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Why the Original Meaning of the Second Amendment Is So Hard to Determine

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What does the Second Amendment mean? This question is at the center of one of the most divisive debates in modern American constitutional law. The amendment itself contains 27 words: "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." This provision references both the collective right of a militia and an individual right. Does this two-century-old text, then, mean that Americans today have a right to gun ownership and use?

In a landmark 2008 decision on this question, *District of Columbia v. Heller*, the Supreme Court was sharply divided. The majority opinion, by Justice Antonin Scalia, concluded, among other things, that the phrase *bear arms against* would always refer to service in a militia. But *bear arms* by itself—the wording used in the Second Amendment—could sometimes refer to an individual right. The dissenting opinion, by Justice John Paul Stevens, intimated that the phrase *keep and bear arms* was a fixed term of art that always referred to militia service.

In the 12 years since that decision, scholars have gained access to a new research tool that some hope can settle this debate: corpus linguistics. This tool allows researchers to search millions of documents to see how words were used during the founding era, and could help courts determine how the Constitution was understood at that time—what is known as "original public meaning." Corpus linguistics, like any tool, is more useful in some cases than in others. The Second Amendment in particular poses distinct problems for data searches, because it has multiple clauses layered in a complicated grammatical structure.

With that in mind, in mid-2018 we searched large collections of language from around the time of the founding, and published our tentative findings on the *Harvard Law Review's* blog. We used two databases: the Corpus of Founding Era American English (COFEA), which contains about 140 million words of text from various American documents published from 1760 to 1799, and the Corpus of Early Modern English (COEME), which covers British English from 1475 to 1800 and includes more than 1 billion words of text. We have now expanded that initial research to consider how other aspects of the Second Amendment were understood at the time of the framing. Our findings show that both Scalia and Stevens appear to have been wrong with respect to at least one of their linguistic claims in the *Heller* decision.

In 2008, technology was in a very different place. The iPhone was less than a year old. The format war between Blu-ray and HD DVD drew to a close. And Twitter celebrated its second anniversary. At the time, the justices and their law clerks had fairly rudimentary tools to search how language had been used 200 years earlier. Based on the limited data set Scalia considered, we can't say his linguistic claim about *bear arms against* was unsupported then. But this specific conclusion does not stand the test of time.

Scalia concluded that the phrase *bear arms* "unequivocally" carried a military meaning "only when followed by the preposition 'against.'" The Second Amendment does not use the word *against*. Therefore, Scalia reasoned, the phrase *bear arms*, by itself, referred to an individual right. To test this claim, we combed through COFEA for a specific pattern, locating documents in which *bear* and *arms* (and their variants) appear within six words of each other. Doing so, we were able to find documents with grammatical constructions such as *the arms were borne*. In roughly 90 percent of our data set, the phrase *bear arms* had a militia-related meaning, which strongly implies that *bear arms* was generally used to refer to collective military activity, not individual use. (Whether these results show that the Second Amendment language precludes an individual right is a more complicated question.)

Further, we found that *bear arms* often took on a military meaning without being followed by *against*. Thus, the word *against* was sufficient, but not necessary, to give the phrase bear arms a militia-related meaning. Scalia was wrong on this particular claim.

Next, we turn to Justice Stevens's dissent. He wrote that the Second Amendment protected a right to have and use firearms only in the context of serving in a state militia. Stevens appears to have determined—though his exact conclusion is somewhat unclear—that the phrase *keep and bear arms* was a unitary term of art. Such single linguistic units, called binomials or multinomials, are common in legal writing. Think of *cease and desist* or *lock, stock, and barrel*. As a result, Stevens concluded, there was no need to consider whether *keep arms* had a different meaning from *bear arms*. Therefore, he had no reason to determine whether *keep arms*, by itself, could refer to an individual right.

Was Stevens's linguistic intuition correct? No. The phrase *keep and bear arms* was a novel term. It does not appear anywhere in COEME—more than 1 billion words of British English stretching across three centuries. And prior to 1789, when the Second Amendment was introduced, the phrase was used only twice in COFEA: First in the 1780 Massachusetts Declaration of Rights,

and then in a proposal for a constitutional amendment by the Virginia Ratifying Convention. In short, *keep and bear arms* was not a term of art with a fixed meaning. Indeed, the meaning of this phrase was quite unsettled then, as it had barely been used in other governmental documents. Ultimately, a careful study of the Second Amendment would have to treat *keep arms* and *bear arms* as two separate linguistic units, and thus two separate rights.

We performed another search in COFEA, about the meaning of *keep arms*, looking for documents in which *keep* and *arms* (and their variants) appear within six words of each other. The results here were somewhat inconclusive. In about 40 percent of the hits, a person would keep arms for a collective, military purpose; these documents support Justice Stevens's reading. And roughly 30 percent of the hits reference a person who keeps arms for individual uses; these documents support Justice Scalia's analysis. The remainder of the hits did not support either reading.

We could not find a dominant usage for what *keep arms* meant at the founding. Thus, even if Scalia was wrong about the most common meaning of *bear arms*, he may still have been right about *keep arms*. Based on our findings, an average citizen of the founding era would likely have understood the phrase *keep arms* to refer to possessing arms for both military and personal uses.

Finally, it is not enough to consider *keep and bear arms* in a vacuum. The Second Amendment's operative clause refers to "the right of the people." We conducted another search in COFEA for documents that referenced *arms* in the context of *rights*. About 40 percent of the results had a militia sense, about 25 percent used an individual sense, and about 30 percent referred to both militia *and* individual senses. The remainder were ambiguous. With respect to rights, there was not a dominant sense for keeping and bearing arms. Here, too, an "ordinary citizen" at the time of the founding likely would have understood that the phrase *arms*, in the context of *rights*, referred to both militia-based and individual rights.

Based on these findings, we are more convinced by Scalia's majority opinion than Stevens's dissent, even though they both made errors in their analysis. Furthermore, linguistic analysis formed only a small part of Scalia's originalist opus. And the bulk of that historical analysis, based on the history of the common-law right to own a firearm, is undisturbed by our new findings. (We hope to publish this research, which also looked at other phrases in the Second Amendment, such as *the right of the people*, in an academic journal.)

In the next few months, the Supreme Court will decide a Second Amendment case from New York. More likely than not, the justices will dismiss the case as moot, as the local government has already repealed the law at issue. But should the justices want to settle the questions of the Second Amendment more finally, now or in the future, they'll find that corpus linguistics, by itself, cannot definitively resolve whether *Heller* was right. Neither Scalia's nor Stevens's error provides the gotcha moment that people on both sides of the Second Amendment debate had hoped for.

Yet we remain optimistic about the future of this data tool. For certain originalist cases, corpus linguistics can provide powerful insights into how the founding generation understood a word or phrase in the Constitution. But when corpus linguistics illuminates only part of a text, then

originalists should be candid about its limits. And when corpus linguistics provides answers that contradict long-held beliefs, originalists should be willing to reconsider old precedents—yes, even those by Antonin Scalia, originalism's patron saint

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