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Knowing When to Stop: Is the Punctuation of the Constitution Based on Sound or Sense?

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KNOWING WHEN TO STOP: IS THE PUNCTUATION OF THE CONSTITUTION BASED ON SOUND OR SENSE?

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> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; *nor shall be compelled in any criminal case to be a witness against himself*, nor be deprived of life, liberty, or property, *without due process of law*; nor shall private property be taken for public use without just compensation.[1]

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1. U.S. CONST. amend. V (emphasis added).

I. INTRODUCTION

Take another look at the Fifth Amendment. Look carefully. If you read it with an eye toward punctuation, you will notice that the Amendment itself is one long and complex sentence; you will notice that it contains a number of restrictions on governmental power and that those restrictions seem to be independent and separated by three semicolons.[2] What you may not immediately notice, however, is that the Self-Incrimination Clause runs right into the Due Process Clause, with only a comma between them.[3] If read under a grammatical microscope, the Self-Incrimination Clause is properly susceptible to this startling interpretation: "[N]or shall [any person] be compelled in any criminal case to be a witness against himself . . . without due process of law."[4]

Would such an interpretation allow the state to compel incriminating testimony as long as a certain amount of requisite process is provided? While many on the Court have questioned the usefulness or justice of the privilege against self-incrimination,[5] the Court has never considered that

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2. *Id.*

3. *Id.*

4. *Id.* The rule of the last antecedent holds that a referent generally modifies the immediately previous antecedent, unless there is a comma before the referent, which signals that the referent modifies every thing previous to it. For a fun article briefly explaining this in the context of an insurance contract dispute, see *The Comma That Cost 1 Million Dollars (Canadian)*, N.Y. TIMES, Oct. 25, 2006, at C1.

5. *See* Palko v. Connecticut, 302 U.S. 319, 326 (1937) (containing Justice Cardozo's famous remark that "[j]ustice, however, would not perish if the accused were subject to a duty to respond to orderly inquiry"). Justice Cardozo continued, arguing that "today as in the past there are students of our penal system who look upon the immunity as a mischief rather than a benefit, and who would limit its scope, or destroy it altogether." *Id.* at 325-26. Justice Cardozo's personal opinion of the subject seems to comport well with this reinterpretation of the Fifth Amendment. *See also* Rochin v. California, 342 U.S. 165, 178 (1952) (Douglas, J., concurring) ("As an original matter it might be debatable whether the provision in the Fifth Amendment that no person 'shall be compelled in any criminal case to be a witness against himself' serves the ends of justice. Not all civilized legal procedures recognize it.").

the original intent of the Founders, as expressed in the language of the Amendment, was to allow for the questioning of criminal defendants.[6] Considering the years of settled constitutional jurisprudence concerning the Fifth Amendment, one is tempted to disregard such a hypothesis immediately, casting aside any such inquiry as foolish and irrelevant. What one might not know, however, is that this interpretation is not without its evidence. For instance, contemporary Maryland's Declaration of Rights surprisingly stated that "no man ought to be compelled to give evidence against himself . . . but in such cases as have been usually practised in this state, or may hereafter be directed by the legislature."[7] With both grammatical and precedential evidence behind it, this reinterpretation of the Fifth Amendment becomes much less easy to dismiss.[8]

Regardless, this Note will not seek or encourage any change in Fifth Amendment jurisprudence. Instead, the Fifth Amendment will serve as an example—a case study—to prove a point about the way the modern reader often misunderstands the text of the Constitution and the Bill of Rights. It will guide the reader through the eighteenth-century world of grammar, and most specifically, punctuation; it is a world not completely unlike our own, but with many particular and peculiar ways.

For those who believe in "[t]aking [constitutional] text and structure really seriously," they also ought to believe that the meaning of the Constitution can depend upon how punctuation is understood to operate.[9] The idea of this Note is to consider what many have missed—that the punctuation of the Constitution and the Bill of Rights does not operate

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6. *See Rochin*, 342 U.S. at 178. Justice Douglas continued: "But the Choice was made by the Framers, a choice which sets a standard for legal trials in this country." *Id.* As recently as 2001, the Supreme Court has implicitly reaffirmed the blanket scope of the privilege. *See* Ohio v. Reiner, 532 U.S. 17, 20-22 (2001).

7. THE COMPLETE BILL OF RIGHTS: THE DRAFTS, DEBATES, SOURCES, AND ORIGINS 328 (Neil H. Cogan ed., 1997) [hereinafter COMPLETE BILL OF RIGHTS] (quoting Article 20 of the 1776 Maryland Declaration of Rights).

8. *But see* LEONARD W. LEVY, ORIGINS OF THE FIFTH AMENDMENT: THE RIGHT AGAINST SELF INCRIMINATION 410 (1968) (claiming that the qualification to the privilege in the Maryland Declaration "in effect, required a man to give evidence against himself if a pardon or a grant of immunity against prosecution exempted him from the penal consequences of his disclosures"). Levy provides no evidence for this thesis, nor does he provide any evidence for the implication behind this sentence—that immunity was the only exception to the privilege. If that were the only exception, why was it framed so broadly?

9. Jordan Steiker, Sanford Levinson & J.M. Balker, *Taking Text and Structure Really Seriously: Constitutional Interpretation and the Crisis of Presidential Eligibility*, 74 TEX. L. REV. 237 (1995); *see also* Laurence H. Tribe, *Taking Text and Structure Seriously: Reflections on Free-Form Method in Constitutional Interpretation*, 108 HARV. L. REV. 1221, 1225 (1995) ("I am often troubled by what I hear, and find myself revisiting what it is that I believe makes constitutional interpretation truly a legal enterprise, genuinely disciplined by widely shared canons of the interpretive arts and by stubborn truths of text, structure, and history.").

under the same rules and governing concepts employed today, and that this discrepancy in usage can have serious consequences for contemporary constitutional interpretation.[10]

To that end, Part II of this Note will provide an overview of the punctuational history of the Fifth Amendment, laying a foundation for further analysis. Then, in Part III, it will delve into the world of mid- to late-eighteenth-century punctuation and style, explaining the significant differences between now and then. Part IV will apply historical punctuation norms to the Fifth Amendment and attempt to make sense out of the seemingly inexplicable. Part V will include a brief selection of other strangely punctuated passages in the Constitution that this Note will argue are not so strange after all. Finally, Part VI will conclude by suggesting the importance and applicability of these observations to any interpretive philosophy of the Constitution.

II. THE DRAFTING HISTORY OF THE FIFTH AMENDMENT

A. *The Punctuation of the Drafting Process*

When one first sees the interpretation of the Fifth Amendment suggested above, one is tempted to ask: Why didn't the drafters just put a semicolon there like they did for the other clauses? Well, the funny thing is, at first, they did. Virginia was the first[11] state truly to enact the privilege;[12] in fact, the clause in the Bill of Rights being the grandson of a clause in the celebrated Virginia Declaration of Rights.[13] It was, however, not an exact duplication.[14] One pertinent difference stands out:

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10. It is not fair to say that *everyone* has missed the "odd" punctuation of the Constitution; it has not gone unnoticed, it just has never been explained satisfactorily. For a more detailed discussion, see *infra* note 99 (explaining the many theories and ideas concerning the strange-seeming practices of the Founders).

11. *See* LEVY, *supra* note 8, at 405 (quoting George Mason, the author of the Virginia Declaration, who remarked, "'This was the first thing of the kind upon the continent . . . .'").

12. There is a bit of argument over the nature of the "privilege" against self-incrimination. Many prefer to term it a "right." *See id.* at vii (comparing self-incrimination to the other rights, like freedom of religion, and explaining that the term privilege means something that is granted by the government but is nevertheless revocable). This Note takes no stance on the propriety of any usage but will continue to use the term "privilege" for the sake of history and clarity.

13. *See id.* at 420 ("The initial proposal for a bill of rights, by [John] Lansing, consisted of three sections: one securing the rights of life and liberty in general, another vesting sovereignty in the people, and the third a verbatim statement of Section 8 of the Virginia Declaration of Rights."). Section 8 of the Virginia Declaration is set forth in its entirety at *infra* note 14. *See also* LEVY, *supra* note 8, at 409 (explaining that the Virginia Declaration was the "model for other states and for the United States Bill of Rights").

14. Section 8 of the 1776 *Virginia Declaration of Rights* read:

Section 8 of the Virginia Declaration of Rights did in fact include a semicolon between its Self-Incrimination Clause and its "law of the land" clause[15] (progenitor of the up-and-coming Due Process Clause).[16] During the years immediately after the Declaration of Independence, six other state constitutions followed Virginia and also ended their self-incrimination clauses with either a semicolon or period.[17] Of these six, two mirrored the Virginia formulation nearly verbatim and similarly used a semicolon to divide the privilege from the "law of the land" clause.[18]

When James Madison first presented the original rough draft of the Amendment before the First Congress on June 8, 1789, he too included a dividing semicolon.[19] By July 28, however, the House Committee drafted a significant rewrite. The Committee replaced all semicolons save one with commas and specifically removed the semicolon dividing the Self-

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> THAT in all capital or criminal prosecutions a man hath a right to demand the cause and nature of his accusation, to be confronted with the accusers and witnesses, to call for evidence in his favour, and to a speedy trial by an impartial jury of his vicinage, without whose unanimous consent he cannot be found guilty, nor can he be compelled to give evidence against himself; that no man be deprived of his liberty except by the law of the land, or the judgment of his peers.

15. COMPLETE BILL OF RIGHTS, *supra* note 7, at 330. As is self-evident, the Fifth Amendment and Section 8 are different; but the resemblance is clear and definite. *Id.*

16. *See* Hurtado v. California, 110 U.S. 516, 534 (1884) ("Due process of law in the [Fifth Amendment] refers to that law of the land . . . .").

17. The six states were Delaware, Massachusetts, New Hampshire, North Carolina, Pennsylvania, and Vermont. *See* COMPLETE BILL OF RIGHTS, *supra* note 7, at 328-30.

18. The two copycats were Vermont and Pennsylvania. *See id.* at 329-30. Vermont's Constitution of 1777 read: "[N]or can he be compelled to give Evidence against himself; nor can any man be justly deprived of his Liberty, except by the Laws of the Land, or the Judgment of his Peers." *Id.* at 330. Pennsylvania's 1776 Constitution read: "[N]or can he be compelled to give evidence against himself; nor can any man be justly deprived of his liberty except by the laws of the land, or the judgment of his peers." *Id.* at 329. *But see id.* (reprinting the later Pennsylvania Constitution of 1790 which, as amended, read, "That he cannot be compelled to give evidence against himself, nor can he be deprived of his life, liberty, or property, unless by the judgment of his peers, or the law of the land"). The amended Constitution of 1790 removed all semicolons and replaced them with commas, with no apparent rhyme or reason. *Id.* A possible rationale behind this type of switch will be one focus of this Note.

19. *Id.* at 315. Madison's first proposal read:

> No person shall be subject, except in cases of impeachment, to more than one punishment, or one trial for the same offence; nor shall be compelled to be a witness against himself; nor be deprived of life, liberty, or property without due process of law; nor be obliged to relinquish his property, where it may be necessary for public use, without a just compensation.

Id.

Incrimination Clause from the Due Process Clause.[20] On August 17, the Congressional Register included further rewrites and, this time, no semicolons at all—only commas.[21] By August 21, the House Journal reported yet another significant rewrite, this time liberally including semicolons to divide all major clauses.[22] The August 25 Senate Consideration, however, removed the semicolon and once again replaced it with a comma.[23] The Senate Resolution of September 9, which significantly revised the Amendment yet again, retained the comma and reported the Amendment exactly as we read it today.[24] The Enrolled

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20. *Id.* at 316. The *House Committee of Eleven Report* read:

> No person shall be subject, except in case of impeachment, to more than one trial or one punishment for the same offence, nor shall be compelled to be a witness against himself, nor be deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use without just compensation.

Id. Notice also that in this draft no comma separates the words "property" and "without."*Id.*

21. *Id.* (citing 2 CONG. REG. 224 (1789)). The *Congressional Register* read:

> The 5th clause of the 4th proposition was taken up, viz. "no person shall be subject, [*sic;* except] in case of impeachment, to more than one trial or one punishment for the same offence, nor shall be compelled to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law, nor shall private property be taken for public use without just compensation.

Id. Notice that in the version immediately above, only a comma separates the Just Compensation Clause from the Self-Incrimination Clause. *Id.*

22. *Id.* at 318. The *House Journal* read:

> No person shall be subject, except in case of impeachment, to more than one trial or one punishment for the same offence; nor shall he be compelled in any criminal case to be a witness against himself; nor be deprived to life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Id.

23. *Id.* The *Rough* and *Smooth Senate Journals* of August 25 both read:

> No person shall be subject, except in case of impeachment, to more than one trial, or one punishment for the same offense; nor shall be compelled in any criminal case, to be a witness against himself, nor be deprived to life, liberty or property, without due process of law; nor shall private property be taken for public use without just compensation.

Id.

24. *Id.* Although the Amendment would be published many more times before finally going to print, the missing semicolon would not appear again until one version of the printed *Statutes at*

Resolution of September 28, the final publicized version before printing, again reflected the ultimate punctuation.[25]

B. *The Punctuation of Compromise?*

What is to be made of this chaotic and seemingly inexplicable punctuation? Is it possible that there was a compromise—that there might have been arguments for and against a blanket privilege against self-incrimination? Perhaps. The privilege was certainly not just qualified in Maryland, considering that four colonies did not even have constitutions, let alone enacted rights and privileges.[26] In fact, an Originalist could easily interpret this legislative history as evidence that the missing semicolon was purposely left out, and for the apparent reason that coerced self-

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Large (mistakenly?) added it back. *See id.* at 318-26; *infra* note 25 (discussing the discrepancy in the *Statutes at Large*). COMPLETE BILL OF RIGHTS, *supra* note 7, at 321. The *Senate Pamphlet* read:

> No Person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia when in actual service in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case, to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

Id.

25. *Id.* The Amendment went to print in volume 1 of the *Statutes at Large* in two different places, page 21 and page 98. *Id.* Interestingly, while the version on page 98 is identical to the final Amendment, the version on page 21 surprisingly brought back the dividing semicolon! *Id.* The two versions have only one other discrepancy, and that discrepancy is again punctuational. *Id.* The page-98 version, which eventually became the official Amendment, contains a comma in the phrase "[n]o person shall be held to answer for a capital, or otherwise infamous crime." *Id.* The page-21 version omits it. *Id.* It is most likely that these discrepancies were either typos or the stylistic choices of a different, unofficial editor. Under today's heavily syntactic view of punctuation, the inserted comma after "capital" is obviously irregular. However, viewed under the eighteenth-century rules for punctuation, the comma was not irregular at all and was purely a matter of stylistic choice. This assertion is one of the main points of this Note. *See infra* Part IV.

26. *See* LEVY, *supra* note 8, at 409-10. The four states without constitutions were Georgia, New Jersey, New York, and South Carolina. *Id.* at 410. Levy argues that in spite of the lack of a formally enacted privilege, these states nevertheless enforced the privilege by extension of the common law; his assertion is not supported by any direct evidence but is inferred from the way the other rights and privileges were treated. *Id.* at 410-11. *But see* Eben Moglen, *Taking the Fifth: Reconsidering the Origins of the Constitutional Privilege Against Self-Incrimination*, 92 MICH. L. REV. 1086, 1120 (1994) (attacking Levy's explanations for why four states refused to enact any version of the privilege). Even Levy, an ardent proponent of the privilege, admits that the privilege was often ignored during the Revolutionary War, even in the states that had explicitly enacted it. LEVY, *supra* note 8, at 412-13.

incrimination was not intended to be wholly prohibited.[27]

The early jurisprudence of the Supreme Court would not sway much toward either opinion, since no one even cited the privilege in oral arguments until 1866;[28] the Court preferred instead, as in the Burr conspiracy, to protect a defendant or witness from self-incrimination based only on common-law practice.[29] In fact, there is not much primary evidence either way.[30] It was not until much later in our history that the privilege came to get much attention at all.

Looking at this legislative history and employing modern syntactic punctuation, it is certainly imaginable that either a Textualist or an Originalist could argue, justifiably, for a reinterpretation. With the dearth of primary-source evidence, it might be hard to logically refute such an

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27. *See* Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 856 (1989) (explaining that Originalism entails "the consideration of an enormous mass of material—in the case of the Constitution and its Amendments, for example, to mention only one element, the records of the ratifying debates in all the states"). The drafting history of an amendment is certainly one of the elements an Originalist would look to for evidence.

28. The first case in which the Court considered arguments concerning the Self-Incrimination Clause was *Ex Parte* Garland, 71 U.S. (4 Wall.) 333, 374-77 (1866). The Court in *Garland* invalidated a statute that disbarred from the Supreme Court bar any attorney who would not take an oath swearing he had never supported anyone taking arms against the United States, effectively disbarring any former Confederates. *See id.* at 381. *Garland* is famous for construing the statute as an ex post facto law and a bill of attainder; however, less well known is that the law was also implicitly held to be in conflict with the Self-Incrimination Clause. *Id.* at 374-77.

29. *See* LEVY, *supra* note 8, at 429. The earliest federal case on the privilege in general was United States v. Goosely, 25 F. Cas. 1363, 1364 (C.C.D. Va.) (No. 15,230) (undated). *See* LEVY, *supra* note 8, at 429. In *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), Chief Justice Marshall upheld the privilege with no mention of the Fifth Amendment. *See* LEVY, *supra* note 8, at 429. In United States v. Burr (Burr's Trial), 25 F. Cas. 38, 39 (C.C.D. Va. 1807) (No. 14,692e), Chief Justice Marshall, sitting on the Circuit Court of the United States for the District of Virginia, upheld the privilege but did not once mention the Fifth Amendment, instead declaring the privilege "a settled maxim of law." LEVY, *supra* note 8, at 429. *But see* Blau v. United States, 340 U.S. 159, 161 (1950) (implying, likely erroneously, that in the *Burr Trial* Chief Justice Marshall did in fact rely on the Fifth Amendment).

30. *See* ALFREDO GARCIA, THE FIFTH AMENDMENT: A COMPREHENSIVE APPROACH 17-18 (2002). Garcia, a top Fifth Amendment scholar, claims:

> What can be discerned from the sparse historical record is that the framers and those who ratified the self-incrimination clause believed that torture was an unacceptable way of "extorting" a confession from a criminal suspect. . . .
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> Apart from this conclusion, nothing else is definite about what the privilege may have meant at the time of ratification. Shifting definitions and applications betrayed uncertainty about the extent and scope of the right. . . .
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> . . . .
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> . . . At best, what we can glean from the historical record is a fluid and perhaps ambiguous perception of just what the privilege meant.

Id.

argument.[31] Instead, the best arguments that immediately spring to mind against such a reinterpretation seem to be stare decisis and the intuition that we just know what the Founders meant, and that they meant a blanket privilege.[32] As alluded to before, however, there is another argument—an argument based on the premise that the punctuation system espoused by the Founders significantly differed from that of today.

III. HISTORICAL AND CURRENT PUNCTUATION: LISTENING TO THE MUSIC OF LANGUAGE

A. *The General History of Punctuation*

Today's experts generally accept that punctuation was first invented as a means of indicating the places in the text for the reader to pause while reading aloud[33] since, strangely enough, reading silently is a rather modern concept.[34] In fact, the punctuation of the early Romans was entered by the readers, not the authors.[35] It was on account of the drop in standards of education that writers started putting in punctuation marks at all; less educated readers needed the help.[36] Whereas today we use a highly regulated syntactic system of punctuation, the original view of punctuation

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31. *Compare id.* (declaring the Founders' intent to be ambiguous), *with* LEVY, *supra* note 8, at 432 (stating that "the Fifth Amendment reflected [the] judgment that in a free society . . . the determination of guilt or innocence by just procedures, in which the accused made no unwilling contribution to his conviction, was more important than punishing the guilty"). Levy does admit, however, that "nothing can be found of a theoretical nature expressing a rationale or underlying policy for the right in question or its reach." LEVY, *supra* note 8, at 430; *see also supra* note 30 (explaining the lack of primary evidence concerning the original understanding of the Self-Incrimination Clause).

32. The principle of stare decisis speaks for itself. As to the intuition, Levy claims the founding fathers considered the privilege "a self-evident truth needing no explanation." LEVY, *supra* note 8, at 430. Since he admits he has no direct evidence of this, he is apparently working off an intuition that he has developed from looking at the totality of the facts. *Id.*

33. Nigel Hall, *Learning About Punctuation: An Introduction and Overview*, *in* LEARNING ABOUT PUNCTUATION 5, 9 (Nigel Hall & Anne Robinson eds., 1996); *see also* Walter J. Ong, *Historical Background of Elizabethan and Jacobean Punctuation Theory*, 59 PMLA 349, 350-51 (1944) (concluding that, in the context of examining Diomedes' *Ars Grammatica*, Cassiodorus' *Institutio de Arte Grammatica*, and Dositheus' *Ars Grammatica*, "[i]t is clear from the grammarians that [punctuation] marks were designed primarily to meet the demands of oral reading"). *But see* M. B. PARKES, PAUSE AND EFFECT: AN INTRODUCTION TO THE HISTORY OF PUNCTUATION IN THE WEST 66 (1993) (discussing the punctuation of the Romans and stating that "[t]he function of pauses in reading aloud was not simply to provide opportunities to take breath, or to emphasize particular cadences or metres, but primarily to bring out the meaning of a text"). Ong, on the other hand, considers any such evidence "coincidental." Ong, *supra*, at 351.

34. Hall, *supra* note 33, at 9.

35. *Id.*; *see also* PARKES, *supra* note 33, at 68.

36. Hall, *supra* note 33, at 9.

was quite the opposite.[37] Punctuation was for marking pauses for breath and for marking emphasis, being in nature prosodic, rhetorical, or elocutionary,[38] rather than syntactic. This tradition continued for centuries, and it was not until the seventeenth century that commentators began to argue for a syntactic approach.[39] Surprisingly, many if not most scholars believe that the original punctuation of Shakespeare was entirely elocutionary.[40]

Syntactic punctuation—the idea that punctuation's purpose is to delineate the different grammatical units of a sentence[41]—caught on slowly, as grammar continued to be thought of as a means for employing mainly rhetorical effects.[42] In the seventeenth century, syntactic punctuation was beginning to take root, but the mid-eighteenth century saw a backlash against it in what has been termed "The Elocutionary Revolution" or "The Elocutionary Movement."[43] This was a time of great

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37. *See supra* note 33.

38. These terms will all be used interchangeably, in spite of their subtle differences in definition. They all reflect the idea that punctuation primarily conveys the length of time taken to pause, and not logic; even Parkes admits that "[o]riginally punctuation was regarded as a guide to the oral performance of the written record of the spoken word." PARKES, *supra* note 33, at 68.

39. *See* 29 THE NEW ENCYCLOPAEDIA BRITANNICA 1050 (15th ed. 2005) ("It was Ben Jonson, in his [circa 1617] *English Grammar* . . . who first recommended syntactical punctuation in England.").

40. *See* H. W. FOWLER & F. G. FOWLER, THE KING'S ENGLISH 230 (3d ed. 1931) (stating that "anyone who will look at an Elizabethan book with the original stopping will see how far they have moved: the old stopping was frankly to guide the voice in reading aloud"); Ong, *supra* note 33, at 359-60 (claiming that punctuation of the Elizabethan era was quasi-elocutionary and better termed "physiological," being wholly determined by the "exigencies of breathing"). *But see* C. C. Fries, *Shakespearian Punctuation*, *in* UNIVERSITY OF MICHIGAN STUDIES IN SHAKESPEARE, MILTON AND DONNE 67, 67-86 (1925) (arguing that the contrast between rhetorical and grammatical punctuation is too simplistic). *See generally* PERCY SIMPSON, SHAKESPEARIAN PUNCTUATION (1911) (positing the assertion that Shakespeare's punctuation was entirely elocutionary).

41. *See* Vivian Salmon, *English Punctuation Theory 1500-1800*, 106 ANGLIA 285, 287 (1988) (defining syntactic punctuation as "representing the structure of the sentence, i.e. the 'logical' or 'grammatical' function which conveys meaning").

42. *See id.* at 300. For those not grammatically inclined, an example of rhetorical punctuation is in order. Try comparing the statement, "[t]he master beat the scholar with a strap," to the statement, "[t]he master beat the scholar, with a strap." The former is rapid and matter-of-fact while the latter is indignant and staccato. FOWLER & FOWLER, *supra* note 40, at 230. Rhetorical punctuation is not dead; it is just no longer dominant. *See infra* notes 95-97 and accompanying text.

43. *See* JAY FLIEGELMAN, DECLARING INDEPENDENCE: JEFFERSON, NATURAL LANGUAGE, AND THE CULTURE OF PERFORMANCE 2 (1993) (discussing the new rhetorical ideal, where "[a]ccording to the rhetoricians of what came to be called 'the elocutionary revolution', th[e] new language was composed not of words themselves, but of the tones, gestures, and expressive countenance with which a speaker delivered those words"); Salmon, *supra* note 41, at 300 (containing a chapter entitled *Rhetorical Function of Pointing: The Eighteenth Century Revival*). Punctuation was a large focus of this movement and came to be seen more as 'performative' than 'oral,' if this author may be allowed a hearsay metaphor.

focus on the prosodic nature, or the "melody," of speech.[44] This was an era when philosophers and rhetoricians urged writers and speakers to give great care to the cadence of their works,[45] and this was the age and context of the Founders and of the drafting of the Constitution.[46] In fact, an elocutionary or prosodic philosophy of punctuation came to overshadow the emerging syntactic view[47] so greatly that in 1786, David Steel was driven to complain: "Grammar, which ought to be the basis of punctuation, has seldom been considered as adequate to the purpose: too much accommodation [is given] to the reader, and too little attention to grammatical construction."[48] Steel, a proponent of the syntactic view, was displeased with what he considered the pervasive use of prosodic punctuation.[49] This elocutionary view of punctuation was encouraged by the writers of numerous general grammars.[50]

B. *The Eighteenth-Century English Grammars*

One of the most influential grammars of the times, Bishop Lowth's 1762 *English Grammar*,[51] advocated usages both syntactic and prosodic,[52]

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44. Salmon, *supra* note 41, at 301.

45. *Id.*; *see also* Yvonne Merrill, *Joshua Steele*, *in* EIGHTEENTH-CENTURY BRITISH AND AMERICAN RHETORICS AND RHETORICIANS 220 (Michael G. Moran ed., 1994) (discussing Joshua Steele, an indirect founder of the Elocutionary Movement, who taught that "speech is a musical genus because it has melody and rhythm"). The melody of speech was described in terms like intonation, pause, emphasis, and rhythm, as well as cadence, note, point, rest, pause, and crotchets. Salmon, *supra* note 41, at 301-02.

46. *See* FLIEGELMAN, *supra* note 43, at 28-35 (connecting the Elocutionary Movement to the Founders); PARKES, *supra* note 33, at 92 (claiming that the most important significance of the late-eighteenth-century tension between syntactic and rhetorical punctuation "probably lies in its effect on the practice of influential authors" because "[i]n the second half of the eighteenth century such authors analysed their discourse and applied punctuation according to the nature of the style employed in particular contexts much more obviously than before"). If Parkes is right, then it is highly likely that the Founders were significantly influenced by this movement and tailored the punctuation in their writings to accord with rhetorical and prosodic functions.

47. *See* Salmon, *supra* note 41, at 300.

48. DAVID STEEL, ELEMENTS OF PUNCTUATION 1 (1786).

49. *See* Salmon, *supra* note 41, at 300.

50. *See id.* at 300-01.

51. R. C. Alston, *Introductory Note* to ROBERT LOWTH, A SHORT INTRODUCTION TO ENGLISH GRAMMAR (photo. reprint 1969) (1762) (declaring Lowth's grammar "probably the most influential, and widely used text-book for the rudimentary instruction of English produced in the eighteenth century"). Alston continues: "It was the basis for numerous other grammars published between 1763 and 1840, and could claim a distinct authority which no other grammar had before Webster." *Id.*

52. PARKES, *supra* note 33, at 92 (explaining that "[a]n attempt at compromise may be seen in the discussion of punctuation by Bishop Lowth, where he presents a definition of punctuation which should have satisfied any elocutionist" but nevertheless proceeds to advocate certain rules "expressed not in terms of elocution but in terms of . . . structure and grammar"). For Bishop

but nevertheless defined punctuation as "the art of marking in writing the several pauses, or rests, between sentences, and the parts of sentences, according to their proper quality or proportion, as they are expressed in a just and accurate pronunciation."[53] Lowth continued: "As the several articulate sounds . . . are marked by Letters; so the rests and pauses between sentences and their parts are marked by Points."[54] Though his examples betrayed syntactic influences, his core philosophy of punctuation remained elocutionary.[55]

Many grammarians of the time espoused a compromise view of punctuation, believing it to be both syntactic and prosodic.[56] James Greenwood's 1753 *Essay Towards a Practical Grammar* explained that punctuation marks "direct what Kind of Pause is to be observed."[57] Greenwood believed "that Writing, being the Picture or Image of *Speech*, ought to be adapted unto all the material Circumstances of it."[58] But he also wrote that "the Use of Stops is not only to mark the Distance of Time in pronouncing, but also to prevent any Confusion or obscurity in the Sense . . . ."[59] Lindley Murray's 1799 *English Grammar* suggested that "[t]here are two kinds of pauses: first, emphatical pauses; and next, such as mark the distinctions of the sense."[60] Murray stated plainly that "[t]he primary use of points is to assist the reader in discerning the grammatical construction; and it is only a secondary object, that they regulate his pronunciation."[61] A generation earlier, James Gough's 1760 *A Practical Grammar of the English Tongue* explained that "[a]t a Comma, the Reader should pause while he can privately tell One; at a Semicolon, Two; at a Colon, Three; and at a Period, Four."[62] As will be discussed later, his quasi-musical approach was not uncommon.[63]

Lowth's definition of punctuation, see *supra* notes 51-53 and accompanying text.

53. LOWTH, *supra* note 51, at 154.

54. *Id.*

55. *See supra* note 52.

56. *See* PARKES, *supra* note 33, at 92.

57. JAMES GREENWOOD, AN ESSAY TOWARDS A PRACTICAL ENGLISH GRAMMAR, DESCRIBING THE GENIUS AND NATURE OF THE ENGLISH TONGUE 241 (1753).

58. *Id.*

59. *Id.* at 240.

60. LINDLEY MURRAY, ENGLISH GRAMMAR, ADAPTED TO THE DIFFERENT CLASSES OF LEARNERS 199 (1799).

61. *Id.* at 201.

62. JAMES GOUGH, A PRACTICAL GRAMMAR OF THE ENGLISH TONGUE 12 (1760).

63. *See infra* note 73 and accompanying text; *see also* LOWTH, *supra* note 51, at 158 (explaining the punctuation marks to represent pauses in the same proportion as the whole note, half note, quarter note, and eighth note in music); MICHAEL MAITTAIRE, THE ENGLISH GRAMMAR: OR, AN ESSAY ON THE ART OF GRAMMAR 31 (1712) ("One art often borroweth a Technical word from another . . . . Thus Grammar borrows from Musick . . . the word [from] Tone or Accent . . . .").

C. *The Many Essays on Punctuation*

The late eighteenth century saw a number of treatises published specifically on punctuation.[64] These treatises were even more inconsistent than the general grammars.[65] James Burrow's 1772 *De Ratione et Usu Interpungendi* argued that

> [t]he General Idea of *Pointing* seems to include nothing more than Marking *down upon Paper*, by different Signs or Notations, the *respective* Pauses which actually were or ought to be made in *pronouncing* the Words written or printed; together with like *Hints* for a *different Modulation of Voice*, where a just Pronunciation would require it.[66]

Burrow was silent on the role of syntax. On the other hand, the 1785 *Essay on Punctuation* by Joseph Robertson took a completely syntactic view, describing punctuation as "the art of dividing compounded sentences in proper places."[67] In fact, when the aforementioned David Steel wrote *Elements of Punctuation* in 1786, he systematically attacked Robertson's *Essay*.[68] But, as mentioned before, Steel, like Robertson, was a vocal proponent of the syntactic view.[69] In *Elements*, Steel explicitly rejected the prosodic view when he forcefully argued that "[p]unctutation should lead to the sense; the sense will guide to modulation and emphasis . . . ."[70] Though both authors treated punctuation as completely syntactic, they did not agree on much else.[71] As can be seen, punctuation was not immune to the general eighteenth-century culture of intellectual upheaval.[72]

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64. *See* Salmon, *supra* note 41, at 285-86.

65. The works were inconsistent both internally and with respect to other works. This internal schizophrenic attitude is well summed up by Parkes. *See supra* note 56 and accompanying text (explaining the "compromise" view that pervaded many of the general English grammars of the times).

66. JAMES BURROW, DE RATIONE ET USU INTERPUNGENDI: AN ESSAY ON PUNCTUATION 8 (1772).

67. *See* JOSEPH ROBERTSON, AN ESSAY ON PUNCTUATION 18 (photo. reprint 1969) (1785).

68. *See generally* STEEL, *supra* note 48 (containing a split-page format where the pages on the left are verbatim copies of pages from Robertson's *Essay* and the pages on the right are Steel's own criticisms of the pages on the left). In fact, the full title of Steel's work is *Elements of Punctuation: Containing Remarks on an "Essay on Punctuation" and Critical Observations on Some Passages in Milton. Id.*

69. *See supra* notes 47-48 and accompanying text; *infra* note 70 and accompanying text.

70. *See* STEEL, *supra* note 48, at 34.

71. *See* STEEL, *supra* note 48, at 2 (explaining that his purpose in writing *Elements* was to "proceed to examine those rules, in [Robertson's] 'Essay on Punctuation,' that appear to me defective . . .").

72. *See infra* note 81.

D. *The Rhetorical Grammars*

James Gough's quasi-musical description of punctuation is in many respects the same as the one espoused by what came to be known as the rhetorical grammars.[73] Isaac Watts' grammar of 1721, which included detailed directions on how to read aloud, is considered by some to be the beginning of the rhetorical grammars and "The Elocutionary Revolution" in general.[74] The ethos of the movement is perhaps best represented by Joshua Steele's somewhat romantic philosophy described in his work *An Essay Towards Establishing the Melody and Measure of Speech*.[75] To Steele and other rhetoricians and writers, strings of words were deeply analogous to musical notes on a score; comparisons between both overwhelm the genre.[76] They considered reading to be "artificial speaking" and "an imitative art which has eloquent speaking for its model, as eloquent speaking is an imitation of beautiful nature."[77] The written word was considered a subspecies of the spoken one, and the rules developed by these grammars reflected that philosophy.[78]

In fact, the aim of the rhetorical grammars was to teach how to speak and write with forcefulness, clarity, and beauty, having particular regard for "pauses, tones, and variations of voice."[79] Essential to this goal was the proper use of punctuation, and every rhetorical grammar contained extensive sections solely devoted to the exploration of punctuation's nature and use.[80]

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73. *See* Salmon, *supra* note 41, at 300-05 (explaining in detail the rhetorical grammars and their focus on music); *see also* ANSELM BAYLY, THE ALLIANCE OF MUSICK, POETRY AND ORATORY 31 (1789) (referring to the likeness between elegant speaking and singing, which both rely upon the precise use of punctuation). Music was not the only art to which the Elocutionists compared grammar. *See* FLIEGELMAN, *supra* note 43, at 15-16. In fact, John Rice in his *Art of Reading* considered an author using pauses "[l]ike a Painter, [who] draws [his] Strokes one after another, whence they must necessarily be separated from one another by some Kind of Space or Interval." JOHN RICE, AN INTRODUCTION TO THE ART OF READING WITH ENERGY AND PROPRIETY 237 (1765).

74. Salmon, *supra* note 41, at 301.

75. *Id.*

76. *Id.* at 300-05; *see also supra* notes 63, 73.

77. For a representative view, see JOHN WALKER, A RHETORICAL GRAMMAR, OR COURSE OF LESSONS IN ELOCUTION 29 (1785).

78. *See id.* (claiming that "[r]eading . . . is to speaking, what a copy is to an original picture: both of them have beautiful nature for their object . . .").

79. *See* WALKER, *supra* note 77, at v; *see also* FLIEGELMAN, *supra* note 43, at 28-35 (reviewing the basic premises of "The Elocutionary Revolution").

80. *See, e.g.*, JOSHUA STEELE, PROSODIA RATIONALIS: OR, AN ESSAY TOWARDS ESTABLISHING THE MELODY AND MEASURE OF SPEECH, TO BE EXPRESSED AND PERPETUATED BY PECULIAR SYMBOLS (1779) (containing extensive analysis of punctuation and developing a highly complicated system of notation, explicitly lifted from the musical scale, for a new and extremely sophisticated punctuation method).

To the modern sensibilities, the notion that punctuation ought to take a musical, over a logical, form seems rather romantic and impractical.[81] To the eighteenth-century mind, however, such an analogy was very well accepted.[82] Indeed, the Founders were not immune from this prevalent philosophic trend.[83] Thomas Jefferson, a fervent musician, was fascinated by the perceived linkage between writing and music.[84] Particularly, he was deeply interested in how Homer rhythmically measured his language, "as a piece of music is divided into bars."[85] In a 1773 letter to a law student, he emphatically recommended John Mason's *Essay on the Power and Harmony of Prosaic Numbers*—an essay that argued at length that the writing of prose, not just poetry, could profit from being written "in measured Cadences."[86] It is clear that the rhetorical grammars were extremely popular. It is also clear that they advocated punctuation as a

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81. *See infra* Part III.E (particularly note 95 and accompanying text, discussing the demise of rhetorical punctuation and the eventual dominance of syntactic theories). The modern world has been similarly unkind to many ideas from the Enlightenment and Romantic eras.

82. *See* FLIEGELMAN, *supra* note 43, at 1-2 ("In the mid eighteenth century that world was revolutionized by an intensified quest to discover (or theorize into existence) a natural spoken language that would be a corollary to natural law . . . .").

83. *See supra* note 46 (connecting this movement to the Founders); *infra* notes 84-86 and accompanying text (discussing Jefferson).

84. *See generally* FLIEGELMAN, *supra* note 43 (discussing as the theme of the entire book Jefferson and the elocutionary movement). Jefferson was indeed the consummate man of his times and was so swept up in the elocutionary movement that he wrote his own book on the subject, *Thoughts on English Prosody*. *Id.* at 6; Thomas Jefferson, *Thoughts on English Prosody*, *in* THOMAS JEFFERSON: WRITINGS 593 (Merrill D. Peterson ed., 1984). Jefferson was heavily influenced by John Rice's *Art of Reading* and Thomas Sheridan's *Lectures on the Art of Reading* and *Lectures on Elocution*, all heavily prosodic in their view of punctuation. FLIEGELMAN, *supra* note 43, at 5-14.

85. FLIEGELMAN, *supra* note 43, at 7, 14. In his *Thoughts on English Prosody*, Jefferson "printed a verse passage from the *Iliad* as if it were prose and argued that the rhythms of the verse remain perfectly audible to the reader because Homer had 'studied the human ear.'" *Id.* at 7. Jefferson continued to discuss Homer:

> He has discovered that in any rhythmical composition the ear is pleased to find at certain regular intervals a pause where it may rest, by which it may divide the composition into parts, as a piece of music is divided into bars. He contrives to mark this division by a pause in the sense or at least by an emphatical word which may force the pause so that the ear may feel the regular return of the pause. . . . A well-organized ear makes the pause regularly whether it be printed as verse or prose.

Id.

86. *Id.* at 7-10 (quoting Jefferson). *Id.* at 14. John Mason was one of the most important proponents of the elocutionary movement. *See* Brenda H. Cox, *John Mason*, *in* EIGHTEENTH-CENTURY BRITISH AND AMERICAN RHETORICS AND RHETORICIANS, *supra* note 45, at 170-74 (discussing John Mason's contributions to rhetoric).

vehicle for addressing pause, emphasis, cadence, and other elocutionary concerns.[87] This was the underlying message behind the rhetorical grammars and the elocutionary movement in general: that writing was a subset of language and that language was primarily spoken in nature; that writing was to be made over "in the image of speaking."[88]

Vivian Salmon argues that the immense popularity of the rhetorical grammars was rooted in three premises: First, the emerging middle class was extremely interested in acquiring an acceptable standard accent and pronunciation; second, new forms of literature, most notably the novel, were often read aloud, especially in light of the growing custom of reading aloud to those who were otherwise engaged in some manual labor; and third, the culture at the time was overwhelmingly oral in nature, and it is no surprise that the written should mimic the oral, as the former was only just becoming more accessible to the newly educated masses.[89] Any important or popular writing (especially anything as important as the constitutional documents) would have been read aloud over and over to those not privileged enough to acquire the skill.[90] In many ways, the primacy of the rhetorical grammars was an outgrowth of the popular audience—an audience that probably heard works of literature and law as much as or even more than it read them.[91]

E. *The Counter-Revolution: Logic Prevails*

Of course, "The Elocutionary Revolution" did not last forever; it always had many vocal and influential detractors, such as David Steel and Joseph Robertson.[92] Nevertheless, even as late as 1844, influential writer J. Wilson published *A Treatise on Grammatical Punctuation* and complained:

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87. *See supra* note 45 (discussing the terms used to describe language).

88. *See* FLIEGELMAN, *supra* note 43, at 24 (explaining the elocutionary movement as a "revolution in the conceptualization of language, a revolution that sought to replace artificial language with natural language and make writing over in the image of speaking"); *supra* note 78.

89. *See* Salmon, *supra* note 41, at 300-01.

90. The *Declaration of Independence* was certainly meant to be primarily read aloud. FLIEGELMAN, *supra* note 43, at 24. Interestingly, Jefferson's original draft was riddled with special marks, in addition to punctuation marks, designed to alert him to extra rhetorical pauses. *Id.* at 5-6. The marks are akin to those proposed by John Rice and Thomas Sheridan in their respective rhetorical grammars. *Id.* at 5-6, 10.

91. Literacy rates in eighteenth-century America varied greatly by region and location and were significantly lower in rural areas than in urban ones. Regardless, rates were much lower than they are today. *See* F.W. Grubb, *Growth of Literacy in Colonial America: Longitudinal Patterns, Economic Models, and the Direction of Future Research*, 14 SOC. SCI. HISTORY 451, 452-55 (1990).

92. *See supra* notes 67-72 and accompanying text.

> Many persons seem to consider points as being only the representatives of rhetorical pauses,—as showing merely those places in the utterance of a composition, in which time for breathing is required. But, though it is not denied that the points are, to a very great extent, serviceable to a reader in knowing when he should pause, occasion will frequently be taken, in the course of this work, to prove that the art of punctuation is founded more on a grammatical than on a rhetorical basis.[93]

This view of punctuation has been the dominant philosophy ever since.[94] Geoffrey Nunberg's recent and influential *The Linguistics of Punctuation* states emphatically that punctuation is based completely on written grammatical principles.[95] There is, of course, no end to the debate,[96] but generally the consensus holds that punctuation predominantly ought to be—and in fact now is—governed by rules of logic, based on syntax, and designed to separate ideas and phrases, not denote pauses.[97] It is interesting to note just how far we have swung the pendulum and what this means for the way in which we interpret the Constitution.

F. *Punctuation: Then and Now*

It should now be established that the Framers almost certainly understood punctuation to be something quite different from what we understand it to be today. Some period writers considered it purely prosodic, some purely syntactic, and others considered it both.[98] As a result, it is not surprising that the punctuation of the Constitution is rather

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93. JOHN WILSON, A TREATISE ON GRAMMATICAL PUNCTUATION, at vii-viii (1884) *quoted in* Hall, *supra* note 33, at 9.

94. *See infra* note 95.

95. GEOFFREY NUNBERG, THE LINGUISTICS OF PUNCTUATION 11 (1990).

96. *See* Hall, *supra* note 33, at 9 (asserting "a general consensus among writers on punctuation" but admitting that "the issue seems far from resolved"). Interestingly, in 1977, Professor H. Sopher argued that "speech rhythm, adapted to the needs of the written language, should in fact constitute the basis of sound punctuation." H. Sopher, *The Problem of Punctuation*, 31 ELT 304 (1977). For a realistic view, see ERIC PARTRIDGE, YOU HAVE A POINT THERE: A GUIDE TO PUNCTUATION AND ITS ALLIES 7 (1955) (explaining that "punctuation is predominantly constructional or grammatical or logical, yet it has what is in some ways a non-logical, non-grammatical element, necessitated by the part played in speech by intonation and pause and in writing (or printing) by emphasis").

97. The modern view of punctuation often allows for one more governing principle: taste. G. V. CAREY, MIND THE STOP: A BRIEF GUIDE TO PUNCTUATION WITH A NOTE ON PROOF-CORRECTION 1 (1958) (defining "punctuation as being governed two-thirds by rule and one-third by personal taste").

98. *See* PARKES, *supra* note 33, at 91-92.

odd by modern standards.[99] The prosody/syntax split, however, is not the only difference between then and now. In addition, there are many differences particular to specific punctuation marks,[100] including the semicolon.[101] In fact, the eighteenth century has been described as highlighted by "the overwhelming dominance of the semicolon," with rates of semicolon use per word higher by far than at any other time in history.[102] Lexicographer Eric Partridge has gone so far as to label a certain category of semicolon usage explicitly as "the literary or 18th Century semicolon," used to denote "fine grammatical as well as superfine elocutionary, or rhetorical, distinctions."[103] Returning to the Fifth

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99. A few commentators have noticed the oddity of constitutional punctuation. Professor Paul E. McGreal has theorized that the Founders either ignored punctuation or used semicolons and commas interchangeably. Paul E. McGreal, *There Is No Such Thing As Textualism: A Case Study in Constitutional Method*, 69 FORDHAM L. REV. 2393, 2406 (2001). Peter Jeremy Smith has commented on the Constitution's punctuation in detail, but his conclusion is that the punctuation "reflect[s] poorly on the grammatical acuity of the drafters . . . ." Peter Jeremy Smith, *Commas, Constitutional Grammar, and the Straight-Face Test: What If Conan the Grammarian Were a Strict Textualist?*, 16 CONST. COMMENT. 7, 21, 31 (1999). Commentators Vasan Kesavan and Michael Stokes Paulsen have also noticed the oddities and instead argue for a highly complex syntactic view of eighteenth-century punctuation in which, as in McGreal's view, semicolons often act like commas. *See* Vasan Kesavan & Michael Stokes Paulsen, *Is West Virginia Unconstitutional?*, 90 CALIF. L. REV. 291, 349 (2002). No commentator has ever mentioned the possibility that the "odd" punctuation might be based on prosody and not syntax. Indeed, if this Note is wrong and the Constitution does not include prosodic punctuation, then it is quite likely that the Drafters were in fact punctuationally incompetent.

100. Looking at the Constitution, the text simply reeks of commas; passages seem to burp off the modern tongue quite awkwardly. *See generally* U.S. CONST. ("No Person except a natural born Citizen, or a Citizen of the United States, at the time of the Adoption of this Constitution, shall be eligible to the Office of President; . . . ."). In the eighteenth century, commas were used to separate every subordinate clause and separable phrase; vestiges of this attitude were published in a handbook as late as 1880. *See* ENCYCLOPEDIA BRITANNICA, *supra* note 39. However, it must be noted that since punctuation was often utilized for prosodic effect, the plethora of commas is easily explainable. *See* Salmon, *supra* note 41, at 294. John Walker, "anxious it seems to place pauses in every conceivable position," advocated that, regardless of structure, a comma or other punctuational pause should be inserted every five or six words! *Id.* This seeming overuse of commas is additional proof that the drafters were heavily influenced by the elocutionary movement, since their usage conformed to the grammatical practice advocated by the rhetorical grammars. *See id.* Also, the use of colons was far different than it is today; today, it virtually has only one specialized use: the annunciatory. *See* CAREY, *supra* note 97, at 27. However, the colon used to have myriad other roles both functioning as a strong pause rhetorically (the many colons in the *Authorized Version* of the *Bible* are related to rhythm, not syntax) and as explanatory, appositive, equipollent, parallelistic, oppositional, compensatory, interpolative, substitutive, cumulative, conclusive, and promotional. *See id.*; PARTRIDGE, *supra* note 96, at 52-53; Paul Bruthiaux, *The Rise and Fall of the Semicolon: English Punctuation Theory and English Teaching Practice*, 16 APPLIED LINGUISTICS 1, 2 (1995).

101. PARTRIDGE, *supra* note 96, at 49 (describing "the literary or 18th Century semicolon"); *see also* Bruthiaux, *supra* note 100, at 2-5 (discussing in detail the evolution of the semicolon).

102. *See* Bruthiaux, *supra* note 100, at 6-9.

103. PARTRIDGE, *supra* note 96, at 49.

Amendment, this invites the question: If the Founders, like the rest of their contemporaries, were so apt to use semicolons (there are sixty-five in the original Constitution), why did they leave this one out?[104]

IV. CHAOS, CADENCE, OR COMPROMISE: WHAT IS A SEMICOLON ANYWAY?

A. *The Possible Explanations*

After reviewing the legislative history of the Fifth Amendment, it appears that there are only five possible explanations for the fluctuating insertions and deletions of the semicolon that once separated the Self-Incrimination Clause from the Due Process Clause.[105] The first possibility, as one commentator has generally suggested about the Constitution, is that the Framers simply did not know what they were doing; that is, their system of punctuation was no system at all.[106] Second, it is arguable that the punctuation represents a highly complex form of syntactic punctuation operating under rules not easily observed. The third possibility is that it is simply a typo, that they meant a semicolon all along. Fourth, there is the possibility that, after argument and debate that did not survive in the record, it was agreed that the privilege against self-incrimination would be made available but would be limited in scope—a compromise between the Maryland and Virginia versions.[107] Finally, it is possible, and it is the argument of this Note, that the missing semicolon is instead the product of a rhetorical use of punctuation—that the drafters and editors of the amendment had cadence and elocution in mind, consciously or unconsciously, when they inserted and deleted the semicolon.

1. Is It Just Chaos?

Concerning the first possibility, Professor McGreal has argued that "[t]he existing evidence suggests that the drafters either ignored the significance of punctuation or used semi-colons much as we use commas today."[108] Perhaps this assertion is true, for the Constitution itself does

104. *See* Kesavan & Paulsen, *supra* note 99, at 334. There are also nearly 4,400 words with approximately 375 commas, 140 periods, 10 colons, and 10 em-dashes. *Id.* Interestingly, this result depends on which Constitution is considered, the engrossed copy (the official one) or the printed copy. *Id.* at 334 n.140. For a discussion of these documents, see Akhil Reed Amar, *Our Forgotten Constitution: A Bicentennial Comment*, 97 YALE L.J. 281, 281-85 (1987).

105. To review the fluctuations, see *supra* Part II.A.

106. *See* McGreal, *supra* note 99, at 2406.

107. *See supra* notes 7-8 and accompanying text.

108. *See* McGreal, *supra* note 99, at 2406.

indeed contain many seemingly inexplicable usages.[109] For writers as sophisticated as Thomas Jefferson, however, whose library overflowed with every possible book on style, such an idea seems unlikely.[110] Commentators Vasan Kesavan and Michael Stokes Paulsen claim outright that McGreal is wrong,[111] and instead put forward their idea that semicolon usage in the Constitution had variable meaning depending on the grammatical context.[112] What all three commentators fail to mention, however, is the practice of rhetorical punctuation.[113] Instead, McGreal has simply declared it chaos, while Kesavan and Paulsen have attempted to deduce a syntactic theory by working backward from the inexplicable usages, effectively putting the cart before the horse.[114] Neither of these explanations, however, is completely correct.[115] Instead, the punctuation of the times was neither chaotic nor extraordinarily complex, but a transitionary mixture of both prosody and syntax.[116] It is, therefore, logical that both types of punctuation found their way into the founding texts.[117] To a reader *unaware* of this admixture, the punctuation would indeed seem rather chaotic or super complex.[118] To a reader *aware* of it, however, it would be odd for it not to seem so.

2. Is It Syntactic, but Highly Complex?

The second possibility, touched on previously, is that the use of the comma is just a highly complex or unstructured syntactic use. Kesavan and Paulsen's theory of the semicolon as a mutable unit, dependent on

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109. *See supra* notes 99-100.

110. Fliegelman discusses the many books on elocution and writing owned by Jefferson, including Jefferson's own work, *Thoughts on English Prosody*. *See* FLIEGELMAN, *supra* note 43, at 4-28.

111. Kesavan & Paulsen, *supra* note 99, at 352 n.196.

112. *Id.* at 348.

113. *See supra* note 99.

114. Kesavan & Paulsen, *supra* note 99, at 348. Kesavan and Paulsen, in their attempt to make sense of the Constitution's punctuation, located a number of strange usages and then tried to deduce a system. The system they deduced is only that sometimes some marks act as other marks based on "grammatical context," which is hardly a system at all, but more akin to McGreal's theory of chaos and interchangeability. *See id.* at 332-52.

115. They are not, however, totally incorrect. Their *descriptions* of the punctuation phenomena are accurate. In fact, the idea of Kesavan and Paulsen would be far more correct if it were changed from "grammatical context" to "rhetorical context." *See id.*

116. *See* Bruthiaux, *supra* note 100, at 4-5 (explaining that "the historical shift in perceptions of the role of punctuation from a prosodic to a syntactic function has always been less of a one-way affair than is generally believed").

117. If both types of punctuation did not make it into the Constitution, then the Drafters probably were incompetent. *See supra* note 99.

118. *See id.*

grammatical context, seems to represent this theory.[119] In order to test this idea, it is necessary to look at what syntactic uses the semicolon was supposed to have in the late eighteenth century and decide whether the missing semicolon is explained by any of the syntactic theories of the time.[120] The syntactic work most cited by Kesavan and Paulsen, Joseph Robertson's *Essay on Punctuation*, argued that punctuation was designed to "affect the sense of all literary compositions in the highest degree, and that even a comma may illuminate, or totally obscure, the finest passage in Homer or Virgil."[121] Robertson defined the semicolon as "used for dividing a compounded sentence into two or more parts, not so closely connected, as those, which are separated by a comma; nor yet so independent on each other, as those, which are distinguished by a colon."[122] He includes some statements to clarify this assertion. First, he states that a semicolon is often used before a conjunction, depending on the sense.[123] This is obviously irrelevant to this Note's discussion of the Fifth Amendment.[124] Second, he states that "[t]he connection, which appears between the several parts of . . . compounded sentences" often allows for the insertion of a semicolon.[125] He does not continue to explain what he means, but he instead simply states that it will be explained by examples, which he then lists.[126] His examples all show that when the sense of certain phrases depends upon an earlier phrase, it is proper to attach them into one big sentence using semicolons to separate the

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119. *See* Kesavan & Paulsen, *supra* note 99, at 348.

120. On the other hand, as has been mentioned, Kesavan and Paulsen, unable to find a decisive rule or usage in a treatise, have deduced new rules for semicolons based upon their observations. For a more thorough explanation, see *supra* notes 114-15.

121. ROBERTSON, *supra* note 67, at 15. Robertson's is, in fact, the only eighteenth-century treatise cited by Kesavan and Paulsen, which is probably why they failed to notice the rhetorical usage of punctuation. *See generally* Kesavan & Paulsen, *supra* note 99, at 343 n.164, 344 n.167 (citing ROBERTSON, *supra* note 67, at 78, 80).

122. ROBERTSON, *supra* note 67, at 77.

123. *Id.* at 78.

124. Why? The issue of the missing semicolon does not depend upon any conjunctions. *See* U.S. CONST. amend. V. In fact, there does not seem to be any syntactic reason for treating the penultimate "nor" phrase any differently than the others, i.e., preceding it with a semicolon.

125. ROBERTSON, *supra* note 67, at 80.

126. *Id.* at 80-81. His examples include:

> The orator makes the truth plain to his hearers; he awakens them; he excites them to action; he shews them their impending danger. . . . Bruyere declares, that we are come into the world too late to produce any thing new; that nature and life are pre-occupied; and that description and sentiment have been long since exhausted.

Id. at 80 (citations omitted). These uses are all very logical usages, but they nevertheless fail to explain the missing semicolon in the Fifth Amendment. Indeed, these examples make the missing semicolon seem even less logical.

phrases.[127] This idea is continued when he argues that

> [w]hen several detached phrases succeed one another, each forming a complete sense, they are properly distinguished by a period. Nevertheless, when they are short; when they have a slight connection; when they are subordinate parts of one general proposition; or seem to be only thrown promiscuously into one group, the exact pointing may be neglected or diminished, and the semicolon used instead of the period.[128]

These ideas would handily explain the punctuation of the Fifth Amendment were the semicolon *not* missing.[129] A thorough and exhaustive search of fifteen contemporary grammars, rhetorical grammars, and treatises on punctuation reveals no decisive *syntactic* explanation.[130] The only seemingly plausible syntactic explanation comes from Kesavan and Paulsen themselves, which, as mentioned above, is unsatisfactory.[131]

3. Is It Just a Typo?

The third possibility, that of the typo, is not something that can be conclusively argued either way. Considering that the first printed version of the Fifth Amendment in the Statutes at Large contained an obvious typo, this is a distinct possibility.[132] Surely it is possible, but this might not explain the numerous other inexplicable usages in the Constitution, begging the question of whether there are really *that many* typos.[133] It

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127. *See supra* note 126.

128. ROBERTSON, *supra* note 67, at 82.

129. Consider the quoted text accompanying note 128. If you were to remove from that example the semicolon after the word "proposition," then you would have a situation akin to the instant Fifth Amendment riddle. In fact, if you look even more carefully at the example itself, you will see that the phrase "the exact pointing may be neglected or diminished" modifies all the other phrases in the passage, not just the last one as the Due Process Clause is contended to do. *See supra* note 128 and accompanying text. This example serves to illustrate further the inability of the contemporary syntactic treatises on punctuation to explain the punctuation of the Fifth Amendment.

130. The examined texts include: BAYLY, *supra* note 73; BURROW, *supra* note 66; WILLIAM COCKIN, THE ART OF DELIVERING WRITTEN LANGUAGE; OR, AN ESSAY ON READING (1775); GOUGH, *supra* note 62; GREENWOOD, *supra* note 57; LOWTH, *supra* note 51; MAITTAIRE, *supra* note 63; JOHN MASON, AN ESSAY ON ELOCUTION, OR PRONUNCIATION, INTENDED CHIEFLY FOR THE ASSISTANCE OF THOSE WHO ARE OFTEN CALLED TO READ AND SPEAK IN PUBLIC (1800); MURRAY, *supra* note 60; RICE, *supra* note 73; ROBERTSON, *supra* note 67; THOMAS STACKHOUSE, A NEW ESSAY ON PUNCTUATION: BEING AN ATTEMPT TO REDUCE THE PRACTICE OF POINTING TO THE GOVERNMENT OF DISTINCT AND EXPLICIT RULES (1800); STEEL, *supra* note 48; STEELE, *supra* note 80; JOHN WALKER, ELEMENTS OF ELOCUTION (1781).

131. *See supra* notes 114-15.

132. *See supra* note 25 (explaining the typo discrepancy in the *Statutes at Large*).

133. *See supra* notes 99-100 (discussing the "odd" punctuation that pervades the Constitution).

seems unlikely that the Founders would be so cavalier with these documents. Kesavan and Paulsen argue that the Founders were indeed extremely conscientious drafters;[134] the existence of the Committee of Style would seem to support this proposition.[135]

4. Is It the Product of Compromise?

Fourth, it is possible that there was indeed a compromise; that Maryland and the others who did not completely protect the privilege convinced those who did to qualify it.[136] This Note does not intend to delve deeply into the voluminous research that has been done on the original intent of the privilege. But, it should be noted that the assumption of every commentator, even those who would call for its revision and those who have disagreed as to its scope, has always been that the privilege was meant to be an absolute one.[137] This is not explicitly expressed in the early case law, but it is alluded to. In the *Burr Trial*, Chief Justice Marshall did treat the privilege as absolute, even though he ruled it a "settled maxim of law," making no mention of the Fifth Amendment.[138] At any rate, it does

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134. Kesavan & Paulsen, *supra* note 99, at 337 (claiming that the Founders "were conscientious draftsmen who generally paid attention to fine distinctions in drafting substantive provisions"). For another argument that the Founders were indeed precise, see H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885, 903 nn.88-90 (1985).

135. *See* Kesavan & Paulson, *supra* note 99, at 337-38 (discussing the "Committee of Style and Arrangement," which was formed "'to revise the style of and arrange the articles agreed to by the House'" (quoting 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 547 (Max Farrand ed., rev. ed. 1966))). The Committee oversaw matters such as spelling, punctuation, capitalization, and arrangement. *Id.* at 338. Professor Farrand alleges that Gouverneur Morris, chairman of the Committee, attempted to insert a semicolon surreptitiously into the Spending Clause—attempting to create a more independent General Welfare Clause—but was caught by Roger Sherman. *See* MAX FARRAND, THE FRAMING OF THE CONSTITUTION OF THE UNITED STATES 181-83 (1913). Farrand's evidence is from a 1789 speech by a congressman, but it is noticeably circumstantial. *See id.* Farrand claims that Madison commented on this attempt, and that Madison reasoned that punctuation should have not "the weight of a feather against the solid and diversified proofs which have been pointed out." 3 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 493 (Max Ferrand ed., rev. ed. 1966). This scenario is not improbable, and it illustrates the attention to detail paid by the drafters to punctuation as well as a modicum of concern for any syntactic ramifications of punctuation choices. It must be noticed that the Committee of Style did not review the *Bill of Rights* and therefore had no oversight over the drafting process of the Fifth Amendment.

136. *See supra* notes 28-32 and accompanying text.

137. *See, e.g.*, LEWIS MAYERS, SHALL WE AMEND THE FIFTH AMENDMENT? (photo. reprint 1978) (1959). Although claiming that the original intent of the scope of the privilege was much smaller than it is today, Mayers never argues that the Drafters ever contemplated the compulsory questioning of a criminal defendant. *Id.*

138. *See supra* note 29. This Note's contribution to this argument is to look at the Pennsylvania Constitution as amended, *see supra* note 18, which would, under this premise, read: "That he cannot be compelled to give evidence against himself . . . unless by the judgment of his peers, or the law of the land." This would be a somewhat nonsensical construction, though not

not seem to be anything that can be conclusively found either way; regardless, the totality of the evidence seems to weigh in favor of an absolute privilege.

5. Is It Rhetorical?

Finally, it seems most probable and reasonable that the punctuation of the Fifth Amendment, specifically the case of the missing semicolon, can be described best as rhetorical choice. This depends on what a semicolon meant to someone of the rhetorical, rather than syntactic, philosophy. Bishop Lowth provides an excellent reminder of this, explaining that punctuation embodies a "proportional quantity or time of the Points" which is quantified only "with respect to one another . . . by the following general rule: The Period is a pause in quantity or duration double of the Colon; the Colon is double of the Semicolon; and the Semicolon is double of the Comma."[139] He continues to explain, noting that the proportions "are in the same proportion to one another as the [whole note, half note, quarter note, and eighth note], in Music."[140]

Extending Lowth's theory of punctuation to the Fifth Amendment, we see that the Due Process Clause is the only clause to have been shortened from a "nor shall be" clause to a "nor be" clause.[141] This abbreviation, most likely for the stylistic reasons against repetition,[142] speeds up the pace between the Self-Incrimination Clause and the Due Process Clause.[143] By deleting part of the compound verb included in the other clauses, the Founders added a little variety to the text and in doing so probably noted that they quickened the pace of the latter half of the Amendment.[144] To compensate for the natural acceleration brought along by the abbreviation, they cut the pause time for breath in half—from that of one half of a period, to that of one fourth of a period—thereby forming the text and structure more closely to the natural cadence of the passage.[145]

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necessarily an impossible one.

139. LOWTH, *supra* note 51, at 158. Lowth, of course, was not the only one to see punctuation musically. *See supra* notes 63, 73.

140. LOWTH, *supra* note 51, at 158.

141. *See* U.S. CONST. amend. V.

142. *See* FOWLER & FOWLER, *supra* note 40, at 218-22 (explaining in detail the rhetorical effects of "elegant variation" as well as discussing the more appropriate uses of repetition).

143. In order to see this effect, one must read the Amendment oneself, both with the "shall" and without it. *See* U.S. CONST. amend. V.

144. *See supra* note 143.

145. *See* U.S. CONST. amend. V; *supra* note 63 and accompanying text (discussing the appropriate length of pauses).

B. *Reflections on the Possibilities*

Of the five possibilities, the most satisfactory one is the simplest one. The Founders were not lacking in any system of punctuation. Indeed, the opposite is true. The Founders were beset by competing and not necessarily wholly contradictory theories, in fact suffering from the existence of too many systems of punctuation.[146] It seems then that the Fifth Amendment is simply an example of a grammatical system long antiquated, but once vibrant and even dominant, a system of rhetorical punctuation that did indeed exist and that was in no way insulated from the drafters.[147]

V. MORE EXAMPLES IN THE CONSTITUTION

A. *Is West Virginia Unconstitutional?*

This Note is not the first work to comment upon and attempt to explain confusing punctuation in the Constitution; it is the first, however, to discuss rhetorical punctuation. These unapplied rhetorical concepts bear interpretive fruit when directed upon passages previously considered mysterious. For example, a recent paper by commentators Kesavan and Paulsen[148] discussed the punctuationally strange New States Clause:

> New States may be admitted by the Congress into this Union; but no new State shall be formed or erected within the Jurisdiction of any other State; nor any State be formed by the Junction of two or more States, or Parts of States, without the Consent of the Legislatures of the States concerned as well as of the Congress.[149]

The controversy here centers on the constitutionality of West Virginia, clearly formed within the jurisdiction of another state.[150] Interestingly, the interpretive problem here is the exact opposite of the self-incrimination conundrum. Instead of trying to turn a comma into a semicolon, here we feel as though we should treat a semicolon (the one after "State") like a comma, thereby validating West Virginia and conforming to common

146. *See supra* note 46 (discussing the fact that two distinct philosophies of punctuation were in tension and that both were obviously affecting the writers of the late eighteenth century).

147. *See supra* note 46 (connecting this movement to the Founders); *supra* notes 84-86 and accompanying text (discussing Jefferson).

148. *See* Kesavan & Paulsen, *supra* note 99, at 332-62.

149. U.S. CONST. art. IV, § 3, cl. 1.

150. *See* Kesavan & Paulsen, *supra* note 99, at 297-301.

sense.[151]

Kesavan and Paulsen put forth a complicated explanation for why the semicolon here actually acts as a comma, [152] but they never consider the possibility that this semicolon is a prime candidate for the category Partridge so eloquently named "the literary or 18th Century semicolon," used to denote "superfine elocutionary, or rhetorical, distinctions."[153] In fact, reading the passage with an eye toward its prosody, and not toward its syntax, makes such an explanation self evident; it was merely a pause for breath.

B. *The Humorous Crisis of Presidential Eligibility*

Another punctuation-based source of confusion stems from the awkwardly composed Presidential Eligibility Clause:

> No Person except a natural born Citizen, or a Citizen of the United States, at the time of the Adoption of this Constitution, shall be eligible to the Office of President . . . ."[154]

Professors Steiker, Levinson, and Balkin have argued, although not seriously, that the "at the time of the adoption" phrase ought to modify both "natural born Citizen" and "Citizen of the United States," effectively decreeing every president since Zachary Taylor unconstitutional.[155] Of course, under a strictly syntactic point of view this is quite proper.[156] Viewed from a historical and rhetorical perspective, however, common sense is no longer the only justification. Historical comma usage in the late eighteenth century was far higher and quite different than it is today.[157] Unlike modern usage, commas were inserted to mark almost any small

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151. *See id.* If the semicolon is treated like a comma, then it becomes syntactically possible to argue that states can be formed within the jurisdiction of another state—as long as there is consent of both Congress and the states involved.

152. Kesavan & Paulsen, *supra* note 99, at 362.

153. *See supra* notes 101, 103 and accompanying text (discussing the eighteenth-century semicolon).

154. U.S. CONST. art. II, § 1, cl. 5.

155. Jordan Steiker, Sanford Levinson & J.M. Balker, *Taking Text and Structure Really Seriously: Constitutional Interpretation and the Crisis of Presidential Eligibility*, 74 TEX. L. REV. 237, 243-46 (1995).

156. *Id.* Grammar amateurs are probably screaming out "doctrine of the last antecedent!" The doctrine, however, can be trumped by the placement of a comma, which is present not only here, but just before the Due Process Clause as well. *See* Kesavan & Paulsen, *supra* note 99, at 353; *see also* U.S. CONST. amend. V. Also, applying it would be another case of imposing syntactic grammar rules on what was never entirely syntactic. Kesavan and Paulsen thoroughly researched the rule in the context of the Constitution and found it was used quite inconsistently, if at all. *See* Kesavan & Paulsen, *supra* note 99, at 362.

157. *See supra* note 100.

pause, regardless of the syntax of the sentence.[158] Viewing the commas after "United States" as a tool for demarcating sound rather than sense, the eligibility "controversy" implodes.

C. *The Problem with the Supremacy Clause*

Commentators have raised an interesting punctuation issue in the Supremacy Clause, which reads:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.[159]

Looking at the punctuation from a syntactic view, it is apparent that the semicolon after "thereof" cannot be explained, for it is certainly not acting as a strong syntactic separator. If it were, the clause would be nonsensical. Kesavan and Paulsen, invoking common sense, see the semicolon as acting like a comma; but they offer no explanation for why the Founders would have used a semicolon and not a comma in the first place.[160] Instead, they argue that an eighteenth-century semicolon must simply have been mutable, depending on the "grammatical context."[161] Under a rhetorical-punctuation rubric, however, there is no mystery or vague "mutability" principle; the semicolon is not there to distinguish logically separate units, but is instead either for rhetorical effect or for the "exigencies of breathing."[162]

D. *The Other Fifth Amendment Ambiguity*

In addition to the Self-Incrimination Clause, the Fifth Amendment projects one other punctuation riddle. The first line reads:

> No person shall be held to answer for a capital, or otherwise

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158. *See supra* note 100.

159. U.S. CONST. art. VI, cl. 2.

160. *See* Kesavan & Paulsen, *supra* note 99, at 346.

161. *Id.* at 348.

162. *See* Ong, *supra* note 33, at 351, 359-60 (discussing Ong's theory that early punctuation was designed around the exigencies of breathing). As for the Supremacy Clause, with such a long sentence to read, and the slow pace of the clause, it seems reasonable to assume that the semicolon was chosen for its extended time value, giving the reader a bit longer to catch his breath until he or she reaches the next major pause.

> infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; . . . .[163]

The phrase, under present-day syntactic rules of punctuation, and just like the Eligibility clause, contains an ambiguous modification. The clause properly can be read to require a grand jury for military cases when there is no ongoing war or public danger. The Supreme Court ruled against this construction in 1895, admitting that it was "grammatically possible" but nevertheless contrary to common sense.[164] However, if the comma after "Militia" was added for prosodic or rhetorical value only, as it very well seems to have been, then the conclusion reached by the Court can remain the same, but the reasoning no longer must rely solely on common sense.[165]

VI. CONCLUSION

Though many justices, judges, and commentators have advocated a "free-form" interpretative method taking minimal account of text or history,[166] many still advocate some form of Textualism or another.[167] Even many liberal commentators have committed to taking text and structure really seriously.[168] But it is proponents of Textualism, or the "New Textualism," who have the most to learn from this exercise.[169] The

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163. U.S. CONST. amend. V.

164. Johnson v. Sayre, 158 U.S. 109, 114 (1895) ("That construction is grammatically possible. But it is opposed to the evident meaning of the provision . . . .").

165. For an explanation of the different uses of commas in the eighteenth century, see *supra* note 100.

166. *See* Tribe, *supra* note 9, at 1285-86 (discussing "the larger war on constitutional text and structure" waged by professors such as Bruce Ackerman and David Golove).

167. *See, e.g.*, ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 37-47 (1997).

168. *See* Tribe, *supra* note 9, at 1302-03 ("If the Constitution is law, and if we are trying to interpret that law, then the claim that a particular governmental practice . . . is efficacious, is consistent with democratic theory, and is in some popular or moral sense 'legitimate' just doesn't cut much ice when the question before us is whether that practice is constitutional. . . . [I]f it lacks basis in the text or structure of the Constitution, then we have no business proclaiming it a norm of constitutional law."). As Tribe's statement shows, a Textualist/Originalist, if he or she did *not* take into account historical differences in punctuation, could view the ambiguous evidence concerning the Fifth Amendment's original intent coupled with its apparent structure, and argue for a reinterpretation.

169. "New Textualism" is a term coined by Professor Eskridge to describe the recent revival of Textualism. *See* William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621, 623 (1990). Eskridge describes New Textualists as "seek[ing] a revival of canons that rest upon precepts of grammar and logic, proceduralism, and federalism." *See id.* at 663.

relevance of this inquiry becomes even more evident considering that the jurisprudence of statutory interpretation has seen "a mini-revival of the long-eschewed punctuation canon . . . [in which] the placement of every punctuation mark is potentially significant."[170] The Supreme Court has often been at the forefront of this revival, deciding a number of relatively recent cases largely, arguably entirely, on grammatical structure.[171]

Of course, the fact that the punctuation of the Constitution often can be hard to decipher does not lead inexorably to the conclusions of Professor McGreal—that there is no such thing as "Textualism."[172] The truth is, with a deeper understanding of eighteenth-century punctuation, a proper Texualist approach is just more complicated, requiring detailed investigation of antiquated concepts. But the intuitions of danger sensed by McGreal should nevertheless be obvious. Textualists armed with dictionaries and grammar books could seriously malign the original intent of the Constitution, imposing today's regularized syntactic punctuation onto the documents, effectively pushing a round peg into a square hole.[173]

The Constitution is a deceptive document. Written in modern English, it seems easy to read and understand, but that simplicity is only skin deep. Eric Partridge claims that "[p]unctuation is not something you introduce into writing. It is a part of writing. It is not an addition, but an

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170. *Id.* at 664. Of course, historical punctuation is not just relevant to constitutional analysis. As any law student knows, a large chunk of heavily invoked statutes date from many of the first Acts of Congress. These too should be analyzed with rhetorical punctuation in mind. There might even be more at stake here, since Textualists tend to be stricter with statutes than with the Constitution. *Id.* at 677.

171. *See, e.g.*, Moreau v. Klevenhagen, 508 U.S. 22, 32 (1993) ("Purely as a matter of grammar . . . ."); United States v. Idaho, 508 U.S. 1, 7 (1993) ("The argument of the United States is weak, simply as a matter of grammar . . . ."); Rowland v. Cal. Men's Colony, 506 U.S. 194, 205 (1993) ("[I]t would wrench the rules of grammar . . . ."); Int'l Primate Prot. League v. Adm'rs of Tulane Educ. Fund, 500 U.S. 72, 79-80 (1991) ("Several features of § 1442(a)(1)'s grammar and language support this reading. The first is the statute's punctuation. If the drafters of § 1442(a)(1) had intended the phrase 'or any agency thereof' to describe a separate category of entities endowed with removal power, they would likely have employed the comma consistently." (citation omitted)).

172. *See* McGreal, *supra* note 99, at 2393-94 (equating Textualism to the Loch Ness Monster).

173. *See* Lars Noah, *Divining Regulatory Intent: The Place for a "Legislative History" of Agency Rules*, 51 HASTINGS L.J. 255, 268 (2000) (discussing how Textualists "[a]rmed" with dictionaries and grammar books "can confidently cut through almost any seeming ambiguity in a statutory text," and noting that "[e]xcept in rare cases to confirm that an apparently absurd result was not in fact what the legislature had intended, the adherents of this approach, most notably Justice Scalia, adamantly refuse to consider a statute's legislative history"). For an interesting discussion on the supposed objectivity of Textualism, and Formalism in general, see Lyrissa Barnett Lidsky, *Detensor Fidei: The Travails of a Post-Realist Formalist*, 47 FLA. L. REV. 815, 827-28 (1995).

essential . . . ."[174] If the punctuation of the Constitution is an integral part of the document, just as important as the text itself, then it follows that our most fundamental document is written in a quasi-foreign language. Even more devious than if it were in a foreign language, it tempts us to believe we have mastered it. But it is not that this document can never be properly understood; things just get "lost in translation." Perhaps the answer is to rewrite the Constitution, "translating" it into modern punctuation. But what if punctuation continues to evolve? Educating judges on the niceties of rhetorical punctuation does not seem like a viable option either; we cannot expect them to learn such arcane material. Instead, we must recognize our limits, taking into account the vast differences between then and now and keeping those differences in mind whenever we make a textual argument about the Constitution.

And this does not mean the end of Textualism. It is as much the purpose of this Note to argue against Textualism as it is to argue for radical change in Fifth Amendment jurisprudence. But it *is* one purpose of this Note to showcase the irony that courts have likely preserved the original intent of the Constitution by rejecting *syntactically* correct arguments in favor of common sense. One commentator has noticed the "lack of attention" to constitutional grammar.[175] He feels that this "is distressing . . . ."[176] He is only half right.

174. ERIC PARTRIDGE, NOTES ON PUNCTUATION 1 (2d ed. 1956).
175. Smith, *supra* note 99, at 21.
176. *Id.*