**MEMORANDUM**

**TO:** Dr. Idan Blank

**FROM:** David G. Kamper

**DATE:** Summer 2024

**RE:** Second Amendment Language Construction: What is it, why the dependencies are odd, and what it says about judicial interpretation

**SECOND AMENDMENT LAW: A JUDICIAL INTERPRETIVE CHALLENGE**

The Second Amendment to the United States Constitution is part of the Bill of Rights and was ratified on December 15, 1791. The exact text of the Second Amendment is:

“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.”

As highlighted in a show Radiolab from WNYC, “More Perfect - The Gun Show,” the construction of the second amendment, with its myriad of commas in odd places, has confounded jurists for two centuries. As with other amendments, there has been extensive clarity established by courts, particularly the Supreme Court of the United States. For example, the Fourth Amendment against unlawful search and seizures was litigated in the early days of the republic, only a year or so after the ratification of the amendments in 1791. But the Second Amendment is actually a recent controversial interpretative nightmare. Few nineteenth and early twentieth century cases implicated the Second Amendment directly, and thus the small number of references in early cases were glancing and largely unilluminating as to the nature and scope of the right protected by the Amendment.

Given scant guidance from the Supreme Court, there was no definitive resolution in the twentieth century of what the right protected by the Second Amendment encompasses, and what role, if any, the textual reference to a “well regulated Militia” plays in addressing that question. Courts, commentators, and Congress debated, over the course of decades, the meaning of, and relationship between, the clauses, primarily with respect to whether (1) in light of the first clause, the Amendment protects a collective right tied to maintaining formal, organized militia units; or (2) in light of the second clause, the Amendment protects an individual right to possess a firearm unconnected with service in a militia.

In 1939, the Supreme Court first took the question in US v. Miller. The opinion and decision seemed to tie the Second Amendment right “to keep and bear arms” to militia use. Miller involved a federal statute, the National Firearms Act, which required registration of short-barreled shotguns, among other firearms. After reciting the original provisions of the Constitution dealing with the militia, the Miller Court observed that “[w]ith obvious purpose to assure the continuation and render possible the effectiveness of such forces the declaration and guarantee of the Second Amendment were made. It must be interpreted with that end in view.” The Miller decision accordingly rejected the proposition that the federal restriction on short-barreled shotguns violated the Second Amendment, holding that absent evidence “tending to show that possession or use of” a short-barreled shotgun “at this time has some reasonable relationship to the preservation or efficiency of a well regulated militia, [the Court] cannot say that the Second Amendment guarantees the right to keep and bear such an instrument.” With weapons and firearms development across the twentieth century, and subsequent strengthening state and local regulations on one’s ability to own a firearm, the lack of clarity regarding the fundamental nature and scope of the Second Amendment following Miller fueled strong disagreement, and therefore, attention was paid to the linguistic construction of the amendment.

Lower courts and at least one congressional subcommittee weighed in as well. In the ninety-seventh Congress, the Senate Judiciary Committee’s Subcommittee on the Constitution issued a report concluding, among other things, that the Second Amendment protects “a right of the individual citizen to privately possess and carry in a peaceful manner firearms and similar arms.” By the turn of the century, most U.S. Courts of Appeals to have considered the matter interpreted the Second Amendment as speaking of a collective right tied to military or militia use of firearms, though a divided panel of the U.S. Court of Appeals for the Fifth Circuit in 2001 reached a contrary conclusion. Then, in 2007, a split panel of the D.C. Circuit struck down District of Columbia restrictions on the private possession of handguns as inconsistent with the Second Amendment, and the Supreme Court granted review, leading to the Court’s first significant pronouncements on the Second Amendment in almost seventy years. This was the DC v. Heller case.

**JUDICIAL INTERPRETATION**

Over the centuries, lawyers and jurists are asked to consider how one might interpret the statutory (laws passed through a legislative body) or caselaw (opinions from courts). Many countries, such as the United Kingdom and Israel do not have constitutions; instead, they fall back on legislative acts or in the case of criminal law, often through centuries of case law. How is one supposed to interpret text based on this? This becomes the subfield of legal linguistics called judicial interpretation. Judicial interpretation refers to how a judge interprets laws. Different judges interpret the laws of their state or the country in different ways. Some judges are said to interpret laws in ways that cannot be sustained by the plain meaning of the law; at other times, some judges are said to "legislate from the bench." These judicial behaviors are sometimes referred to as judicial activism, which is contrasted to judicial restraint as a way of interpreting both what laws say and how much freedom judges have to create new laws from the bench. There are various methods, where a jurist often attaches oneself to. The major ones in the United States are, textualism, originalism, strict constructionism, and functionalism.

Textualism is a method whereby the plain text of a statute is used to determine the meaning of the legislation or opinion of the jurist. Instead of attempting to determine statutory purpose or legislative intent, textualists adhere to the objective meaning of the legal text. Textualism may also refer to a set of practical techniques used by jurists to determine the application of a statute through close consideration of its text. Textualism is consistent with the Plain Meaning Rule. The plain meaning of a word is determined by its dictionary definition, its placement in the body of the text, and its layperson, or common, usage at the time the statute was written. A judge that relies solely on the literal or plain meaning of a text does not consider supporting or supplementary sources, such as modern social policy or legislative history, when interpreting a statute. It assumes meaning must be intuited given legal centrism, that people are made to follow the law, and behaviors adapt to the law, not in reverse. In other words, the chain of causation is that law is passed or developed, and people adjust their behavior considering new law. This is contrasted with customary law, which is that law is retrospective discipline, and most of the law is adaptive to human behavior (I am strongly in this camp, though I allow for some edge cases that modify this). Textualism states that we must follow how a written most intuitively states. It is fast becoming a more important legal interpretative lens.

One is right to suggest it might be that the second amendment syntax construction of sentences at the time its writing in 1790. This seems to not be true, given our context. Moreover, as compared to other amendments, complicated syntax is not an issue. But this also does not matter to our case, given that textualism wants us to consider what the intuitional meaning of the sentence is. Therefore, we must defer to how one would interpret it now.

**SECOND AMENDMENT TEXTUALISM - DEPENDENCIES**

Given the position of the commas and the rise of textualism as the lens to which jurists interpret jurisprudence, *it is crucial to consider how lay persons interpret theses dependencies.* We want to study this because if interpretation or the further writing of amendments to the US Constitution yields complicated syntactic structures, it might be

**Interpretation 1: Conditional Dependency (Militia Clause as a Justification):**

The introductory clause (“A well regulated Militia, being necessary...") is seen as a condition or justification for the operative clause ("the right of the people to keep and bear Arms..."). In this interpretation, the right to bear arms is explicitly tied to the necessity of a "well regulated Militia.” This view suggests that the Second Amendment protects the right to bear arms primarily in the context of maintaining a militia, potentially limiting the right to arms to this purpose. This is the interpretation of the earlier Second Amendment jurisprudence.

**Interpretation 2: Independent Clauses (Militia Clause as a Prefatory Statement):**

The introductory clause is seen as a prefatory or explanatory statement that does not restrict the operative clause. The main clause ("the right of the people to keep and bear Arms, shall not be infringed") stands independently. This view supports the idea that the right to bear arms is not contingent on militia service, but rather a general right of the people. In a dependency tree, the introductory clause would be loosely connected or parallel to the main clause, with minimal direct syntactic dependency. This is the interpretation of the later Second Amendment jurisprudence.

Understanding lay intuitions of how people interpret these dependencies is crucial. You can see in the Github page (<https://github.com/dgkamper/secondamendmentdependencies>) that there are different mappings. This goes to the heart of the second amendment analysis question.

**STUDY DESIGN AND STIMULI**

Our independent and dependent variables are such that we can condition our understanding. We want to better understand what lay interpretations of the second amendment might be given its confusing structure, given the odd dependencies. Our stimuli are a set of twenty sentences found at the github link: <https://github.com/dgkamper/secondamendmentdependencies>.

We have within-subjects design, where each participant interprets all twenty sentences, allowing comparison across different sentence types. Covariates included are age, race, sex, education level, political affiliation, and religious background. The sentence is presented, with two interpretations. The first interpretation one focuses on the idea that the latter part of the sentence (the main clause) is justified or conditioned by the first part (the introductory clause). The second interpretation treats the main clause as an independent statement, with the introductory clause providing background or context but not limiting the main clause. Take for example the following stimuli example:

**10) Mental health awareness, being crucial for overall well-being, the destigmatization of seeking therapy and support, is important.**

*How do you understand the relationship between mental health awareness and the importance of destigmatizing therapy in this sentence?*

* The sentence suggests that destigmatizing therapy is important because mental health awareness is crucial for well-being, with the importance tied to this awareness.
* The sentence emphasizes the importance of destigmatizing therapy independently, with mental health awareness being a contextual but not directly limiting factor.

We subsequently ask the following questions:

1. Perceived Importance of the Introductory Clause:

How important do you believe the introductory clause (for example, is mental health awareness, being crucial for overall well-being) is for determining the meaning of the sentence?

1. Agreement with the Sentence:

Do you agree with the overall message of the sentence?

1. Confidence in Interpretation:

How confident are you in your chosen interpretation of the sentence?

1. Perceived Clarity of the Sentence:

How clear do find the sentence?

All are measured on a five-point Likert scale.

We might include open ended responses so as participants can justify their response. We would do exploratory analysis of open-ended responses for insights into participant reasoning behind their interpretations.

Our Quantitative Analysis uses chi-square tests for categorical data (interpretation choice) and t-tests or ANOVA for Likert scale data (importance, agreement, confidence, clarity). We would then analyze whether different sentence constructs lead to different interpretations and levels of agreement or perceived clarity.

A cursory analysis completes the following power analysis.

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I also want to suggest a study two, that has to do with a different interpretability problem. In this essay (<https://firearmslaw.duke.edu/2021/07/the-strange-syntax-of-the-second-amendment>) from the most preeminent second amendment law professoriate, the Duke University Law School Center for Firearms Law, there are four different constructions, particularly on the use of the word “being.” The first is the **temporal interpretation**, with the main clause being true whenever the condition in the being-clause is met. For example, one could interpret whenever a well-regulated militia is necessary, the right to bear arms shall not be infringed. The second is the **conditional interpretation**, where the main clause is contingent upon the being-clause as a condition. For instance, one could see if a well-regulated militia is necessary, then the right to bear arms shall not be infringed. The third is the **external causal interpretation**, that being the being-clause provides a real-world cause for the main clause. In this case, the right to bear arms shall not be infringed for the purpose of maintaining a well-regulated militia necessary for the security of a free state. The fourth is the **internal causal interpretation**, that being the being-clause gives a logical reason or justification for the main clause. Here one could write, "because it is known that a well-regulated militia is necessary for the security of a free state, the right to bear arms shall not be infringed."

Building a further set of stimuli to test the these clause structures given the “being-clauses” would be the next step.