

THE SIXTH AMENDMENT: VERSION 1.0 *ET SEQ.*—
 COMMAS, CLAUSES, AND THE CONSTITUTION

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INTRODUCTION

On January 20, 2009, Chief Justice of the United States John Roberts administered the oath of office to President-elect Barack Obama in front of approximately two million people.¹ Or at least he tried.² Reciting the oath prescribed in Article II of the U.S. Constitution, Chief Justice Roberts inadvertently moved the word “faithfully” from the middle to the end of the first clause.³ Aware of the mistake, Mr. Obama attempted to correct the Chief Justice without adding to the confusion.⁴ The Chief Justice began again, but this time omitted the word “execute.”⁵ Eventually, the two found their way to the end.⁶ Many of those attending probably did not notice the error, and those who did notice were likely either embarrassed, amused, or something in between. Nevertheless, on January 21, the day after the inauguration and Barack Obama’s first full day as President, a robed Chief Justice Roberts administered the oath a second time at the White House, “out of an abundance of caution.”⁷ The reason? Even after presidential aides asserted that a second swearing-in was unnecessary, White House counsel Gregory B. Craig admitted, “the oath appears in the Constitution itself.”⁸

It is a truth universally acknowledged that the Constitution of the United States is one of the most important written documents in the history

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¹ Jeff Zeleny, *I Really Do Swear, Faithfully: Obama and Roberts Try Again*, N.Y. TIMES, Jan. 22, 2009, <http://www.nytimes.com/2009/01/22/us/politics/22oath.html>.

² *Id.*

³ *Id.* (internal quotation marks omitted). The Presidential oath reads: “I do solemnly swear (or affirm) that I will faithfully execute the Office of President of the United States, and will to the best of my Ability, preserve, protect and defend the Constitution of the United States.” U.S. CONST. art. II, § 1, cl. 8 (internal quotation marks omitted).

⁴ Zeleny, *supra* note 1.

⁵ *Id.* (internal quotation marks omitted).

⁶ *See id.*

⁷ *Id.* (internal quotation marks omitted).

⁸ *Id.* (internal quotation marks omitted).

of mankind, and the most important written document in the history of the United States. What is less certain, however, is what we mean when we refer to “the” Constitution.⁹ Is the text Congress originally proposed to the several states “the” Constitution? Or is it the text ratified by a particular state? And, if the latter, *which* state? Or is there some other, definitive version of our founding document to which we should look—and look closely—for the organizing principles that define the land of the free and the home of the brave?

The Sixth Amendment is the repository of some of the oldest rights protected by the Constitution.¹⁰ These include the right to a speedy, public trial by an impartial jury in the locality of the alleged offense; the rights of confrontation and compulsory process; and the right to counsel.¹¹ But the text of the Sixth Amendment proposed by Congress to the several states in 1789 and the texts ratified by each state vary in their use of capitalization and spelling.¹² More remarkably, the proposed and ratified texts, as well as a selection of other sources thrown in for good measure, employ commas and semicolons in a variety of combinations, dividing and subdividing (or, in their absence, performing neither of these functions) the Sixth Amendment into clauses and subclauses.¹³

The Obama-oath episode had a happy ending and is destined for anecdotal immortality. Other examples of the critical importance of text and the potentially lethal dangers of interpretation have had more tragic consequences.¹⁴ And in the constitutional comma context, a recent, groundbreaking Supreme Court decision relied on the distinction between and interrelation of prefatory and operative clauses—clauses created by commas.¹⁵ This precedential evidence suggests that our inquiry, while

⁹ See Ross E. Davies, *Which Is the Constitution?*, 11 GREEN BAG 2D 209, 209 (2008) (“[I]dentifying 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.”).

¹⁰ See, e.g., *Klopfer v. North Carolina*, 386 U.S. 213, 223 (1967) (“We hold here that the right to a speedy trial is as fundamental as any of the rights secured by the Sixth Amendment. That right has its roots at the very foundation of our English law heritage. Its first articulation in modern jurisprudence appears to have been made in Magna Carta (1215) . . . but evidence of recognition of the right to speedy justice in even earlier times is found in the Assize of Clarendon (1166).”).

¹¹ U.S. CONST. amend. VI; CLIFF ROBERSON, *CONSTITUTIONAL LAW AND CRIMINAL JUSTICE* 167 (2009).

¹² See *infra* Part II.A.

¹³ See *infra* Part II.A.

¹⁴ See *R v. Casement*, [1917] 1 K.B. 98 at 129, 134, 138-39, 144 (Eng). For a gripping retelling of this trial—in which a man lost his life but gained immortality because of the placement of a comma—see ROBERT AITKEN & MARILYN AITKEN, *LAW MAKERS, LAW BREAKERS AND UNCOMMON TRIALS* 175-99 (2007).

¹⁵ *District of Columbia v. Heller*, 554 U.S. 570, 579-603 (2008); see also Adam Freedman, Op-Ed., *Clause and Effect*, N.Y. TIMES, Dec. 16, 2007, <http://www.nytimes.com/2007/12/16/opinion/16freedman.html>.

perhaps seeming insignificant or even irrelevant on its face, has potentially powerful predictive purport.¹⁶

In a good-faith effort to address some of these questions, this Comment begins in Part I by painting a contemporary backdrop of punctuation-dependent constitutional interpretation in the aftermath of the Supreme Court's decision in *District of Columbia v. Heller*.¹⁷ In Part II, the "why" and "how" of our Sixth Amendment inquiry is expounded, and this methodology is applied to the Supreme Court's Sixth Amendment jurisprudence. Finally, in Part III, the results of our inquiry are examined and predictions are made about the possible future application of *Heller's* brand of constitutional interpretation.

I. BACKGROUND: THE POST-*HELLER* SIGNIFICANCE OF CONSTITUTIONAL PUNCTUATION

In *Parker v. District of Columbia*,¹⁸ the court of appeals decision reviewed by the Supreme Court in *District of Columbia v. Heller*, the D.C. Circuit divided the Second Amendment into two clauses separated by a comma.¹⁹ Without referencing a dialectical or grammatical source for the labels, the court first identified a "prefatory clause": "[a] well regulated Militia, being necessary to the security of a free State."²⁰ The court then identified an "operative clause": "the right of the people to keep and bear Arms shall not be infringed."²¹ In its subsequent analysis, the court found that the "prefatory clause" and the civic purpose it announced (i.e., the maintenance of a "well regulated Militia") was narrower than the "operative clause" identifying the individual right that followed (i.e., "the right of the people to keep and bear Arms").²²

Moreover, the court found that this construction reflected political pressure during and after the ratification of the Constitution, as well as the

¹⁶ See generally Michael Nardella, *Knowing When To Stop: Is the Punctuation of the Constitution Based on Sound or Sense?*, 59 FLA. L. REV. 667, 668-89 (2007) (suggesting that a disciplined grammatical reading of the Fifth Amendment raises interpretive questions, notwithstanding more than two centuries of constitutional jurisprudence); Peter Jeremy Smith, *Commas, Constitutional Grammar, and the Straight-Face Test: What If Conan the Grammarian Were a Strict Textualist?*, 16 CONST. COMMENT. 7, 16-17 (1999) (using strict grammatical readings of the Twenty-Sixth and Seventeenth amendments to question the propriety of plain meaning constitutional construction).

¹⁷ 554 U.S. 570 (2008).

¹⁸ 478 F.3d 370 (D.C. Cir. 2007), *aff'd sub nom.* *District of Columbia v. Heller*, 554 U.S. 570 (2008).

¹⁹ *Id.* at 378.

²⁰ *Id.* (internal quotation marks omitted).

²¹ *Id.* (internal quotation marks omitted).

²² *Id.* at 382, 386, 389-90; see also Eugene Volokh, *The Commonplace Second Amendment*, 73 N.Y.U. L. REV. 793, 801-07 (1998) (arguing that the justification clause should not be read as a condition on the operative clause).

Framers' intention to provide for the resolute protection of a natural right and the expedient preservation of a political benefit.²³ Thus, the Second Amendment—properly construed—could not be read to make the right of individuals to “keep and bear Arms” contingent upon militia service.²⁴

In *Heller*, Justice Antonin Scalia, speaking for a majority of the Supreme Court that included Chief Justice John Roberts and Associate Justices Anthony Kennedy, Clarence Thomas, and Samuel Alito, followed the court of appeals's lead in the “natural[.]” division of the Second Amendment into “prefatory” and “operative” clauses.²⁵ While acknowledging the necessity of a logical relationship between the two clauses, the Court stressed the “clarifying function” of the “prefatory clause” before going on to state outright that the latter “does not limit or expand the scope of the operative clause.”²⁶ Following an in-depth textual analysis of the “operative” and “prefatory” clauses, the Court concluded that the relationship between the two clauses was in fact logical, and it affirmed the judgment of the court of appeals after considering analogous provisions in state constitutions, ratification and post-ratification history, and precedent.²⁷

Black's Law Dictionary defines a “clause” as “[a] distinct section or provision of a legal document or instrument.”²⁸ An “operative clause” is defined as “[a] provision under an enacting or resolving clause; a provision that is not a mere recital or preamble,”²⁹ and a “resolving clause” is defined as “[t]he clause that introduces a resolution's operative text, usu[ally] beginning with ‘Resolved, That’”³⁰ This definition of “resolving clause” appears to be the closest definition of a “prefatory clause” available in the legal lexicon, as no edition of *Black's Law Dictionary* defines a “prefatory clause.”³¹ Nor does any edition separately define “prefatory.”³²

The Court's identification of “prefatory” and “operative” clauses in its constitutional interpretation is a relatively recent development. A LEXIS

²³ *Parker*, 478 F.3d at 390.

²⁴ *Id.* at 395.

²⁵ District of Columbia v. *Heller*, 554 U.S. 570, 577-78 (2008).

²⁶ *Id.* at 578.

²⁷ *Id.* at 579-626, 636.

²⁸ BLACK'S LAW DICTIONARY 285 (9th ed. 2009).

²⁹ *Id.*

³⁰ *Id.* at 286.

³¹ See *id.* at 285; BLACK'S LAW DICTIONARY 268 (8th ed. 2004); BLACK'S LAW DICTIONARY 244 (7th ed. 1999); BLACK'S LAW DICTIONARY 249 (6th ed. 1990); BLACK'S LAW DICTIONARY 226 (5th ed. 1979); BLACK'S LAW DICTIONARY 316 (rev. 4th ed. 1968); BLACK'S LAW DICTIONARY 316 (4th ed. 1951); BLACK'S LAW DICTIONARY 336 (3d ed. 1933); BLACK'S LAW DICTIONARY 210 (St. Paul, Minn., West 1891).

³² BLACK'S LAW DICTIONARY 1298 (9th ed. 2009); BLACK'S LAW DICTIONARY 1217 (8th ed. 2004); BLACK'S LAW DICTIONARY 1197 (7th ed. 1999); BLACK'S LAW DICTIONARY 1178 (6th ed. 1990); BLACK'S LAW DICTIONARY 1060 (5th ed. 1979); BLACK'S LAW DICTIONARY 1342 (rev. 4th ed. 1968); BLACK'S LAW DICTIONARY 1342 (4th ed. 1951); BLACK'S LAW DICTIONARY 1401 (3d ed. 1933); BLACK'S LAW DICTIONARY 927 (St. Paul, Minn., West 1891).

terms-and-connectors search of Supreme Court cases for “prefatory clause” yields only two results: *Heller* and *City of Rancho Palos Verdes v. Abrams*.³³ The latter case refers only once to a “prefatory clause,” and then only in a statutory context.³⁴ A similar LEXIS search for “operative clause” yields only seven results in addition to *Heller*. These refer to “operative” clauses in two statutes,³⁵ a contract,³⁶ a proration order,³⁷ a war-risk insurance policy,³⁸ a conveyance deed,³⁹ and an insurance policy.⁴⁰

As we have seen, the importance of the comma separating the two clauses in *Heller* cannot be understated. What cannot be assumed, however, is the fixed position of the comma itself.⁴¹ Indeed, while there are cases quoting the version of the Second Amendment that includes the separating comma, several extant versions omit *Heller*’s critical comma altogether.⁴² This poses interesting constitutional historical and interpretive questions. In other cases in which other amendments are construed, which version(s) of the amendment are used? Does the presence or the absence of a comma—depending on the version used—change the interpretation? If not, could it in the future?

II. METHODOLOGY

A. *Choosing a Measure: Why the Sixth Amendment?*

The Sixth Amendment was selected as the focus of our inquiry into the historical and practical use of constitutional quotations because it is, quite simply, a target-rich environment in both substantive and formal terms. In other words, the Sixth Amendment is a good “test case,” providing both a point of departure for and manageable limitations to our inquiry into past use of constitutional quotations. While not the longest of the original ten amendments comprising the Bill of Rights⁴³ or the shortest,⁴⁴ the Sixth Amendment contains approximately eighty words and guarantees no less

³³ 544 U.S. 113 (2005).

³⁴ *Id.* at 125.

³⁵ *Holly Farms Corp. v. NLRB*, 517 U.S. 392, 413 (1996) (O’Connor, J., concurring in judgment in part and dissenting in part); *Nobelman v. Am. Sav. Bank*, 508 U.S. 324, 330 (1993).

³⁶ *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 208 (1995).

³⁷ *N. Natural Gas Co. v. State Corp. Comm’n*, 372 U.S. 84, 88 n.6 (1963).

³⁸ *Calmar S.S. Corp. v. Scott*, 345 U.S. 427, 434 n.4 (1953) (referring to a “non-operative clause”).

³⁹ *Schley v. Pullman Car Co.*, 120 U.S. 575, 583 (1887).

⁴⁰ *Reed v. Ins. Co.*, 95 U.S. 23, 24 (1877).

⁴¹ *See* *Davies*, *supra* note 9, at 209.

⁴² *See id.* at 210-11.

⁴³ U.S. CONST. amend. V.

⁴⁴ U.S. CONST. amend. VIII.

than eight rights to criminal defendants: (1) the right to a speedy trial; (2) the right to a public trial; (3) the right to an impartial jury; (4) the right to a trial in the judicial district in which the crime was committed; (5) the right to be informed of the nature and cause of the accusation; (6) the right to confront witnesses; (7) the right to have compulsory process for obtaining favorable witnesses; and (8) the right to have assistance of counsel for one's defense.⁴⁵

Adding to the formal complexity of the Sixth Amendment is its punctuation. While reliance on commas in constitutional interpretation seems a principled and sincere approach, difficulties arise when we consider that several extant versions of at least some constitutional text exist, and that these are inconsistent in their punctuation.⁴⁶ Indeed, we discover eight uniquely punctuated texts of the Sixth Amendment when we compare the text Congress proposed to the states,⁴⁷ the ratifying acts of eight states,⁴⁸ the text of the amendment included in the front pages of Justice Joseph Story's Commentaries,⁴⁹ and the text of a modern pocket Constitution published by the Federalist Society.⁵⁰

The only ratification act that explicitly tracks the punctuation of Congress's proposed amendment is South Carolina's.⁵¹ Proposed by Congress to the states:

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 favor, and to have the Assistance of Counsel for his defence.⁵²

South Carolina's ratification act provides:

⁴⁵ U.S. CONST. amend. VI; ROBERSON, *supra* note 11.

⁴⁶ See Davies, *supra* note 9, at 209.

⁴⁷ 2 DOCUMENTARY HISTORY OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA, 1786-1870, at 322-23 (1894) [hereinafter DOCUMENTARY HISTORY] (presenting Congress's proposal to the States, dated March 4, 1789).

⁴⁸ New Jersey, Maryland, North Carolina, South Carolina, Delaware, Pennsylvania, New York, and Rhode Island and Providence Plantations. *Id.* at 323-44, 347-66.

⁴⁹ 1 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES, at xxxii (Boston, Little, Brown, and Co., 3d ed. 1858) (1833).

⁵⁰ U.S. CONST. amend. VI, *reprinted in* THE CONSTITUTION OF THE UNITED STATES 23 (The Federalist Society for Law & Public Policy Studies) (2010).

⁵¹ New Hampshire, Vermont, and Virginia adopted the amendments proposed by reference. DOCUMENTARY HISTORY, *supra* note 47, at 345-46 (presenting New Hampshire's ratification act of January 25, 1790); *id.* at 375-76 (presenting Vermont's ratification act, November 3, 1791); *id.* at 386-90 (presenting Virginia's ratification act of December 15, 1791).

⁵² *Id.* at 323 (presenting Congress's proposal to the States, dated March 4, 1789).

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 favor, and to have the Assistance of Counsel for his defence.⁵³

New York's Sixth Amendment has five commas:

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 favor, and to have the assistance of Counsel for his defence.⁵⁴

North Carolina's and Pennsylvania's Sixth Amendments each contain four commas and one semicolon. The number of punctuation marks remains the same, though the two differ in the placement of the third comma. North Carolina's Sixth Amendment includes a third comma after "nature and cause of the accusation":

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 where 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 Council for his defence.⁵⁵

Pennsylvania's Sixth Amendment includes a third comma after "confronted with the witnesses against him":

In all criminal prosecutions, the accused shall enjoy the right of 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 favor, and to have the assistance of Counsel for his defence.⁵⁶

Maryland's Sixth Amendment has three commas and one semicolon:

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

⁵³ *Id.* at 343 (presenting South Carolina's ratification act of January 19, 1790).

⁵⁴ *Id.* at 359-60 (presenting New York's ratification act of February 27, 1790).

⁵⁵ *Id.* at 338 (presenting North Carolina's ratification act of December 22, 1789).

⁵⁶ *Id.* at 354-55 (presenting Pennsylvania's ratification act of March 10, 1790).

nature and cause of the accusation to be confronted with the Witnesses against him, to have compulsory process for obtaining Witnesses in his favor, and to have the assistance of Counsel for his defence.⁵⁷

Rhode Island's Sixth Amendment has two commas and four semicolons:

In all Criminal Prosecutions, the accused shall enjoy the Right to a speedy & public Trial by an impartial Jury of the State & District wherein the Crime shall have been committed, which District shall have been previously ascertain'd by law; and to be informed of the Nature & 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.⁵⁸

New Jersey's Sixth Amendment has only one comma:

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 favor and to have the assistance of Counsel for his defence.⁵⁹

The Sixth Amendment in the Federalist Society pocket Constitution contains four commas and three semicolons:

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 favor, and to have the assistance of counsel for his defence.⁶⁰

Finally, the texts of the Sixth Amendment in Justice Story's Commentaries and in Delaware's ratification act each have three commas and four semicolons. The placement of punctuation marks is identical, though the commas and semicolons are in a different order. In Justice Story's Commentary:

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

⁵⁷ DOCUMENTARY HISTORY, *supra* note 47, at 333 (presenting Maryland's ratification act of December 19, 1789).

⁵⁸ *Id.* at 365 (presenting Rhode Island and Providence Plantation's ratification act of June 7, 1790).

⁵⁹ *Id.* at 328 (presenting New Jersey's ratification act of November 20, 1789).

⁶⁰ U.S. CONST. amend. VI, *reprinted in* THE CONSTITUTION OF THE UNITED STATES, *supra* note 50.

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 favor; and to have the assistance of counsel for his defence.⁶¹

Delaware's ratification act provides:

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 favor, and to have the assistance of Counsel for his defence.⁶²

Thus, the punctuation of “the” Constitution is at best uncertain. As a result, reliance on the placement of a comma in constitutional decision making is suspect from a historical perspective. Now we turn to an examination of the practical aspects of constitutional quotations of the Sixth Amendment in Supreme Court case law.

B. *Sixth Amendment Quotations: Collection and Comparison*

We must first collect the Supreme Court cases citing the Sixth Amendment and compare the quotations of the constitutional text.⁶³ A

⁶¹ STORY, *supra* note 49.

⁶² DOCUMENTARY HISTORY, *supra* note 47, at 350 (presenting Delaware's ratification act of January 28, 1790).

⁶³ A spreadsheet containing the data used in this Section is available on the Social Science Research Network (“SSRN”). See Joshua Counts Cumby, U.S. Const. Amend. VI: A Collection of Supreme Court Quotes, 1795-2010 (Jan. 17, 2010), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1539665. The Supreme Court knows the Sixth Amendment by many names. See, e.g., *United States v. Ewell*, 383 U.S. 116, 120 n.6 (1966) (“U.S. Const., Amendment VI”); *Stilson v. United States*, 250 U.S. 583, 585 (1919) (“Article VI of the Amendments of the United States Constitution”); *Atkins v. The Disintegrating Co.*, 85 U.S. (18 Wall.) 272, 278 n.† (1873) (“Amendment VI”). Thus, while the author has attempted to collect all quotations of the Sixth Amendment using the search techniques described, the collection may not actually be exhaustive. Also, while punctuation, spelling, and capitalization in Sixth Amendment quotations are inconsistent across cases, they are also inconsistent across reporters. Compare *Flemming v. Nestor*, 363 U.S. 603, 613 n.6 (1960) (“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.” (quoting U.S. CONST. amend. VI) (internal quotation marks omitted)), with *Flemming v. Nestor*, 80 S. Ct. 1367, 1374 n.6 (1960) (“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

LEXIS Shepard's report⁶⁴ for Supreme Court cases citing the Sixth Amendment yields 981 results dating from 1851 to 2010.⁶⁵ A supplemental terms-and-connectors search for "const! /s amend! /s six!" restricted to January 1, 1790, to January 1, 1852, produces another twenty results, though only one of these cases actually cites the Sixth Amendment to the U.S. Constitution.⁶⁶

While this is a significant number of cases, our analysis is confined to those instances in which the language of the Sixth Amendment was directly quoted in the Court's opinion, just as *Heller* directly quoted the Second Amendment. For these reasons, our inquiry excludes quotations in concurring and dissenting opinions. This removes twenty-three cases dating from approximately 2000 to 2010 from the original yield based on LEXIS's explicit designation of references as "Cited in Concurring Opinion" and "Cited in Dissenting Opinion."⁶⁷

confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defence." (quoting U.S. CONST. amend. VI) (internal quotation marks omitted)). This Comment uses text from the United States Reports, the official record of the Supreme Court of the United States.

⁶⁴ The Shepard's Citations Service assists in determining the usefulness and validity of legal documents for research. The service provides a comprehensive report of the cases, statutes, secondary sources, and annotations that cite a particular authority.

⁶⁵ These results are current as of November 20, 2010.

⁶⁶ Compare *Ex parte Bollman*, 8 U.S. (4 Cranch) 75, 109 (1807) ("[S]hall 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," (quoting U.S. CONST. amend. VI) (internal quotation marks omitted)), with e.g., *Butler v. Pennsylvania*, 51 U.S. (10 How.) 402, 409 (1850) ("[T]he sixth article of the amended constitution of Pennsylvania,"), and *Ex parte Burford*, 7 U.S. (3 Cranch) 448, 451 (1806) ("By the 6th article of the amendments to the constitution of the United States, it is declared, 'that on warrants shall issue but upon probable cause, supported by oath or affirmation.'" (emphasis omitted)).

⁶⁷ While this is a helpful tool in winnowing search results, it appears to be a relatively new LEXIS feature. The distinction between citing references generally and citing references in the majority, concurring, and dissenting opinions disappears around 2000. Thus, cases before 2000 included in the search results often have Sixth Amendment quotations only in concurring or dissenting opinions. See, e.g., *Neder v. United States*, 527 U.S. 1, 30 (1999) (Scalia, J., dissenting) ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury. . . ." (alteration in original) (quoting U.S. CONST. amend. VI) (internal quotation marks omitted)); *Penson v. Ohio*, 488 U.S. 75, 89 (1988) (Rehnquist, J., dissenting) ("[I]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense." (second alteration in original) (quoting U.S. CONST. amend. VI) (internal quotation marks omitted)); *Jones v. Barnes*, 463 U.S. 745, 755 (1983) (Brennan, J., dissenting) ("[I]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." (second alteration in original) (emphasis omitted) (quoting U.S. CONST. amend. VI) (internal quotation marks omitted)); *Scott v. Illinois*, 440 U.S. 367, 375 (1979) (Brennan, J., dissenting) ("In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." (alteration in original) (emphasis omitted) (quoting U.S. CONST. amend. VI) (internal quotation marks omitted)); *Estes v. Texas*, 381 U.S. 532, 559 (1965) (Warren, J., concurring) ("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

Of the initial results, only 161 cases include quotations from the text of the Sixth Amendment in the Court's opinion.⁶⁸ And of those 161 cases, only seventeen quote the amendment in its entirety.⁶⁹ We now turn our attention to the different types of Sixth Amendment quotations used by the Court.

1. Partial Quotations of the Sixth Amendment Text

One hundred and forty-four cases quote some portion of the entire Sixth Amendment text.⁷⁰ The length of the quotations varies from single words⁷¹ to near-complete quotes.⁷² A typical quote reads: "In all criminal

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 favor, and to have the Assistance of Counsel for his defence." (quoting U.S. CONST. amend. VI) (internal quotation marks omitted)); *Carnley v. Cochran*, 369 U.S. 506, 518 (1962) (Black, J., concurring) ("In all criminal prosecutions, the accused shall . . . have the Assistance of Counsel for his defence." (alteration in original) (quoting U.S. CONST. amend. VI) (internal quotation marks omitted)); *Culombe v. Connecticut*, 367 U.S. 568, 637 (1961) (Douglas, J., concurring) ("[T]he Assistance of Counsel for his defence . . ." (quoting U.S. CONST. amend. VI) (internal quotation marks omitted)); *Maxwell v. Dow*, 176 U.S. 581, 608 (1900) (Harlan, J., dissenting) ("[I]n 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 favor, and to have the assistance of counsel for his defence; . . ." (quoting U.S. CONST. amend. VI) (internal quotation marks omitted)), *abrogated by Williams v. Florida*, 399 U.S. 78 (1970).

⁶⁸ A spreadsheet containing the data used in this Section is available on SSRN. See *Cumby*, *supra* note 63. The Court has shown itself to be sensitive to the absence of citations to Sixth Amendment text, at least in lower court opinions. See, e.g., *United States v. Scheffer*, 523 U.S. 303, 307 (1998) ("Without pointing to any particular language in the Sixth Amendment, the Court of Appeals held that '[a] *per se* exclusion of polygraph evidence offered by an accused to rebut an attack on his credibility . . . violates his Sixth Amendment right to present a defense.'" (alterations in original) (quoting *United States v. Scheffer*, 44 M.J. 442, 445 (1996), *rev'd*, 523 U.S. 303 (1998))).

⁶⁹ See *Cumby*, *supra* note 63.

⁷⁰ See *id.*

⁷¹ See, e.g., *Indiana v. Edwards*, 554 U.S. 164, 170 (2008) (quoting only the term "accused" (quoting U.S. CONST. amend. VI) (internal quotation marks omitted)); *Custis v. United States*, 511 U.S. 485, 507 (1994) (Souter, J., dissenting) (quoting only the term "assistance" (quoting U.S. CONST. amend. VI) (internal quotation marks omitted)).

⁷² See, e.g., *United States v. Cronin*, 466 U.S. 648, 650 n.1 (1984) ("In all criminal prosecutions, the accused shall enjoy the right . . . 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 favor, and to have the Assistance of Counsel for his defence." (alteration in original) (quoting U.S. CONST. amend. VI) (internal quotation marks omitted)); *Herring v. New York*, 422 U.S. 853, 857 n.6 (1975) ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . [,] 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 favor, and to have the Assistance of Counsel for his defence." (alterations in original) (quoting U.S. CONST. amend. VI)

prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him.”⁷³ Many quotes use ellipses and, in rare exceptions, end in periods.⁷⁴ Often, different clauses are cited but no quotation provided.⁷⁵ In other opinions, no quotation or clause reference is included.⁷⁶ As we might expect, given the complexity of the text’s grammatical structure and the number of substantive constitutional guarantees it contains, the Court often excises specific clauses for quotation depending on the questions presented in a given case or controversy. While these excisions often render the quotations comma independent and thus less salient in our inquiry into comma-dependent constitutional interpretation post-*Heller*, a brief case study provides some insight into the Court’s approach to the text in deciding discrete Sixth Amendment questions.

(internal quotation marks omitted)); *Nat’l Mut. Ins. Co. v. Tidewater Transfer Co.*, 337 U.S. 582, 621 n.14 (1949) (Rutledge, J., concurring) (“[T]o 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 favor, and to have the Assistance of Counsel for his defence.” (quoting *United States v. Wood*, 299 U.S. 123, 142-43 (1936)) (internal quotation marks omitted)); *Spies v. Illinois*, 123 U.S. 131, 165-66 (1887) (“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.” (quoting U.S. CONST. amend. VI) (internal quotation marks omitted)).

⁷³ *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527, 2531 (2009) (alterations in original) (quoting U.S. CONST. amend. VI) (internal quotation marks omitted); *Giles v. California*, 554 U.S. 353, 357 (2008) (alterations in original) (quoting U.S. CONST. amend. VI) (internal quotation marks omitted); *Danforth v. Minnesota*, 552 U.S. 264, 267 (2008) (alterations in original) (quoting U.S. CONST. amend. VI) (internal quotation marks omitted); *Davis v. Washington*, 547 U.S. 813, 821 (2006) (second alteration in original) (quoting U.S. CONST. amend. VI) (internal quotation marks omitted); *Crawford v. Washington*, 541 U.S. 36, 38, 42 (2004) (alterations in original) (quoting U.S. CONST. amend. VI) (internal quotation marks omitted).

⁷⁴ *See, e.g.*, *Harris v. United States*, 536 U.S. 545, 549 (2002) (ending in a comma); *Lilly v. Virginia*, 527 U.S. 116, 120 (1999) (ending without punctuation); *United States v. Rodriguez-Moreno*, 526 U.S. 275, 278 (1999) (ending in a comma); *Lewis v. United States*, 518 U.S. 322, 325 (1996) (ending with an ellipsis); *Sullivan v. Louisiana*, 508 U.S. 275, 277 (1993) (ending with an ellipsis); *Doggett v. United States*, 505 U.S. 647, 651 (1992) (ending with an ellipsis); *Holland v. Illinois*, 493 U.S. 474, 480 (1990) (ending with an ellipsis).

⁷⁵ *See, e.g.*, *Whorton v. Bockting*, 549 U.S. 406 *passim* (2007) (citing the “Confrontation Clause”); *Tennessee v. Lane*, 541 U.S. 509, 523 (2004) (same); *United States v. Inadi*, 475 U.S. 387, 388 (1986) (same); *Delaware v. Fensterer*, 474 U.S. 15, 16 (1985) (per curiam) (same); *Tennessee v. Street*, 471 U.S. 409, 410 (1985) (same); *Parker v. Randolph*, 442 U.S. 62, 64 (1979) (same), *abrogated by Cruz v. New York*, 481 U.S. 186 (1987); *Schneble v. Florida*, 405 U.S. 427, 430 (1972) (same); *Douglas v. Alabama*, 380 U.S. 415, 419 (1965) (same).

⁷⁶ *United States v. Denedo*, 129 S. Ct. 2213, 2220 (2009) (referring to “deprivation of counsel” as a “violation of the Sixth Amendment”); *Montejo v. Louisiana*, 129 S. Ct. 2079, 2083 (2009) (referring to the Sixth Amendment “right to counsel”); *Rivera v. Illinois*, 129 S. Ct. 1446, 1454 (2009) (referring to the Sixth Amendment “right to an impartial jury”); *Oregon v. Ice*, 129 S. Ct. 711, 714 (2009) (referring to the Sixth Amendment “jury-trial guarantee”).

Looking only at those landmark cases in which constitutional guarantees included in the Sixth Amendment were incorporated against the states provides some insight into how the Court commonly uses partial quotations. In the 1963 case of *Gideon v. Wainwright*,⁷⁷ the Court was asked to reconsider its holding in *Betts v. Brady*⁷⁸ that there was no right to state-appointed counsel in every case in which a criminal defendant was unable to obtain counsel.⁷⁹ The Court did so, incorporating the Sixth Amendment right to counsel against the states.⁸⁰ At the outset of its analysis, the Court stated: “The Sixth Amendment provides, ‘In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence.’”⁸¹ Similarly, in *Duncan v. Louisiana*,⁸² the Court incorporated the right to trial by impartial jury in criminal cases.⁸³ In *Duncan*, the Court provided a truncated quotation of the Sixth Amendment: “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.”⁸⁴

In the case of *In re Oliver*,⁸⁵ the Court applied the public trial right to the states, quoting “[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial.”⁸⁶ And in *Pointer v. Texas*,⁸⁷ the Court applied the confrontation right to the states, quoting “[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . and to have the Assistance of Counsel for his defence.”⁸⁸ Interestingly, in *Klopfer v. North Carolina*⁸⁹ the Court applied the speedy trial right to the states, but it did not quote the text of the Sixth Amendment.⁹⁰

Two features of the Court’s partial quotation use in these and other cases are worthy of note. First, most of the partial quotations using ellipses include the introductory clause, “[i]n all criminal cases.”⁹¹ Whether this is

⁷⁷ 372 U.S. 335 (1963).

⁷⁸ 316 U.S. 455 (1942), *overruled by Gideon*, 372 U.S. 335.

⁷⁹ *Gideon*, 372 U.S. at 335, 338; *Betts*, 316 U.S. at 473.

⁸⁰ *Gideon*, 372 U.S. at 339.

⁸¹ *Id.* (quoting U.S. CONST. amend. VI).

⁸² 391 U.S. 145 (1968).

⁸³ *Id.* at 149, 156.

⁸⁴ *Id.* at 153 (quoting U.S. CONST. amend. VI) (internal quotation marks omitted).

⁸⁵ 333 U.S. 257 (1948).

⁸⁶ *Id.* at 267, 273 (quoting U.S. CONST. amend. VI) (internal quotation marks omitted).

⁸⁷ 380 U.S. 400 (1965).

⁸⁸ *Id.* at 400-01, 403 (second and third alterations in original) (quoting U.S. CONST. amend. VI) (internal quotation marks omitted).

⁸⁹ 386 U.S. 213 (1967).

⁹⁰ *Id.* at 222.

⁹¹ *See, e.g., Kansas v. Ventris*, 129 S. Ct. 1841, 1844 (2009) (“[I]n all criminal prosecutions, the accused shall . . . have the Assistance of Counsel for his defence.” (second alteration in original) (quoting U.S. CONST. amend. VI) (internal quotation marks omitted)); *Vermont v. Brillion*, 129 S. Ct.

done for the sake of form or simply to provide the quotation, its appropriate criminal context remains an open question. Second, not all of the partial quotations that include the introductory clause are consistent in also including the comma that separates this clause from the subsequent clauses.⁹² This is also true of those cases citing the text of the Sixth Amendment in full, as we shall see.

2. Full Quotations of the Sixth Amendment Text

Comparing the seventeen full quotations of the Sixth Amendment included in Supreme Court cases spanning the more than 200-year period between 1807 and 2010, we find eight unique versions of the text. Nine of the seventeen full quotes mirror the punctuation, spelling, and capitalization of the Sixth Amendment as proposed by Congress to the states and ratified by South Carolina.⁹³ This version (“Version 1.0”) has five commas and two semicolons, spells “defense” with a “c” rather than an “s,” and capitalizes “assistance” and “counsel”:

1283, 1287 (2009) (“[I]n all criminal prosecutions, the accused shall enjoy the right to a speedy . . . trial.” (second alteration in original) (quoting U.S. CONST. amend. VI) (internal quotation marks omitted)); *Giles v. California*, 554 U.S. 353, 357-58 (2008) (“[I]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him.” (second alteration in original) (quoting U.S. CONST. amend. VI) (internal quotation marks omitted)); *Ring v. Arizona*, 536 U.S. 584, 597 n.3 (2002) (“In all criminal prosecutions, the accused shall enjoy the right to a . . . trial, by an impartial jury” (quoting U.S. CONST. amend. VI) (internal quotation marks omitted)).

⁹² See, e.g., *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527, 2531 (2009) (“[I]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him.” (second alteration in original) (quoting U.S. CONST. amend. VI) (internal quotation marks omitted)); *Gaines v. Washington*, 277 U.S. 81, 85 (1928) (“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.” (quoting U.S. CONST. amend. VI) (internal quotation marks omitted)); *Schick v. United States*, 195 U.S. 65, 68 (1904) (“[I]n 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.” (quoting U.S. CONST. amend. VI) (internal quotation marks omitted)); *Motes v. United States*, 178 U.S. 458, 467 (1900) (“[I]n all criminal prosecutions the accused shall enjoy the right . . . to be confronted with the witnesses against him.” (second alteration in original) (quoting U.S. CONST. amend. VI) (internal quotation marks omitted)); *Kirby v. United States*, 174 U.S. 47, 55 (1899) (“[I]n all criminal prosecutions the accused shall . . . be confronted with the witnesses against him.” (second alteration in original) (quoting U.S. CONST. amend. VI) (internal quotation marks omitted)); *Capital Traction Co. v. Hof*, 174 U.S. 1, 18 (1899) (“[I]n all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial jury.” (quoting U.S. CONST. amend. VI) (internal quotation marks omitted)).

⁹³ See DOCUMENTARY HISTORY, *supra* note 47, at 323 (presenting Congress’s proposal to the States, dated March 4, 1789); *id.* at 343 (presenting South Carolina’s ratification act of January 19, 1790).

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 favor, and to have the Assistance of Counsel for his defence.⁹⁴

Two versions of the text of the Sixth Amendment quoted in full mirror the punctuation above but deviate from the spelling and/or capitalization. Thus, one version (“Version 1.1”) also contains five commas and two semicolons identically placed but does not capitalize “assistance” or “counsel”:

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 favor, and to have the assistance of counsel for his defence.⁹⁵

Similarly, the other deviating version (“Version 1.2”) does not capitalize “assistance” or “counsel,” but it also spells “defense” with an “s” rather than a “c”:

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 favor, and to have the assistance of counsel for his defense.⁹⁶

Another version (“Version 2.0”) contains four commas and three semicolons, substituting a semicolon for the final comma that appears in Versions 1.0, 1.1, and 1.2:

⁹⁴ Strickland v. Washington, 466 U.S. 668, 685 (1984) (quoting U.S. CONST. amend. VI) (internal quotation marks omitted); Gannett Co. v. DePasquale, 443 U.S. 368, 379 n.7 (1979) (quoting U.S. CONST. amend. VI) (internal quotation marks omitted); Ballew v. Georgia, 435 U.S. 223, 224 n.1 (1978) (quoting U.S. CONST. amend. VI) (internal quotation marks omitted); Colgrove v. Battin, 413 U.S. 149, 151-52 n.5 (1973) (quoting U.S. CONST. amend. VI) (internal quotation marks omitted); Barker v. Wingo, 407 U.S. 514, 515 n.1 (1972) (quoting U.S. CONST. amend. VI) (internal quotation marks omitted); Kirby v. Illinois, 406 U.S. 682, 690 n.7 (1972) (quoting U.S. CONST. amend. VI) (internal quotation marks omitted); Washington v. Texas, 388 U.S. 14, 15 n.1 (1967) (quoting U.S. CONST. amend. VI) (internal quotation marks omitted); Singer v. United States, 380 U.S. 24, 25 n.2 (1965) (quoting U.S. CONST. amend. VI) (internal quotation marks omitted).

⁹⁵ Thompson v. Utah, 170 U.S. 343, 346 (1898) (quoting U.S. CONST. amend. VI) (internal quotation marks omitted).

⁹⁶ Patton v. United States, 281 U.S. 276, 288 (1930).

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 favor; and to have the Assistance of Counsel for his defense.⁹⁷

Version 2.0 is unlike any of the Sixth Amendment text previously encountered.⁹⁸ While there are four commas and three semicolons, like the version in the Federalist Society pocket Constitution,⁹⁹ the placement of all four commas before the Confrontation Clause makes this version unique.

Another version (“Version 3.0”), like Version 1.0, also contains five commas and two semicolons. This version, however, is unique because the first comma does not appear after the introductory clause “In all criminal prosecutions,” but after “the right to a speedy and public trial”:

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 favor, and to have the assistance of counsel for his defence.¹⁰⁰

Another version (“Version 4.0”) contains only five commas placed like those in New York’s ratification act,¹⁰¹ and like Version 2.0, it does not include a comma following the introductory clause “In all criminal prosecutions”:

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

⁹⁷ *Burch v. Louisiana*, 441 U.S. 130, 132 n.2 (1979) (quoting U.S. CONST. amend. VI) (internal quotation marks omitted). It is interesting to note that Version 1.0 is used consistently throughout the 1970s and into the 1980s. See *supra* note 94 and accompanying text. Version 2.0, however, is introduced in *Burch* in 1979. The overlapping use of different versions indicates the absence of a conscious use of any one, specific version of the Sixth Amendment text on the part of the Court.

⁹⁸ See *supra* Part II.A.

⁹⁹ U.S. CONST. amend. VI, reprinted in *THE CONSTITUTION OF THE UNITED STATES*, *supra* note 50.

¹⁰⁰ *Dorr v. United States*, 195 U.S. 138, 144 (1904) (quoting U.S. CONST. amend. VI) (internal quotation marks omitted).

¹⁰¹ DOCUMENTARY HISTORY, *supra* note 47, at 359-60 (presenting New York’s ratification act of April 2, 1790).

process for obtaining witnesses in his favor, and to have the assistance of counsel for his defence.¹⁰²

Another version (“Version 5.0”)—the version appearing in the oldest of the cases examined—includes four commas and two semicolons and is wholly unique. Like Versions 3.0 and 4.0, Version 5.0 omits the comma following the introductory clause “in all criminal prosecutions.” Also, Version 5.0 begins with a lowercase “i”:

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 favor, and to have the assistance of counsel for his defence.¹⁰³

Finally, the last version (“Version 6.0”) includes three commas and three semicolons. Like Versions 2.0, 3.0, and 5.0, this version is unlike any of the versions encountered yet.¹⁰⁴ Like Version 2.0, this quotation substitutes a semicolon for the final comma that appears in Versions 1.0, 1.1, 1.2, 3.0, 4.0, and 5.0. Moreover, like Versions 3.0, 4.0, and 5.0, Version 6.0 also omits the comma following the introductory clause “In all criminal prosecutions”:

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.¹⁰⁵

One notable feature common to all of the full quotations compared here is the near consistent use of double semicolons to set off the Confrontation Clause.¹⁰⁶ Another noteworthy feature of the full quotations of the Sixth Amendment text surveyed is the inconsistent use of the comma following the phrase “in all criminal prosecutions.” When this comma is

¹⁰² *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 120 (1866) (quoting U.S. CONST. amend. VI) (internal quotation marks omitted).

¹⁰³ *United States v. Zucker*, 161 U.S. 475, 478 (1896) (emphases omitted) (quoting U.S. CONST. amend. VI) (internal quotation marks omitted); *Callan v. Wilson*, 127 U.S. 540, 548 (1888) (quoting U.S. CONST. amend. VI) (internal quotation marks omitted).

¹⁰⁴ *See supra* Part II.A.

¹⁰⁵ *Flemming v. Nestor*, 363 U.S. 603, 613 n.6 (1960) (quoting U.S. CONST. amend. VI) (internal quotation marks omitted).

¹⁰⁶ *See generally* U.S. CONST. amend. VI (providing the right for the accused “to be confronted with the witnesses against him”).

present, it creates an introductory clause that provides context for the clauses that follow. When the comma is absent, however, the text arguably ceases to be merely introductory and joins the absolute character of the following text.

III. ANALYSIS

A. *Sixth Amendment Commas and Past Construction*

In none of the cases surveyed do the commas—however placed—appearing in the Sixth Amendment play a significant interpretive role.¹⁰⁷ In other words, to date the Court has not relied on the presence or absence of a comma in the Sixth Amendment to delimit the scope of any of its constituent clauses as it did in *Heller*.¹⁰⁸ With some confidence, we can posit several plausible reasons for this.

First, the Sixth Amendment may be more precisely written than the Second Amendment, or at least not as badly written as the Second Amendment. Thus, its construction may be more amenable to plain-meaning interpretation than the seemingly tortured locutions of its gun-toting fellow. Second, unlike the Second Amendment, the Sixth Amendment contains a multitude of constitutional guarantees.¹⁰⁹ As we have seen from our survey of quotations of the Sixth Amendment in decisions, in most cases the Court is allowed and may in fact prefer to resolve constitutional questions involving these provisions in isolation: “jury-trial guarantee” today, “Confrontation Clause” tomorrow.¹¹⁰ Thus, the Justices need not wrestle with all of the Sixth Amendment’s substantive and formal complexity in order to reach satisfying constitutional conclusions, a luxury they are not afforded when construing the substantively more compact and formally more problematic Second Amendment.

Finally, and perhaps most interesting in the context of our present inquiry, it may be that *Heller* marks a new departure in constitutional interpretation.¹¹¹ If this is true, then the Sixth Amendment’s past immunity to close, comma-dependent construction is less suggestive than its possible

¹⁰⁷ See *supra* Part II.B.2.

¹⁰⁸ See *District of Columbia v. Heller*, 554 U.S. 570, 577-603 (2008).

¹⁰⁹ See U.S. CONST. amend. VI; ROBERSON, *supra* note 11.

¹¹⁰ See, e.g., *Oregon v. Ice*, 129 S. Ct. 711, 714 (2009) (“This case concerns the scope of the Sixth Amendment’s jury-trial guarantee, . . .”); *Davis v. Washington*, 547 U.S. 813, 817 (2006) (“These cases require us to determine when statements made to law enforcement personnel during a 911 call or at a crime scene are ‘testimonial’ and thus subject to the requirements of the Sixth Amendment’s Confrontation Clause.”).

¹¹¹ See generally William G. Merkel, *Parker v. The District of Columbia and the Hollowness of Originalist Claims to Principled Neutrality*, 18 GEO. MASON U. C.R. L.J. 251 (2008).

future susceptibility. For this reason, we turn now to consider two possible outcomes of *Heller*-like interpretation of the Sixth Amendment grounded in grammatical principles and supported by Supreme Court precedent.

B. *Commas in Future Construction*

1. “In all criminal prosecutions”: Introductory Phrase, Prefatory Clause, or Both?

As detailed above, several extant versions of the Sixth Amendment and both full and partial quotations of the Sixth Amendment text include the opening phrase “in all criminal prosecutions.” However, as we have also explored, the several texts of the amendment and its quotations are inconsistent in their inclusion of the comma separating this opening phrase from the rest of the amendment’s text.¹¹²

In 1604, a “phrase” was defined as a “forme of speach [sic].”¹¹³ Less than two centuries later, a phrase was similarly defined as an “idiom.”¹¹⁴ The *Oxford English Dictionary* defines a “phrase” as “[a] small group or collocation of words expressing a single notion, or entering with some degree of unity into the structure of a sentence.”¹¹⁵ Thus, “in all criminal prosecutions” is properly termed a phrase. And in a modern grammatical context, “[a]n adverbial or participial phrase at the beginning of a sentence is usually followed by a comma, especially if a slight pause is intended.”¹¹⁶ Further, “[a] single word or a very short introductory phrase does not require a comma except to avoid misreading.”¹¹⁷

Given all this, how dissimilar is the introductory phrase “in all criminal prosecutions” from the “prefatory clause” identified in *Parker* and later in *Heller*, “A well regulated Militia, being necessary to the security of a free State”?¹¹⁸ Could the introductory phrase of the Sixth Amendment be read to *not* “limit or expand the scope” of the subsequent text?¹¹⁹

¹¹² See *supra* Part II.

¹¹³ THE FIRST ENGLISH DICTIONARY, 1604, at 123 (Bodleian Library, Univ. of Oxford 2007) (1604).

¹¹⁴ 2 SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE 1443 (London, W. Strahan 1755).

¹¹⁵ 11 THE OXFORD ENGLISH DICTIONARY 731 (James A. H. Murray et al. eds., 2d ed. 1989).

¹¹⁶ THE CHICAGO MANUAL OF STYLE ¶ 6.25 (15th ed. 2003); see also Nardella, *supra* note 16, at 667.

¹¹⁷ THE CHICAGO MANUAL OF STYLE, *supra* note 116.

¹¹⁸ *District of Columbia v. Heller*, 554 U.S. 570, 577-78 (2008) (quoting U.S. CONST. amend. II) (internal quotation marks omitted); *Parker v. District of Columbia*, 478 F.3d 370, 378 (D.C. Cir. 2007) (quoting U.S. CONST. amend. II) (internal quotation marks omitted), *aff’d sub nom.* *District of Columbia v. Heller*, 554 U.S. 570 (2008).

¹¹⁹ *Heller*, 554 U.S. at 578.

While this may seem at first a fruitless exercise in constitutional shadowboxing, there is some precedent for controversy over the qualifying and/or “clarifying” function of the Sixth Amendment’s introductory phrase.¹²⁰ Exceptions to the categorical language of the phrase were recognized at common law and incorporated into our constitutional jurisprudence, including exemptions for “petty” crimes and prosecutions for criminal contempt.¹²¹ It may be, however, that *Heller*’s treatment of introductory or “prefatory” language will unsettle an area of constitutional law that has nothing whatever to do (at least on its face) with the right to “keep and bear arms.”

2. “[B]y an impartial jury of the state and district wherein the crime shall have been committed”:¹²² Supplemental Statement or Constitutional Surplusage?

As previously mentioned, the reasoning in *Heller* turns in some part on the interrelationship between the “prefatory” and “operative” clauses identified first by the D.C. Circuit in *Parker* and later acknowledged by the Supreme Court in *Heller*.¹²³ We have also seen that these labels are a relatively new addition to the Court’s interpretive methodology. Thus, our investigation might be aided by putting the Court’s substantive analysis in a more formal grammatical context.

In 1773, very near the founding of the United States and the drafting of the Constitution, a “clause” was defined as “[a] sentence; a single part of a discourse; a subdivision of a larger sentence; so much of a sentence as is to be construed together.”¹²⁴ Later, a “clause” meant:

A particular disposition which makes part of a treaty, an act of the legislature, a deed, written agreement, or other written contract or will. When a clause is obscurely written, it ought to be construed in such a way as to agree with what precedes and what follows, if possible.¹²⁵

The *Oxford English Dictionary* defines a clause as “[a] short sentence; a single passage or member of a discourse or writing; a distinct part or

¹²⁰ See, e.g., *Scott v. Illinois*, 440 U.S. 367, 375-76 (1979) (Brennan, J., dissenting) (arguing that the plain wording of the Sixth Amendment and precedent compelled reversal of an uncounseled conviction for an offense punishable by incarceration but actually punished only by a fine, on grounds that such conviction violated the Sixth and Fourteenth Amendments).

¹²¹ 6 ENCYCLOPEDIA OF THE AMERICAN CONSTITUTION 2683 (Leonard W. Levy & Kenneth L. Karst eds., 2d ed. 2000); see *Levine v. United States*, 362 U.S. 610, 616 (1960).

¹²² U.S. CONST. amend. VI.

¹²³ *Heller*, 554 U.S. at 577-78; *Parker*, 478 F.3d at 378.

¹²⁴ 1 JOHNSON, *supra* note 114, at 329.

¹²⁵ 1 JOHN BOUVIER, A LAW DICTIONARY 180 (The Lawbook Exchange, Ltd. 1993) (1839).

member of a sentence.”¹²⁶ There are four types of clauses: independent, dependent (or subordinate), restrictive, and nonrestrictive.¹²⁷ The appropriate grammatical use of commas depends on the character of the clause.¹²⁸ *Parker* and *Heller* at least stand for the proposition that the presence of commas indicates the existence of clauses.¹²⁹

A nonrestrictive clause is “one that does not serve to identify or define the antecedent noun.”¹³⁰ Nonrestrictive clauses “are parenthetical, as are similar clauses introduced by conjunctions indicating time or place. Commas are therefore needed.”¹³¹ Further, “clauses introduced by which, when, and where are nonrestrictive; they do not limit or define, they merely add something.”¹³² By contrast, restrictive clauses, (i.e., those that do “limit” or “define”) “are not parenthetical and are not set off by commas.”¹³³

Applying these definitions to the text of the Sixth Amendment, we discover a nonrestrictive clause hidden in plain sight at its center: “by an impartial jury of the State and district wherein the crime shall have been committed,” the so-called Vicinage Clause.¹³⁴ Commas set off this clause in two of the eight unique versions of the text found when comparing the Sixth Amendment as proposed and the various state ratification acts.¹³⁵ Moreover, commas set off this clause in Versions 1.0, 1.1, 1.2, 2.0, 3.0, 5.0, and 6.0 of the full Sixth Amendment quotations found in Supreme Court case law.¹³⁶ Given its “supplemental” and “parenthetical” nature, then, is this Sixth Amendment clause on similar footing with the “prefatory” clause in the Second Amendment? If so, could it similarly be “read out” of the text of the amendment? This would, after all, be consistent with *Parker* and *Heller*, which set aside a “prefatory clause” that arguably limited the Second Amendment “right to bear arms” to those in the armed services.¹³⁷ *Heller*, then, may be appreciated as introducing “free radicals” in the form

¹²⁶ 3 THE OXFORD ENGLISH DICTIONARY, *supra* note 115, at 285.

¹²⁷ See THE CHICAGO MANUAL OF STYLE, *supra* note 116, ¶¶ 6.32, 6.35, 6.38; WILLIAM STRUNK, JR. & E. B. WHITE, THE ELEMENTS OF STYLE 2-7 (2d ed. 1972).

¹²⁸ See THE CHICAGO MANUAL OF STYLE, *supra* note 116, ¶¶ 6.32, 6.35, 6.38; STRUNK & WHITE, *supra* note 127.

¹²⁹ District of Columbia v. Heller, 554 U.S. 570, 577 (2008); Parker v. District of Columbia, 478 F.3d 370, 378 (D.C. Cir. 2007), *aff'd sub nom.* District of Columbia v. Heller, 554 U.S. 570 (2008); cf. United States v. Bass, 404 U.S. 336, 340 n.6 (1971) (stating that “[w]hen grammarians are divided [on the discretionary use of commas at the end of a series to avoid ambiguity] . . . we will not attach significance to an omitted comma.”).

¹³⁰ STRUNK & WHITE, *supra* note 127, at 3.

¹³¹ *Id.*

¹³² *Id.* (emphases omitted).

¹³³ *Id.* at 4.

¹³⁴ U.S. CONST. amend. VI.

¹³⁵ See *supra* Part II.A.

¹³⁶ See *supra* Part II.B.2.

¹³⁷ District of Columbia v. Heller, 554 U.S. 570, 577 (2008); Parker v. District of Columbia, 478 F.3d 370, 378 (D.C. Cir. 2007), *aff'd sub nom.* District of Columbia v. Heller, 554 U.S. 570 (2008).

of commas into the constitutional jurisprudence of the Supreme Court, and for that reason there is cause, at least, for inquiry into the potential effects of the uncertainty.

One of the American colonists' specific, express grievances in the Declaration of Independence was "transporting us beyond the Seas to be tried for pretended offenses."¹³⁸ And in 1787 and later, the Framers attempted to preserve the common law right to be tried by a "jury of the vicinage," first through the language in Article III, Section 2 of the U.S. Constitution, and then in the Sixth and Seventh Amendments.¹³⁹

Writing in the early years of the Republic, Justice Joseph Story remarked:

It is observable, that the trial of all crimes is not only to be by jury, but to be held in the state where they are committed. The object of th[e Vicinage C]lause is to secure the party accused from being dragged to a trial in some distant state, away from his friends, and witnesses, and neighborhood, and thus to be subjected to the verdict of mere strangers, who may feel no common sympathy, or who may even cherish animosities or prejudices against him.¹⁴⁰

While the Framers and others recognized the importance of locality and shared values to the function of the jury, and the Supreme Court has recognized the vital importance of juries in our democracy,¹⁴¹ the Vicinage Clause has not been incorporated against the states.¹⁴²

In June 2005, a federal jury composed of Vermont residents and sitting in Vermont found fellow resident Donald Fell guilty of carjacking and kidnapping and sentenced him to death.¹⁴³ Vermont does not provide for the death penalty in capital cases.¹⁴⁴ Fell committed three murders between November 26 and 27, 2000, but only one qualified as a federal capital crime because it involved an interstate carjacking and kidnapping.¹⁴⁵ Fell's last victim was kidnapped in Vermont and driven in her car to New York.¹⁴⁶ A

¹³⁸ See Drew L. Kershen, *Vicinage*, 29 OKLA. L. REV. 801, 807 (1976) (quoting THE DECLARATION OF INDEPENDENCE para. 21 (U.S. 1776)) (internal quotation marks omitted).

¹³⁹ See *Williams v. Florida*, 399 U.S. 78, 93-94 (1970) (internal quotation marks omitted); Kershen, *supra* note 138, at 808.

¹⁴⁰ 2 STORY, *supra* note 49, § 1781.

¹⁴¹ See, e.g., *Blakely v. Washington*, 542 U.S. 296, 306 (2004) ("Just as suffrage ensures the people's ultimate control in the legislative and executive branches, jury trial is meant to ensure their control in the judiciary.").

¹⁴² *Stevenson v. Lewis*, 384 F.3d 1069, 1071 (9th Cir. 2004) ("The Supreme Court has not decided whether the Fourteenth Amendment incorporated the Sixth Amendment's vicinage right."); see also *Caudill v. Scott*, 857 F.2d 344, 345 (6th Cir. 1988); *Cook v. Morrill*, 783 F.2d 593, 595-96 (5th Cir. 1986); *Zicarelli v. Dietz*, 633 F.2d 312, 325 (3d Cir. 1980) (concluding that the Fourteenth Amendment did not extend federal vicinage protection to the states).

¹⁴³ *United States v. Fell (Fell II)*, 571 F.3d 264, 265 (2d Cir. 2009) (Raggi, J., concurring).

¹⁴⁴ See *id.* at 268.

¹⁴⁵ *Id.* at 265.

¹⁴⁶ *Id.*

Second Circuit panel affirmed Fell's conviction on appeal¹⁴⁷ and denied his petition for rehearing en banc.¹⁴⁸

Dissenting from the circuit court's denial of Fell's petition for rehearing, Senior Circuit Judge Guido Calabresi raised the issue of whether a district court selecting a federal capital jury in a state that does not provide for the death penalty may excuse jurors—also residents of that state—who express opposition to the death penalty.¹⁴⁹ Judge Calabresi asserted his belief that the constitutional mandate of juries “of the State and district wherein the crime shall have been committed” served to protect federalism by requiring federal juries to reflect the values of citizens of a particular state.¹⁵⁰ While constitutional rights apply uniformly nationwide, this does not undermine the importance of federalism and the fact that such rights may operate differently in different communities.¹⁵¹ Indeed, federalism's recognition of states' diverse moral viewpoints is as fundamental as equal protection, and “entails the right to be tried by a set of people who truly represent the point of view of a state and district.”¹⁵²

This begs the question in Fell's case of whether the jury who tried and sentenced him to death could accurately represent a state whose people chose to outlaw the death penalty.¹⁵³ Judge Calabresi recognized that federalism both allows for the general disagreement that naturally surrounds capital punishment and counteracts the “centripetal forces” that threaten to turn us into a “national state.”¹⁵⁴ And one of federalism's bulwarks is quietly hidden in the Vicinage Clause of the Sixth Amendment.

How might a future Supreme Court, reviewing a case like *United States v. Fell*, approach Judge Calabresi's federalism concerns? If it were to apply its *Heller* comma-dependent interpretive methodology, it might find that the Vicinage Clause—set off by commas in nearly all of the texts quoted in past cases, nonrestrictive, unincorporated, and thus presumably nonfundamental (or at least less fundamental)—is no more important than the “prefatory clause” in the Second Amendment. If so, the Court would arguably agree with Judge Calabresi's characterization of the concurring judges' opinion in *Fell*: “federal crimes do not implicate federalism.”¹⁵⁵

¹⁴⁷ *United States v. Fell (Fell I)*, 531 F.3d 197, 205 (2d Cir. 2008), *reh'g en banc denied*, 571 F.3d 264 (2d Cir. 2009).

¹⁴⁸ *Fell II*, 571 F.3d at 264.

¹⁴⁹ *Id.* at 283 (Calabresi, J., dissenting).

¹⁵⁰ *See id.* at 284 (quoting U.S. CONST. amend. VI) (internal quotation marks omitted).

¹⁵¹ *Id.* at 285-86.

¹⁵² *Id.* at 285.

¹⁵³ *Id.* at 289.

¹⁵⁴ *Fell II*, 571 F.3d at 292 (Calabresi, J., dissenting).

¹⁵⁵ *Id.* at 292-93.

As radical a result as this may appear given the current makeup of the Court,¹⁵⁶ it should be remembered that *Heller* itself broke with precedent, and more than one sitting Justice has suggested revisiting areas of the law now thought to be well settled.¹⁵⁷ For instance, Associate Justice Clarence Thomas, who joined the majority opinion in *Heller*, has expressed a willingness to reconsider *Calder v. Bull*¹⁵⁸ and to extend the prohibition of the Ex Post Facto Clause to retroactive civil regulation.¹⁵⁹ And one of the newest members of the Court, Associate Justice Sonia Sotomayor, stated recently in oral argument that the decision in *Santa Clara County v. Southern Pacific Railroad*¹⁶⁰ to “create[] corporations as persons, g[i]ve birth to corporations as persons” may have been an “error to start with.”¹⁶¹

CONCLUSION

Of course, neither the *Parker* nor *Heller* courts made their decisions based solely on the placement of a comma in the Second Amendment. Both considered the text in light of history and precedent, and drew conclusions from their respective reconciliations of all relevant concerns that each found constitutionally satisfying. However, as Justice Baldwin admonished in *Ewing’s Lessee v. Burnet*:¹⁶²

Punctuation is a most fallible standard by which to interpret a writing; it may be resorted to when all other means fail; but the [c]ourt will first take the instrument by its four corners, in order to ascertain its true meaning: if that is apparent on judicially inspecting the whole, the punctuation will not be suffered to change it.¹⁶³

Interpretive methodologies applied in the constitutional context are only as good as their foundations, and commas that are literally here in one case and gone in the next can only be allowed to become so important and cannot be “suffered to change” the writing—the Constitution. Hopefully in

¹⁵⁶ See *Biographies of Current Justices of the Supreme Court*, SUPREME COURT OF THE UNITED STATES, <http://www.supremecourt.gov/about/biographies.aspx> (last visited Nov. 25, 2010).

¹⁵⁷ See Richard H. Fallon, Jr., *Constitutional Precedent Viewed Through the Lens of Hartian Positivist Jurisprudence*, 86 N.C. L. REV. 1107, 1110 (2008).

¹⁵⁸ 3 U.S. (3 Dall.) 386 (1798).

¹⁵⁹ *E. Enters. v. Apfel*, 524 U.S. 498, 538-39 (1998) (Thomas, J., concurring); see also J. Richard Broughton, *On Straddle Crimes and the Ex Post Facto Clauses*, 18 GEO. MASON L. REV. 719, 721 n.6 (2011).

¹⁶⁰ 118 U.S. 394 (1886).

¹⁶¹ Transcript of Oral Argument at 33, *Citizens United v. Fed. Election Comm’n*, 130 S. Ct. 876 (2010) (No. 08-205).

¹⁶² 36 U.S. (11 Pet.) 41 (1837).

¹⁶³ *Id.* at 54.

the future those with the responsibility of deciding important questions will not be distracted from the Constitution by its commas.