Not semantics but just results: The use of linguistic analysis in constitutional interpretation

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Abstract

The role of judges is to apply the law in order to decide disputes. In so doing, they are often called upon to interpret statutory and constitutional provisions, and their opinions in such cases may be presented as linguistic analyses. This paper examines the use of linguistic arguments in the case of District of Columbia v. Heller, in which the United States Supreme Court was asked to determine whether a statute severely restricting the right to possess firearms violated the Second Amendment of the federal Constitution. The parties advanced conflicting interpretations of the amendment which the Court resolved on ostensibly semantic grounds, provoking a strong dissent that criticized the majority's interpretation as unfounded. This paper presents an analysis of the Court's majority opinion that seeks to demonstrate the problems that arise when the rules and principles that are used to decide a case are linguistic rather than legal. I argue that the focus of the law is justice and not semantics, and it is therefore inappropriate to limit the analysis of legal questions to linguistic arguments. In so doing, I demonstrate the role of applied pragmatics in exploding an interpretive strategy that has proven to be impervious to legal argument.

Keywords: Legal language; Ambiguity; Dictionaries; Word meaning; Semantic analysis

1. Introduction

The role of judges is to apply the law in order to decide disputes. In so doing, they are often called upon to interpret statutory and constitutional provisions, and their opinions in such cases may be presented as linguistic analyses. This practice has been extensively examined by Solan (1993a,b, 1995, 2003), a lawyer who is also a linguist, who warns against substituting linguistic interpretation for legal doctrine (see, e.g., Solan, 1993b:185–186). Like Solan, I am both a lawyer and a linguist and, like Solan, I question whether linguistics can be properly substituted for law.

This paper examines the use of linguistic arguments in the case of District of Columbia v. Heller, in which the United States Supreme Court was asked to determine whether a statute severely restricting the right to own firearms violated the Second Amendment to the Constitution. The parties advanced conflicting interpretations of the amendment which the Court resolved on ostensibly semantic grounds, provoking a strong dissent that criticized the majority's interpretation as unfounded. This paper presents an analysis of the Court's majority opinion that seeks to demonstrate the problems that arise when the rules and principles that are used to decide a case are linguistic rather than legal. I argue that the focus of the law is justice and not semantics, and it is therefore inappropriate to limit the analysis of legal questions to linguistic arguments.

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arguments. In so doing, I demonstrate the role of applied pragmatics in exploding an interpretive strategy that has proven to be impervious to legal argument.

2. The Heller case

The District of Columbia (the “D.C.” in “Washington, D.C.”) is the seat of government of the United States, and its 61-square-mile area houses the centers of all three branches of the federal government: the White House, Congress, and the United States Supreme Court. Like many large cities in the United States, the District witnessed a rise in violent crime in the second half of the twentieth century. In an effort to remedy this situation, it enacted laws prohibiting the possession of functional firearms in the home.

In 2003, Dick Heller, a District of Columbia special police officer assigned to the Federal Judicial Center, where he was authorized to carry a handgun while on duty, challenged this prohibition by attempting to register a handgun that he wished to keep in his home. When his application was denied, he filed a lawsuit in the federal district court for the District of Columbia, requesting the court to find that the restrictions violated the Second Amendment to the Constitution, which guarantees “the right of the people to keep and bear Arms”. Finding no merit in Heller’s claims, the court dismissed his suit; however, on appeal, the District of Columbia Circuit Court of Appeals held that the Second Amendment protects an individual right to possess firearms, and that the District’s ban on handguns and its requirement that firearms kept in the home be maintained in a non-useable condition, even when such firearms were necessary for self-defense, violated the Second Amendment.

The District then filed a petition for certiorari in the United States Supreme Court, requesting the Court to review the D.C. Circuit’s opinion; the Court granted the petition and agreed to hear and decide the case. Following briefing and oral argument, on June 26, 2008, the Court affirmed the decision of the District of Columbia Circuit in an opinion written by Justice Scalia and joined by Chief Justice Roberts and Justices Alito, Kennedy and Thomas, holding, largely on semantic grounds, that the Second Amendment “guarantee[s] the individual right to possess and carry weapons in case of confrontation” (Scalia, 128 S.Ct. at 2797), and that the laws challenged by Heller violated that right (Scalia, 128 S.Ct. at 2817–2822). However, this reading of the amendment provoked a strong dissent, announced in an opinion written by Justice Stevens and joined by Justices Breyer, Ginsberg and Souter, which argued pointedly:

> The Second Amendment was adopted to protect the right of the people of each of the several States to maintain a well-regulated militia. It was a response to concerns raised during the ratification of the Constitution that the power of Congress to disarm the state militias and create a national standing army posed an intolerable threat to the sovereignty of the several States. Neither the text of the Amendment nor the arguments advanced by its proponents evidence the slightest interest in limiting any legislature’s authority to regulate private civilian uses of firearms. Specifically, there is no indication that the Framers of the Amendment intended to enshrine the common-law right of self-defense in the Constitution.

(Stevens, Dissenting, 128 S.Ct. at 2822).

This paper presents an analysis of the Court’s majority opinion that seeks to investigate the problems that arise when linguistic rules and principles are substituted for legal doctrine. I will apply both linguistic and legal principles in my examination of this issue.

3. The Second Amendment

The text of the Second Amendment is brief:

> 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.

Yet although it was incorporated into the Constitution in the Bill of Rights in 1791, prior to Heller the precise meaning of its words had not been authoritatively interpreted. In the only previous case in which the Court had considered the question, United States v. Miller (1939), the Court upheld a provision of the National Firearms Act requiring the registration of ‘sawed-off shotguns’ (those having barrels less than 18 inches long) against a Second Amendment challenge, stating that absent any evidence that the possession or use of this particular type of firearm “at this time has some reasonable relationship to the preservation or efficiency of a well regulated militia, we cannot say that the Second Amendment

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2 While joining in this opinion (and thus expressing his agreement with its reasoning), Justice Breyer also wrote a separate dissenting opinion which challenged the majority’s conclusions on additional grounds.
guarantees the right to keep and bear such an instrument” (307 U.S. 174, 178). The Court emphasized that, because the amendment’s “obvious purpose” was to assure the continuation and effectiveness of state militias, “[i]t must be interpreted and applied with that end in view” (307 U.S. 174, 178).

To the lay reader this may appear to confirm that the right bestowed pertains specifically to the use of firearms by state militias. Not so to the legal mind, however. Thus Miller did nothing to quell the burgeoning debate, beginning in the 1980s, and fueled by the proliferation of state and federal laws that regulated the possession, transportation and purchase of firearms, over whether the right granted by the Second Amendment was individual (granting a personal right to possess firearms) or collective (granting a state right to maintain armed militias). Moreover, a striking feature of this debate is the extent to which the proponents of each of the competing views have relied upon the same historical, linguistic and legal arguments to support their conclusions (see, e.g., Kates, 1983; Halbrook, 1984; Levinson, 1989; Cottrol, 1993).

This raises a number of related questions, namely: Are the words of the amendment ambiguous? Would they have seemed ambiguous to the Framers (those who wrote the Constitution and the Bill of Rights)? And, if so, would they have altered ambiguous language to make it clear(er)? These questions will be addressed below.

4. Is the Second Amendment ambiguous?

Is the Second Amendment ambiguous? Readers’ answers to this question may differ; nevertheless, the divergent interpretations of the amendment by legal experts, including the Court's opposing interpretations in Heller, cannot be ignored. Thus whether the ambiguity is inherent in its phrasing or was invented by gun-rights proponents, at this particular moment in history it exists.

What is the locus of this ambiguity? For the Court in Heller, a major area of disagreement was whether the amendment's introductory clause, “A well regulated Militia, being necessary to the security of a free State”, limits the scope of the right to militia-related activities. The dissent maintains that it does, arguing that

the clear statement of purpose announced in the Amendment's preamble...confirms that the Founders' single-minded focus in crafting the constitutional guarantee “to keep and bear arms” was on military uses of firearms, which they viewed in the context of service in state militias.

The preamble thus both sets forth the object of the Amendment and informs the meaning of the remainder of its text. Such text should not be treated as mere surplusage, for “[i]t cannot be presumed that any clause in the constitution is intended to be without effect.” Marbury v. Madison, 1 Cranch. 137, 174 (1803).

(Stevens, Dissenting, 128 S.Ct. at 2826).

The majority argues that it does not; however, in so doing, it states:

The Second Amendment is naturally divided into two parts: its prefatory clause and its operative clause. The former does not limit the latter grammatically, but rather announces a purpose. The Amendment could be rephrased, “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.”

(Scalia, 128 S.Ct. at 2789; citations omitted).

It thus appears that the majority and the dissent agree that the amendment's introductory clause announces its purpose. It is also clear that the majority's rephrasing is supportive of the dissent's interpretation of the amendment's meaning. The amendment's ambiguity would thus appear to lie in the effect of the actual or implied purposive ‘because'. According to this view, the ambiguity is inherent in the phrasing of the amendment. Yet if the language of the Second Amendment is ambiguous, wouldn’t the Framers have been expected to have noted this, and accordingly rephrased it? The answer is: Not necessarily. In the landmark early case of Martin v. Hunter's Lessee (1816), Justice Story, writing for a unanimous Court, explained:

The Constitution unavoidably deals in general language... The instrument was not intended to provide merely for the exigencies of a few years, but was to endure through a long lapse of ages, the events of which were locked up in the inscrutable purposes of Providence. It could not be foreseen what new changes and modifications of power might be indispensable to effectuate the general objects of the charter, and restrictions and specifications which at the present might seem salutary might in the end prove the overthrow of the system itself. Hence its powers are expressed in general terms, leaving to the legislature from time to time to adopt its own means to effectuate legitimate objects and to mould and model the exercise of its powers as its own wisdom and the public interests, should require.

(14 U.S. 304, 326–327.)

According to this view, the Framers of the Constitution, wishing to ensure its permanence and long-term effectiveness, drafted a document which laid down general principles while leaving their precise contours undefined, in order to avoid the
possibility that its scope and effect would be limited by future developments that were not foreseen (see Levi, 1949:58–59; Dworkin, 1997:119–126; see also Mellinkoff, 1963:234–235). In this view, some degree of ambiguity is not only inevitable, but to be desired (Levi, 1949:64–65).

5. Brief for professors of Linguistics and English

In order to aid in the decision-making process, in addition to the briefs submitted by the parties, the Court granted permission to 67 groups or individuals to file amicus curiae (‘friend of the court’) briefs to address various aspects of the issue presented; one of these briefs was filed on behalf of three professors of linguistics and English. The brief was not presented as legal argument, but as a linguistic analysis of the Second Amendment which examined its sentential structure and the meanings of its words and phrases in order “to assist the Court in understanding eighteenth century grammar and the historical meaning of the language used in the Second Amendment.”

The brief appears to have been of interest to the Court: It is cited by Justice Stevens as supporting his critique of the majority opinion, and by Justice Scalia as a crutch relied upon by Justice Stevens. However, although Justice Scalia purports to refute the brief's interpretation, his opinion draws upon its analysis. Relevant portions of the brief's analysis are thus presented here, in order to inform the analysis of Justice Scalia's opinion that is to follow. I adopt the Court's convention of referring to the brief as the ‘Linguists’ Brief’.

5.1. The Linguists' grammatical analysis

In technical grammar parlance, the first clause is an “absolute construction” or “absolute clause.” It functions to modify the main clause the way an adverbial clause does. In traditional grammar, absolute constructions are considered grammatically independent from the main clause, but they add meaning to the entire sentence. It is apparent that one way that absolute constructions add meaning is by establishing the cause or reason for the thing expressed in the main clause. . .

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Absolute constructions that show causation also can be identified through a test in which one tries to deny the causal connection without contradicting oneself (or at least sounding foolish). . .

The Second Amendment's absolute construction expresses the cause for the main clause's prohibition, as it is contradictory (and foolish sounding) to say, “A well regulated Militia being necessary to the security of a free State, the right of the people to keep and bear Arms shall not be infringed; but the fact that a well regulated Militia is necessary to the security of a free State is not the reason that the right of the people to keep and bear Arms shall not be infringed.”

... Most American readers in the federal period, including those without formal grammar study, would have had no trouble understanding that the Second Amendment's absolute construction functioned to make the Amendment effectively read: 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.

(Linguists' Brief, pp. 6–8, 9–10, 14; fns omitted).

As will be seen below, this analysis of the causal function of the amendment's introductory clause is unreservedly adopted by Justice Scalia.

5.2. The Linguists' semantic analysis

The question, then, is what does the specific language used in the Amendment mean? Meaning comes from the words of a text and, importantly, how they are used. As established below, the unmistakably military language used in the Second Amendment makes clear that what is protected is the right of the people to serve in a well regulated militia and keep arms for such service.

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3 It may be argued that generality relates to vagueness and not ambiguity; however, the relationship between vagueness and ambiguity is well recognized in the law. As Waldron explains, “Ambiguity, it can be argued, is a special case of vagueness...and perhaps the first condition in the definition of contestability depends on vagueness also. Contestability will behave like ambiguity in certain contexts, and ambiguity can become contestability when something moral or political seems to be at stake in a discussion about the proper meaning of a term” (1994: 514, n. 10).

4 Dennis E. Baron, University of Illinois; Richard W. Bailey, University of Michigan; and Jeffrey P. Kaplan, San Diego State University. The author is not acquainted with the individuals and is not affiliated with their institutions.
The “well regulated Militia” clause sets forth the cause-and-effect relationship between the Amendment's two halves: *Because X is necessary, Y shall not be infringed*. Because we need a well regulated militia, the right of the people to keep and bear arms shall not be infringed. 

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The phrase “well regulated Militia” is overtly military. 

...The use of the past participle “regulated”...suggests a militia that not only is “subject to” regulation under the militia laws, but also is in possession of the qualities that flow from participation in regular military exercises—orderliness, discipline, proficiency with arms, knowledge about maneuvers and so on. 

...The language of the Amendment, therefore, tells us that the right of the people to keep and bear arms was protected not merely to safeguard the militia, but to safeguard a well regulated militia. 

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The term “bear arms” is an idiomatic expression that means “to serve as a soldier, do military service, fight.” *Oxford English Dictionary* (J.A. Simpson & E.S.C. Weiner, eds., 2nd ed., 1989). ...

Since bearing arms inherently involves the use of weapons, it is not surprising that the term originates from the Latin *arma ferre*, which literally translates as “to bear [ferre] war equipment [arma].” At the time of the Second Amendment's adoption, the word “arms” had an overwhelmingly military meaning. For example, Samuel Johnson's eighteenth century dictionary defines “arms” as: “1. weapons of offence, or armour of defence. ... 2. A state of hostility. ... 3. War in general. ... 4. Action; the act of taking arms. ... 5. The ensigns armorial of a family.” Samuel Johnson, 1 *A Dictionary of the English Language* (1755) (arms, v.) This definition was universal at the time. 

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The verb “to keep” means “to hold; to retain in one's power or possession” and “to have in custody for security or preservation.” Webster, *An American Dictionary of the English Language* (keep, v.) ... Given the Second Amendment's purpose and use of the idiom “bear Arms,” the natural meaning of the adjacent word “keep,” when used in reference to “arms,” is the personal possession or public control of Arms (weapons of offence, or armour of defence) for service in a well regulated militia. 

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By simply (i) giving the idiom “bear Arms” the meaning it had at the time (to serve as a soldier, do military service, fight), (ii) reading the term “well regulated Militia” as it was used at the time (to refer to a militia that not only is subject to regulation under the militia laws, but also well functioning and disciplined), and (iii) looking to the absolute clause's statement of causation (the right to “bear Arms” is protected to perpetuate “a well regulated Militia”) to determine the scope of military service covered by the right (that which is in a well regulated Militia), one finds a balanced text that protects the right of the people to serve in a well regulated militia and keep arms for such service. 

(Linguists' Brief, pp. 14, 14–15, 15–16 (emphasis in original), 18–20 (fn. omitted), 27, 29; fn. omitted.)

6. Analysis: the *Heller* majority opinion

Justice Scalia frames his analysis as linguistic by structuring it upon the Linguists’ Brief. He examines the grammatical function of the amendment's introductory clause, the meanings of the amendment's key words and phrases, and the relationship between its two clauses; he presents his conclusion that the amendment protects an individual right to keep and bear arms as the outcome of this analysis. But although he devotes the majority of his analysis to examining the meanings of the amendment's words, these definitions bear little relationship to his interpretation of the amendment's meaning.

In the following analysis, I examine Justice Scalia's use of linguistic arguments to justify an interpretation of the amendment that excludes the militia language. In so doing, I expose the problems that result when judges resolve legal questions by resort to linguistic arguments.

6.1. The function of the introductory clause

Justice Scalia begins his analysis with the words, “We turn first to the meaning of the Second Amendment.” After quoting the text of the amendment, he cites prior decisions of the Court stating that the Constitution was meant to be understood by voters, and that its words and phrases should accordingly be given their ordinary meanings, but notes that the parties have advanced two very different interpretations of the amendment's meaning (Scalia, 128 S.Ct. at 2788–2789). He then launches his analysis as follows:
(A)

The Second Amendment is naturally divided into two parts: its prefatory clause and its operative clause. The former does not limit the latter grammatically, but rather announces a purpose. The Amendment could be rephrased, “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.” See, J. Tiffany, A Treatise on Government and Constitutional Law §585, p. 394 (1867); Brief for Professors of Linguistics and English as Amici Curiae 3 (hereinafter Linguists’ Brief).

Logic demands that there be a link between the stated purpose and the command. The Second Amendment would be nonsensical if it read, “A well regulated Militia, being necessary to the security of a free State, the right of the people to petition for redress of grievances shall not be infringed.” That requirement of logical connection may cause a prefatory clause to resolve an ambiguity in the operative clause (“The separation of church and state being an important objective, the teachings of canons shall have no place in our jurisprudence.”) The preface makes clear that the operative clause refers not to canons of interpretation but to clergymen.) But apart from that clarifying function, a prefatory clause does not limit or expand the scope of the operative clause. See F. Dwarris, A General Treatise on Statutes 268–269 (P. Potter ed. 1871) (hereinafter Dwarris); T. Sedgewick, The Interpretation and Construction of Statutory and Constitutional Law 42–45 (2nd ed. 1874). “It is nothing unusual in acts...for the enacting part to go beyond the preamble; the remedy often extends beyond the particular act or mischief which first suggested the necessity of the law.” J. Bishop, Commentaries on Written Laws and Their Interpretation §51, p. 49 (1882) (quoting Rex v. Morris, 3 East. 157, 165 (K.B. 1802)). Therefore, while we will begin our textual analysis with the operative clause, we will return to the prefatory clause to ensure that our reading of the operative clause is consistent with the announced purpose.

(Scalia, 128 S.Ct. at 2789–2790; fns omitted).

In the first paragraph of this excerpt Justice Scalia paraphrases and substantially reproduces the grammatical analysis contained in the Linguists’ Brief. In so doing, he cites both their brief and Tiffany's mid-nineteenth-century legal treatise, which includes a similar rephrasing of the amendment, as supportive of his interpretation. He next addresses the effect of the introductory clause on the amendment's meaning, and again appears to paraphrase the Linguists’ Brief while restating their conclusion in stronger terms: “Logic demands that there be a link between the stated purpose and the command.” He then continues to evoke their (linguistic and specifically grammatical) analysis by providing his own “nonsensical” and disambiguating counterexamples. However, what appears to be a strong endorsement of the Linguists’ interpretation is effectively negated by the following sentence: “But apart from that clarifying function, a prefatory clause does not limit or expand the scope of the operative clause.”

In thus qualifying his initial statement, he takes the position that the clause makes no contribution to the amendment's meaning, but functions solely to establish its purpose. He supports his conclusion with citations to English commentators, and quotes from an 1802 English case, Rex v. Morris, cited by the American commentator Joel Bishop: “It is nothing unusual in acts...for the enacting part to go beyond the preamble; the remedy often extends beyond the particular act or mischief which first suggested the necessity of the law.” He thus exploits the two meanings of the word ‘clause’ (part of a sentence; part of a legislative act) to shift from a grammatical to a statutory analysis in which he equates the introductory clause with a statutory preamble. This begs the question of whether the amendment's militia clause is in fact analogous to sentence; part of a legislative act) to shift from a grammatical to a statutory analysis in which he equates the introductory clause on the amendment's meaning, and again appears to paraphrase the Linguists’ conclusion in stronger terms: “The separation of church and state being an important objective, the teachings of canons shall have no place in our jurisprudence.” The preface makes clear that the operative clause refers not to canons of interpretation but to clergymen.) But apart from that clarifying function, a prefatory clause does not limit or expand the scope of the operative clause. See F. Dwarris, A General Treatise on Statutes 268–269 (P. Potter ed. 1871) (hereinafter Dwarris); T. Sedgewick, The Interpretation and Construction of Statutory and Constitutional Law 42–45 (2nd ed. 1874). “It is nothing unusual in acts...for the enacting part to go beyond the preamble; the remedy often extends beyond the particular act or mischief which first suggested the necessity of the law.” J. Bishop, Commentaries on Written Laws and Their Interpretation §51, p. 49 (1882) (quoting Rex v. Morris, 3 East. 157, 165 (K.B. 1802)). Therefore, while we will begin our textual analysis with the operative clause, we will return to the prefatory clause to ensure that our reading of the operative clause is consistent with the announced purpose.

6.2. The meaning of the main clause

He first addresses the phrase “the right of the people”. In determining its meaning, he employs a contextual analysis that examines the text of the Constitution and concludes that the right conferred is an individual right. Then, contrary to his announced plan to defer examination of the introductory clause until the analysis of the operative clause has been completed, he argues that the use of the term ‘the right of the people’ is inconsistent with the dissent’s position that the amendment creates only a militia-related right. He presents this analysis as relevant to determining which of the competing views of the amendment's scope accords with its language; however, Justice Stevens contests this assumption in his dissent, noting that “a conclusion that the Second Amendment protects an individual right does not tell us anything about the scope of that right” (Stevens, Dissenting, 128 S.Ct. at 2822). Moreover, Justice Scalia himself in a sense acknowledges this in the following excerpt when he states, “We move now from the holder of the right—‘the people’—to the substance of the right: ‘to keep and bear Arms.’” He then launches a semantic analysis of the elements of the phrase “to keep and bear Arms”.

Like the grammatical analysis that precedes it, this analysis substantially reproduces the analysis contained in the Linguists’ Brief. Justice Scalia examines the meanings and definitions of the individual words and phrases and presents his
interpretation as the product of this analysis. But while the linguists examine the semantic and syntactic relationships between the amendment's constituent parts, Justice Scalia treats the interpretation of the amendment as a word-by-word task (compare Hoffman, 2002:402); this allows him to conduct a decontextualized analysis of the amendment's words and phrases.

Justice Scalia quotes the first definition of 'arms' listed in the 1773 edition of Samuel Johnson's dictionary and cited in the Linguists' Brief. Noting that the word “was applied, then as now, to weapons that were not specifically designed for military use”, he cites an example from Cunningham's legal dictionary that uses the phrase 'bear arms' in the context of recreational hunting (“Servants and labourers shall use bows and arrows on Sundays, &c., and not bear other arms”). He then addresses the meaning of 'keep arms'. He begins by citing the dictionary definitions of 'keep' (“to retain; not to lose”, “to have in custody” [Johnson] and “to hold; to retain in one's power or possession” [Webster]), and notes that no party has suggested an idiomatic meaning of the term. This observation forms the basis of his conclusion that “the most natural reading” of the term, as it is used in the Second Amendment, is “to have weapons” (Scalia, 128 S.Ct. at 2792). This is an acontextual reading that does not take the amendment's introductory clause into account; it thus differs from the contextualized interpretation advanced in the Linguists' Brief.

Having spent only slightly more than two pages discussing the meaning of 'keep arms', including its component parts, Justice Scalia now initiates what will prove to be an extensive exploration of the meaning of the term 'bear arms' that labors to discredit the interpretation advanced by Justice Stevens and by the Linguists' Brief.

(B)(i)

At the time of the founding, as now, to “bear” meant to “carry.” See Johnson 161; Webster; T. Sheridan, A Complete Dictionary of the English Language (1796); 2 Oxford English Dictionary 20 (2nd ed. 1989) (hereinafter Oxford). When used with “arms,” however, the term has a meaning that refers to carrying for a particular purpose—confrontation. . .

From our review of founding-era sources, we conclude that this natural meaning was also the meaning that “bear arms” had in the 18th century. In numerous instances, “bear arms” was unambiguously used to refer to the carrying of weapons outside of an organized militia. The most prominent examples are those most relevant to the Second Amendment: Nine state constitutional provisions written in the 18th century or the first two decades of the 19th, which enshrined a right of citizens “to bear arms in defense of themselves and the state” or “bear arms in defense of himself and the state.” It is clear from those formulations that “bear arms” did not refer only to carrying a weapon in an organized military unit. . .

The phrase “bear arms” also had at the time of the founding an idiomatic meaning that was significantly different from its natural meaning: “to serve as a soldier, do military service, fight” or “to wage war.” See Linguists' Brief 18; post, at 11 (Stevens, J., dissenting). But it unequivocally bore that idiomatic meaning only when followed by the preposition “against,” which was in turn followed by the target of the hostilities. . . . Every example given by petitioners' amici for the idiomatic meaning of “bear arms” from the founding period either includes the preposition “against” or is not clearly idiomatic. See Linguists' Brief 18–23 . . .

(Scalia, 128 S.Ct. at 2793–2794; citations omitted; emphasis in original.)

He begins, as he began with 'keep arms', by citing the dictionary definition of the verb, noting that 'to bear' means 'to carry'. This prompts the reader to expect a parallel analysis, since the phrasing of the amendment, when coupled with his own analysis, projects the following train of reasoning: If 'to keep' means 'to have', 'to keep arms' means 'to have weapons', and 'to bear' means 'to carry', then 'to bear arms' means 'to carry weapons'. However, he abandons this structuring and rejects both the general definition and the linguists' military definition in favor of his own specific definition: to carry for the purpose of confrontation. He declares this to be the term's “natural meaning” and cites eighteenth- and nineteenth-century state constitutional provisions as supportive of this claim. He then contrasts this “natural meaning” of the term with the idiomatic (and thus presumably unnatural and artificial) meaning endorsed in the Linguists' Brief and in Justice Stephens' dissent: “to serve as a soldier, do military service, fight' or 'to wage war'”.

This analysis ignores, and thus serves to conceal, the fact that the “natural meaning” that he describes is itself idiomatic, since it serves to connote a specific purpose, i.e., for use as a weapon.5 Thus rather than admitting that the idiom embraces both military and non-military use for defensive or offensive purposes, he argues that although “to bear

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5 Today most people would not speak of “bearing arms”, but instead of “carrying a gun [or weapon]”. The term has both idiomatic and non-idiomatic uses, for example:

idiomatic: When he went out late at night, he always carried a gun.

non-idiomatic: He carried a gun from the house to the garage and placed it in a locked cabinet.
arms against their Country” (one of the examples cited in the Linguists’ Brief) is an idiomatic use of the term, “to bear arms in defense of themselves and the state” (one of the state constitutional provisions that he cites) is not. In so doing, he maintains that the military meaning of the term is unambiguously expressed only by adding the prepositional modifier ‘against’ to ‘bear arms’, but appears not to notice that the modifiers “in defense of themselves and the state” and “in defense of himself and the state” in the state constitutional provisions that he cites perform the identical disambiguating function. In a passage that is dripping with acidity, he then proceeds to attack the interpretation of the term advanced by the petitioners and the dissent.

(B)(ii)

In any event, the meaning of “bear arms” that petitioners and JUSTICE STEVENS propose is not even the (sometimes) idiomatic meaning. Rather, they manufacture a hybrid definition, whereby “bear arms” connotes the actual carrying of arms (and therefore is not really an idiom) but only in the service of an organized militia. No dictionary has ever adopted that definition, and we have been apprised of no source that indicates that it carried that meaning at the time of the founding. But it is easy to see why petitioners and the dissent are driven to the hybrid definition. Giving “bear Arms” its idiomatic meaning would cause the protected right to consist of the right to be a soldier or to wage war—an absurdity that no commentator has ever endorsed. See L. Levy, Origins of the Bill of Rights, 135 (1999). Worse still, the phrase “keep and bear Arms” would be incoherent. The word “Arms” would have two different meanings at once: “weapons” (as the object of “keep”) and (as the object of “bear”) one-half of an idiom. It would be rather like saying “He filled and kicked the bucket” to mean “He filled the bucket and died.” Grotesque.

(Scalia, 128 S.Ct. at 2794; italics in original.)

He begins by stating that their proposed meaning is “not even” the idiomatic meaning, but a “hybrid definition” that limits its sense to the carrying of arms for militia-related purposes, and that “[n]o dictionary has ever adopted that definition”. This is a distortion, because their analysis is contextual—something that he seeks to avoid. Nevertheless, he argues that they are forced to adopt this definition because giving ‘bear arms’ its idiomatic meaning would render the amendment “incoherent” by simultaneously assigning two meanings to the word ‘arms’. He then compares this to saying “He filled and kicked the bucket” to mean “He filled the bucket and died”, which he labels with the pejorative evaluation, “Grotesque.”

However, this is a false analogy, because ‘kick the bucket’ is a metaphor and the so-called idiomatic meaning of ‘bear arms’ is not metaphorical, but refers to the literal use (‘bearing’ or ‘carrying’) of arms in a military context. Moreover, the incoherence that he ascribes to their interpretation of ‘bear arms’ does not result, because the idiomatic meaning is not expressly stated but is connoted. Thus the sentence, “When asked about her favorite pastimes, Mary said that she liked books, movies and shopping”, is not rendered incoherent by the fact that the reader would understand it to mean that Mary likes reading books, watching movies, and shopping at the mall (cf. Pustejovsky, 1991:425; Lascarides and Copestake, 1998:387–389). It is therefore inadequate (and inaccurate) to critique the dissent’s interpretation of “to keep and bear arms” by postulating different senses of the word ‘arms’ (cf. Lascarides and Copestake, 1998:388, citing Pustejovsky, 1991). Yet Justice Scalia is driven to this strategy by his context-free approach.

He continues to berate their focus on the military context (the context provided by the amendment’s introductory clause), and dismisses the sources that they cite, noting that “[o]ther legal sources frequently used ‘bear arms’ in nonmilitary contexts.” To illustrate his point, he again cites Cunningham’s example, which uses the term in the context of recreational hunting. This example fits poorly with his own definition of ‘bear arms’, since no hunter would equate sport shooting, which often involves concealing oneself in a blind, with the ‘confrontation’ of quarry that may consist of creatures as harmless as quail or dove. Nevertheless, this issue is not raised.

He continues to discuss the meaning of the term ‘bear arms’ for several additional pages, thus presenting it as central to his interpretation of the amendment’s meaning. During the course of this discussion, he returns to the issue of the modifiers (Excerpt B(i)) in a footnote:

(B)(iii)

JUSTICE STEVENS contends . . . that since we assert that adding “against” to “bear arms” gives it a military meaning we must concede that adding a purposive qualifying phrase to “bear arms” can alter its meaning. But the difference is that we do not maintain that “against” alters the meaning of “bear arms” but merely that it clarifies which of various meanings (one of which is military) is intended.

(Scalia, 128 S.Ct. at 2796, fn. 11; emphasis in original.)

Paradoxically, he thus argues that adding the preposition ‘against’ to ‘bear arms’ acts to clarify the sense in which it is being used, while adding the introductory clause “A well regulated Militia, being necessary to the security of a free State”
does not. He then assembles his analyses to construct an authoritative interpretation, which he presents as consistent with the historical context in which the amendment was enacted:

(B)(iv)

**c. Meaning of the Operative Clause.** Putting all these textual elements together, we find that they guarantee the individual right to possess and carry weapons in case of confrontation. This meaning is strongly confirmed by the historical background of the Second Amendment. ... Between the Restoration and the Glorious Revolution, the Stuart Kings Charles II and James II succeeded in using select militias loyal to them to suppress political dissidents, in part by disarming their opponents. ... These experiences caused Englishmen to be extremely wary of concentrated military forces run by the state and to be jealous of their arms. [additional historical analysis omitted]

(Scalia, 128 S.Ct. at 2797–2798; citations omitted.)

6.3. The meaning of the introductory clause

Claiming to have established the amendment's meaning, he now belatedly returns to its introductory clause, in order to “determine whether the prefatory clause...comports with our interpretation of the operative clause.” This framing of the issue (i.e., as whether the clause comports with his interpretation, rather than vice versa) serves to signal the post hoc nature of the analysis that follows.

(C)

2. Prefatory Clause

The prefatory clause reads: “A well regulated Militia, being necessary to the security of a free State....”

a. “Well-regulated Militia.” In *United States v. Miller*, 307 U.S. 174, 179 (1939), we explained that “the Militia comprised all males physically capable of acting in concert for the common defense.” That definition comports with founding-era sources. ...

... Although we agree with petitioners' interpretative assumption that “Militia” means the same thing in Article I and in the Second Amendment, we believe that petitioners identify the wrong thing, namely, the organized militia. Unlike armies and navies, which Congress is given the power to create...the militia is assumed by Article I already to be in existence.... This is fully consistent with the ordinary definition of the militia as all able-bodied men....

Finally, the adjective “well-regulated” implies nothing more than the imposition of proper discipline and training. See Johnson 1619 (“Regulate”): “To adjust by rule or method”; Rawle 121–122; cf. Va. Declaration of Rights §13 (1776), in 7 Thorpe 3812, 3814 (referring to “a well-regulated militia, composed of the body of the people, trained to arms”).

b. “Security of a Free State.” The phrase “security of a free state” meant “security of a free polity,” not security of each of the several states.... It is true that the term “State” elsewhere in the Constitution refers to individual States, but the phrase “security of a free state” and close variations seem to have been terms of art in 18th-century political discourse, meaning a “free country” or free polity. ... Moreover, the other instances of “state” in the Constitution are typically accompanied by modifiers making clear that the reference is to the several States—“each state,” “several states,” “any state,” “that state,” “particular states,” “one state”, “no state.” And the presence of the term “foreign state” in Article I and Article II shows that the word “state” did not have a single meaning in the Constitution.

There are many reasons why the militia was thought to be “necessary to the security of a free state.” ... First, of course, it is useful in repelling invasions and suppressing insurrections. Second, it renders large standing armies unnecessary. ... Third, when the able-bodied men of a nation are trained in arms and organized, they are better able to resist tyranny.

(Scalia, 128 S.Ct. at 2799–2801; citations omitted; emphasis in original).

He begins by discussing whether “the Militia” that the amendment refers to is the pool of all able-bodied men eligible for militia service, or is only the “organized militia” (that is, all men who have actually been called to serve). He cites the Court's prior decision in *Miller* as establishing the former interpretation; however, this does not dispose of the issue because the District of Columbia argued in its brief that the term “Militia”, as used in both the Second Amendment and in Article I of the Constitution, referred to the organized militia. He purports to refute the argument by explaining that, “[u]nlike armies and navies, which Congress is given the power to create...the militia is assumed by Article I already to be in existence”, but does not explain why this argument supports the definition that he proposes.
After devoting a page and a half to the meaning of “Militia”, he belatedly addresses its modifier “well-regulated”, arguing that it “implies nothing more than the imposition of proper discipline and training.” He does not discuss how its use can be squared with the definition of “Militia” as “all males physically capable of acting in concert for the common defense”, and does not respond to the issue raised in the District of Columbia’s brief: “If language is to have meaning, membership in an unorganized militia is not membership in a ‘well regulated’ militia” (Petitioners’ Brief, p. 14, fn. 2). Yet in the next section of his discussion (b. “Security of a Free State”), he appears to endorse precisely the district’s reading of the term “Militia”: “In citing the ‘many reasons’ that the militia was ‘necessary to the security of a free state’, he notes that ‘when the able-bodied men of a nation are trained in arms and organized, they are better able to resist tyranny.’” However, he does not acknowledge the contradiction inherent in his reasoning.

His analysis concludes with these examples. He thus limits his discussion to the meanings of the terms “Militia”, “well-regulated” and “security of a Free State”, and provides no interpretation of the meaning of the clause as a whole.

6.4. The relationship between the clauses and the meaning of the amendment

(D) 3. Relationship between Prefatory Clause and Operative Clause
We reach the question, then: Does the preface fit with an operative clause that creates an individual right to keep and bear arms? It fits perfectly, once one knows the history that the founding generation knew and that we have described above... 

***

It is therefore entirely sensible that the Second Amendment’s prefatory clause announces the purpose for which the right was codified: to prevent elimination of the militia. 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. But the threat that the new Federal Government would destroy the citizens’ militia by taking away their arms was the reason that right—unlike some other English rights—was codified in a written Constitution. Justice Breyer’s assertion that individual self-defense is merely a ‘subsidiary interest’ of the right to keep and bear arms, see post, at 36, is profoundly mistaken. He bases that assertion solely upon the prologue—but that can only show that self-defense had little to do with the right’s codification; it was the central component of the right itself.

(Scalia, 128 S.Ct. at 2801; emphasis in original.)

He now returns to the question, “Does the preface fit with an operative clause that creates an individual right to keep and bear arms?” to which he appends his response, “It fits perfectly”. He then presents this historical analysis as supportive of his interpretation of the amendment’s meaning.

He begins by stating that, “[i]t is therefore entirely sensible” that the introductory clause “announces the purpose for which the right was codified: to prevent elimination of the militia.” He then injects the argument that the language of the clause “does not suggest that preserving the militia was the only reason Americans valued the ancient right”, before repeating and reconfirming that “the threat that the new Federal Government would destroy the citizens’ militia by taking away their arms was the reason the right...was codified.” The logical conclusion of this analysis seems clear: If citizen militias are an essential bulwark against tyranny, but the government can disable such militias by confiscating the arms of its political opponents, then an individual right to bear arms is necessary to prevent this from occurring.

However, this is not his conclusion, and he does not conclude his analysis at this point, but instead appears to shift gears to address Justice Breyer’s argument in his separate dissenting opinion (see n. 2) that individual self-defense is at most subsidiary to the interest that the amendment serves—an argument that he labels as “mislabeled”. This lays the groundwork for his conclusion that the clause “can only show that self-defense had little to do with the right’s codification” (emphasis in original), but that this is irrelevant because “it was the central component of the right itself” (emphasis in original). He thus equates the right to bear arms with the right to self-defense. In so doing, he conflates two related but distinct concepts: military self-defense, that is, military action as a form of (collective) self-defense in the context of war and revolution, on the one hand, and personal self-defense against physical attack in the context of crime, on the other. This is problematic because, reading the amendment in accordance with his own interpretation, if the clause is to have any meaning or purpose, then its purpose must be to specify that the right of self-defense to which it refers is the right to military self-defense. This aligns with Justice Breyer’s analysis, as stated at the outset of his opinion, that
the Second Amendment protects militia-related, not self-defense-related, interests. These two interests are sometimes intertwined. To assure 18th-century citizens that they could keep arms for militia purposes would necessarily have allowed them to keep arms that they could have used for self-defense as well. But self-defense alone, detached from any militia-related objective, is not the Amendment's concern.

(Breyer, Dissenting, Scalia, 128 S.Ct. at 2847).

Nevertheless, this is not mentioned or discussed.

7. Is Justice Scalia's analysis 'linguistic'?

Judges sometimes use linguistic principles as authority for their interpretations of statutory or constitutional language, thus treating them as analogous to legal precedents; however, the linguistic principles invoked often do not function in the ways that the courts claim (Solan, 1993b:29). This is amply illustrated in *Heller*, in which Justice Scalia uses an analysis of sentence structure and word meaning to construct a decontextualized interpretation of the term ‘bear arms’, in order to find that the Second Amendment protects an individual right of self-defense.

Justice Scalia's grammatical analysis allows him to literally cut the amendment in half by separating its two clauses, which he labels as 'prefatory' and 'operative'; this implies that the 'prefatory' introductory clause is non-operative. He then strengthens this implication by arguing that the clause establishes the amendment's purpose but does not otherwise affect its meaning, thus effectively erasing it from the amendment's text (cf. Heniger, 2009:1176). But can the meaning of the amendment be determined without taking the militia language into account?

The militia clause is an absolute construction or absolute clause, as noted in the Linguists' Brief. It modifies the main clause of the amendment by specifying that “The right to keep and bear Arms” refers to arms for militia service. And indeed, Justice Scalia agrees that the clause announces a purpose, and that the amendment could be restated as, “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.” Nevertheless, he argues that the militia language does not contribute to its meaning. Yet if it does not, why does the following reformulation appear contradictory?

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 preserved.

If a militia is necessary, then what would enable it to be operative is necessary, and to claim otherwise is inconsistent and paradoxical. But in fact, Justice Scalia does not assert that the clause is semantically empty, but that it should be disregarded. However, this is not a linguistic argument.

Justice Scalia's lexical analysis of the amendment's words and phrases allows him to examine them individually, thus focusing on their context-independent meaning or 'logical form' (cf. Akman, 2000:746). But although he presents this examination as linguistically motivated by patterning it upon the Linguists' Brief, the majority of his analysis is cursory and pro forma, and serves mainly to shift the inquiry from the contextual meaning of the amendment's language to the possible meanings of its words. He then launches an extensive exegesis of the meaning of the term 'bear arms', and argues in favor of his own selected meaning. However, he does not support his own interpretation but instead criticizes the interpretation of the District of Columbia and the dissent—and the focus of his criticism is quite simply their contextual approach. He disparages their citations to military uses of the term, and notes that it was used in nonmilitary contexts as well, which is true but is not the issue. He then argues that the militia language does not create a military context, and that the nonmilitary meaning of the term should accordingly be applied, while disguising his circular reasoning by framing it as a linguistic analysis.

8. Discussion

In *Heller*, Justice Scalia employs a 'linguistic' analysis to argue for a different meaning of the Second Amendment than the language of the amendment suggests. He uses the framework of the linguists' semantic analysis to examine the meanings of the individual words, while omitting all discussion of the syntactic and pragmatic considerations that inform their analysis, and instead focusing on the dictionary definitions of the words to support his acontextual approach. This strategy exemplifies a trend that has troubled legal scholars, the Court's increasing reliance on dictionaries in recent years (see generally Solan, 1993a,b, 2003; Thumma and Kirchmeier, 1999, 2001; Hasko, 2002; Hoffman, 2002; Weinstein, 2005). In the seventy years between 1900 and 1970, the Court cited the dictionary in 100 opinions (Thumma and Kirchmeier, 1999:249–252; Weinstein, 2005:652), that is, considerably less than twice a year. However, the 1970s witnessed the beginning of a dramatic increase in this practice (Thumma and Kirchmeier, 1999:249–252; Weinstein, 2005:652); as a result, approximately half of the opinions in which the Court has made use of the dictionary in its entire history were issued during the 1990s (Thumma and Kirchmeier, 2001:52; Hasko, 2002:432). Justice Scalia, who was
appointed to the Court in 1986, is at the forefront of this movement. By the end of the Court's 1997–1998 term, he had cited the dictionary in fifty opinions, to define a total of 65 terms—more than any other justice in history (Thumma and Kirchmeier, 1999:261, n. 15).

Hoffman identifies two ways that the Court uses the dictionary, which he labels 'Definition' and 'Verification' (2002:402). In the first of these, the Court uses the dictionary to define technical or obscure words that the reader may not be familiar with; Hoffman refers to this as using the dictionary “for its intended purpose” (Hoffman, 2002). More often, however, the Court uses the dictionary “to verify that a common English word can have a meaning that the Court chooses to assign it” (Hoffman, 2002). Hoffman argues that judges’ use of the dictionary in such cases acts to confirm rather than advance their legal arguments, and adds nothing to their force, but merely provides “authority for the writer's intuitions about what a common word means” (2002:416–419). However, judicial decision-making involves both legal analysis and the linguistic strategies by which it is expressed; these processes, although distinct, are inextricably intertwined (Hobbs, 2007:184). Thus verification can be used to fill interpretive gaps by substituting a dictionary definition for legal reasoning (Solan, 1993b:11).

Hoffman identifies a common pattern of verification arguments, in which the writer states a legal conclusion about the meaning of a statutory provision, identifies a “language problem” relating to the meaning of one the provision's words, and purports to resolve the issue by citing a dictionary definition that supports the original conclusion (2002:417). A somewhat different pattern is used by Justice Scalia. This alternate pattern cites the dictionary definition of one of the amendment's words, identifies a problem relating to its meaning in the amendment's text, and then states a conclusion that is broader than the definition will support, but is nevertheless presented as its logical result. This three-part argument structure is immediately recognizable as the legal syllogism, a standard form of legal reasoning, in which “the previously-established precedent is the major premise, the proposition stating the crucial facts of the case before the court is the minor premise, and the judge's decision is the conclusion” (Bodenheimer et al., 1988:110). Its use thus functions to present the definition as an appropriately legal interpretive standard that is based on a neutral and universal body of knowledge (Solan, 1993b:26). Justice Scalia's use of this pattern of verification is most notable in his exhaustive analysis of the term 'bear arms', an analysis that is extraneous to his ultimate interpretation of the amendment's meaning.\(^7\) He thus constructs a linguistic analysis which he then appears to abandon, a phenomenon noted by Solan, who states that when judges resort to linguistic arguments, “[i]n many cases, the linguistic argumentation either falls hopelessly flat, collapsing into incoherence, or can best be seen as window dressing, part of an effort to mask some other agenda that is at the root of the judge's opinion” (1993:11).

And indeed, legal scholars have been sharply critical of Heller. Thus Henigan accuses Justice Scalia of editing the Constitution by “obliterat[ing] half of the Amendment” in order to give to gun-rights proponents the interpretation they had long sought (2009:1175–1176). Noting that, more than a decade prior to Heller, Justice Scalia had stated in his extrajudicial writings that the Second Amendment guaranteed a “right of self-defense” that was “absolutely fundamental”, he states that “[i]n Heller, the conservative majority of the Supreme Court did make history by creating a new Constitutional right to be armed. It did so, however, only by engaging in an unprincipled abuse of judicial power in the pursuit of an ideological objective” (2009:1175). He then delivers a scathing critique of the opinion's analysis:

Scalia interprets the phrase “keep and bear Arms” by ripping the phrase out of context; that is, by artificially separating the phrase from the words that precede it. ...

The issue is not, however, whether the phrases “keep Arms” and “bear Arms” could have nonmilitia meanings in other contexts. The issue is the meaning of the phrase “keep and bear Arms” as it is used in the context of a provision of the Constitution declaring the importance of a “well regulated Militia to the security of a free State.” Justice Scalia proudly points to the “many sources” presented in his opinion in which “bear arms” was used in “nonmilitary contexts,” but ignores the particular context in which the phrase appears in the Second Amendment. (Henigan, 2009:1177; fn omitted).

Eskridge similarly criticizes the opinion as inconsistent with the Amendment's language and history:

Heller recognized and enforced a right for “law-abiding” citizens to possess and use handguns and perhaps other firearms within the home for self-defense. This holding was in tension with the text of the Second Amendment and precedent. According to professional linguists and historians, in the eighteenth century “bear arms” almost always meant to use weapons in a military context; hence, the Second Amendment's “original meaning” was to allow citizens to “keep” military weapons insofar as needed to “bear” them in military service. Consistent with that reading...\(^7\) The definition of ‘bear arms’ as “to carry for the purpose of confrontation” arguably implicates self-defense (as well as use for offensive purposes); however, Justice Scalia does not make this connection. Moreover, it is rendered superfluous by his conclusion, which effectively claims that the right to keep and bear arms is synonymous with the right to self-defense.
of the operative clause's words... the prefatory clause's emphasis on a citizen militia seems to limit the Second Amendment right "to keep and bear Arms." The Heller Court's broader construction of the operative clause leaves the prefatory clause as surplusage having no legal consequences, contrary to the canon of construction presuming that every clause in the Constitution adds something to its interpretation. The broad reading is also contrary to the Court's only significant Second Amendment precedent, Miller v. United States, where a unanimous Court limited the Second Amendment right by tying it to militia service. (2009:203; emphasis in original; fns omitted.)

He then concludes:

_Heller rewrote the Constitution._ In _Heller,_ the Second Amendment not only loses the prefatory clause, but gains new nontextual limitations on the right. The _Heller_ Second Amendment now reads: "The right of law-abiding people to keep Arms in their homes, for self-defense purposes, shall not be subjected to unreasonable regulation." Such a dramatic revision requires a lot more explanation than the Court provides. (Eskridge, 2009:209, fn omitted.)

9. Conclusion

In an article that examines the role of linguistics in statutory interpretation, Cunningham, a law professor, and Levi, Green and Kaplan,8 professors of linguistics, note that ambiguities that arise from the ways that words interact with one another involve issues related to syntax, semantics and pragmatics that linguists are particularly qualified to address; thus linguists can assist judges by identifying possible interpretations, which will allow them to make principled and objective decisions that are grounded in textual language (Cunningham et al., 1994:1616, 1561). But although they endorse the use of linguistic analysis by judges, they emphasize that the linguist's role is "to analyze the language, not to make judicial decisions about the legal implications of such analysis"; thus linguistic analysis should not be seen as controlling of legal outcomes (Cunningham et al., 1994:1612; see also Mootz, 1995:1015–1016). Solan similarly warns that "interpretive principles do not make good legal principles" (1993:186), for

There is simply no theory of meaning that tells us whether a corporation should be considered a person for purposes of determining whether the corporation is entitled to constitutional rights... or whether the Fifth Amendment's prohibition against compelled self-incrimination protects us against the government forcing us to submit to blood tests against our will. (Solan, 1993b:185).

Yet while linguistic analysis cannot determine the applicability of a statutory or constitutional provision, it can expose the flaws in the court's approach where linguistic rules are misused to decide a case; thus applied pragmatics can explode an interpretive strategy that has proven to be impervious to legal argument, as this paper seeks to demonstrate.

Justice Scalia's analysis ignores the basic principle of pragmatics, that meaning is essentially contextual (Topf, 1992:18; and compare Wisotsky, 2009). He thus erases the distinction between linguistically encoded meaning and situationally-determined meaning (see Klinge, 1995:651) to produce a non-pragmatic or even an anti-pragmatic interpretation (Azar, 2002).

It is hoped that this paper will serve as a platform for further discussion and investigation of this important subject.

References


8 Kaplan, who was one of the authors of the Linguists’ Brief, is a well-known figure in pragmatics.

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