



School of Law

WHICH IS THE CONSTITUTION?

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WHICH IS THE CONSTITUTION?

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WHEN DELIBERATING OVER *District of Columbia v. Heller* – the gun control case¹ – the Supreme Court might do well to consider whether the result on which it settles will depend on the number and placement of commas in the Second Amendment. There are, after all, several versions of the Second Amendment available. They feature from zero to three commas in various arrangements over which reasonable minds have differed for a long time, as William Van Alstyne recently noted in these pages.² And Denys Myers’s *History of the Printed Archetype of the Constitution of the United States of America* shows that the problem is more general – that identifying and preserving a single, agreed-upon version of a text produced by our federal constitutional ratification processes can be much more difficult than one might imagine.³

If the Court does rest a decision in *Heller* on an interpretation of one particular version (any one will do) of the Second Amendment, it should be prepared to answer a puzzling question about federal

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¹ 128 S. Ct. 645 (2007) (granting petition for a writ of certiorari).

² William W. Van Alstyne, *A Constitutional Conundrum of Second Amendment Commas: A Short Epistolary Report*, 10 GREEN BAG 2D 469, 470-74 (2007).

³ Reprinted at pages 217-241 below. See also Akhil Reed Amar, *Our Forgotten Constitution: A Bicentennial Comment*, 97 YALE L.J. 281 (1987).

judicial power.⁴ The question is this: If the Court is in charge of interpreting the Constitution,⁵ does that mean it is also in charge of deciding what counts as part of the Constitution?

SOME SECOND AMENDMENTS

Does the Court have, for example, the power to say a three-comma version of the Second Amendment is part of the Constitution, and the no-comma, one-comma, and two-comma versions are not? And if it does have that power, is it also free to select different Second Amendments for different occasions? If so, it has several options close at hand, including the following:

In the Ratifying States

No commas: “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.”⁶

⁴ The Court might prefer to say the result would be the same under all versions of the Second Amendment – the position of most commentators – but for purposes of this exercise we are assuming that an unorthodox but not unheard-of, comma-dependent view prevails in the minds of a decisive number of Justices. See, e.g., David Yassky, *The Second Amendment: Structure, History, and Constitutional Change*, 99 MICH. L. REV. 588 & 617 n.116 (2000); Brief for an Ad Hoc Group of Law Professors and Historians as Amici Curiae in Support of Appellant, *United States of America v. Emerson*, 270 F.3d 203 (5th Cir. 2001), 1999 WL 33617705 at *13 n.4 (Sept. 3, 1999). At the very least, arguments about the significance of commas in the Second Amendment persist in litigation and in public debates. See, e.g., Brief for Professors of Linguistics and English Dennis E. Baron, Ph.D., Richard W. Bailey, Ph.D. and Jeffrey P. Kaplan, Ph.D. in Support of Petitioners, *District of Columbia v. Heller*, U.S. No. 07-290 (Jan. 11, 2008); Adam Freedman, *Clause and Effect*, N.Y. TIMES, Dec. 16, 2007.

⁵ As it certainly seems to think, at least in some contexts. See, e.g., *Cooper v. Aaron*, 358 U.S. 1, 18 (1958).

⁶ 2 DOCUMENTARY HISTORY OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA, 1786-1870, DERIVED FROM THE RECORDS, MANUSCRIPTS, AND ROLLS DEPOSITED IN THE BUREAU OF ROLLS AND LIBRARY OF THE DEPARTMENT OF STATE 327 (1894) (New Jersey’s ratification act, Nov. 20, 1789).

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One comma: “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.”⁷

Two commas: “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.”⁸

Three commas: “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.”⁹

In the Supreme Court

One comma: “[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.”¹⁰

Three commas: “A well regulated Militia, being necessary to the security of a free State, the right of people to keep and bear Arms, shall not be infringed.”¹¹ Or: “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.”¹²

⁷ *Id.* at 342 (South Carolina’s ratification act, Jan. 19, 1790); *id.* at 354 (Pennsylvania’s ratification act, Mar. 10, 1790) (same); *id.* at 359 (New York’s act, Feb. 24, 1790) (same, except for “Security,” “People,” and “arms”); *id.* at 364 (Rhode Island’s act, June 15, 1790) (same, except for “Security,” “Right,” and “& bear”).

⁸ *Id.* at 332 (Maryland’s ratification act, Dec. 19, 1789); *id.* at 337 (North Carolina’s ratification act, Dec. 22, 1789) (same, except for “militia” and “arms”).

⁹ *Id.* at 349 (Delaware’s ratification act, Jan. 28, 1790).

¹⁰ *Houston v. Moore*, 18 U.S. 1, 52 (1820) (Story, J., dissenting); *see also Presser v. Illinois*, 116 U.S. 252, 260 (1886); *Konigsberg v. State Bar of California*, 366 U.S. 36, 50 (1961); *and see* JOSEPH STORY, 3 COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1889 (1833).

¹¹ *United States v. Miller*, 307 U.S. 174, 176 (1939). Yes, the *Miller* Court’s version of the Second Amendment has no “the” before “people.”

¹² *Printz v. United States*, 521 U.S. 898, 938 (1997) (Thomas, J., concurring); *see also Adams v. Williams*, 407 U.S. 143, 150 (1972) (Douglas, J., dissenting); *United States v. Schwimmer*, 279 U.S. 644, 650 (1929).

Article the Fourth.—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.

CONGRESS OF THE UNITED STATES,

Begun and held at the City of NEW-YORK, on Wednesday, the Fourth of
MARCH, One Thousand Seven Hundred Eighty-nine.

THE Conventions of a Number of the States having, at the Time of their adopting the Constitution, expressed a Desire, in Order to prevent Misconstruction or Abuse of its Powers, that further declaratory and restrictive Clauses should be added: And as extending the Ground of public Confidence in the Government will best insure the beneficial Ends of its Institution,

RESOLVED, by the Senate, and House of Representatives, of the United States of America, in Congress assembled, Two Thirds of both Houses concurring, That the following Articles be proposed to the Legislatures of the several States as Amendments to the Constitution of the United States: All, or any of, which Articles, when ratified by Three-Fourths of the said Legislatures, to be valid to all Intent and Purposes as Part of the said Constitution, viz.

ARTICLES In Addition to, and Amendment of, the Constitution of the United States of America, proposed by Congress, and ratified by the Legislatures of the several States, pursuant to the Fifth Article of the original Constitution.

Article the First.—After the First Enumeration, required by the First Article of the Constitution, there shall be One Representative for every Thirty Thousand, until the Number shall amount to One Hundred; after which the Proportion shall be regulated by Congress that there shall not be less than One Hundred Representatives, nor less than One Representative for every Forty Thousand Persons, until the Number of Representatives shall amount to Two Hundred, after which the Proportion shall be regulated by Congress, that there shall not be less than Two Hundred Representatives, nor more than one Representative for every Fifty Thousand Persons.

Article the Second.—No Law varying the Compensations for the Services of the Senators and Representatives shall take Effect, until an Election of Representatives shall have intervened.

Article the Third.—Congress shall make no Law respecting the Establishment of Religion, or prohibiting the free Exercise thereof; or abridging the Freedom of Speech, or of the Press, or to the Right of the People peaceably to assemble, and to petition the Government for a Redress of Grievances.

Article the Fourth.—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.

Article the Fifth.—No Soldier shall, in Time of Peace, be quartered in any House without the Consent of the Owner, nor, in Time of War, but in a Manner to be prescribed by Law.

Article the Sixth.—The Right of the People to be secure in their Persons, Houses, Papers, and Effects, against un-

reasonable Searches and Seizures shall not be violated, and no Warrants shall issue, but upon probable Cause supported by Oath, or Affirmation, and particularly describing the Place to be searched, and the Persons or Things to be seized.

Article the Seventh.—No Person shall be held to answer for a Capital, or otherwise Infamous Crime, unless on a Presentment or Indictment of a Grand Jury; except in Cases arising in the Land or Naval Forces; or in the Militia, when in actual Service in Time of War or public Danger: Nor shall any Person be subject for the same Offence to be Twice put in Jeopardy of Life or Limb; nor shall be compelled, in any Criminal Case, to be a Witness against himself; nor be deprived of Life, Liberty or Property, without due Process of Law: Nor shall private Property be taken for public Use without just Compensation.

Article the Eighth.—In all Criminal Prosecutions, the accused shall enjoy the Right to a speedy and public Trial, by an impartial Jury of the State and District wherein the Crime shall have been committed, which District shall have been previously ascertained by Law; and to be informed of the Nature and Cause of the Accusation; to be confronted with the Witnesses against him; to have compulsory Process for obtaining Witnesses in his Favour; and to have the Assistance of Counsel for his Defence.

Article the Ninth.—In Suits at Common Law, where the Value in Controversy shall exceed Twenty Dollars, the Right of Trial by Jury shall be preserved, and no Fact tried by a Jury shall be otherwise re-examined in any Court of the United States, than according to the Rules of the Common Law.

Article the Tenth.—Excessive Bail shall not be required; nor excessive Fines imposed; nor cruel and unusual Punishments inflicted.

Article the Eleventh.—The Enumeration in the Constitution of certain Rights shall not be construed to deny or disparage others retained by the People.

Article the Twelfth.—The Powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively or to the People.

FREDERICK AUGUSTUS MÜHLENBERG,
Speaker of the House of Representatives.

JOHN ADAMS,
*Vice-President of the United States, and
President of the Senate.*

Attest, **JOHN BECKLEY,**
Clerk of the House of Representatives.

SAM. A. OTIS,
Secretary of the Senate.

A true Copy of the Original, duly examined:
Witness, **HENRY WARD,** *Secretary.*

State of Rhode-Island, and Providence-Plantations.

In GENERAL ASSEMBLY, October Session, A. D. 1789.

IT is Voted and Resolved, That the Secretary be directed to cause to be printed One Hundred and Fifty Copies of the Amendments to the new Constitution, as agreed to by Congress, and which have been communicated by the President of the United States to this Legislature: And that One Copy thereof be sent to each Town-Clerk in the State as soon as may be, to be laid before the Freeman at the Town-Meetings to be holden on Monday next, agreeably to a former Resolve of this Assembly, for their Consideration.

A true Copy :

Witness,

HENRY WARD, Sec'y.

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Facing page, top: Detail from a broadside published by order of the Rhode Island Assembly in 1789, showing what would become the one-comma version of the Second Amendment. Bottom: The entire broadside, presenting the 12 constitutional amendments proposed by Congress that year – ten of which would be quickly ratified and become the Bill of Rights, and one of which would be ratified two centuries later and become the 27th Amendment. The broadside was produced for distribution at town meetings to be held throughout the state to consider the proposed amendments.

Looking beyond its own and the ratifiers' expressions of the Second Amendment is unlikely to help the Court narrow the field much. Neither Congress nor the Executive has a clear and consistent record of Second Amendment usage that might point toward a definitive version:

In Congress

One comma: "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

Three commas: "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."¹⁴

In the Executive

Two commas: "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."¹⁵

Three commas: "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."¹⁶

¹³ *Proposed Amendments to the Constitution*, JOURNAL OF THE FIRST SESSION OF THE SENATE OF THE UNITED STATES OF AMERICA, Appendix at 96 (1789, 1820).

¹⁴ THE CONSTITUTION OF THE UNITED STATES OF AMERICA: ANALYSIS & INTERPRETATION 26 (2004) (hereafter "ANALYSIS & INTERPRETATION").

¹⁵ MANUAL FOR COURTS-MARTIAL UNITED STATES, Appendix 1 at A1-5 (2008).

Then there is the version that appears in the opinion in *Parker v. District of Columbia*, the decision the Court is reviewing in *Heller*:

Two commas: “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.”¹⁷

And so, over the course of more than 200 years, the range of possible Second Amendments seems to have expanded, despite the fact that the Amendment was supposed to have been settled in the Constitution in 1791.¹⁸

IDENTIFICATION VS. INTERPRETATION

The Court itself has been of two minds about the extent of its power over what might be called the identification – as opposed to the interpretation – of the Constitution, at least in the context of amendment-making. On the one hand, in *Dillon v. Gloss* the Court was willing to busy itself with the administration of Article V, reviewing the validity of an amendment (the 18th) ratified by the states under a time constraint imposed by Congress.¹⁹ On the other hand, in *Coleman v. Miller* the Court found ratification of the ultimately unsuccessful Child Labor Amendment to be a political, non-justiciable process over which Congress reigned supreme.²⁰

So, the Court might feel free to select what it believes to be a reasonably appropriate Second Amendment by the same authority it exercised in *Dillon*. Or it might feel bound to look only to the ver-

¹⁶ *Whether the Second Amendment Secures an Individual Right*, Op. Off. Legal Counsel, Aug. 24, 2004, www.usdoj.gov/olc/secondamendment2.pdf.

¹⁷ *Parker v. District of Columbia*, 478 F.3d 370, 378 (D.C. Cir.); *cert. granted sub nom. District of Columbia v. Heller*, 128 S. Ct. 645 (2007).

¹⁸ ANALYSIS & INTERPRETATION at 25.

¹⁹ 256 U.S. 368, 371-77 (1921).

²⁰ 307 U.S. 433, 452-56 (1939); *id.* at 456 *et seq.* (Black, J., concurring); *id.* at 460 *et seq.* (opinion of Frankfurter, J.); *cf. id.* at 446-47 (equally divided court on whether a dispute over the Kansas lieutenant governor’s participation in the legislature’s ratification vote on an amendment “presents a justiciable controversy, or a question which is political in its nature and hence not justiciable”).

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sion authorized by Congress, based on the same lack of judicial authority it acknowledged in *Coleman*. Alas, on only two occasions has Congress explicitly proclaimed its approval of the states' ratification of an amendment (the 14th and the 27th),²¹ which means that even on such a political question the Court might feel obliged to read the congressional mind to determine which Second Amendment the legislature intended to promulgate as the real Second Amendment.²² At least the Court has had plenty of practice at the mind-reading part.

All is not lost, however, even if the Court determines that (a) it lacks the authority to select a Second Amendment or (b) it lacks sufficient information about the intent of the appropriate authorities (the ratifiers? Congress?) to determine which Second Amendment is really in the Constitution. There are other possibilities. Perhaps only "We the People" could settle the matter, by re-ratifying (or not) one version of the Second Amendment or another, either with or without the help of our representative state assemblies.²³ Or maybe the Archivist of the United States could make the choice.²⁴

²¹ See CONG. GLOBE, 40th Cong., 2d Sess. 453 (Jan. 11, 1868); *id.* at 4266, 4295-96 (Jul. 21, 1868); H.R. Con. Res. 320, 102d Cong., 2d Sess., in 138 Cong. Rec. H 3505-06 (May 18, 1992); S. Con. Res. 120, 102d Cong., 2d Sess., in 138 Cong. Rec. 56948-57001 (May 20, 1992); see also Walter Dellinger, *The Legitimacy of Constitutional Change*, 97 HARV. L. REV. 386, 400 (1983); David P. Currie, *The Constitution in Congress*, 61 U. CHI. L. REV. 775, 851 & n.449 (1994).

²² See *Baker v. Carr*, 369 U.S. 186, 214-15 (1962).

²³ Compare, e.g., *Dillon*, 256 U.S. at 374, and Ronald D. Rotunda & Stephen J. Safranek, *An Essay on Term Limits and a Call for a Constitutional Convention*, 80 MARQ. L. REV. 227 (1996), with BRUCE ACKERMAN, 1 WE THE PEOPLE: FOUNDATIONS 266-94 (1991). A related problem was thoroughly ventilated in the 1990s when the 27th Amendment was new on the scene. Michael Stokes Paulsen, *A General Theory of Article V*, 103 YALE L.J. 677 (1993).

²⁴ See 1 U.S.C. § 106b:

Whenever official notice is received at the National Archives and Records Administration that any amendment proposed to the Constitution of the United States has been adopted, according to the provisions of the Constitution, the Archivist of the United States shall forthwith cause the amendment to be published . . . and that the same has become valid, to all intents and purposes, as a part of the Constitution

Law professors who write constitutional law casebooks also might be willing to shoulder the burden.²⁵

Or, finally, the Court might certify the question to Congress.²⁶ Congress, for its part, would surely be reluctant to respond to the Court without assurances about how any particular answer would affect both the *Heller* case and the Court's treatment of the Second Amendment in general.²⁷ But advisory opinions are forbidden,²⁸ and in any event a modern Court likely would not feel bound to honor any advice it might give about the Constitution if it later determined that implementation of that advice would be "impracticab[le]" or "unworkable."²⁹

Which brings us back to *Dillon*, and the Court's apparently unreflective assumption in that case that judicial review extends to supervision of the amendment processes of Article V. Perhaps, then, *Dillon* just follows from the literal meaning of *Marbury v. Madison*'s famous statement: "It is emphatically the province and duty of the judicial department to say what the law is," as well as what the law means.³⁰

²⁵ Sanford Levinson, *Authorizing Constitutional Text: On the Purported Twenty-Seventh Amendment*, 11 CONST. COMMENT. 101 (1994).

²⁶ See Amanda Frost, *Certifying Questions to Congress*, 101 NW. U. L. REV. 1 (2007).

²⁷ Which is not to say that many legislators do not already share an opinion on the subject. See Brief for Amici Curiae 55 Members of United States Senate, the President of the United States Senate, and 250 Members of United States House of Representatives in Support of Respondent, *District of Columbia v. Heller*, U.S. No. 07-290 (Feb. 8, 2008):

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." Congress adopted that wording and proposed it to the States in 1789.

Accord (except for capitalization), Brief for the United States as Amicus Curiae, *District of Columbia v. Heller*, U.S. No. 07-290 (Jan. 11, 2008).

²⁸ See, e.g., *Hayburn's Case*, 2 U.S. 409 (1792); *Massachusetts v. EPA*, 127 S. Ct. 1438 (2007).

²⁹ See *FEC v. Wisconsin Right to Life, Inc.*, 127 S. Ct. 2652, 2684-85 (2007) (Scalia, J., concurring in part and concurring in the judgment).

³⁰ 5 U.S. 137, 177 (1803) (emphasis added).