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CORPUS LINGUISTICS CRITICISMS OF *HELLER* MISUSE CORPUS LINGUISTICS

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In recent years, a number of commentators have asserted that new corpus-linguistics evidence undermines the U.S. Supreme Court’s 2008 landmark holding in *District of Columbia v. Heller* that the Second Amendment protects an individual right to possess and carry weapons.¹ But these commentators have misused corpus linguistics, and their analytical errors underscore that judges should exercise caution when invoking corpus data and should not uncritically accept conclusions drawn by linguistics experts.

Legal corpus linguistics is a relatively new tool for illuminating a legal text’s original meaning. Its method is to search large databases of language usage from around the time of the law’s enactment. While virtually unheard of as a judicial tool just a decade ago, citation of corpus linguistics in judicial opinions—including at the Supreme Court—has spiked in recent years.² One scholar has predicted that corpus linguistics “will revolutionize statutory and constitutional

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1. See Dennis Baron, *Corpus Evidence Illuminates the Meaning of Bear Arms*, 46 HASTINGS CONST. L.Q. 509 (2019); Alison L. LaCroix, *Historical Semantics and the Meaning of the Second Amendment*, PANORAMA (Aug. 3, 2018), <http://thepanorama.shear.org/2018/08/03/historical-semantics-and-the-meaning-of-the-second-amendment> [<https://perma.cc/M2AY-YP4>]; Neal Goldfarb, *A (Mostly Corpus-Based) Linguistic Reexamination of D.C. v. Heller and the Second Amendment*, SSRN (Feb. 27, 2021), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3481474 [<https://perma.cc/TX59-JTFW>]; James C. Phillips & Josh Blackman, *Corpus Linguistics and Heller*, 56 WAKE FOREST L. REV. 609 (2021) (concluding that corpus data undermines aspects of both the *Heller* majority and the dissent); Josh Jones, Comment, *The “Weaponization” of Corpus Linguistics: Testing Heller’s Linguistic Claims*, 34 BYU J. PUB. L. 135 (2019) (same).

2. See Kevin Tobia, *The Corpus and the Courts*, U. CHI. L. REV. ONLINE (Mar. 5, 2021), <https://lawreviewblog.uchicago.edu/2021/03/05/tobia-corpus/> [<https://perma.cc/HA7P-YP3A>] (“[B]etween 2018 and 2020, legal corpus linguistics was cited in the U.S. Supreme Court; in the D.C., Federal, Third, and Sixth Circuits; in U.S. District Courts; and in state courts in Alabama, Idaho, Michigan, Montana, Ohio, and Utah.”).

interpretation.”³ Legal corpus linguistics’ ascendance has brought it detractors and defenders from the academy and from the bench.⁴

Corpus-linguistics commentators recently have weighed in on the meaning of the Second Amendment phrase *keep and bear arms*, a central issue in *Heller*.⁵ While the *Heller* majority concluded that the right to keep and bear arms broadly protects the possession and carrying of weapons,⁶ the dissent concluded that the right is limited to military service.⁷ The dissent observed that at the time of ratification there existed an idiomatic sense of the term *bear arms* meaning “to serve as a soldier.”⁸ The majority countered that it is absurd to say that the Second Amendment protects a right to serve as a soldier, and concluded that the Amendment uses a literal sense of *bear arms* meaning “carry weapons.”⁹

Corpus-linguistics commentators have concluded that corpus data unavailable in 2008 establishes that *bear arms* was used more often in the idiomatic military sense than the literal sense at the time of ratification.¹⁰ They argue that this data is probative of how the Second Amendment uses the term, and according to most of them, it establishes that the Second Amendment uses the idiomatic military sense.

This Article argues that these commentators are wrong. Frequency data comparing the literal and idiomatic senses may be relevant if there is ambiguity as to which sense the Second Amendment uses, but most of the commentators do not even mention the *Heller* majority’s conclusion that there is no ambiguity because in context the idiomatic reading is absurd. And the *Heller* majority was right—traditional tools of interpretation establish that the idiomatic reading is not plausible. It is error to treat frequency data comparing senses as relevant without establishing the existence of even a modest level of ambiguity. Compounding the problem, most of the commentators compare uses of *bear*

3. Amanda K. Fronk, *Big Lang at BYU*, *BYU MAG.* (Summer 2017) (quoting Lawrence Solum), <https://magazine.byu.edu/article/big-lang-at-byu/> [https://perma.cc/4N65-8RH8].

4. *Compare, e.g.*, *Facebook, Inc. v. Duguid*, 141 S. Ct. 1163, 1174–75 (2021) (Alito, J., concurring in the judgment); *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1769 n.22 (2020) (Alito, J., dissenting); *Carpenter v. United States*, 138 S. Ct. 2206, 2238 & n.4 (2018) (Thomas, J., dissenting); *Wilson v. Safelite Grp. Inc.*, 930 F.3d 429, 439–45 (6th Cir. 2019) (Thapar, J., concurring in part and in the judgment); *Am. Bankers Ass’n v. Nat’l Credit Union Admin.*, 306 F. Supp. 3d 44, 68 & nn.5–6 (D.D.C. 2018) (Friedrich, J.); Thomas R. Lee & Stephen C. Mouritsen, *Judging Ordinary Meaning*, 127 *YALE L.J.* 788 (2018); Lawrence B. Solum, *Triangulating Public Meaning: Corpus Linguistics, Immersion, and the Constitutional Record*, 2017 *BYU L. REV.* 1621 (2018); Lawrence M. Solan & Tammy Gales, *Corpus Linguistics as a Tool in Legal Interpretation*, 2017 *BYU L. REV.* 1311 (2018); *with Wilson*, 930 F.3d at 445–48 (Stranch, J., concurring); Kevin Tobia, *Testing Ordinary Meaning*, 134 *HARV. L. REV.* 726 (2020); Carissa Byrne Hessick, *Corpus Linguistics and the Criminal Law*, 2017 *BYU L. REV.* 1503 (2018); Anya Bernstein, *Legal Corpus Linguistics and the Half Empirical Attitude*, 106 *CORNELL L. REV.* 1397 (2021); John S. Ehrett, *Against Corpus Linguistics*, 108 *GEO. L.J. ONLINE* 50 (2019); Donald Drakeman, *Is Corpus Linguistics Better than Flipping a Coin?*, 109 *GEO. L.J. ONLINE* 81 (2020).

5. I italicize uses of phrases as phrases. *See, e.g.*, *TEX. L. REV.*, *MANUAL ON USAGE & STYLE* § 4.06 (14th ed. 2020).

6. *District of Columbia v. Heller*, 554 U.S. 570, 581–92 (2008).

7. *Id.* at 646–652 (Stevens, J., dissenting).

8. *Id.* at 646.

9. *Id.* at 584, 586–87 (majority opinion).

10. *See infra* note 28.

arms in military *contexts* versus nonmilitary *contexts*, but ambiguity can exist only with respect to distinct *senses*. In sum, most of the commentators have skipped step one (establish a degree of ambiguity) and botched step two (compare usage of the competing senses).

These multiple linguistic errors—made not by newcomers but by a group of scholars that includes a pioneer of legal corpus linguistics and others who have described themselves to the Supreme Court as “experts in the field of linguistics, law, and legal history”¹¹—highlight that judges and practitioners should exercise caution when evaluating assertions from corpus data. That is not controversial—leading proponents of legal corpus linguistics often have been quick to sound similar warnings.¹² But amid a developing debate over use of corpus linguistics in the law, this Article is significant both for its substantive Second Amendment implications and as an interpretive cautionary tale.

* * *

The Second Amendment provides: “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.”¹³ In *Heller*, the U.S. Supreme Court held that the Amendment protects an individual right to possess and carry weapons in case of confrontation.¹⁴ Justice Scalia, the most prominent pioneer of modern originalism, wrote the majority opinion. Dissenting with three other justices, Justice Stevens concluded that the Amendment “does not curtail the Legislature’s power to regulate the nonmilitary use and ownership of weapons.”¹⁵ The justices contested several aspects of the Amendment’s language, but probably most important was their dispute over the meaning of *keep and bear arms*. Justice Scalia concluded that the phrase protects the possession and carrying of weapons in case of confrontation,¹⁶ while Justice Stevens concluded that the phrase protects a right “to possess arms if needed for military purposes and to use them in conjunction with military activities.”¹⁷

11. Brief for Corpus Linguistics Professors and Experts as Amici Curiae Supporting Respondents at 1, *N.Y. State Rifle & Pistol Ass’n, Inc. v. City of New York*, 140 S. Ct. 1525 (2020) (No. 18-280), 2019 WL 3824697, at *1; Brief for Corpus Linguistics Professors and Experts as Amici Curiae Supporting Respondents at 1, *N.Y. State Rifle & Pistol Ass’n, Inc. v. Bruen*, No. 20-843, 2021 WL 4353034, at *1.

12. *E.g.*, Solan & Gales, *supra* note 4, at 1357 (use of corpus data requires “asking the right questions, conducting the right searches, and drawing valid inferences”); Phillips & Blackman, *supra* note 1, at 684 (“[O]ur research highlights some of the limitations of applying corpus linguistics to constitutional interpretation.”); Thomas R. Lee & Stephen C. Mouritsen, *The Corpus and the Critics*, 88 U. CHI. L. REV. 275, 279, 351 (2021) (while corpus linguistics “can address shortcomings of existing tools for assessing the ordinary meaning of legal language,” “there certainly are some wrinkles to iron out”); Solum, *supra* note 4, at 1647 (“[C]orpus data alone cannot disambiguate the text.”); *cf.* Tobia, *supra* note 2 (“I suspect that many of Lee and Mouritsen’s ‘critics’ believe that “at least some version of good corpus linguistics can provide at least some evidence of ordinary meaning, in at least some circumstances.”).

13. U.S. CONST. amend. II.

14. 554 U.S. at 592.

15. *Id.* at 637–38 (Stevens, J., dissenting).

16. *Id.* at 592 (majority opinion).

17. *Id.* at 646 (Stevens, J., dissenting).

Justice Scalia and Justice Stevens agreed that at the time of ratification the term *bear arms* carried both an idiomatic sense and a literal sense.¹⁸ A *sense* is a meaning of a word. For example, the word *play* carries a different sense (a different meaning) in these sentences: (1) We went to see the play *Romeo and Juliet* at the theater; (2) The coach devised a play that surprised the other team. These different senses require separate dictionary definitions. A word usage is *ambiguous* when it is unclear what sense the word usage employs—stating that “the play was a success” without context leaves *play* ambiguous because the statement could plausibly employ either the theater sense or the sports sense.¹⁹ And an *idiom*, to give one more background definition, is a figure of speech—when we say that someone “kicked the bucket,” for example, we usually mean that they died, not that they physically kicked a bucket.

In *Heller*, it was uncontested that the *bear arms* idiom referred to service as a soldier or the waging of war.²⁰ If someone *bore arms* in the idiomatic sense, they were serving as a soldier or off to war, not physically using an arm at the moment. It was also uncontested that the literal sense of *bear arms* meant to physically carry a weapon.²¹ While Justice Scalia concluded that the Second Amendment uses the literal sense of *bear arms*, Justice Stevens concluded that it uses the idiomatic sense.

Well, not quite. Although Justice Stevens asserted at times that *bear arms* should be read idiomatically, recall his conclusion that *keep and bear arms* means “to possess arms if needed for military purposes and to use them in conjunction with military activities.”²² That describes literal, not figurative, arms-bearing—it refers to someone physically possessing and using arms. Justice Scalia criticized Justice Stevens for this inconsistency and conjectured that he didn’t ultimately adopt the idiomatic reading because that reading 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.”²³ Justice Stevens did not respond.

* * *

Since *Heller* was decided, corpus linguistics as an aid in the interpretation of legal text has made significant inroads in the legal community.²⁴ Corpus linguistics involves searches of large databases composed of the text of newspapers, books, speeches, television, and so on.²⁵ These searches allow interpreters to examine word usage with statistical rigor rather than relying on

18. See *id.* at 584–86 (majority opinion); *id.* at 646 (Stevens, J., dissenting).

19. See Lawrence Solum, *Legal Theory Lexicon: Vagueness and Ambiguity*, LEGAL THEORY BLOG (Mar. 15, 2020), <https://lsolum.typepad.com/legaltheory/2020/03/legal-theory-lexicon-vagueness-and-ambiguity.html> [<https://perma.cc/AT4X-64W7>].

20. See *Heller*, 544 U.S. at 586 (majority opinion); *id.* at 646 (Stevens, J., dissenting).

21. See *id.* at 584–86 (majority opinion).

22. *Id.* at 646 (Stevens, J., dissenting).

23. *Id.* at 586 (majority opinion).

24. See generally Tobia, *supra* note 2.

25. See Lee & Mouritsen, *supra* note 12, at 277 (“Corpus linguistics is the study of language through the analysis of large bodies of naturally occurring text.”).

isolated examples or their intuition.²⁶ Most relevant here, corpus data can shed light on how often a word was used in a particular sense at a particular time. That frequency data might help resolve ambiguity in a particular legal text's usage of the word.²⁷ Recently, commentators have employed frequency data to determine in what sense the Second Amendment uses *bear arms*.

These commentators have concluded that at the time of ratification *bear arms* was used in the idiomatic sense more often than in the literal sense (or, as some have characterized it, more often in a collective/militia sense than an individual sense).²⁸ From that conclusion, some of them have asserted that Justice Scalia's interpretation of *bear arms* is wrong.²⁹ And in light of this "[n]ewly available corpus linguistics evidence," several of them have urged the Supreme Court to cabin *Heller*.³⁰

These commentators have been much too quick, however, to test Justice Scalia's interpretation of *bear arms* with frequency data. As noted, frequency data might help resolve ambiguity. But when it is clear which sense a word usage employs, there is by definition no ambiguity. And that is true even if the sense can be employed in different contexts. This point is the core linguistic reality that several of the commentators have completely missed. Sometimes a word is used in competing senses ("read a book" versus "read a face"), while other times a word is used in the same sense but in different contexts ("read a book" versus "read a magazine"). When a person reads a book, they are *reading* in the same sense that they are *reading* when they read a magazine. When they read a face, however, they are *reading* in a different sense. If we don't know whether a usage of *read* employs the text-reading sense or the face-reading sense, frequency data might help resolve the ambiguity. On the other hand, imagine a law providing that "the right to read text shall not be infringed." (This is a weird law but the hypothetical will make the point.) Because it is evident that *read* is being used

26. See *id.* at 285–86, 285 n.48.

27. See Lee & Mouritsen, *supra* note 4, at 829–30.

28. See Goldfarb, *supra* note 1, at 3 ("The corpus data for bear arms was overwhelmingly dominated by uses of the phrase in its idiomatic military sense."); Jones, *supra* note 1, at 136 ("[T]he phrase *bear arms* was recorded more often in its [idiomatic] sense than its carrying sense in the latter half of the eighteenth century."); Baron, *supra* note 1, at 510 ("Founding-era sources almost always use *bear arms* in an unambiguously military sense."); Phillips & Blackman, *supra* note 1, at 674 ("The overwhelming majority of *bear arms* was the 'collective/militia' sense."); LaCroix, *supra* note 1 ("[I]n 67.4 percent of the instances in which the phrase 'bear arms' was used in books published between 1760 and 1795, the phrase was being employed in a collective sense."). *But see* Jones, *supra* note 1, at 165 (arguing that other commentators substantially overstate the discrepancy); *id.* at 157 (noting disagreement with another commentator's coding decisions "in several respects").

29. See Goldfarb, *supra* note 1, at 3, 27; Baron, *supra* note 1, at 510; LaCroix, *supra* note 1.

30. Brief for Corpus Linguistics Professors and Experts as Amici Curiae Supporting Respondents at 17, *N.Y. State Rifle & Pistol Ass'n, Inc. v. City of New York*, 140 S. Ct. 1525 (2020) (No. 18-280), 2019 WL 3824697, at *17; see also Brief for Corpus Linguistics Professors and Experts as Amici Curiae Supporting Respondents at 3–4, *N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen*, No. 20-843, 2021 WL 4353034, at *3–4 (arguing that "recent findings in the field of corpus linguistics" "caution[] against expanding the right recognized in *Heller*"); Brief of Neal Goldfarb as Amicus Curiae in Support of Respondents at 5, *N.Y. State Rifle & Pistol Ass'n v. City of New York*, 140 S. Ct. 1525 (2020) (No. 18-280), 2019 WL 3987630, at *5 ("[G]iven that *Heller* has been called in[to] question, it would be a mistake for the Court to continue applying *Heller*").

in the text-reading sense, there is no ambiguity. And it would be a diversion to run a corpus search to determine in which *contexts* people most frequently read text. A corpus search might return more instances of people reading a book than reading a magazine, but that frequency data is irrelevant because both categories involve the text-reading sense and thus the provision encompasses both. It would be linguistic malpractice to suggest that reading magazines is unprotected because people read books more often. The question is simply whether someone is reading in the text-reading sense.

The terms *keep arms* and *bear arms* work the same way.³¹ *Keep arms* is straightforward—in the Second Amendment *keep arms* unambiguously carries a literal sense meaning to physically possess arms.³² And it doesn't matter how often people kept arms in military contexts versus other contexts—just as a law's unqualified reference to reading text would encompass text-reading in all contexts, the Second Amendment's unqualified language protects all types of arms-keeping.³³ Yet Dennis Baron and James Phillips & Josh Blackman compare usages of *keep arms* in military contexts versus nonmilitary contexts, and they do not rebut—or even acknowledge—the consensus that *keep arms* is unambiguous.³⁴ They skip step one (establish a degree of ambiguity) and botch step two (compare usage of the competing senses), and each of those errors is alone enough to make their analysis a red herring.

They make the same errors with respect to *bear arms*. Because the literal and idiomatic senses of *bear arms* are separate senses, frequency data arguably could

31. Justice Stevens asserted that *keep and bear arms* refers to a “unitary right,” i.e., that *keep arms* and *bear arms* are not separate terms in the Amendment. *District of Columbia v. Heller*, 554 U.S. 570, 646 (Stevens, J., dissenting). But he provided no citation, and several commentators have conclusively refuted the assertion with corpus data. *E.g.*, Phillips & Blackman, *supra* note 1, at 660–64; Jones, *supra* note 1, at 159–60.

32. *See, e.g.*, *Heller*, 554 U.S. at 582 (“No party has apprised us of an idiomatic meaning of ‘keep Arms.’”); *id.* at 650 (Stevens, J., dissenting) (not contesting that only one relevant sense of *keep arms* exists); Goldfarb, *supra* note 1, at 3 (*keep arms* is “literal”).

33. The scope of that right and the *bear arms* right, and whether and how the rights secured by the Constitution are defeasible, are separate issues I do not address. As applied to the Second Amendment, those debates involve the meaning of the words *right* and *infringed*. My argument, by contrast, concerns the meaning of *keep and bear arms*.

34. *E.g.*, Baron, *supra* note 1, at 510 (asserting that *keep arms* occurred most frequently in a “military context” without attempting to establish that *keep arms* is ambiguous); *id.* at 513 (same); Josh Blackman & James C. Phillips, *Corpus Linguistics and the Second Amendment*, HARV. L. REV. BLOG (Aug. 7, 2018) [hereinafter Blackman & Phillips, *Corpus Linguistics and the Second Amendment*], <https://blog.harvardlawreview.org/corpus-linguistics-and-the-second-amendment/> [<https://perma.cc/CLK4-LLRL>] (concluding that about half of coded uses referred to keeping arms in a “military context” without attempting to establish that *keep arms* is ambiguous); Phillips & Blackman, *supra* note 1, at 667–72 (examining frequency data with respect to uses in which “individuals stored . . . arms [that] they could use in . . . militia service” without attempting to establish that possessing arms for use in militia service is a distinct sense rather than a distinct context in which one can physically possess weapons); James C. Phillips & Josh Blackman, *The Mysterious Meaning of the Second Amendment*, THE ATLANTIC (Feb. 28, 2020), <https://www.theatlantic.com/ideas/archive/2020/02/big-data-second-amendment/607186/> [<https://perma.cc/79BN-FSUX>] (asserting that in some founding-era documents “a person would keep arms for a collective, military purpose” and that “these documents support Justice Stevens’s reading” without explaining why physical possession of weapons for a military purpose supports any sense of *keep arms* other than the literal sense described by Justice Scalia).

be helpful if we don't know which one is being used. But suppose context makes clear that the Second Amendment uses the literal sense. Just like one can read a book or a magazine in the same sense of *read*, one can physically *bear arms* in different contexts—for self-defense, as part of a military exercise, and so on. But if a law protects the right to physically bear arms, and the law doesn't add a qualification such as “the right to bear arms *for purposes of x*,” then it encompasses all types of physical arms-bearing.³⁵ It doesn't matter whether people bore arms more often in a military context or a self-defense context; so long as something is an instance of physical arms-bearing, the *bear arms* term encompasses it. Before analyzing frequency data for *bear arms* as if it is relevant, therefore, a commentator must establish that ambiguity exists—that the usage plausibly might employ either of the two senses.

But most commentators criticizing Justice Scalia have skipped this step entirely. Recall that Justice Scalia described the idiomatic reading of *bear arms* as absurd because it would mean that the Second Amendment protects a right to serve as a soldier. Justice Stevens had no answer, and indeed he ultimately did not even himself adopt the idiomatic reading. Before commentators can invoke frequency data as relevant, they must do the work Justice Stevens did not do—demonstrate that the idiomatic reading is plausible in context.

Almost none of them, however, have even recognized this issue. Baron, for example, quotes Justice Scalia's *bear arms* conclusion and then states: “Justice Scalia was wrong: Founding-era sources almost always use bear arms in an unambiguously military sense.”³⁶ To begin with, Baron's analysis is fundamentally flawed because he conflates varying contexts with varying senses—though he claims that a military *sense* was most often used, his examination of corpus data addresses the proportion of uses in a “military context.”³⁷ Because one can physically carry weapons in a military context, no conclusion about the senses of *bear arms* can be drawn from Baron's study.³⁸ But even accepting that the idiomatic sense was used more often than the literal sense, it doesn't follow that Justice Scalia was wrong. Baron invokes the presumption that a word's most common meaning is the meaning it carries in a statute,³⁹ but that presumption comes into play when an interpreter must decide between competing senses. Baron does not address Justice Scalia's argument

35. For this reason, to the extent the *Heller* majority stated that the Second Amendment protects arms-bearing only for purposes of confrontation, that too is wrong. At times Justice Scalia asserted that *bear arms* means “simply the carrying of arms,” 554 U.S. at 589, but at other times he stated that *bear arms* “refers to carrying for a particular purpose—confrontation,” *id.* at 584. He did not root that limitation (if he meant it as a limitation) in any originalist logic and instead cited only a 1998 judicial opinion and a 1998 dictionary. *Id.* And he himself articulated the refutation when citing founding-era phrases such as “bear arms . . . for the purpose of killing game” to address Justice Stevens's limitation on the right. If *bear arms* “means . . . the carrying of arms only for [confrontation], one simply cannot add ‘for purpose of killing game.’” *Id.* at 589. “The right ‘to carry arms [for confrontation] for the purpose of killing game’ is worthy of the mad hatter.” *Id.*

36. Baron, *supra* note 1, at 510.

37. *Id.* at 512 (emphasis added); *see also id.* at 511 (“military association”).

38. According to Josh Jones, in fact, “many” “instances of bear arms in the literal carrying sense . . . occurred in military contexts.” Jones, *supra* note 1, at 161.

39. Baron, *supra* note 1, at 516.

that there are no competing senses here because the idiomatic reading is implausible.

Phillips & Blackman compare usages of *keep arms* and *bear arms* in a collective “sense” versus an individual “sense,” but they do not provide a reason to think that any such senses existed.⁴⁰ Recall that a sense is a meaning of a word; lexicographers create separate dictionary definitions for each sense the word carries. Phillips & Blackman do not say what definitions they have in mind for the purported individual and collective senses. Perhaps they would describe respective meanings of *bear arms* as “to physically carry weapons by oneself” and “to physically carry weapons in a collective.” But they provide no evidence that a lexicographer might reasonably have listed these as separate definitions under a *bear arms* entry. More likely, the lexicographer would have simply listed one definition, “to physically carry weapons,” on the understanding that a thousand people physically carrying weapons are *bearing arms* in the same sense that one person physically carrying weapons is *bearing arms*.⁴¹

All nine *Heller* justices, and the linguists they cited, certainly exhibited that view.⁴² Justice Stevens opened his dissent by observing: “The question presented by this case is not whether the Second Amendment protects a ‘collective right’ or an ‘individual right’” because “[s]urely it protects . . . an individual right.”⁴³ (The majority concurred on that point, of course.) Justice Stevens never even mentioned the word *collective* when discussing the meaning of *bear arms* or *keep arms*.⁴⁴ Rather, Justice Stevens asserted that “[t]he term ‘bear arms’ is a familiar idiom” “meaning . . . ‘to serve as a soldier, do military service, fight.’”⁴⁵ Justice Scalia, on the other hand, thought that in the Second Amendment “‘bear arms’ means . . . the carrying of arms.”⁴⁶ No one contested that the literal and

40. See Phillips & Blackman, *supra* note 1, at 683. For *keep arms*, Phillips & Blackman used the categories (1) collective keeping arms for collective use; (2) individual keeping arms for collective use; (3) individual keeping arms for individual use; (4) collective keeping arms for individual use. *Id.* at 668–70. For *bear arms*, Phillips & Blackman used the categories (1) collective/military; (2) individual; and (3) both. *Id.* at 673.

41. While founding-era dictionaries did not define *bear arms*, they did define *bear*, and Phillips & Blackman do not point to a single entry defining *bear* as collective or individual. Samuel Johnson’s Dictionary, for one, defines thirty-eight senses of the *bear* verb and none say anything about individuals versus collectives. *Bear*, SAMUEL JOHNSON’S DICTIONARY (1755), <https://johnsonsdictionaryonline.com/views/search.php?term=bear> [<https://perma.cc/523J-ZYM6>] (last visited June 4, 2022). Nor do modern entries for *bear arms*. See, e.g., *Bear arms*, OXFORD LANGUAGES DICTIONARY, <https://tinyurl.com/2p8d5w5w> [<https://perma.cc/3EQ5-T3K2>] (last visited June 4, 2022).

42. See Jones, *supra* note 1, at 135–36 (observing that while some scholars “have focused on whether *bear arms* was used more often in ‘military’ or ‘collective’ contexts than ‘individual’ contexts,” “the two camps delineated by the Court [are the literal sense and the idiomatic sense]”).

43. *District of Columbia v. Heller*, 554 U.S. 570, 636 (2008) (Stevens, J., dissenting).

44. A control-f of *Heller* for *collective* returns no results under the dissent’s heading “*To keep and bear Arms.*” See *id.* at 646–52. The only mention of collective versus individual rights—in both the majority and the dissent—came when discussing a *different* phrase, *the right of the people*. See *id.* at 579–80 (majority opinion); *id.* at 645 (Stevens, J., dissenting).

45. *Id.* at 646 (Stevens, J., dissenting); see also Brief for Professors of Linguistics and English et al. as Amici Curiae Supporting Petitioners, *District of Columbia v. Heller* at 18, 554 U.S. 570 (2008) (No. 07-290), 2008 WL 157194, at *18 (“The term ‘bear arms’ is an idiomatic expression that means ‘to serve as a soldier, do military service, fight.’”).

46. *Heller*, 554 U.S. at 589 (majority opinion).

idiomatic senses were in fact meanings of *bear arms* at the time of ratification, both justices cited dictionaries and usage establishing the existence of these senses, and no one suggested that any other sense of *bear arms* might be relevant. Nor did anyone suggest that there might be competing senses of *keep arms*.⁴⁷

Phillips & Blackman appear to recognize this issue, acknowledging that their coding categories “may reflect distinct senses, or they may [instead] reflect different contexts.”⁴⁸ But they do not seem to recognize the significance of that question—because ambiguity can exist only with respect to distinct senses, the fact that their coding categories do not reflect senses means that their frequency data is not probative of the meaning of *keep arms* or *bear arms*. They conclude that “Justice Stevens was more right than Justice Scalia about the predominant sense of *keep arms*,”⁴⁹ but Justice Stevens didn’t assert a competing sense of *keep arms*.⁵⁰ They also conclude that the “dominant sense of *bear arms* is [a] militia/collective meaning” on the ground that “most references to bearing arms in late eighteenth-century writings were in the military *context*,” but that conflates senses and contexts.⁵¹ Their coding would categorize as militia/collective a reference to someone physically carrying a weapon as part of a militia exercise, but that reference actually uses the literal sense of *bear arms*.⁵² Alison LaCroix makes the same mistake, comparing usages of *bear arms* in a “collective sense” versus an “individual sense” without attempting to establish that those are senses.⁵³

* * *

Unlike Justice Stevens and the other commentators, Neal Goldfarb defends the position that the Second Amendment might use the idiomatic sense of *bear arms* and thus protect a right to serve as a soldier.⁵⁴ To his credit, he doesn’t

47. See *id.* at 582 (“No party has apprised us of an idiomatic meaning of ‘keep Arms.’”); see also Phillips & Blackman, *supra* note 1, at 629 (acknowledging that Justice Stevens “seems to contend that keeping arms was an ‘individual’ right”).

48. Phillips & Blackman, *supra* note 1, at 672.

49. *Id.* at 678.

50. See *Heller*, 554 U.S. at 650 (Stevens, J., dissenting) (offering only an example of a particular *context* in which certain persons physically possessed arms, not a competing *sense*, by asserting that “a number of state militia laws in effect at the time of the Second Amendment’s drafting used the term ‘keep’ to describe the requirement that militia members store their arms at their homes”).

51. Phillips & Blackman, *supra* note 1, at 679 (emphasis added); see also Blackman & Phillips, *Corpus Linguistics and the Second Amendment*, *supra* note 34 (concluding that “the overwhelming majority of instances of ‘bear arms’ was in the military *context*” (emphasis added)).

52. See Jones, *supra* note 1, at 161 (“[M]any instances of *bear arms* in the literal carrying sense . . . occurred in military contexts.”).

53. LaCroix, *supra* note 1.

54. Goldfarb, *supra* note 1, at 27 (describing his objective as establishing the existence of ambiguity as to whether in the Second Amendment *bear arms* carries “the military meaning that the Supreme Court rejected: ‘to serve as a soldier, do military service, fight’ or ‘to wage war’”). Goldfarb perceives the *keep* and *bear arms* debate as between “gun-rights advocates” and “their opponents.” Neal Goldfarb, *Regarding the Strength of the Corpus Evidence (and Noting Issues that the Evidence Doesn’t Resolve)*, DUKE CTR. FOR FIREARMS LAW (July 13, 2021) [hereinafter Goldfarb, *Strength of Corpus Evidence*], <https://firearmslaw.duke.edu/2021/07/regarding-the-strength-of-the-corpus-evidence-and-noting-issues-that-the-evidence-doesnt-resolve/>

make the other commentators' process mistakes. But his effort only highlights the idiomatic reading's untenability.

First, as Goldfarb concedes, because all agree that the Amendment's use of *keep arms* is literal, reading *bear arms* as idiomatic requires reading *arms* as carrying a different meaning in *keep . . . arms* than in *bear arms*.⁵⁵ Because it's extremely unusual for an English word usage to carry multiple senses simultaneously, and it's even rarer in a formal and carefully written legal document like the Constitution, the Supreme Court rightly has always held a strong presumption against interpretations that place multiple meanings on a single word usage.⁵⁶ And even worse, as Goldfarb further concedes, the idiomatic reading requires *arms* not merely to carry two senses at once but also to be simultaneously literal and idiomatic.⁵⁷ On the idiomatic reading, Justice Scalia memorably observed, *keep and bear arms* resembles the statement "He filled and kicked the bucket."⁵⁸ That statement, with *bucket* carrying idiomatic and literal senses simultaneously, would be extremely irregular. Goldfarb does not name a single instance of anyone speaking a phrase like that even poetically, let alone in a formal legal document.⁵⁹ This problem alone is reason to reject the idiomatic reading of *bear arms*.

[<https://perma.cc/9DVA-DWVU>]. But the debate concerns a legal interpretive question, not gun policy.

55. Goldfarb, *supra* note 1, at 66.

56. *E.g.*, *Cochise Consultancy, Inc. v. United States ex rel. Hunt*, 139 S. Ct. 1507, 1512 (2019) ("all but the most unusual situations"); *Reno v. Bossier Par. Sch. Bd.*, 528 U.S. 320, 329 (2000) ("simply . . . untenable"); *Gibbons v. Ogden*, 22 U.S. 1, 194 (1824) ("unless there be some plain intelligible cause"). Goldfarb accuses the *Heller* majority of itself reading a term in the Massachusetts Constitution as carrying two meanings at once, but he is wrong. The Massachusetts Constitution provided that "[t]he people have a right to keep and to bear arms for the common defence." *District of Columbia v. Heller*, 554 U.S. 570, 601 (2008) (quotation marks omitted). The *Heller* majority noted that "if one gives a narrow meaning to the phrase 'common defence' this [provision] can be thought to limit the right to the bearing of arms in a state-organized military force." *Id.* at 601–02. Goldfarb asserts that under this interpretation, *arms* carries the literal and idiomatic meanings simultaneously. Goldfarb, *supra* note 1, at 67. But that is not true—on this interpretation, *arms* is literal at all times. The provision's limited scope results from an additional phrase ("for the common defence") that limits the right to physically carry weapons to a particular purpose. And the *Heller* majority did not adopt this interpretation in any event. *See* 554 U.S. at 601–02.

57. *See* Goldfarb, *supra* note 1, at 3 (acknowledging that his interpretation "requires that *arms* be understood as being simultaneously literal (as part of *keep arms*) and figurative (as part of *bear arms*)").

58. *Heller*, 554 U.S. at 587.

59. Goldfarb responds that his reading of *keep and bear arms* is less "awful" than *filled and kicked the bucket* because the *bear arms* idiom carries less idiomaticity than *kicked the bucket* (i.e., it is more closely related to its literal sense). Goldfarb, *supra* note 1, at 61–63. But that proves far too little—it establishes at most only that Goldfarb's reading of *keep and bear arms* is somewhat less grotesque than *filled and kicked the bucket*, not that it is permissible. And it is not permissible. As one commentator observes in an article otherwise critical of *Heller*, "[e]ven weak idioms can't be used idiomatically and literally at the same time." Jeffrey Kaplan, *Unfaithful to Textualism*, 10 GEO. J.L. & PUB. POL'Y 385, 422 (2012) (citing linguistic scholarship). Goldfarb's discussion makes the point. Apparently unable to find even one clear example of a person actually using a word both literally and idiomatically at the same time, Goldfarb creates two hypothetical examples: (1) by recording her sale of books in a spreadsheet, "Chris both sold and kept the books"; and (2) "Chris and Charles went outside to enjoy and shoot the breeze" on a nice day. Goldfarb, *supra* note 1, at 63. As Goldfarb admits, "these come off as rather contrived." *Id.* They could be taught at draftsmanship school only as writing to avoid at all costs.

Second, Goldfarb also concedes that the idiomatic reading requires an interpretation of *the people* that violates the presumption that when a law uses the same word multiple times the word carries a consistent meaning across the multiple usages.⁶⁰ As Justice Scalia observed, every other reference to *the people* in the Constitution refers to all members of the political community.⁶¹ But if the Second Amendment protects a right to serve as a soldier, Goldfarb explains, its reference to *the people* must refer only to those eligible for military service.⁶² That the idiomatic reading requires *the people* to mean something different in the Second Amendment than everywhere else in the Constitution—not to mention that it requires reading *the people* as “the people eligible for military service” instead of “the people”—is another strike against it.⁶³

Third, many founding-era state constitutions protected the people’s “right to bear arms for the defence of themselves and the state” or “the defence of himself and the state.”⁶⁴ Goldfarb surprisingly excluded these language uses from his dataset,⁶⁵ but they are by a long shot the *most* relevant because they each come

60. Goldfarb, *supra* note 1, at 56; WILLIAM N. ESKRIDGE JR., INTERPRETING LAW 108 (2016) (“In our legal system, interpreters traditionally assume that identical words used in different parts of the same [legal document] are intended to have the same meaning.” (internal quotation marks omitted)).

61. *Heller*, 554 U.S. at 580.

62. Goldfarb, *supra* note 1, at 56.

63. Akhil Amar argues that *the people* did mean something different in the Second Amendment, observing that on Justice Scalia’s interpretation the Amendment was designed to read: “A well-regulated militia being necessary to the security of a free state, the right of persons—most of whom are not in the militia, have never been in the militia, and can never be in the militia—to keep and bear arms shall not be infringed.” Akhil Amar, *Heller, HLR, and Holistic Legal Reasoning*, 122 HARV. L. REV. 145, 167 (2008). Amar argues that such a reading “begins to border on non sequitur,” and that the correct reading is to interpret *people* as a synonym for *militia*. *Id.* at 167–68. But Amar’s analysis erroneously assumes that a law’s scope must correspond with precision to the mischief that prompted its enactment. Imagine a hypothetical Fourteenth Amendment: “Discrimination against Black people being an abhorrent stain on our country’s history, no state shall deny to any person within its jurisdiction—most of whom are not Black, have never been Black, and can never be Black—the equal protection of the laws.” There is nothing remotely strange about this hypothetical provision even though the introductory clause refers to a subset of the population while the operative clause protects the entirety of the population. Legal prohibitions “often go beyond the principal evil to cover reasonably comparable evils.” *Oncale v. Sundowner Offshore Servs.*, 523 U.S. 75, 79 (1998).

64. *See Heller*, 554 U.S. at 585 n.8 (quoting nine state constitutions). Another clear example of the literal *bear arms* in a founding-era constitutional context is a proposal by the Pennsylvania Antifederalists: “That the people have a right to bear arms for the defence of themselves and their own State, or the United States, or for the purpose of killing game.” *Ratification of the Constitution by the States: Pennsylvania*, in 2 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 597–98 (Merrill Jensen ed., 1976). A person bearing arms to kill game is physically carrying a weapon, not serving as a soldier or waging war.

65. Goldfarb, *supra* note 1, at 35. Goldfarb attempts to justify this coding decision by asserting that we shouldn’t assume that *bear arms* in the Second Amendment was “understood in the same way as the use of the [term] as modified in the state provisions [with the phrase *in defence of himself/themselves*].” Goldfarb, *Strength of Corpus Evidence*, *supra* note 54. But as Goldfarb surely would acknowledge, confidence that a use carries the same meaning as the language being interpreted is not a condition for inclusion in a corpus dataset. The relevant question for coding is simply in what sense the state constitutional provisions used *bear arms*, and far from obscuring that question, the inclusion of *in defence of himself/themselves* illuminates it. And Goldfarb’s exclusion of state constitutional provisions is all the more surprising because *none* of the uses in his dataset mirror the Second Amendment’s language. *See id.* (“Relying on the text that was ultimately adopted as the Second Amendment would obviously amount to begging the question.”).

in the same type of document—a founding-era American constitution—as the *bear arms* language at issue. That is particularly important here given that the purported ambiguity is between literal and idiomatic senses, because people are more likely to speak figuratively in literature or conversation than in a formal legal document that protects rights and imposes obligations.⁶⁶ And as Justice Stevens recognized, the state constitutions employ *bear arms* in its literal sense—those bearing arms for the defense of themselves are not serving as soldiers.⁶⁷ Because it's very unlikely that the U.S. Constitution uses *bear arms* in a sense different from the one used by every founding-era state constitution that mentioned the right, the idiomatic reading fails for this reason as well.

Fourth, Justice Scalia probably was correct that a right to serve as a soldier would be absurd—imagine a citizen suing the government after being refused enlistment. Goldfarb does not offer even the beginning of an explanation of the scope of such a right or how it would coexist with congressional and state power over militias and Congress's power to raise armies.⁶⁸ Instead, he argues that his reading does not carry absurd implications by citing founding-era statements purportedly showing that citizens did indeed have “a right . . . to arm themselves so that they might participate in a militia.”⁶⁹ But that is not a right to serve as a soldier; it is a right to physically (literally) possess and carry weapons for a particular purpose. Unsurprisingly, then, the founding-era statements Goldfarb cites likely use the literal sense of *bear arms*. They refer to, for example, a right to bear arms “in defense of [the] country,” “for the publick defense,” and “for the common defense.”⁷⁰ As noted, many founding-era state constitutional provisions contained analogous wording—“for the defence of . . . the state”—and as noted, those provisions clearly used the literal sense of *bear arms*. And a right to physically carry weapons in case needed for the common defense is not absurd—indeed, that is what Justice Stevens would have held the Amendment protects, and he picked that holding *because* such a right plausibly could exist.

66. See ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW* 170 (2012) (“The preparation of a legal instrument has traditionally been seen as a solemn and deliberative act that requires verbal exactitude.”).

67. See *Heller*, 554 U.S. at 642 (Stevens, J., dissenting) (state constitutions protected “civilian uses” of arms such as “hunting or personal self-defense”). Goldfarb too grants that the state constitutions unambiguously use the literal sense of *bear arms* with respect to “defense of himself” and “defense of themselves.” See Goldfarb, *supra* note 1, at 29 (concluding that the provisions protecting a person’s right to bear arms in “defense of himself and the state” unambiguously use the literal sense of *bear arms* with respect to “defense of himself”); *id.* at 67 (“I’ll give the [*Heller*] Court the benefit of the doubt” that the provisions protecting a person’s right to bear arms in “defense of themselves” also used the literal sense). Goldfarb argues that *bear arms* is nonetheless idiomatic with respect to “defense of . . . the state,” *id.* at 67, but that once again leaves him with a usage (this time *bear arms*) that is simultaneously literal and idiomatic. The much more natural reading is that “bear arms in defense of himself and the state” simply means “carry weapons in defense of himself and the state.”

68. See Goldfarb, *supra* note 1, at 60 (dismissing “the question of what such a right would entail” as not “relevant”).

69. *Id.* at 53 (quotation marks omitted).

70. *Id.* at 54.

What is not plausible is the notion that Americans have a right to serve as a soldier or wage war. That is why Justice Stevens didn't adopt that view.⁷¹

So the idiomatic reading violates multiple presumptions of language usage, departs from the clear meaning used in all comparable documents of the era, and has implausible implications. These many problems force Goldfarb to admit at the end of his article—to his credit—that “even if you intellectually accept what I've said so far, the interpretation I've proposed might still seem odd.”⁷² It speaks volumes that the only commentator who has defended the idiomatic reading concedes its unpalatability.

* * *

Because context makes clear which sense of *bear arms* the Second Amendment uses, linguistics experts are mistaken to cite frequency data comparing usages of the term's senses. And they are doubly mistaken to compare usages in military contexts versus other contexts. While there are hard questions about the scope of the rights, the *keep and bear arms* phrase does not itself limit the kinds of arms-keeping and arms-bearing protected.

71. The *noscitur a sociis* canon also supports the literal reading of *bear arms*. *Noscitur a sociis* “means literally ‘it is known from its associates,’ and means practically that a word may be defined [with reference to] an accompanying word, and that, ordinarily, the coupling of words denotes an intention that they should be understood in the same general [sphere].” SINGER & SINGER, 2A SUTHERLAND STATUTORY CONSTRUCTION § 47:16 (7th ed. 2014). Here, as noted, it is undisputed that *keep arms* means to physically possess weapons. And *bear arms* more closely parallels that next-door right on the literal reading (physically carry weapons) than on the idiomatic reading (serve as a soldier).

72. Goldfarb, *supra* note 1, at 72–73; *see also id.* at 73 (acknowledging that the idiomatic reading “seems unnatural”). Goldfarb rightly observes that original meaning controls rather than modern intuition, *id.* at 72–73, but the principles that make the idiomatic reading so unnatural to us are longstanding, *see, e.g., Gibbons v. Ogden*, 22 U.S. 1, 194 (1824) (presumption against interpretations that place multiple meanings on a single word usage).