The Ohio State University

From the SelectedWorks of Perry Lee Meyer

Spring April 20, 2013

The Second Amendment to the Constitution of the United States of America: A Grammarian’s Perspective of How Heller Won the Personal Right to Keep and Bear Arms

Perry Lee Meyer

Available at: https://works.bepress.com/perry_l_meyer/5/
The Second Amendment to the Constitution of the United States of America: A Grammarian’s Perspective of How Heller Won the Personal Right to Keep and Bear Arms

Perry Lee Meyer*

The purpose of the Bill of Rights was to guarantee certain individual rights of citizens of the United States of America. These are listed in the first 10 Amendments to the Constitution. The Second Amendment, in reference to its clause-containing “right to keep and bear arms,” has had its share of heated debate, arguments and legal battles over the sale, purchase, and transportation of firearms. I will present relevant, historical U.S. court cases that have challenged the Second Amendment’s ambiguity and challenged the very essence of what right the Second Amendment protects. Since the Second Amendment has sparked my curiosity as an undergraduate grammarian, I have chosen it not to debate it, but to clarify its grammatical structure and expose the reason why its interpretations remain ambiguous.

In District of Columbia v. Heller, 554 U.S. 570 (2008), the U.S. Supreme Court ruled that “a prefatory clause does not limit or expand the scope of the operative clause” and, therefore, only the second clause has any “operative,” or substantive, meaning. In other words, Heller did not have to be a member of ‘a well-regulated militia’ to keep and bear arms. I will diagram how the grammatical syntax of the English language split the militia of a state from the people’s right, and I will show how that severance helped Heller prove his case.

INTRODUCTION...............................................
I. THE SECOND AMENDMENT...................................................
II. UNITED STATES V. CRUIKSHANK, 92 U.S. 542 (1875)....................
III. UNITED STATES V. MILLER, 307 U.S. 174 (1939)....................... 
IV. HICKMAN V. BLOCK, 81 F.3d 98 (9th Cir.) (1996)............................
V. DISTRICT OF COLUMBIA V. HELLER, 554 U.S. 570.......................
VI. MCDONALD V. CHICAGO, 561 U.S. 3025 (2010).........................
VII. DIAGRAM 1. REED-KELLOGG........................................
VIII. DIAGRAM 2. HOPPER........................................
IX. THE NOMINATIVE ABSOLUTE: A PREFATORY CLAUSE...........
CONCLUSION...........................................................................

*Perry Lee Meyer is a senior at the Ohio State University.
INTRODUCTION

“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.”¹ This is how the Second Amendment to the Constitution of the United States reads. From its onset came a controversy that every once in a while is still being debated both in and out of courtrooms across the land. There is something to be said about the Second Amendment: it’s ambiguous. So, what does the Second Amendment imply and what have some inferred its two clauses to mean? These are a few questions I will answer in this essay.

I wanted to show the importance of English grammar as it pertains to the Constitution of the United States, specifically the Second Amendment, without debating the issue itself. Since there are several Amendments in our Constitution that can be interpreted to read in several ways, as a law writing student myself, I was compelled to use the Second Amendment as my case study for research. “[T]he right of the people to keep and bear arms” was recently ruled, in 2008, by the Supreme Court of the United States of America through the persuasive interpretation and usage of English syntax. Finally, it had been declared what right the Second Amendment had given, and it had also stated for whom the Amendment was written. However, the ruling is not as simple as it may sound, and there are still many citizens wishing to refute the U.S. Supreme Court’s landmark decision.

Later I will show how the Supreme Court’s 2008 decision in District of Columbia v. Heller, 554 U.S. 570 ruled that “a prefatory clause does not limit or expand the scope of the operative clause” and, therefore, only the second clause has any “operative,” or substantive, meaning. It may read as being very difficult to comprehend at first, but I will make an attempt to simplify this ruling by breaking down the entire Second Amendment into two grammar diagrams.

Some Constitutional Amendments evolved in our American history, and many of her court battles led to other cases that shaped a few of our state and federal laws that we read today. It requires an Amendment to change an Amendment, but it only takes a proven violation of an individual’s personal rights to have a court change a law within its jurisdiction. Sometimes that violation can be taken all the way to the United States Supreme Court, if in fact, the court choses to hear the case.

I have offered an historical background of a few cases that involved the Second Amendment—using a great amount of brevity. I have chosen to begin each case with an italicized, quick-reference brief allowing the reader to review the highlights of each case. This will make the essay a faster read. While I have stated earlier in my preface, that I have chosen the Second Amendment not to debate it, but to clarify its grammatical structure, its interpretations still remain ambiguous. Some grammarians argue that “grammatically” the US Supreme Court got it all wrong in the Heller case, but I am only showing how they came to their decision. This is the beauty of our Constitution: we may interpret it, and we may change it. The possibility for me to debate how grammarians disagree with aforementioned ruling requires further study, and it is my intention to present my findings in the near future.

¹http://constitution.findlaw.com/amendment2/amendment.html.
I. THE SECOND AMENDMENT

The Second Amendment to the Constitution of the United States has been under debate and protest from its onset. However, there have only been five cases heard by the U.S. Supreme Court related to this Amendment. In United States v. Cruikshank, 92 U.S. 542 (1875), Klu Klux Klan members deprived their black victims the freedom of assembly and the right to bear arms.\(^2\) Members of the KKK disregarded the most basic, fundamental human right of our Constitution: all men are created equal. If we are all considered equal under the law, then everyone should have the right to keep and bear arms. Unfortunately, for African Americans in this case, the U.S. Supreme Court simply stated that the federal government had no power to correct these “violations.” Estimates were that 100-280 African Americans were killed, most of them following surrender, and 50 were being held prisoner, on Easter Sunday, April 13, 1873, after an armed white militia attacked Republican freedmen, who had gathered at the Colfax, Louisiana, courthouse to protect it from the pending Democratic takeover.

In United States v. Miller, 307 U.S. 174 (1939), the U.S. Supreme Court ruled that the right to bear arms was a right specifically guaranteed by the militia, and that since Miller was not a member of the militia then he had no right to bear arms. Miller happened to cross state lines with a sawed-off shot gun, so there were many charges in his case, but “longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms”\(^3\) would be Second Amendment issues to come.

While these cases dealt with loose interpretations of the Second Amendment, some scholars have argued against the grammatical structure of this Amendment. While some have claimed that the positions of the commas within the two clauses of the Amendment clearly prove that the Amendment is referring to the right of the militia to keep and bear arms and that those rights do not extend to the people, unless those people were members of the militia, others have claimed that a prefatory clause does not limit or expand the scope of the operative clause” and, therefore, only the second clause has any “operative,” or substantive, meaning.

Certainly, in United States v. Heller, English syntax is what settled the case. Since the prefatory clause, “A well[-] regulated Militia, being necessary to the security of a free state,” was declared not to limit or expand the operative clause “the right of the people to keep and bear arms, shall not be infringed,” it was determined that only the second clause, an “operative” clause had any substantive meaning. Heller won his case, and it shall be his case that I will expound upon. I want to show the importance that English syntax had to play in the U.S. Supreme Court’s landmark decision.

\(^2\) http://dlhen1.tripod.com/News/Court%20Rulings.html
\(^3\) www.ksdk.com/rss/article375203/18/Supreme-Court-may-decide-who-can-carry-guns
II. UNITED STATES V. CRUIKSHANK, 92 U.S. 542 (1875)

In United States v. Cruikshank, 92 U.S. 542 (1875), the Supreme Court ruled that “neither the First Amendment nor the Second Amendment applied to the states, rather it was a limitation on congress. The Second Amendment means no more than that it shall not be infringed by Congress, and has no other effect than to restrict the powers of the National Government.” Members of the Klu Klux Klan denied their black victims the right to assembly and the right to keep and bear arms. The federal government had to power to correct these violations, rather the citizens had to rely on the police power of the states for their protection from private individuals.

During the 1870s, African Americans in the South received little or no mercy from their state governments and even less sympathy from their white American neighbors. In fact, it was considered to be a serious threat to white Americans if an African American was seen with a weapon of any kind. “When Democrats regained their legislative powers in the late 1870s, they passed legislation making voter registration and elections more complicated, effectively stripping many blacks from voter rolls.” Another unsettling result of the Cruikshank case is that it gave political parties the right to use paramilitary forces, which is what brought the case to the Supreme Court in the first place. “On Easter Sunday, April 13, 1873, an armed white militia attacked Republican freedmen, who had gathered at the Colfax, Louisiana court house to protect it from the pending Democratic takeover. Although some of the blacks were armed and initially defended themselves, estimates were that 100-280 were killed, most of them following their surrender to their white opponents.”

The Supreme Court ruled on a range of issues in United States v. Cruikshank, 92 U.S. 542 (1875) and found the indictment faulty. The Court did not incorporate the Bill of Rights to the states and found that the First Amendment right to assembly "was not intended to limit the powers of the State governments in respect to their own citizens" and that the Second Amendment "has no other effect than to restrict the powers of the national government." It was the responsibility of the state to protect the individuals of that state from private individuals, not Congress.

Constitutional commentator Leonard Levy wrote, "Cruikshank paralyzed the federal government's attempt to protect black citizens by punishing violators of their Civil Rights and, in effect, shaped the Constitution to the advantage of the Ku Klux Klan." If certain states possessed members of a racist organization, like the KKK, it was not the right of the federal government to intervene when racial atrocities occurred within such states.

---

4 http://supreme.justia.com/cases/federal/us/92/542/case.html
5 Slaughter-House Cases [United States v. Cruikshank, 92 U.S. 542 (1875)]
7 http://supreme.justia.com/cases/federal/us/92/542/case.html
8 Ibid.
III. UNITED STATES V. MILLER, 307 U.S. 174 (1939)

In United States v. Miller, 307 U.S. 174 (1939), the U.S. Supreme Court ruled that the right to bear arms was a right specifically guaranteed by the militia, and that since Miller was not a member of the militia then he had no right to bear arms. “The right to keep and bear arms is not unlimited. “The very right to keep and bear any weapon whatsoever in any manner whatsoever and for whatever purpose: For example, concealed weapons prohibitions have been upheld under the Second Amendment or state analogues.” Miller’s case was not just about his sawed-off shotgun-- he was convicted of crossing state-lines without a weapon’s permit, as required by Section 1132d of Title 26, United States Code (Act of June 26, 1934), but the main reason for his defeat in court was that he was not a member of the militia.

An indictment in the District Court Western District Arkansas, charged that Jack Miller and Frank Layton "did unlawfully, knowingly, willfully, and feloniously transport in interstate commerce from the town of Claremore, in the State of Oklahoma to the town of Siloam Springs in the State of Arkansas a certain firearm, to wit, a double barrel 12-gauge Stevens shotgun having a barrel less than 18 inches in length [...] not having registered said firearm as required by Section 1132d of Title 26, United States Code (Act of June 26, 1934).

The Supreme Court ruled that the amendment "[protects arms that had a] reasonable relationship to the preservation or efficiency of a well-regulated militia." This ruling has been widely described as ambiguous, and ignited a debate on whether the amendment protected an individual right, or a collective militia right. "Arguably, an individual could assert a collective right to participate in militia service. But Miller did not challenge the NFA [National Firearms Act] as a limitation on his right to participate in militia service. He challenged his indictment for transporting an untaxed NFA firearm in interstate commerce. And the Court evaluated Miller’s right to possess and use a particular firearm, not his right to join the militia."11
IV. HICKMAN V. BLOCK, 81 F.3d 98 (9th Cir.) (1996)

In Hickman v. Block, 81 F.3d 98 (9th Cir.) (1996), Hickman owned his own business. He wanted to expand that business. He believed that he needed a concealed firearms permit, so he applied many times for it. He was denied every time. The County and San Fernando denied Hickman the right to obtain said permit under the grounds that Hickman had cited no clear and present danger to his personal safety and failed to show good cause as to why he needed a concealed firearms permit. Hickman's last attempt to obtain such a permit landed him at the recruiting station of the Fernando police department, where he joined the reserves unit of the San Fernando police department. Still, the San Fernando court denied and blocked his approach to obtain his concealed firearms permit.

The San Fernando court ruled that Hickman failed to cite any “clear and present danger to his personal safety” in his case to obtain a concealed firearms permit, and that he failed to show good cause. Douglas Ray Hickman owned and operated a security alarm company. He was federally licensed as an arms dealer. Hickman wanted to apply his efforts in "executive protection," so he submitted a series of applications to the appellee municipal authorities with the request to obtain a concealed firearms permit. Every time Hickman sent in an application it was denied by the authorities. This denial by the authorities infuriated Hickman. He strongly believed that his civil rights had been violated with every disapproval letter. Hickman filed a lawsuit for damages and injunctive relief, arguing several theories of liability under 42 U.S.C. sections 1983 and 1985(3).

Hickman’s quest to obtain a concealed firearms permit began in 1988. In every instance, when he applied to each of the appellees, Hickman stated that he required such a permit in order to work as a private bodyguard. The County and San Fernando denied his applications on the grounds that Hickman, having cited no "clear and present danger" to personal safety, had failed to show good cause.

Hickman next attempted to obtain a permit in 1989 by joining a reserves unit for the San Fernando police department. For reasons not clear in the record, San Fernando denied him admission to the reserves and blocked this approach to a permit.

_________________________

12 Under California law, this entitles Hickman to carry an exposed firearm while he is in uniform. See California Penal Code § 12031(d).

13 At oral argument, Hickman's attorney denied that his client had attempted to join the reserves to obtain a permit. However, in his 1991 permit re-application to the County, Hickman stated that his "ulterior motive" for applying to the reserves had been to obtain a permit. Police officers obtain their concealed weapons authorization under a separate statute, which does not demand a showing of good cause. See Cal.Penal Code § 12031(b). Hickman does not attack the preferential access of police officers to concealed weapons permits in this lawsuit.

14 According to Hickman, the San Fernando Police cited a potential conflict of interest between Hickman's private security operation and his official duties. San Fernando maintains that it rejected Hickman's application after uncovering his ulterior motive.
V. DISTRICT OF COLUMBIA V. HELLER, 554 U.S. 570

Dick Heller was a special police officer who was authorized to carry a handgun while he performed his duties at the Federal Judicial Center in the District of Columbia. Heller applied for a registration certificate for a handgun—he wished to keep and bear arms, specifically a handgun—to have inside his home and was denied. The District of Columbia generally prohibited the possession of handguns, and it was a crime to carry an unregistered firearm, and the registration of handguns was prohibited. Also, the law stated that registered “long guns must be unloaded and disassembled or bound by a trigger lock or similar device, unless they are located in a place of business or are being used for lawful recreational activities. Heller sued for his right to keep and bear arms inside his domicile, and he argued against the portion of the law that required guns to be unloaded and disassembled or bound by a trigger lock or similar device. In Heller’s neighborhood he claimed that he needed a ‘functional firearm within the home.’”

The Court of Appeals for the District of Columbia Circuit, construing Heller's complaint as seeking the right to render a firearm operable and carry it about his home in that condition only when necessary for self-defense, reversed. It held that the Second Amendment protects an individual’s right to possess firearms and that the city’s total ban on handguns, as well as its requirement that all firearms in the home be kept nonfunctional even when necessary for self-defense, violated that right.

During Richard Nixon’s Presidential days, the Chief Justice of the United States, Warren Burger, wrote that “the idea that the Second Amendment has anything whatsoever to do with an individual’s right to own a gun is the biggest Constitutional hoax ever perpetrated on the American people.” Yet, decades later, in District of Columbia v. Heller, 554 U.S. 570 (2008), the Supreme Court ruled that the Second Amendment “codified a pre-existing right” and that it “protects an individual right to possess a firearm unconnected with service in a militia, and to use that arm for traditionally lawful purposes, such as self-defense within the home,” but “the right is not unlimited.” It is not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose.” It also clarified that many longstanding prohibitions and restrictions on firearms possession listed by the Court are consistent with the Second Amendment. In the case of the District of Columbia v. Heller, 554 U.S. 570 (2008), the U.S. Supreme Court ruled that “a prefatory clause does not limit or expand the scope of the operative clause” and, therefore, only the second clause has any “operative,” or substantive, meaning. (See section IX, titled THE NOMINATIVE ABSOLUTE: A PREFATORY CLAUSE, on page 11 of this essay for the grammatical explanation of the U.S. Supreme Court’s ruling).

________________________

15 www.law.cornell.edu/supct/html/07-290.ZS.html. 16 Ibid.

17 Ibid.

18 Ibid.
VI. MCDONALD V. CHICAGO, 561 U.S. 3025 (2010)

Otis McDonald, et al., were petitioners in Chicago who wanted to keep handguns within their homes; however, the city of Chicago enacted a handgun ban to protect its residents “from loss of property and injury or death from firearms.” Otis McDonald had been a target of threats and violence because he was in his late seventies, and he lived in a high crime neighborhood. “McDonald’s home and garage had been broken into a combined five times, with the most recent robbery committed by a man McDonald recognized from his own neighborhood.”19 The City of Chicago and the village of Oak Park, a Chicago suburb argued that their laws banning handguns were constitutional because the Second Amendment had no application to the states. The case was taken to the U.S. Supreme Court. The U.S. Supreme Court clearly defined the state and local governments were limited to the same extent as the federal government. Citizens within existing states, cities and local governments had the same right to defend themselves against the states, as the states did against the federal government, and that self-defense within federal enclaves extended to state enclaves. Citizens had the right to defend themselves within their own home regardless of what state or city or county they chose to live. “No State could make or enforce laws that abridged the privileges or immunities of its citizens.”20

In McDonald v. Chicago, 561 U.S. 3025 (2010), the Supreme Court ruled that “the Second Amendment limits state and local governments to the same extent that it limits the federal government.”21 McDonald v. Chicago addressed the ruling that District of Columbia v. Heller did not. In District of Columbia v. Heller it was ruled that “self-defense within federal enclaves is a personal right that is protected under the Second Amendment to the U.S. Constitution. In McDonald v. Chicago the ruling extended that personal right to include “self-defense within state enclaves.” Individuals had the same right to defend themselves against any abusive powers of the state to the same extent that that state had the right to defend its citizens against any abusive power of the federal government.


20 “[T]he words ‘No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States’ seems to me an eminently reasonable way of expressing the idea that henceforth the Bill of Rights shall apply to the States.” Erwin Chemerinsky et al., Constitutional Law § 6.3.2 (3d ed. 2006) (quoting Duncan v. Louisiana, 391 U.S. 145, 166 (1968) (Black, dissenting))

“THE Conventions of a number of the States [. . .] in order to prevent misconstruction or abuse of its powers, that further declaratory and restrictive clauses—in this case a non-restrictive clause—should be added.” Preamble of the Bill of Rights.

¹The first clause beginning with “A well-regulated militia” and ending with "a free State" is a nominative absolute. It consists of a substantive—a noun or noun substitute, in this case, militia, and a participle: being.

²The second clause is the operative clause. This was argued in the U.S. Supreme Court, and it was ruled that only the secondary clause has any “operative,” or substantive, meaning. The operative clause “the right of the people [...]” gave Heller an individual right to keep and bear arms.

NOTE: If the participle “being,” were to be changed into its predicate form “is,” the grammatical meaning of the Second Amendment would be changed. It would better imply to the reader that the right to keep and bear arms pertained to the people belonging to a well-regulated militia.
The U.S. Supreme Court in District of Columbia v. Heller ruled that “a prefatory clause does not limit or expand the scope of the operative clause” and, therefore, only the second clause has any “operative,” or substantive, meaning. Consequently, the people have the right to own guns independent of service in a militia.

The Heller ruling is consistent with the nominative absolute—the prefatory clause—that I diagrammed in both the Reed Kellogg Diagram and the Hopper Diagram. People have the right to keep and bear arms, and [grammatically] the people are separate from the militia.
IX. THE NOMINATIVE ABSOLUTE: A PREFATORY CLAUSE

A nominative absolute is defined as “a free-standing (absolute) part of a sentence that describes or modifies the main subject and verb. It is usually at the beginning or end of the sentence, although it can also appear in the middle. Its parallel is the ablative absolute in Latin, or the genitive absolute in Greek.” A nominative absolute is a noun phrase that begins or ends a sentence. The phrase has no grammatical connection with the rest of the sentence. Most nominative absolutes contain a participle or participial phrase which modifies the noun or pronoun. For example: The weather being rainy, we decided to postpone the trip. (Nominative absolute in bold/italics)

In the case of the Second Amendment, the prefatory clause is in the nominative absolute. It consists of a substantive—a noun or noun substitute, in this case, militia, and a participle: being. Since the participle “being” is vague, it renders the remaining of the clause to be read as being ambiguous. If the participle “being,” were to be changed into its predicate form “is,” the grammatical meaning of the Second Amendment would be changed. It would better imply to the reader that the right to keep and bear arms pertain to the people belonging to a well-regulated militia. The prefatory clause would then become a predicate because it would contain a verb instead of a participle. It would read 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.” Some grammarians believe that this is already implied, even in the prefatory clause and nominative absolute case.

However, in District of Columbia v. Heller, 554 U.S. 570 (2008), the U.S. Supreme Court ruled that “a prefatory clause does not limit or expand the scope of the operative clause” and, therefore, only the second clause has any “operative,” or substantive, meaning. In other words, Heller did not have to be a member of ‘a well-regulated militia’ to keep and bear arms. The secondary clause, “the right of the people to keep and bear arms shall not be infringed” was substantial enough to stand alone without its prefatory clause.

http://englishplus.com/grammar/00000390.htm
http://www.santafenewmexican.com/opinion/my_view/article_926cc247-7762-5fe9-ae2e-2b6aba16f261.html
CONCLUSION

Since the onset of the Second Amendment’s implementation, both the federal and state courts had yet to define what specific right this Amendment protected. Many gun-rights advocates had speculated—possibly through their over-simplification of the Amendment’s ambiguous meaning—that the Second Amendment unequivocally protected the people’s rights to keep and bear arms, and that their individual rights to sell, purchase, and transport said arms were implied under the Second Amendment. However, others have argued that only the states had the rights to keep and bear arms in connection with their militia units. Therefore, it was the right of each state’s militia to protect the sovereignty of their state against any enemy threat, even if that threat included an organized militia of the federal government. Any attempt by the federal government to obtain absolute power over the people of a certain state, consequently, would be countered and engaged by that state’s militia. “The Second Amendment was believed to bar only federal action, not state or municipal restraints.”

In District of Columbia v Heller, as ruled by the court, it was concluded that the prefatory clause of the Second Amendment, precisely “the right of the people to keep and bear Arms shall not be infringed,” stemmed from “the Anti-Federalist’s concern that the federal government would disarm the people in order to disable the citizens’ militia, enabling a politicized standing army or a select militia to rule.” Heller’s case “to keep and bear arms” was ruled in his favor not simply because of the threat of a federal take-over, but because of English syntax. The power of English grammar prevailed, but some grammarians may argue that “time will reverse this decision.”

The court strains to use context to define the amendment without giving due consideration to how the phrase “the people” is used throughout the Constitution. One scholar has noted that “the Second Amendment speaks of a right of ‘the people’ collectively rather than a right of ‘persons’ individually.” The people collectively are seen as being the militia members and not individual citizens of the United States.

Still, any word or passage is said to be ambiguous “when it can be interpreted in two or more ways, yet provides the reader with no certain basis for choosing among the alternatives.” That is the didactic truth, and there will always be many interpretations of the Amendments of the U.S. Constitution, especially the Second Amendment. During the time our brilliant Latinate-minded Founders wrote the Amendments, there is no doubt that 10 U.S.C. 311 states that everyone is part of the militia: everyone.

With this in mind and the many places our founding fathers like Washington and Jefferson talked about the people’s right to defend liberty, some have argued that the writers of our Bill of Rights made every intent of making certain that the people of this country were armed well enough to make sure that an oppressive government—federal or state—would not be tolerated. “The people” is a collective body of Americans and above, not under, the federal government of the United States of America.

\footnote{http://constitution.findlaw.com/amendment2/amendment.html}
\footnote{Ibid.}
\footnote{http://www.law.yale.edu/documents/pdf/2002Enduring.pdf}