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A CONSTITUTIONAL CONUNDRUM OF SECOND AMENDMENT COMMAS

A SHORT EPISTOLARY REPORT

William W. Van Alstyne

THE FOLLOWING CONSTITUTIONAL EPISTOLARY travelogue on commas begins with an original email inquiry from Dan Gifford posted to an email list of Second Amendment addressees in late March, 2007, soon after the decision by a three-judge panel of the U.S. Court of Appeals for the District of Columbia Circuit in *Parker v. District of Columbia*.¹ The decision in *Parker* is the first to apply the Second Amendment to hold a federal gun law to be invalid. The particular law, enacted in the District of Columbia, forbade anyone to keep any operable handgun at home, regardless of the homeowner's competence, complete lack of any criminal record, or evidence of prior abuse or misuse of firearms. In holding that the District had overreached any adequate justification sufficient to sustain such a measure as this,

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¹ 478 F.3d 370 (D.C. Cir. 2007).

consistent with the Second Amendment, the court of appeals made some use even of the particular comma placements within the Second Amendment. The comma commentary was far from being the sole source of the court's compelling review and rejection of the challenged law. The reader is certainly encouraged to read the entire opinion for the rest of the court's reasoning, but that is not the object of the following observations and remarks. Rather, they – the observations and remarks offered here – are merely as they purport to be, *i.e.*, light liftings from an ongoing exchange of letters on the comma controversy. And so they begin as they do, with the first posted note by Dan Gifford, raising an interesting point the reader is now invited to consider and then invited also to read further (but of course only if so inclined).

FROM: DAN GIFFORD, MARCH 22, 2007

I raised some questions the other day about whether the different number of commas used in the Second Amendment make any difference in its meaning. Essentially, the older written versions I've seen in books – like Joseph Story's – have one² while more recent

² Mr. Gifford is correct. See JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 708 (1833) (Ronald Rotunda & John Nowak, eds., 1987) (“1000. The next 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.’”). Similarly, Justice Story likewise quoted the Second Amendment in this same fashion, in an opinion he authored while on the Supreme Court. See *Houston v. Moore*, 18 U.S. 1, 52 (1820). Beyond that, moreover, the Supreme Court *itself* has similarly quoted from the Second Amendment in just this same way (*i.e.*, with *one* comma). See, *e.g.*, *Presser v. Illinois*, 116 U.S. 252, 260 (1886) (“The clauses of the constitution of the United States referred to in the assignments of error were as follows: ... ‘Art. 2 of Amendments. 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.’”) See also *id.* at 265 (“[T]he right of the people to keep and bear arms is not a right granted by the constitution. Neither is it in any manner dependent upon that instrument for its existence. The second amendment declares that it [*i.e.*, the right of the people to keep and bear arms] shall not be infringed, but this, as has been seen, means no more than that it shall not be infringed by congress.”) Note that even in this quotation from the

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ones use three. I'm told the version on public display in Washington, DC has three, but that that is an anomaly to others of the period and to those sent around for ratification. I have seen one of them, and it contained one comma. Anyway, my question was, do the number of commas make a difference in the Second's meaning? The piece below in this morning's *L.A. Times* looks at that question as well.

CAN COMMAS SHOOT DOWN GUN CONTROL?

by Dennis Baron

*Professor of English at the University of Illinois*³

Citing the second comma of the 2nd Amendment, the U.S. Circuit Court of Appeals for the District of Columbia ruled March 9 that district residents may keep guns ready to shoot in their homes.

Plaintiffs in *Shelly Parker et al vs. District of Columbia* were challenging laws that strictly limited who could own handguns and how they must be stored. This is the first time a federal appeals court used the 2nd Amendment to strike down a gun law, and legal experts say the issue could wind up in the Supreme Court.

Supreme Court, the "right" thus identified by the Court itself in *Presser* thus put beyond Congress is "the right of the people to keep and bear arms," as such (*i.e.*, the "it" that shall not be infringed), rather than some sort of "state right."

The version of the Second Amendment published by the Library of Congress, of authentic congressional documents as enrolled, also uses only a single comma, in the same place within the text of the amendment, as reflected both in Justice Story's quoted version and in the Supreme Court's own version as quoted in the *Presser* case of 1886. Thus, as recorded as "adopted" by Congress to become "amendments . . . when ratified by three fourths of the said legislatures," the proposed amendment appears as follows: "ART. IV. 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." And so, too, still again, with but one comma, when recorded following receipt of the requisite state ratification (the sole difference being that the enrolled copy begins with "ART. II," the number newly assigned insofar as the original, proposed, numbered first two amendments had not met with sufficient ratifications.

³ Los Angeles Times, Op. Ed., March 22, 2007. Reprinted with permission of the author and the publisher.

While the D.C. Circuit Court focused only on the second comma, the 2nd Amendment to the Constitution actually has three: “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.” The 2–1 majority of judges held that the meaning turns on the second comma, which “divides the Amendment into two clauses; the first is prefatory, and the second operative.”

The court dismissed the prefatory clause about militias as not central to the amendment and concluded that the operative clause prevents the government from interfering with an individual’s right to tote a gun.⁴ Needless to say, the National Rifle Assn. is very happy with this interpretation. But I dissent. Strict constructionists, such as the majority on the appeals court, might do better to interpret the 2nd Amendment based not on what they learned about commas in college but on what the framers actually thought about commas in the 18th century.

The most popular grammars in the framers’ day were written by Robert Lowth (1762) and Lindley Murray (1795). Though both are concerned with correcting writing mistakes, neither dwells much on punctuation. Lowth calls punctuation “imperfect,” with few precise rules and many exceptions. Murray adds that commas signal a pause for breath. Here’s an example of such a pause, from the Constitution: “The judicial power of the United States, shall be vested in one Supreme Court” (Article III, Section 1). But times change. If a student put that comma in a paper today, it would be marked wrong.

The first comma in the 2nd Amendment signals a pause. At first glance, it looks like it’s setting off a phrase in apposition, but by the time you get to the second comma, even if you don’t know what a phrase in apposition is, you realize that it doesn’t do that. That second comma identifies what grammarians call an absolute clause, which modifies the entire subsequent clause. Murray gave this ex-

⁴ Actually, of course, the D.C. circuit court opinion says nothing as to whether one may “tote a gun,” there being no such question before the court (as the opinion itself takes care to explain).

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ample: “His father dying, he succeeded to the estate.” With such absolute constructions, the second clause follows logically from the first.

So, the 2nd Amendment’s second comma tells us that the subsequent clauses, “the right of the people to keep and bear Arms, shall not be infringed,” are the logical result of what preceded the comma: “A well regulated Militia, being necessary to the security of a free State.” The third comma, the one after “Arms,” just signals a pause. But the ju[dg]les repeatedly dropped that final comma altogether when quoting the 2nd Amendment – not wise if you’re arguing that commas are vital to meaning.

But that’s just my interpretation. As the D.C. Circuit Court decision shows us, punctuation doesn’t make meaning, people do. And until a higher court says otherwise, people who swear by punctuation will hold onto their commas until they’re pried from their cold, dead hands.

FROM: WM. VAN ALSTYNE TO DAN GIFFORD

Dear Dan,

In regard to your inquiry regarding the decision in *Parker* and the critical reflections in the *Los Angeles Times* Op Ed piece respecting commas and the Second Amendment, I can offer two (or perhaps three) points, though none, perhaps, of particular weightiness.

First, just for clarification, the D.C. circuit court opinion in the recent *Parker* case did not turn on one comma, two,⁵ or three, rather, the court’s references to the comma placements were accompanied by a wide range of strong and convincing supportive history pertinent to the amendment, *i.e.*, an accompanying history strongly supportive of what the court concluded was (and still is) protected by the provisions of the amendment as such.⁶ Second, and

⁵ The D.C. Circuit opinion quotes the amendment with two – rather than three – commas. See 478 F.3d at 377: “As we noted, 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. U.S. CONST. amend. II.”

⁶ See 478 F.3d. at 381-395.

still as a mere preliminary observation, I have a framed copy of the Second Amendment as it appears in the original, sepia ink document of the twelve proposed amendments as approved by the requisite two-thirds of both houses and signed at the bottom by the then-Speaker of the House and by John Adams as President of the Senate. There, it appears with *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”).⁷ The Amendment is often (inaccurately?) reprinted with just two commas (*i.e.*, omitting the third one), and sometimes also printed with only one (*i.e.*, omitting the first and the third). The more common contemporary mistake – if it is a mistake – is merely in the omission of the third comma.⁸

But, to be sure, there is some serious scholarship that says that, while the copy I have (*i.e.*, of the proposed amendments as approved by Congress) is doubtless accurate so far as it goes, nevertheless, when it was in turn copied (remember, there were at the time no simple Xerox machines or their like), some transcribed copies as they were then sent to the various states (for consideration as part of the necessary ratification process), did – by simple oversight – *omit the third comma*. And, if so (as may well be the case), then no doubt one may raise a perfectly reasonable question as to

⁷ A quick review of a half-dozen constitutional law casebooks currently in use in most of the AALS-accredited law schools confirms that, in each, the part of the casebook that provides a full copy of the Constitution with all (current) twenty-seven amendments, likewise reproduces the Second Amendment with *three* commas, placed as in the version just now quoted in the text. Perhaps, however, this is just another instance of an increasingly entrenched mistake.

⁸ And there are still further variations. For example, in the quite famous *Commentaries on the Constitution* by St. George Tucker, the Second Amendment appears with three commas, but one of the three is in a *different place* than it appears on the copy as framed in the hand-written enrolled original. See ST. GEORGE TUCKER, VIEW OF THE CONSTITUTION OF THE UNITED STATES 239 (Liberty Fund edition, 1999) (quoting as follows: “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. Amendments to C.U.S. Art. 4.”). See also the different (one comma) versions at note 2 *supra*.

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what now shall we say as to the “authentic” text of the Second Amendment? Is it the text as approved in Congress, or is it the different text as approved by the requisite number of state legislatures (the “difference” being precisely in the difference of one comma or more, neither more nor less)? And if one genuinely wants to pursue this particular matter even more rigorously, if we hold that there *is* a (meaningful?) difference between (a) the amendment as approved by Congress and (b) the “different” amendment as approved by the state legislatures, then perhaps it is entirely possible that there is no Second Amendment *as such*.

“There is no Second Amendment as such,” we may have to admit, given what we have already admitted, because we know (and surely agree) that for any new text to become added to the Constitution, *i.e.*, for any new text to become effective as an “amendment” to the Constitution itself, it must meet two criteria as required by Article V (the article describing how amendments are to be made ... what consecutive steps proposals must clear before becoming effective *as* amendments). And what are they?

The first is proposal (*i.e.*, approval) by not less than two-thirds of both houses of Congress. Separately, ratification (*i.e.*, approval) by not less than three-fourths of the legislatures of the states. Okay, so far? Well, then, consider this:

1. Suppose that Congress approves a proposed amendment that provides “X,” but that “X” is not approved by three-fourths of the states.

2. But then also suppose that three-fourths of the states approve an amendment that provides “Y”, but that “Y” had not been first approved by two-thirds of both houses of Congress (rather, the only thing both houses had approved was “X” and not “Y”).

Inexorably each of the following conclusions may follow:

1. “X” failed to become an amendment to the Constitution (because it failed to receive ratification by three-fourths of the states).

2. “Y” also failed to become an amendment (because, while three-fourths of the states “approved” it, it never received the requisite antecedent approval by two-thirds of both houses of Congress as required by Article V.

Now, what conclusion shall you and I draw from this exercise? What shall “we” say and do? It seems to me we have the following possibilities –

Well, if we say that the only difference between the version of the Second Amendment as approved in Congress and that approved by the requisite number of states is trivial – (“trivial” in the sense of not conveying any meaningful difference or “understanding”) then everything is okay. In brief, we are denying that there is any “meaningful” difference, and so the “analogy” between an “X” and a “Y” is a false analogy. Rather, Congress and the states approved the “same” thing as such. This is possible, of course, if – but only if – we treat the differences in the two texts – namely (for example) the sole difference of a third comma – as not “meaningful.”

But on the other hand – Note this as well. If we *do* regard it as a “meaningful” difference, then, in so declaring (*i.e.*, exactly in insisting upon the “meaningfulness” of *that* difference), we are compelled to admit that: (a) Congress proposed one thing (which no sufficient number of states approved), and (b) the states ratified another thing (which Congress never approved by the requisite votes in each house necessary to qualify it for ratification by the states).

And from this, perhaps it also follows, accordingly, that the U.S. Government Printing Office should stop printing copies of the Constitution which “include” the Second Amendment and, instead, just renumber the amendments in all new and all subsequent printings such that after what is now numbered as the First Amendment will itself still be printed as the First Amendment, but it will be followed by what is currently numbered the Third Amendment but will hereafter appear as the Second Amendment, etc., to the end (until what is currently numbered as the Twenty-Seventh Amendment becomes the Twenty-Sixth).

Is this the new impasse to which we have arrived? – That we can now stop quarreling over the “true (or more faithful) interpretation” of the Second Amendment? Rather, we can start quarreling over its existence *as such*. (Perhaps the District of Columbia government ought itself so to argue in some further review or some new case?) “Inquiring Minds Want to Know.” Meantime, pending further lucu-

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brations of just this sort, perhaps it would be more useful just to go back to the D.C. circuit court opinion in *Parker* and, after reading it again (even as one might also encourage Dennis Baron to do), decide for yourself whether you are of the view that the two judges in the majority got the matter more nearly “right” (as I do) or whether you are more impressed with the dissent (as no doubt some others well may be) ...

Best wishes,
Wm. Van Alstyne



The preceding reply was emailed to Dan Gifford, with a “show copy” to Eugene Volokh with the suggestion that he consider it for posting on the “Volokh Conspiracy,”⁹ to see what responses it might draw from any of the many knowledgeable readers of his famous website, in respect to the “correct” actual text of the Second Amendment. The following is a copy of his reply. I then sent him a clarifying response that is reproduced in turn, momentarily concluding this adventure as it began with the original Dan Gifford email note.

FROM: EUGENE VOLOKH TO WM. VAN ALSTYNE

Bill:

I much liked your message to Dan, and I was thinking about posting it, but on reflection I began to wonder if people might miss the point. As I understand it, you’re basically saying that it’s pointless to worry overmuch about typographic inconsistencies, and you’re also alluding to some people’s tendency to find any means, however unsound, to try to nullify the Second Amendment. But my sense is that at least some of our readers won’t grasp this, and will either think you’re making a serious argument about the possible invalidity of the Amendment, or a serious argument that the pro-

⁹ <http://volokh.com>.

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gun-control forces would indeed make such an argument. Am I misunderstanding your point?

Eugene

FROM: WM. VAN ALSTYNE TO EUGENE VOLOKH

Eugene,

For a very, very rare occasion, you *are* (or at least may be) “misunderstanding” my point. My personal “point” was neither to provide ammunition for the pro-gun-control forces as such nor necessarily to suggest (on the other hand) that “it’s pointless” to worry overmuch about typographic inconsistencies. Instead, it was merely to suggest a worthy conundrum of sorts, *i.e.*, the very sort of thing I would have thought that blogs are “for” – and most especially yours, in a flattering way, where one expects to find a certain intellectual willingness to engage in a course of original inquiry and see where it may or may not lead. And that is pretty much all that I had – and have – in mind. I’ll try to clarify matters better in this additional note.

On the one hand, I wouldn’t want to say that commas don’t matter (surely not!). Whether one is a grammarian, an antiquarian, or just an ordinary fellow, what sort of “know-nothingness” would such a bizarre stance represent? Especially for “folks like us,” *i.e.*, those who are of the view that the first obligation of those on the Supreme Court (and other federal courts) is to discharge the oath they take, namely, to “support *this* Constitution” (emphasis added to the language I am quoting from Article VI itself), and not some other (*e.g.*, the Constitution as it might have been written by John Rawls or Ronald Dworkin, or the enthusiasts of “Handgun Control,” or still some other volunteer, but was not – it was not written by any of them at all, any more than it was written by any of us). And, indeed, if faithful, informed, reliable scholarship is able to explain the disparity – such as it appears to be – between the framing of the Second Amendment (or anything else) as it appears on the signed copy of the document framed on my office wall and some different version as considered in the several states, we should all

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feel enriched – rather than embarrassed – by that information (again, why would one want to be so “anti-intellectual” as to take no interest in it?).

Perhaps, once one has a grasp of the events, one may well conclude that one feels enriched by the information, but quite unconvinced by someone’s effort – whether mine or someone else’s – to seize on the discrepancy – such it is – in the manner they chose to do.¹⁰ But, oppositely, too, perhaps one is in fact quite impressed and does conclude that, well, yes, one does see how the presence – or absence – of any commas, or of just one comma, or maybe two commas, *could* make a substantial difference, depending, too, one might suppose on just where, within a particular sentence, the comma (or several commas) appeared – perhaps to break the “rhythm” of the sentence as a whole, perhaps to introduce a subjunctive clause, perhaps ... any number of things (including among our “perhaps” even this one – that in fact it didn’t affect the common understanding at all!). Whatever the case, however, surely we should take a willing interest and lend an encouraging ear – rather than turn away with a deaf ear and a closed mind.

So much, then, by way of gentle rebuke of any who just want to say “who cares” about such a matter ... for these are the very folks inclined to say, more generally, “who cares” what was meant to be secured – or not secured – by *anything* in the Constitution, whether in the Second Amendment or anywhere else. These, indeed, are the “living constitution” folks, *i.e.*, our overweening fellow scribes who want to make each generation its own “founding” generation and by its own mere roving Gallup Poll add, subtract, blank out, etc. whatever suits its fancy with nary a nod to the niceties of Article V (on amendments ... changes) ... in essence, the Ackermaniacs *et al.*

Rather, the modest point of my missive was merely to offer an observation I had not seen before in any of the various offerings previously published on the “comma disputes” of the Second Amend-

¹⁰ For example, as in the Op Ed piece by Dennis Baron, that prompted this cascade of exchanges via email.

ment ... a point I think, while probably of no great moment, may be at least somewhat original and sufficiently provocative to share on your excellent blog, perhaps to draw comment from some among your many literate readers, neither more nor less.

So, the point was posed in the form of a dilemma (perhaps a *false* dilemma, but perhaps a true dilemma ... of sorts). Treat the difference in drafts as merely an accident (*e.g.*, in copying) and as not reflecting any “real” difference in the way the amendment is properly read and understood, and perhaps all is well (save only a leftover “mini-dilemma” regarding which version the U.S. Government Printing Office ought itself now to provide as the (more?) authentic one). Or treat the difference in drafts as still, perhaps, just an accident in copying but nonetheless, accident though it may be, as of significant moment even as in “accidents” of a like sort in other contexts (*e.g.*, when the telegraph office mistranscribes the terms of an “offer” such that the “offer” the offeree “accepted” was not the “offer” the offeror made), and *where do we go from there?* Sometimes, even “accidents” have consequences, as we perfectly well know.

Well, we know how these matters are worked out in common law contracts ... but of course that way of deciding, sufficient for judging contracts, may not be correct for judging amendments. But I desist from any further suggestions or analysis. For the point is not to “settle” anything here, rather, just to sketch what would appear to be a dilemma of sorts. Just how shall the Second Amendment be printed in contemporary copies (with one, two, or three commas), and how shall we decide *that* question? And then, if there is any difference – between what Congress approved (but the states did not) on the one hand, and between what the states approved (but Congress had not proposed) on the other hand – what to say about that? That there is *no* Second Amendment? Are two centuries of “seeing” it and dozens and dozens of cases having treated it as “law” suddenly to be wiped out? ’Tis a bold thought! (Perhaps far too bold by half ...)

Anyway, I appreciate your concern to save me from being misunderstood. Still, I think the content of the note I sent in response the inquiry by Dan Gifford is worth sharing with the many literate

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readers of your fine “Vlokh conspiracy” blog. And, in the end, I hope that even now you will help (in the words of a famous starship captain) to “make it so.”

Best wishes,
Bill

