through a metal detector, cities and states may soon find themselves tied up in court justifying weapons regulations to skeptical conservative judges like Nino Scalia, who like to hunt.

Interestingly, it has been the "liberal" side in Heller, the supporters of gun control, who have argued, as we do in our brief, more of a strict-constructionist or originalist position, while the "conservative" opponents of gun regulation have preferred to stretch the meaning of the amendment, stressing the need for personal gun ownership, not in order to bear arms against a tyrannical government but in order to fight the current epidemic of urban crime, or to defend themselves by bearing arms against killer rabbits.



Killer rabbit defeats King Arthur's militia in "Monty Python and the Holy Grail" (1975)

Or, as the late Charlton Heston might have put it, when guns are outlawed, only rabbits will have guns.

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