Constitutional Law Comes Alive: An Innovative Approach 2e

CONSTITUTIONAL LAW COMES ALIVE: AN INNOVATIVE APPROACH 2E

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Contents

Accessibility Statement

This book is undergoing accessibility review at the time of publication (7/23)

Dedication

This book is dedicated to my parents, Bishop Annie J. Johnson, for her toughness and unapologetic loyalty, and Thurman L. Johnson (deceased), for his care, wit and philosophically engaging conversations.

To my siblings, The Johnson Corporation—Dr. OJ, SJ, SW, and DJ—for their willingness to vet, interview, and keep me honest.

To my two God daughters and son, love you guys—your amazing love gives me the strength I don't deserve!

To my husband, who ignited full growth, academic curiosity and encouraged racial and social justice—while loving me holistically.

A special thank you to our Manuscript Editor, Sonja Johnson. Her diligence and dedication to this project was overwhelmingly excellent.

Introduction

This book is meant to be a practical approach for those who desire to enact, enforce, and interpret the law.

This book is held to be a less intimidating and non-elitist approach to how one should view and use the freedoms, rights, and privileges in the United States Constitution (hereinafter "Constitution") and all other relevant sources.

Notice each chapter contains the actual verbiage or words of the Constitution. Please read these words aloud as most of us began interpreting the Constitution before we have actually read the words. We tend to confuse our favorable interpretations with the actual document; however, the document was meant to be used two-fold.

1. As a document of unity and a government of checks and balances between the federal and state (originally) and later individual rights.
2. As a living document meant to reflect the growing dynamic within our society.

As such, we must read it for what it was and let it develop and morph into what it can be.

Please take the time to read the words of the Constitution in its entirety, located in the Appendix, before relying upon what you have been told each section should mean to you. Additionally, concentrate on the legal definitions of the words in the actual Constitution; it will further your comprehension of the language. Meditate on how this impacts the words, then grapple with what meaning should be attributed to those specific words. You will notice in the Constitution that many of the Articles have sections. Similarly, this text attempts to mirror that structure by including "Parts" for the Amendments. The "Parts" are not included in the actual Constitution, but included in the text as another tool to assist in the reader's effort to understand the Amendments.

Let's begin!

Constitutional Law Comes Alive: An Innovative Approach

Chapter 1 - The Original United States Constitution & Its History - Part I

The Preamble, Article I, Article II

RICHARD J. FORST AND TAUYA R. FORST

LEARNING OBJECTIVES

After reading this chapter, you should be able to:

1.1 Define the unfamiliar terms in Article I and Article II.
1.2 Identify the parts which comprise the United States Constitution.
1.3 Summarize the barriers to ratification of the Constitution.
1.4 Explain the need for the creation of the preamble.
1.5 Describe the six goals set forth in the preamble.
1.6 Explain what the Bill of Rights is addressing that the original Constitution omitted.
1.7 List some of the landmark cases challenging the Bill of Rights.
1.8 Compare powers granted in Article I with those granted in Article II.
1.9 Explain how checks and balances apply to the Constitution.
1.10 Describe the four judicial modes of appointment.
1.11 Explain the Vesting Clause.
1.12 Interpret the Impeachment Clause.

KEY TERMS

Amendments

Articles of Confederation
Bicameralism
Bill of Rights
Checks and Balances
Chevron Deference
Congress
Constitution
Constitutional Convention
Doctrine of Incorporation
Executive/Executive powers
Impeachment
Vesting Clause

Historical Progression of Constitutional Interpretation

DATE	1776	1789	1791	1803	1857	1860	1863
EVENT	DECLARATION OF INDEPENDENCE	UNITED STATES CONSTITUTION RATIFIED	BILL OF RIGHTS RATIFIED	MARBURY v. MADISON	DRED SCOTT v. SANDFORD	ABRAHAM LINCOLN ELECTED PRESIDENT	LINCOLN SIGNS EMANCIPATION PROCLAMATIO
SIGNIFICANCE	American colonists declare independence from Great Britain	Replaces Articles of Confederation; establishes supremacy of central government, three branches of government, separation of powers	Limits power of federal government, guarantees individual rights and freedoms to the people	Establishes power of judicial review by Courts over laws and statutes that violate the Constitution	Held that blacks are not entitled to American citizenship	Anti-Slavery, pro-Union President elected, resulting in Southern states seceding from the Union	President declares that slavery is illegal, and all persons held as slaves must be free

Refer to this chart as you read each chapter of the textbook. It will provide the historical context needed to understand why the Constitution has been amended, and how it has been interpreted over time. Cases listed above are all opinions of the Supreme Court of the United States (SCOTUS).

INTRODUCTION TO PREAMBLE

Black's Law Dictionary defines a "constitution" as, "1. The entire plan or philosophy on which something is constructed. 2. The fundamental and organic law of a country or state that establishes the institutions and apparatus of government, defines the scope of governmental sovereign powers, and guarantees individual civil rights and civil liberties; a set of basic laws and principles that a country, state, or organization is governed by. 3. The written instrument embodying this fundamental law, together with any formal amendments."[1]

The original United States Constitution was planned, proposed, negotiated, created, and ultimately drafted by men. It was not a holy text that came down from on high on two tablets or through the words of a prophet inspired by the Creator. Instead, it was the product of human motivations and political considerations. As is true of any human creation, the Constitution was flawed. As Justice John Paul Stevens (2014) has noted, important imperfections in its text were the product of compromises that were certain to require that changes will be made in the future.[2] Changes or **amendments** as identified in the United States Constitution is defined by Black's Law Dictionary as "[a] formal and [usually] minor revision or addition proposed or made to a statute, constitution, pleading, order, or other instrument; [specifically], a change made by addition, deletion, or correction; [especially], an alteration in wording."[3] Hence, since its inception in 1789, the Constitution was amended 27 times, as well as interpreted and re-interpreted by Courts, Legislatures, and Executives ever since, over and over again.

So, how do we better understand this impressive document, the supreme law of the land in this country? Let's start at the very beginning.

PREAMBLE

We the ***People*** *of the United States, in order to form a* ***More Perfect Union****, establish* ***Justice****, insure domestic* ***Tranquility****, provide for the common* ***Defense****, promote the general* ***Welfare****, and secure the blessings of* ***Liberty*** *to ourselves and our* ***Posterity****, do ordain and establish this Constitution for the United States of America.*

A cropped and digitally modified version of the first page of the United States Constitution showing only the preamble.[4]

1. CONSTITUTION, Black's Law Dictionary (12th ed. 2024).
2. Stevens, J. J. P. (2014). *Six Amendments: How and Why We Should Change the Constitution*(Illustrated ed.). Little, Brown and Company.
3. AMENDMENT, Black's Law Dictionary (12th ed. 2024).
4. Constitutional Convention, derivative image by Hidden Lemon, Public domain, via Wikimedia Commons

CONSTITUTIONAL CLIP

The framers purposefully crafted a Preamble at the Constitutional Convention which is defined as "[a] deliberative assembly that consists of delegates elected or appointed from subordinate or constituent organizations within a state or national organization, or elected directly from the organization's membership or from defined geographic or other constituencies into which the membership is grouped, and that [usually] exercises the organization's highest policymaking authority."[5] The Preamble was both brief and vague. During the Civil War, the Southern states interpreted the three opening words to mean "We the States." But the framers, anticipating an ever-changing country, were careful to use the words "the People," rather than "the male white land owners" or "the qualified voters" to allow for future interpretations of "the People."[6]

In the Preamble, the framers of the Constitution set forth six goals:

1. Form a More Perfect Union
2. Establish Justice
3. Insure Domestic Tranquility
4. Provide for the Common Defense
5. Promote the General Welfare
6. Secure the Blessings of Liberty

5. CONVENTION, Black's Law Dictionary (12th ed. 2024).
6. Boorstin, D. J., & Boorstin, R. F. (1987). Hidden History: Exploring Our Secret Past (First Edition). HarperCollins.

ANALYSIS OF PREAMBLE

1. Form a More Perfect Union

A More Perfect Union Installation at the The Frances Young Tang Teaching Museum and Art Gallery at Skidmore College[7]

The United States, until 1787, was governed by the tenets of the Articles of Confederation. The **Articles of Confederation** was "[t]he instrument that governed the association of the 13 original states from March 1, 1781, until the adoption of the U.S. Constitution (September 17, 1787)."[8] After the Revolutionary War, the Articles of Confederation were ratified in 1781 with a sense of urgency. The Revolutionary War, fought from 1775 to 1783, was also known as the American Revolution or the American War for Independence. The war arose from growing tensions between residents of Great Britain's 13 North American colonies and the colonial government, which represented the British crown.[9] Under the Articles of Confederation, the states remained sovereign and independent, with Congress as the last resort to settle disputes between the states. **Congress or the United States Congress,** is defined as "The legislative body of the federal government, created under U.S. Const. art.

7. Installation view. Mel Ziegler. (2016). *A More Perfect Union* [Flag Exchange]. The Frances Young Tang Teaching Museum and Art Gallery at Skidmore College. Saratoga Springs, NY/USA.
8. ARTICLES OF CONFEDERATION, Black's Law Dictionary (12th ed. 2024).
9. History.com Editors. (2019, September 3). *Revolutionary War*. HISTORY. https://www.history.com/ topics/american-revolution/american-revolution-history

I, § 1 and consisting of the Senate and the House of Representatives."[10] The Articles did not give the central government the ability to levy taxes and regulate commerce.

As a result, the Founders of our country, such as George Washington, James Madison, Alexander Hamilton, and Benjamin Franklin, decided to meet for a Constitutional Convention in 1787. The Convention was held in secret in Philadelphia where its stated purpose was to "revise the Articles of Confederation," not to do away with them.[12] Franklin, never an alarmist by nature, nonetheless realized the significance of the moment. He wrote to Thomas Jefferson (then an ambassador to France) that from what he knew of the delegates, they seemed to be men of prudence and ability. Franklin remarked "I hope good from their meeting."[13] But the risks were great.

George Washington called the Confederation "little more than a shadow without the substance."[11]

> He added, "If it does ***not*** do good it ***must*** do harm, as it will show that we have not wisdom enough among us to govern ourselves, and will strengthen the opinion of some political writers that popular governments cannot long support themselves."[14]

10. CONGRESS, Black's Law Dictionary (12th ed. 2024).
11. Elkins, S., & McKitrick, E. (1993). *The Age of Federalism* (1st ed.). Oxford University Press, p. 43.
12. *Ibid*, p. 31.
13. Brands, H. W. (2002). *The First American: The Life and Times of Benjamin Franklin* (Reprint ed.). Anchor, p. 653.
14. *Ibid*.

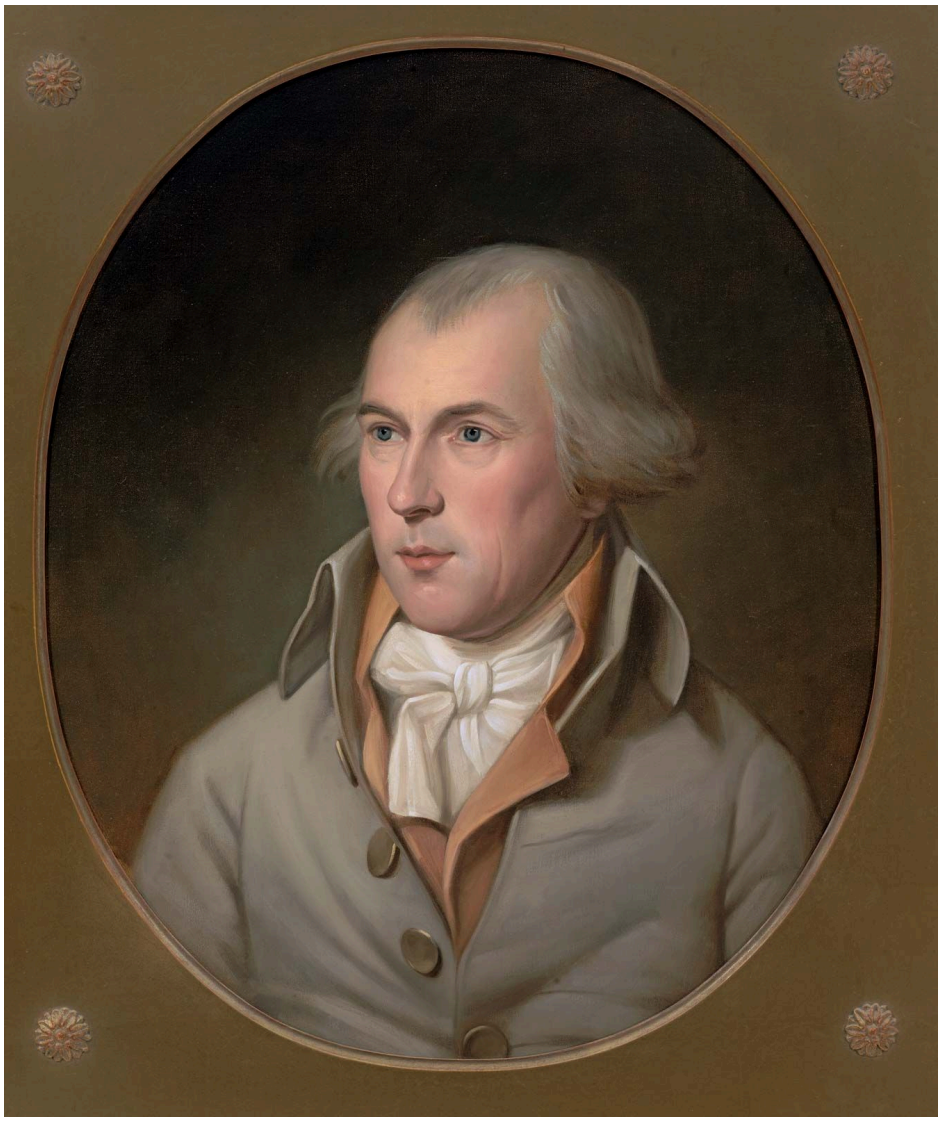
Benjamin Franklin – American author, scientist, and statesman[15]

At the time of the Convention, the effective power in the country was dispersed and located in several states, "controlled by ruling groups not at all anxious to see that power diminished."[16] This dispersion of power resulted in unending battles between the states over trade, tariffs, and debts, all of which greatly concerned the Founders. Commercial disputes among the States, which Madison described to Thomas Jefferson as "the anarchy of our commerce," were symptomatic of underlying flaws in the political framework of the Articles of Confederation.[17] But Madison had a solution in mind.

> "Kowal and Codrington's text makes clear that the beauty of this nation's history is that even in times of deep division and extreme partisanship, citizens can band together to expand democracy and improve

15. Hornberger, T., & Wood, G. S. (2023, July 17). *Benjamin Franklin | Biography, Inventions, Books, American Revolution, & Facts*. Encyclopedia Britannica. https://www.britannica.com/biography/Benjamin-Franklin#/media/1/217331/232438
16. Elkins & McKitrick, 1993, p. 31.
17. *Ibid*.

our governance by amending the Constitution. Our democracy clearly demands that the residents of the territories be included in the democratic process of the federal government. *The People's Constitution* provides the tools to achieve that goal, and also highlights potential pitfalls for this endeavor."[18] It is now up to all of us to pick up the burden of democracy and continue working toward the promise of "a more perfect Union."[19]



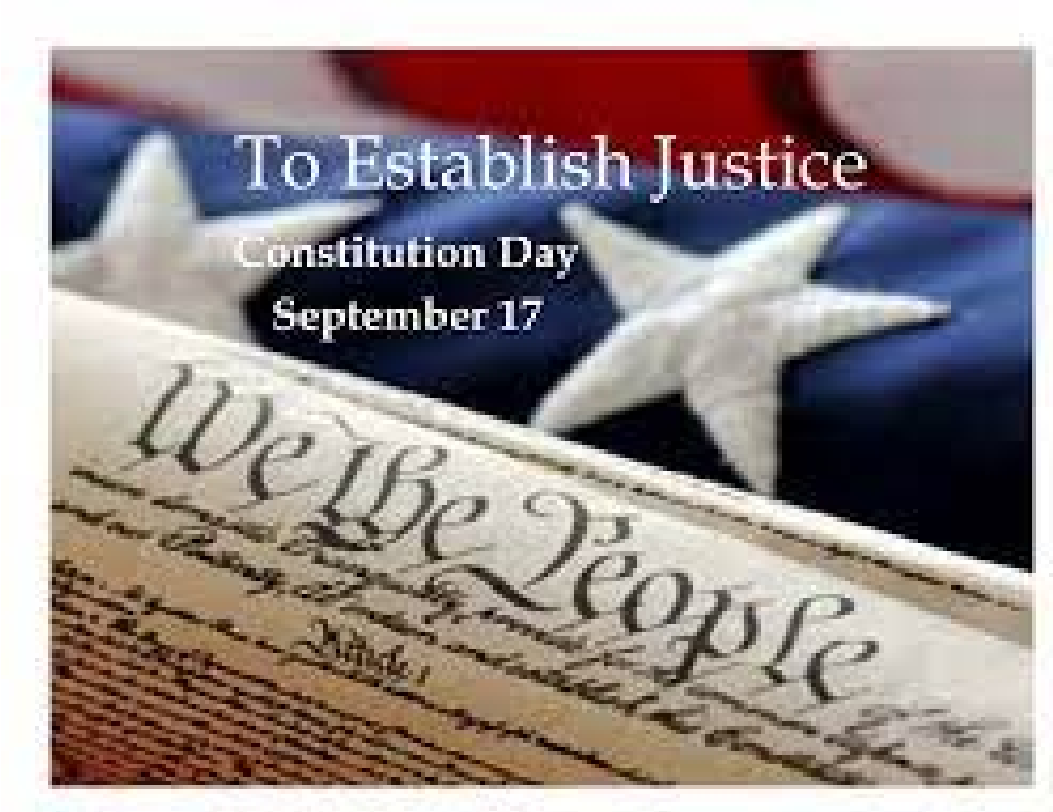
James Madison – 4th President of the United States, 1809-1817[20]

18. Anwarzai, I., & Review, C. L. (2023, April 28). A MORE PERFECT UNION FOR WHOM? *Columbia Law Review*. https://columbialawreview.org/content/a-more-perfect-union-for-whom/
19. Anwarzai, I., & Review, C. L. (2023, April 28).
20. Brant, I. (2023, June 30). *James Madison | Biography, Founding Father, presidency, & accomplishments*. Encyclopedia Britannica. https://www.britannica.com/biography/James-Madison#/media/1/355859/227446

James Madison's great contribution "consisted of a master theory and a master plan." The plan was "Federalism," that is, national supremacy.[21]

This plan for national supremacy would prove to be far more than mere revision of the Articles, and the Framers knew ratification would require some finesse. The Convention was held in secret because there was no popular will and consensus in favor of it. The popular will had to be "sought, cultivated, and labored after."[22] Under the Articles of Confederation, each state was represented equally in Congress, whether their populations were large or small. Smaller states intended to preserve that system. In fact, the Delaware delegates were forbidden by their State to agree to any change. But at the Convention, Benjamin Franklin submitted a compromise motion to create two houses of the legislature: (1) The higher to allow each state equal representation and (2) The lower to allow for proportionate representation in each state, so that states with larger populations would have the greater power to legislate.[23] With this change, Delaware became the first state to ratify the Constitution.

2. Establish Justice



United States Courts Constitution Day 2012[24]

21. Elkins & McKitrick, 1993, p. 83.
22. *Ibid*, p.31.
23. Brands, 2002, p. 681-682.
24. United States Courts. (2012). *To establish justice*. uscourts.gov. Retrieved July 31, 2023, from https://www.uscourts.gov/sites/default/files/constitution-day-2012-preamble_0.pdf

Ironically, after boldly setting forth "Establish Justice" as the second goal of the Constitution, the Framers purposefully limited the franchise by excluding the majority of adults from voting. Only white male landowners were enfranchised. Interestingly, Benjamin Franklin was the primary drafter of the Pennsylvania State constitution. This document was considered radical for its time because it granted voting rights to ALL white men, not just the wealthy and landowning class.[25]

The 1790 Census revealed that 17.8% of the population was enslaved, and therefore, disenfranchised.[26] According to Black's Law Dictionary, **disenfranchise** means "[t]o deprive (someone) of a right, [especially] the right to vote; to prevent (a person or group of people) from having the right to vote."[27] About half of the remaining population were women, who did not partially gain the right to vote until the 19th Amendment was ratified in 1920.[28] Furthermore, "Jim Crow" laws enacted after the passage of the 15th amendment created insurmountable barriers to voting. By the late 1870s, discriminatory practices were used to prevent black men from exercising their right to vote, especially in the South.[29] After the Voting Rights Act of 1965, legal barriers which denied Black Americans their right to vote under the 15th Amendment were outlawed at the state and local levels.[30] *(Note: Sections 4(b) and 5, the enforcement and preclearance provisions of the Voting Rights Act, required states to seek preclearance by the United States Department of Justice for changes in their voting procedures were found to be unconstitutional by the Supreme Court in Shelby County v. Holder, 133 S. Ct. 2612 (2013). As a result, in 2021, nineteen states enacted laws establishing voting restrictions that under the Voting Rights Act of 1965, would have required preclearance. In the first 25 days of 2023, 32 states introduced at least 150 bills aimed at making it harder to vote.)*[31]

CONSTITUTIONAL CLIP

Fascinating Facts About The Constitutional Convention.

- **Of the 55 delegates from the American colonies, 31 were lawyers.**[32]

25. Waldman, M. (2022). *The fight to vote*. Simon & Schuster.
26. Gibson, C., & Jung, K. (2002, September). *Historical Census Statistics on Population Totals by Race, 1790 To 1990, and by Hispanic Origin, 1970 to 1990, For the United States, Regions, Divisions, and States*. U.S. Census Bureau. https://www.census.gov/content/dam/Census/library/working-papers/2002/demo/POP-twps0056.pdf
27. DISENFRANCHISE, Black's Law Dictionary (12th ed. 2024).
28. *Ibid.*
29. Alexander, M. (2020). *The New Jim Crow (Mass Incarceration in The Age of Colorblindness – 10th Anniversary Edition)* (1st ed.). New Press.
30. *Ibid.*
31. Swasey, B. (2021, September 7). *Map: See which states have restricted voter access, and which states have expanded it*. NPR. Retrieved August 17, 2022, from https://www.npr.org/2021/08/13/1026588142/map-see-which-states-have-restricted-voter-access-and-which-states-have-expanded
32. Boorstin & Boorstin, 1987, p. 73.

- Two founding fathers and future Presidents were not at the Convention and did not sign:
  - Thomas Jefferson was ambassador to France.
  - John Adams was ambassador to Great Britain.
  - The only future Presidents to sign were James Madison and George Washington.
  - According to Meacham (2013), Jefferson wrote to Adams, "It is really an assembly of demigods" (p. 211).[33]
- The Convention ended when 39 delegates from 12 states signed the Constitution. Alexander Hamilton was the only one of the three New York delegates to sign.[34]

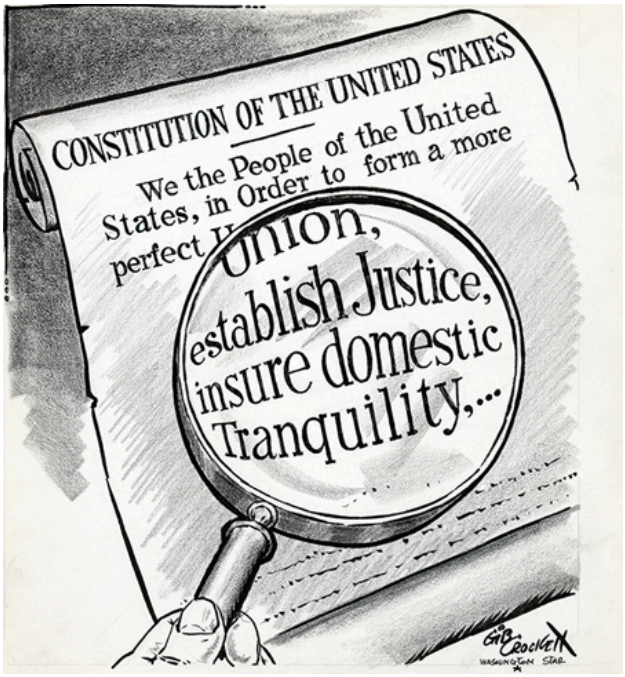
According to the 2010 Census, 72.4% of the population were white and roughly half of those were male.[35] Note that the majority of white voters have supported the Republican candidate in every presidential election since 1968 (while Democratic candidates have won the popular vote in 7 of the last 8 presidential elections).[36] If only white male landowners were allowed to vote in the modern era, as was the case in 1790, Republicans would easily capture the White House and control of Congress in one election after another. If Americans had the same structure in place as the country had at the time of ratification of our Constitution, we would likely not recognize our own country today.

The words "democracy" and "slavery" do not appear in the original Constitution.

But the delegates to the Convention recognized the existence and legitimacy of slavery by including a compromise between the slave-owning states and those with few slaves, counting slaves as 3/5 of a person for representation purposes.[37] In 1800 the 3/5 compromise was a slave "bonus" which gave presidential candidate Thomas Jefferson of Virginia more than the eight votes that provided his margin of victory over John Adams of Massachusetts in the Electoral College. This margin solidified Jefferson as our third President.[38] The word "slavery" first appeared in the Thirteenth Amendment, enacted in 1865. The issue was so explosive at the Convention that the word "slavery" did not appear in the final document, replaced by the euphemism of people "held to service or labor."[39]

33. Meacham, J. (2013). *Thomas Jefferson the art of power.* Random House Trade Paperbacks.
34. Chernow, R. (2005). Alexander Hamilton. Penguin Books, p. 241.
35. US Census Bureau. (2021, May 18). *Decennial Census by Decades.* The United States Census Bureau. https://www.census.gov/programs-surveys/decennial-census/decade.html
36. Britannica, T. Editors of Encyclopaedia (2017, February 3). *United States Presidential Election Results*. Encyclopedia Britannica. https://www.britannica.com/topic/United-States-Presidential-Election-Results-1788863
37. Brands, 2002, p. 688-689.
38. Stevens, 2014, p. 6.
39. Chernow, 2005, p. 239.

3. Insure Domestic Tranquility



Learning from the Source: Preamble to the Constitution Image Sequencing[40]

Delegates to the Constitutional Convention had a financial interest in the establishment of a stable federal government.[41] The country was virtually bankrupt as the federal government and state governments found it impossible to retire the gargantuan debt inherited from the Revolutionary War concluded just a few years earlier. Commercial disputes among the States were symptomatic of underlying flaws in the political framework of the Articles of Confederation.[42] Correcting those flaws became the primary motivation for delegates to convene in Philadelphia.

The Framers foresaw the perils of requiring a supermajority (60% or 67%) to pass legislation in Congress, and elected to require only a bare majority in both chambers of Congress.[43] The Senate began to require a supermajority to cut off debate (the "filibuster") in 1837, five decades after the Constitutional Convention. The Articles of Confederation had required a supermajority vote for most categories of legislation, which paralyzed the government. In Federalist 22, Alexander Hamilton addressed this, noting, "What at first sight might seem a remedy, is in reality a poison."[44] The Senate's supermajority requirement persists to this day. Many legislators continue to advocate for a return to majority rule as more legislation passes in the House but dies in the Senate for lack of supermajority support.[45]

40. *Learning from the Source: Preamble to the Constitution Image Sequencing | Citizen U Primary Source Nexus*. (2017, September 14). https://primarysourcenexus.org/2017/09/learning-source-preamble-constitution-image-sequencing/
41. Beard, C. A. (1913). *An Economic Interpretation of the Constitution of the United States.* The Lawbook Exchange, Ltd.
42. Chernow, 2005, p. 236-238.
43. U. S. Const. Art. I, §5.
44. *The Avalon Project: The Federalist Papers.* (2008). The Federalist Papers: No. 22. https://avalon.law.yale.edu/18th_century/fed22.asp, para. 10.
45. Klein, E. (2021, February 12). *The Senate Is Making a Mockery of Itself.* The New York Times. https://www.nytimes.com/2021/02/12/opinion/ezra-klein-podcast-adam-jentleson.html

CONSTITUTIONAL CLIP

Adam Jentleson, a former deputy chief of staff to Senator Harry Reid, states one of the biggest misconceptions about the filibuster, is that it encourages bipartisanship. Further, he states that in fact the filibuster does the opposite because it gives the party that's out of power the means, motive and opportunity to block the party that's in power from getting anything done.[46]

4. Provide for the Common Defense

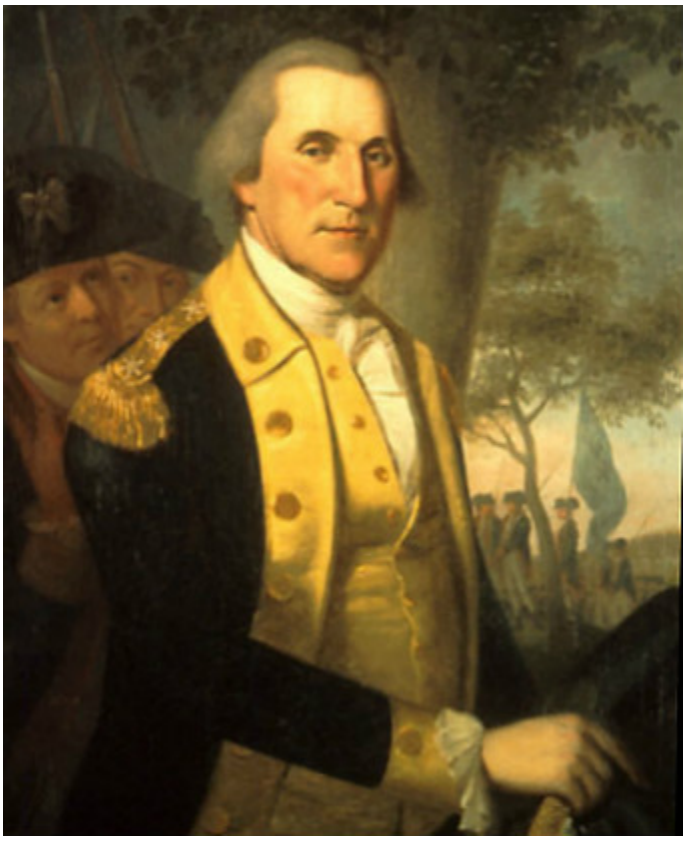
Common Defence[47]

The delegates to the Convention quickly and unanimously chose General George Washington to be the president of the Convention.[48] He was a past commander of the victorious Continental Army who secured America's independence from Great Britain.[49] The delegates recognized that providing for the common defense started with resolving the issue of executive authority, which was dangerously lacking under the Articles of Confederation. For four long months prior to the actual Convention, the best

46. *Ibid.*
47. *Common defence*. (n.d.). Retrieved July 31, 2023, from https://www.washingtonpost.com/wp-apps/imrs.php?src=https%3A%2F%2Fpodcast.posttv.com%2Fpodcast%2F20191205%2Ft_1575549799227_name_CommonDefence_Social.jpg&w=536
48. Elkins & McKitrick, 1993, p. 44-45.
49. *Ibid.*

minds in the country met with Washington and spelled out in great detail what the country thought it needed in the way of executive authority. Additionally, they pondered the limits on the authority that the country might be expected to insist on during debate for ratification. The balance struck by the delegates was almost certainly arrived at from what they already knew of Washington.

George Washington – 1st President of the United States of America, 1789-1797, National Park Service, Independence National Historical Park [50]



Alexander Hamilton argued for a chief executive to be elected for life (by white male landowners).[52] Benjamin Franklin argued for executive power to be shared by an executive council.[53] The **executive power** is defined as "[t]he power to see that the laws are duly executed and enforced. Under federal law, this power is vested in the President; in the states, it is vested in the governors. The President's enumerated powers are found in the U.S. Constitution, art. II, § 2; governors' executive powers are provided for in state constitutions."[54] Other delegates argued for a single seven-year term for the executive. The delegates compromised with a four year term renewable by election of the electoral college and the compromise remains today.[55]

The executive powers probably would have been more limited had the delegates disagreed with Washington as the executive.[51]

50. *George Washington (U.S. National Park Service)*. (n.d.). https://www.nps.gov/people/georgewashington.htm
51. *Ibid.*
52. Brands, 2002, p. 679-680.
53. *Ibid.*
54. EXECUTIVE POWER, Black's Law Dictionary (12th ed. 2024).
55. *Ibid.*

Having now resolved the issue of executive terms, the delegates remained sensitive to the popular distrust of sovereign authority. After all, sovereign authority prompted the American rebellion against the British king. The delegates sought to limit the power of the executive and balance it with the power of the people's elected representatives in the legislature. Thus, they required the executive to seek the "advice and consent" of one branch of the legislature, the Senate, before concluding a treaty with a foreign power.[56] The procedure by which this would occur was not plainly stated, and this was promptly put to the test.

Washington, in August of 1789, sent a message to the Senate that he would meet the Senate the next day "to advise with them on the terms of the treaty to be negotiated with the Southern Indians."[57] After he read a report that Washington carefully prepared, Vice-President John Adams asked the Senate, "Do you advise and consent?"[58] To Washington's frustration, the Senators responded with silence.[59] They appointed a committee to study the matter, met again with Washington the following week, and the Senators promptly gave their consent. It became apparent from this episode that the "advise and consent" power actually was not advice at all, but merely whether to consent or not. From that point forward, no Presidents met with the Senate to discuss treaty negotiations.[60]

The delegates purposefully divided the power of war between the executive and the legislature. Article I, §8 gives Congress the power to declare war and raise and support the armed forces. Article II, §2 appointed the President as Commander in Chief of the armed forces of the country. The tension between these two powers has caused debates about the extent of executive power to conduct wars throughout American history.

James Madison later insisted, "No Constitution ever would have been adopted if the debates were made public."[61]

56. U.S. Const. Art. I, §2.
57. Elkins & McKitrick, 1993, p. 56-57.
58. *Ibid.*
59. *Ibid.*
60. *Ibid.*
61. Beeman, R. (2009). *Plain, honest men: The Making of the American Constitution*. Random House, p. 83.

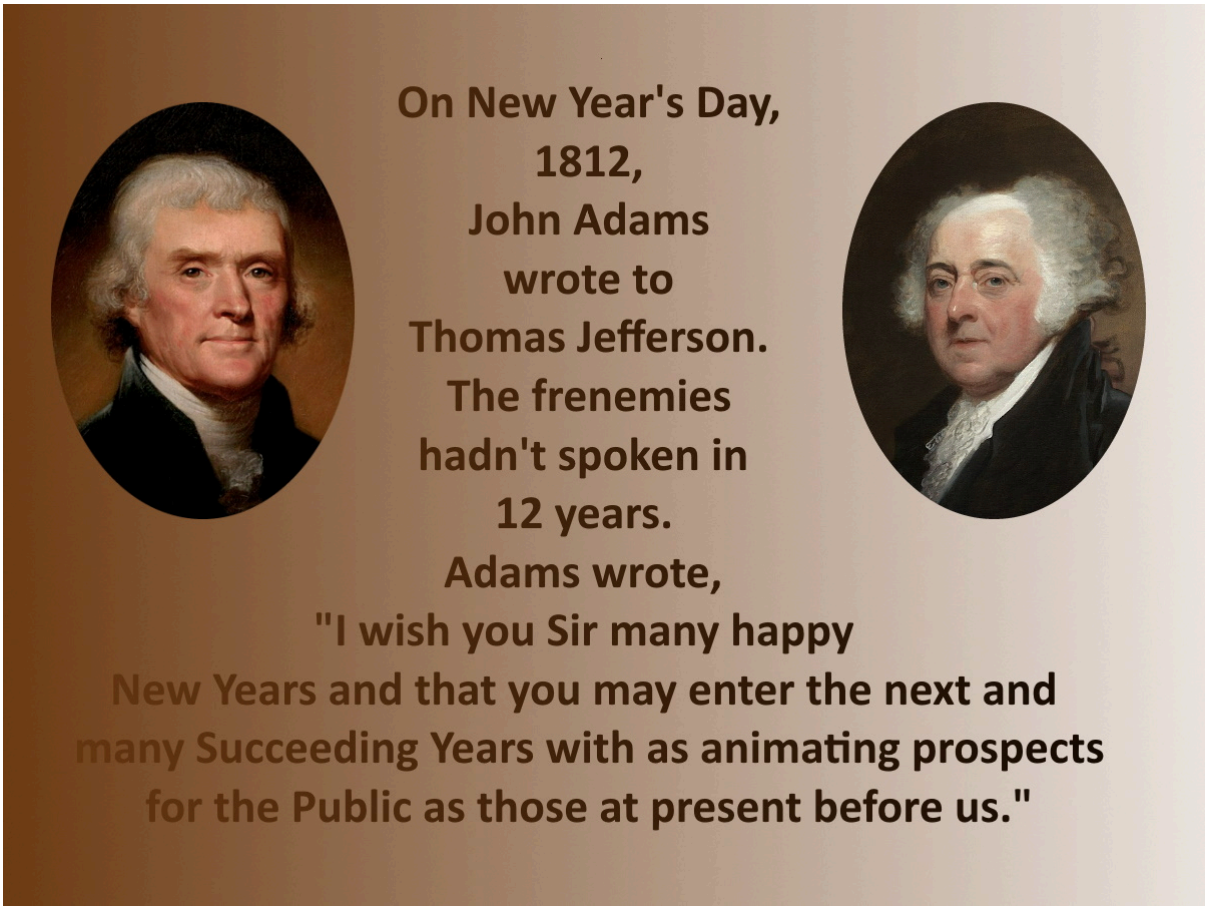
5. Promote the General Welfare

Promote the General Welfare[62]

Recall, Benjamin Franklin submitted a compromise motion at the Constitutional Convention to create two houses of the legislature. The higher house to allow each state equal representation, while the lower would allow for proportionate representation in each state. This compromise gave states with larger populations greater power to legislate. But James Madison countered, "The plan now to be formed will almost certainly be defective, as the Confederation has been found on trial to be. Amendments will therefore be necessary, and it will be better to provide for them, in an easy, regular and Constitutional way than to trust in chance and violence."[63] Madison pointed to the experience in drafting State Constitutions. In Madison's home state of Virginia, the leaders there were first to enact a Constitution. Unfortunately, Virginia allowed for no amendments. Although defects were apparent in the document, there were no provisions for its leaders to do anything about it. Thus, Article V was made part of the Constitution.[64]

Article V of the Constitution provides two ways to propose amendments to the document. Amendments may be proposed either by the Congress, through a joint resolution passed by a two-thirds vote, or by a convention called by Congress in response to applications from two-thirds of the state legislatures. There have been over 11,000 amendments proposed since 1789, of which 27 have been ratified.[65]

62. *Sources*. (n.d.). The Preamble. https://preambleassignment.weebly.com/sources.html
63. Boorstin & Boorstin, 1987, p. 188.
64. *Ibid*.
65. United States Senate. (n.d.). *Measures Proposed to Amend the Constitution*. https://www.senate.gov/ legislative/ MeasuresProposedToAmendTheConstitution.htm



John Adams, 2nd President of the United States, 1797-1801 (on the right) Wishes Thomas Jefferson, 3rd President of the United States, 1801-1809, 'Many Happy New Years'[66]

CONSTITUTIONAL CLIP

John Adams upon reading the final draft of the Constitution to be presented to the States for ratification wrote to Thomas Jefferson. "What think you of a Declaration of Rights? Should not such a thing have preceded the model?"[67] Jefferson wrote Adams, but said nothing about a bill of rights. His great concern was the office of the President, which struck him as "a bad edition of a Polish king...I wish that at the end of the four years, they made him ever ineligible a

66. *John Adams wishes Thomas j=Jefferson 'Many happy new years.'* (n.d.). New England Historical Society. Retrieved July 31, 2023, from https://newenglandhistoricalsociety.com/wp-content/uploads/2014/01/adams-jeff.jpg
67. McCullough, D. (2002). *John Adams* (1st Touchstone ed.). Simon & Schuster, p. 379-380.

second time."[68] Adams responded, "You are afraid of the one, I, the few...You are apprehensive of monarchy, I, of aristocracy. I would therefore have given more power to the President and less to the Senate."[69]

6. Secure the blessings of Liberty

Secure the blessings of Liberty[70]

The framers understood that the central fact of civic life, by which every political collision and its outcome could be understood, was the irreconcilable antimony of liberty and power. Power is by its nature aggressive, encroaching, unstable; liberty is passive, exposed, and subvertible. The lust for power, left unrestrained, is the most dangerous of human appetites; the safeguarding of liberty (or law, or right) requires unsleeping vigilance, virtue and will.[71]

In the closing days of the Constitutional Convention, after all the major compromises were made and the form essentially set, George Mason of Virginia had proposed that the new Constitution be prefaced by a bill of rights. The **Bill of Rights** is defined as "[a] section or addendum, [usually] in a constitution, defining the situations in which a politically organized society will permit free, spontaneous, and individual activity, and guaranteeing that governmental powers will not be used in certain ways; [especially], the first ten amendments to the U.S. Constitution."[72] It was voted down. It had been a long hot Philadelphia summer, in a world without air conditioning, but Mason drafted a set of objections to the Constitution which were subsequently printed and circulated throughout

68. *Ibid.*
69. *Ibid.*
70. *Blessings of Liberty Tour*. (2022, May 28). The Constitution Study. https://constitutionstudy.com/blessings-of-liberty-tour/
71. Elkins & McKitrick, 1993.
72. BILL OF RIGHTS, Black's Law Dictionary (12th ed. 2024).

all the states.[73] In the battle for ratification of their Constitution in the months that followed, the delegates found again and again that the point at which they were most vulnerable was their neglect of a bill of rights. The compromise was reached in Massachusetts, then other states were to ratify the Constitution with a list of recommended rights, largely drafted by James Madison.[74]

73. *Ibid.*
74. *Ibid.*

George Mason, United States Statesman[75]

The result—involving freedom of speech, press, and conscience, trial by jury, security of person and property, and various other rights—was referred to a committee for much debate and finally passed by both houses of Congress in late September of the same year, and then ratified as the first Ten Amendments of the Constitution two years later.[76]

BILL OF RIGHTS

"'The People" [of the United States] have made twenty-seven distinct modifications (better known as amendments). Some of those amendments were aimed at curing procedural deficiencies, while others acknowledged the humanity of an entire segment of the North American population, which was consciously denied by the Constitution's Founders, text, and judicial interpretations of the same.[77]

Amendment I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

Amendment II

A well-regulated militia, being necessary to the security of a free state, the right of the people to keep and bear arms, shall not be infringed.

Amendment III

No soldier shall, in time of peace be quartered in any house, without the consent of the owner, nor in time of war, but in a manner to be prescribed by law.

Amendment IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Amendment V

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

75. The Editors of Encyclopaedia Britannica. (1998, July 20). *George Mason | Founding Father, Virginia Statesman*. Encyclopedia Britannica. https://www.britannica.com/biography/George-Mason#/media/1/368028/141512

76. Elkins & McKitrick, 1993.

77. Anwarzai, I., & Review, C. L. (2023, April 28). A MORE PERFECT UNION FOR WHOM? *Columbia Law Review*. https://columbialawreview.org/content/a-more-perfect-union-for-whom/

service in time of war or public danger; nor shall any person be subject for the same offense 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.

Amendment VI

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.

Amendment VII

In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any court of the United States, than according to the rules of the common law.

Amendment VIII

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Amendment IX

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

Amendment X

The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people.

Drafted by the majority of the delegates, the Constitution did not receive unanimous support. But, in order to encourage the states to unanimously ratify the result, the delegates agreed to the following statement: "Done in Convention, by the unanimous consent of the States present the 17th of September."[78] George Washington signed first, followed by 37 others, state by state. Thus the infant Constitution was presented to the 13 states for ratification in 1787. Proponents of the Constitution (*the "Federalists"*), namely, Hamilton, Madison and John Jay (soon to be our first Chief Justice) drafted closely reasoned essays in support of this effort to implement a strong central government known as "*The Federalist Papers.*"[79] Madison's addition of a Bill of Rights proved to be crucial to ratification by the states, as the Rhode Island and North Carolina legislatures overcame their initial reservations and notified Washington that they were satisfied by the guarantees of individual rights.[80]

78. *Ibid.*
79. *Ibid.*
80. *Ibid.*

CONSTITUTIONAL CLIP

The Convention provided a positive answer to the question that Alexander Hamilton, in defending the new Constitution, had pondered in Federalist No. 1. "Whether societies of men are really capable or not of establishing good government from reflection and choice, or whether they are forever destined to depend for their political constitutions on accident and force."[81]

INTRODUCTION TO THE CONSTITUTION

The first Ten Amendments of the Constitution, the "Bill of Rights," were originally conceived as limitations on the powers of the newly created national government. Under this original conception of the Bill of Rights, citizens seeking legal protections against actions of state and local governments looked to their state constitutions and courts for relief, as the Supreme Court held in *Barron v. Baltimore* (1833).[82] However, over the course of the past 125 years, the Supreme Court has extended the Bill of Rights to the states in a series of cases, on the basis of the "**Doctrine of Incorporation.**" Through this doctrine the provisions of the Bill of Rights were incorporated within the Due Process Clause of the Fourteenth Amendment. The **Doctrine of Incorporation or incorporation doctrine** is defined as "[t]he incorporation doctrine is a constitutional doctrine through which parts of the first ten amendments of the United States Constitution (known as the Bill of Rights are made applicable to the states through the Due Process clause of the Fourteenth Amendment. Incorporation applies both substantively and procedurally."[83] For example, in *Wolf v. Colorado* (1949), the Court held that the freedom from unreasonable searches and seizures is "***implicit in the concept of ordered liberty***" and as such enforceable against the States through the Fourteenth Amendment.[84]

81. Vile, J. R. (2016). Constitutional convention of 1787. In S. Schechter (Ed.), American Governance (1st ed.). Macmillan Reference.
82. *Barron v. Baltimore*, 32 U.S. 243 (1833).
83. *Incorporation doctrine*. (n.d.). LII / Legal Information Institute. https://www.law.cornell.edu/wex/incorporation_doctrine.
84. *Wolf v. Colorado*, 338 U.S. 25, 27-28 (1949).

The following is a list of all the Supreme Court incorporation cases, and the relevant Amendment thereby enforced against the States:

First Amendment protections of free speech and free press, *Gitlow v. New York,* 268 U.S. 652 (1925).

First Amendment protection of free exercise of religion, *Cantwell v. Connecticut,* 310 U.S. 296 (1940).

First Amendment establishment of religion, *Everson v. Board of Education,* 330 U.S. 1 (1947).

First Amendment freedom of assembly, *DeJonge v. Oregon,* 299 U.S. 353 (1937).

First Amendment right to petition for redress of grievances, *Edwards v. South Carolina*, 372 U.S. 229 (1963).

Second Amendment right to keep and bear arms, *McDonald v. Chicago,* 561 U.S. 3025 (2010).

Fourth Amendment protection against unreasonable searches and seizures, *Wolf v. Colorado,* 338 U.S. 25 (1949).

Fourth Amendment exclusionary rule, *Mapp v. Ohio,* 367 U.S. 643 (1961).

Fifth Amendment right to just compensation for seizing private property, *Chicago, B & Q RR v. Chicago,* 166 U.S. 226 (1897).

Fifth Amendment privilege against self-incrimination, *Malloy v. Hogan,* 378 U.S. 1 (1964).

Fifth Amendment double jeopardy clause, *Benton v. Maryland,* 395 U.S. 784 (1969).

Sixth Amendment right to counsel: *Powell v. Alabama,* 287 U.S. 45 (1932). The "Scottsboro Boys" case.

Sixth Amendment right to a public trial, *In Re Oliver,* 333 U.S. 257 (1948).

Sixth Amendment counsel for indigent defendants, *Gideon v. Wainwright,* 372 U.S. 335 (1963).

Sixth Amendment right to confront witnesses against you, *Pointer v. Texas,* 380 U.S. 400 (1965).

Sixth Amendment right to a speedy trial, *Klopfer v. North Carolina,* 386 U.S. 213 (1967).

Sixth Amendment right to compulsory process, *Washington v. Texas,* 388 U.S. 14 (1967).

Sixth Amendment right to a jury trial, *Duncan v. Louisiana,* 391 U.S. 145 (1968).

Sixth Amendment right to an impartial jury, *Duncan v. Louisiana,* 391 U.S. 145 (1968).

Eighth Amendment right against cruel and unusual punishment, *Robinson v. California,* 370 U.S. 660 (1962).

**Highlighted sections indicate changes identified in other parts of the Constitution of the United States.*

Legislative Branch

Article I

Signed in convention September 17, 1787. Ratified June 21, 1788. A portion of Article I, Section 2, was changed by the 14th Amendment; a portion of Section 9 was changed by the 16th Amendment; a portion of Section 3 was changed by the 17th Amendment; and a portion of Section 4 was changed by the 20th Amendment.

Section 1: Congress

All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

Section 2: The House of Representatives

The House of Representatives shall be composed of Members chosen every second Year by the People of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature.

No Person shall be a Representative who shall not have attained to the Age of twenty five Years, and been seven Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State in which he shall be chosen.

Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons. The actual Enumeration shall be made within three Years after the first Meeting of the Congress of the United States, and within every subsequent Term of ten Years, in such Manner as they shall by Law direct. The number of Representatives shall not exceed one for every thirty Thousand, but each State shall have at Least one Representative; and until such enumeration shall be made, the State of New Hampshire shall be entitled to chuse three, Massachusetts eight, Rhode-Island and Providence Plantations one, Connecticut five, New-York six, New Jersey four, Pennsylvania eight, Delaware one, Maryland six, Virginia ten, North Carolina five, South Carolina five, and Georgia three.

When vacancies happen in the Representation from any State, the Executive Authority thereof shall issue Writs of Election to fill such Vacancies.

The House of Representatives shall chuse their Speaker and other Officers; and shall have the sole Power of Impeachment.

Section 3: The Senate

The Senate of the United States shall be composed of two Senators from each State, chosen by the Legislature thereof, for six Years; and each Senator shall have one Vote.

Immediately after they shall be assembled in Consequence of the first Election, they shall be divided as equally as may be into three Classes. The Seats of the Senators of the first Class shall be vacated at the Expiration of the second Year, of the second Class at the Expiration of the fourth Year, and of the third Class at the Expiration of the sixth Year, so that one third may be chosen every second Year; and if Vacancies happen by

Resignation, or otherwise, during the Recess of the Legislature of any State, the Executive thereof may make temporary Appointments until the next Meeting of the Legislature, which shall then fill such Vacancies.

No Person shall be a Senator who shall not have attained to the Age of thirty Years, and been nine Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State for which he shall be chosen.

The Vice President of the United States shall be President of the Senate, but shall have no Vote, unless they be equally divided.

The Senate shall chuse their other Officers, and also a President pro tempore, in the Absence of the Vice President, or when he shall exercise the Office of President of the United States.

The Senate shall have the sole Power to try all Impeachments. When sitting for that Purpose, they shall be on Oath or Affirmation. When the President of the United States is tried, the Chief Justice shall preside: And no Person shall be convicted without the Concurrence of two thirds of the Members present.

Judgment in Cases of Impeachment shall not extend further than to removal from Office, and disqualification to hold and enjoy any Office of honor, Trust or Profit under the United States: but the Party convicted shall nevertheless be liable and subject to Indictment, Trial, Judgment and Punishment, according to Law.

Section 4: Elections

The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators.

The Congress shall assemble at least once in every Year, and such Meeting shall be on the first Monday in December, unless they shall by Law appoint a different Day.

Section 5: Powers and Duties of Congress

Each House shall be the Judge of the Elections, Returns and Qualifications of its own Members,and a Majority of each shall constitute a Quorum to do Business; but a smaller Number may adjourn from day to day, and may be authorized to compel the Attendance of absent Members, in such Manner, and under such Penalties as each House may provide.

Each House may determine the Rules of its Proceedings, punish its Members for disorderly Behaviour, and, with the Concurrence of two thirds, expel a Member.

Each House shall keep a Journal of its Proceedings, and from time to time publish the same, excepting such Parts as may in their Judgment require Secrecy; and the Yeas and Nays of the Members of either House on any question shall, at the Desire of one fifth of those Present, be entered on the Journal.

Neither House, during the Session of Congress, shall, without the Consent of the other, adjourn for more than three days, nor to any other Place than that in which the two Houses shall be sitting.

Section 6: Rights and Disabilities of Members

The Senators and Representatives shall receive a Compensation for their Services, to be ascertained by Law, and paid out of the Treasury of the United States. They shall in all Cases, except Treason, Felony and Breach of the Peace, be privileged from Arrest during their Attendance at the Session of their respective Houses, and in going to and returning from the same; and for any Speech or Debate in either House, they shall not be questioned in any other Place.

No Senator or Representative shall, during the Time for which he was elected, be appointed to any civil Office under the Authority of the United States, which shall have been created, or the Emoluments whereof shall have been encreased during such time; and no Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office.

Section 7: Legislative Process

All Bills for raising Revenue shall originate in the House of Representatives; but the Senate may propose or concur with Amendments as on other Bills.

Every Bill which shall have passed the House of Representatives and the Senate, shall, before it become a Law, be presented to the President of the United States; If he approve he shall sign it, but if not he shall return it, with his Objections to that House in which it shall have originated, who shall enter the Objections at large on their Journal, and proceed to reconsider it. If after such Reconsideration two thirds of that House shall agree to pass the Bill, it shall be sent, together with the Objections, to the other House, by which it shall likewise be reconsidered, and if approved by two thirds of that House, it shall become a Law. But in all such Cases the Votes of both Houses shall be determined by Yeas and Nays, and the Names of the Persons voting for and against the Bill shall be entered on the Journal of each House respectively. If any Bill shall not be returned by the President within ten Days (Sundays excepted) after it shall have been presented to him, the Same shall be a Law, in like Manner as if he had signed it, unless the Congress by their Adjournment prevent its Return, in which Case it shall not be a Law.

Every Order, Resolution, or Vote to which the Concurrence of the Senate and House of Representatives may be necessary (except on a question of Adjournment) shall be presented to the President of the United States; and before the Same shall take Effect, shall be approved by him, or being disapproved by him, shall be repassed by two thirds of the Senate and House of Representatives, according to the Rules and Limitations prescribed in the Case of a Bill.

Section 8: Powers of Congress

The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States;

To borrow Money on the credit of the United States;

To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;

To establish a uniform Rule of Naturalization, and uniform Laws on the subject of Bankruptcies throughout the United States;

To coin Money, regulate the Value thereof, and of foreign Coin, and fix the Standard of Weights and Measures;

To provide for the Punishment of counterfeiting the Securities and current Coin of the United States;

To establish Post Offices and post Roads;

To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries;

To constitute Tribunals inferior to the supreme Court;

To define and punish Piracies and Felonies committed on the high Seas, and Offenses against the Law of Nations;

To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water;

To raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years;

To provide and maintain a Navy;

To make Rules for the Government and Regulation of the land and naval Forces;

To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions;

To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress;

To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards and other needful Buildings;-And

To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

Section 9: Powers Denied Congress

The Migration or Importation of such Persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the Year one thousand eight hundred and eight, but a Tax or duty may be imposed on such Importation, not exceeding ten dollars for each Person.

The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.

No Bill of Attainder or ex post facto Law shall be passed.

No Capitation, or other direct, Tax shall be laid, unless in Proportion to the Census or Enumeration herein before directed to be taken.

No Tax or Duty shall be laid on Articles exported from any State.

No Preference shall be given by any Regulation of Commerce or Revenue to the Ports of one State over those of another: nor shall Vessels bound to, or from, one State, be obliged to enter, clear, or pay Duties in another.

No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law; and a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time.

No Title of Nobility shall be granted by the United States: And no Person holding any Office of Profit or Trust under them, shall, without the Consent of the Congress, accept of any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince, or foreign State.

Section 10: Powers Denied to the States

No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility.

No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing it's inspection Laws: and the net Produce of all Duties and

Imposts, laid by any State on Imports or Exports, shall be for the Use of the Treasury of the United States; and all such Laws shall be subject to the Revision and Controul of the Congress.

No State shall, without the Consent of Congress, lay any Duty of Tonnage, keep Troops, or Ships of War in time of Peace, enter into any Agreement or Compact with another State, or with a foreign Power, or engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay.

INTRODUCTION TO ARTICLE I

The Constitution first vests all federal legislative powers in a representative bicameral Congress. These legislative bodies must work together to draft and pass new laws and regulations.[85] Central to the social compact, this lawmaking institution forms the foundation of the federal government and allows the people's representatives to act together for the common good. Article I, §I establishes several fundamental features of the Congress and creates the basis for the separation of powers between the executive and judicial branches.

ANALYSIS OF ARTICLE I

1. Bicameralism

The United States Capitol, Washington, D.C., the meeting place of the country's bicameral legislature.[86]

The Framers of the Constitution of 1789 created a powerful national legislature to represent both the People and the States. Yet they also feared its awesome power and therefore determined to limit that power in order to protect individual liberty. The **Vesting Clause** defined as, "[t]he clause in the U.S. Constitution vesting the executive power in the President of the United States. U.S. Const. art. II, § 1,"[87] embodies two strategies for limiting Congress's power. One strategy was to condition legislation

85. Fryling, T. M. F. (2020). *Constitutional law in criminal justice*. Aspen Publishing.

86. The Editors of Encyclopaedia Britannica. (2023, July 28). *Bicameral system | Definition, Legislature, & Example. Encyclopedia Britannica*. https://www.britannica.com/topic/bicameral-system#/media/1/64614/120929

87. VESTING CLAUSE, Black's Law Dictionary (12th ed. 2024).

upon the agreement of two differently constituted Chambers.[88] With smaller districts and short terms, the House of Representatives was expected to be responsive to "We the People." But hasty popular measures could be ameliorated or killed in the Senate, whose members served for longer terms and were selected by the state legislatures until enactment of the Seventeenth Amendment.

For the Framers, lawmaking by a representative bicameral Congress would serve a number of purposes. First, laws made by the people's representatives would have legitimacy derived from the consent of the people. Second, by requiring members of Congress to deliberate and to compromise, the difficult process of lawmaking would promote laws aimed at the general good and equally applicable to all people. Third, laws made by a collective legislature would be more likely to avoid the dangers of small factions and special interests. Collective lawmaking would not be perfect, but, along with other Constitutional safeguards, would minimize the dangers of oppressive legislation. Therefore, these features reinforce why "all legislative powers herein granted" are vested in Congress and provided the framework for the concept of bicameralism. **Bicameralism** is defined by Black's Law as "[a] system of government with two legislative or parliamentary chambers. Both chambers must pass a bill before it can be presented to the executive and enacted into law."[89]

Ven Diagram showing the enumerated powers of federal government, the reserved powers of state government, and the concurrent powers of both governments

Powers Sharing – Differentiating Enumerated, Concurrent, and Reserved Powers[90]

2. Limited and Enumerated Powers

The centrality of representative, legislative power suggests Constitutional limits on the delegation of legislative power to the Executive, which lacks the collective multi-member representation necessary for lawmaking.

As a more explicit limitation, the Constitution vests Congress only with those legislative powers that are "herein granted." Unlike state legislatures that enjoy plenary authority, Congress has authority only over the subject matter specified in the Constitution, particularly in Article I, §8. Early Presidents and Congresses knew intimately the limited jurisdiction of the federal government. They assumed no federal power to fund internal improvements, for example. Also, they debated what powers might be implied by the grant of the enumerated powers.

A significant early debate concerned whether Congress could create a Bank of the United States. James Madison and Thomas Jefferson argued against such a power, but President Washington ultimately supported Alexander Hamilton's plan for the Bank. Although the Framers had rejected bank incorporation as an enumerated power, Washington **still** freely offered this support. The Supreme Court of the United States upheld the constitutionality of the Bank and recognized that the enumerated powers included some implied ones in *McCulloch v. Maryland* (1819).[91] Thus, the "necessary and proper" phrase in the last paragraph of §8 became known as the "elastic clause," giving Congress the authority to use powers not explicit in the Constitution, such as the creation of an Internal Revenue Service to collect taxes.[92]

88. *The Avalon Project: The Federalist Papers.* (2008). The Federalist Papers: No. 51. https://avalon.law.yale.edu/18th_century/fed22.asp
89. BICAMERALISM, Black's Law Dictionary (12th ed. 2024).
90. Randall, M. (2020, May 4). *The Constitution*. Pressbooks. https://oer.pressbooks.pub/introtobusinesslaw/chapter/chapter-5/
91. McCulloch v. Maryland, 17 U.S. 316 (1819).
92. U.S. Const. Art. I, §8.

3. Voting

Check Voter Registration Deadlines and Laws in Your State | Vote.gov

Federal Government Voting[93]

Of course, not all of the people were eligible to vote at the time of ratification. Article I, §2 made the qualifications for voting in the United States House of Representatives (hereinafter U.S. House or House) elections the same as those for voting in the larger branch of the state legislature. That effectively excluded women, as well as many free African Americans and Native Americans. It also excluded some white men, who were barred from voting by property ownership requirements that were the norm in 1787.[94]

Some Framers favored making property ownership a qualification for voting in U.S. House elections, but Ben Franklin reminded them that many everyday individuals non-homeowners joined the fight for independence.[95] A uniform suffrage requirement was ultimately rejected, due to fears that it would lead some states to reject the Constitution altogether. The compromise – tying the qualifications for voting in U.S. House elections to the qualifications for voting in state legislative elections—allowed roughly two-thirds of white men – but very few others – to vote.[96]

Nevertheless, these direct elections were a significant milestone in the development of democracy. Many more people were eligible to vote in U.S. House elections than was the case under English law. In the ensuing decades, states moved rapidly toward universal suffrage for white men. The Fifteenth Amendment, adopted in 1870, prohibited denial of the vote on account of race. However, in practice, African-Americans were denied the right to vote in southern states for much of the twentieth century. Primarily white women gained a Constitutional right to vote with the Nineteenth Amendment in 1920.[97]

For most of American history, the apportionment of a particular State's representation in its legislature was determined by the State. This resulted in districts that heavily favored rural voters over urban voters.[98] For example, in California, 40% of the population lived in Los Angeles County, but under California's constitution that county was entitled to just one of forty state senators.[99] In 1962 the Supreme Court revolutionized representation in state legislatures with *Baker v. Carr*.[100] Two years later, in Reynolds v. Sims (1964), the Court proclaimed the doctrine of "one person, one vote," decreeing roughly equal-sized legislative districts.[102] By 1968, ninety-three of ninety-nine State legislative chambers had their lines redrawn to comply with the Supreme Court's ruling.[103]

93. *Check voter registration deadlines and laws in your state*. (n.d.). Vote.gov. https://vote.gov/
94. U.S. Const. Art. I, §2
95. Keyssar, A. (2000). *The Right to Vote: The Contested History of Democracy in the United States*. Basic Books.
96. *Ibid.*
97. Smith, B., & Tokaji, D. (n.d.). *Interpretation: Article I, Section 2 | The National Constitution Center*. Article I, Section 2. Retrieved December 6, 2020, from https://constitutioncenter.org/interactive-constitution/interpretation/article-i/clauses/762
98. Waldman, M. (2023). *The supermajority: How the Supreme Court Divided America*. Simon and Schuster., p. 58, 64.
99. *Ibid.*
100. Id.; *Baker v. Carr*, 369 U.S. 186 (1962).[/footnote] The court held that it would begin hearing cases alleging political inequality due to apportionment of legislative districts by State legislatures under the equal protection clause of the Fourteenth Amendment.[101]*Id.*; *Baker v. Carr*, 369 U.S. 186 (1962).
101.
102. *Id.*; *Reynolds v. Sims*, 377 U.S. 533 (1964).
103. *Ibid.*

Executive Branch

Article II

**Highlighted sections indicate changes identified in other parts of the Constitution of the United States.*
Signed in convention September 17, 1787. Ratified June 21, 1788. Portions of Article II, Section 1, were changed by the 12th Amendment and the 25th Amendment

Section 1

The executive Power shall be vested in a President of the United States of America.

He shall hold his Office during the Term of four Years, and, together with the Vice President, chosen for the same Term, be elected, as follows:

Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress: but no Senator or Representative, or Person holding an Office of Trust or Profit under the United States, shall be appointed an Elector.

The Electors shall meet in their respective States, and vote by Ballot for two Persons, of whom one at least shall not be an Inhabitant of the same State with themselves. And they shall make a List of all the Persons voted for, and of the Number of Votes for each; which List they shall sign and certify, and transmit sealed to the Seat of the Government of the United States, directed to the President of the Senate. The President of the Senate shall, in the Presence of the Senate and House of Representatives, open all the Certificates, and the Votes shall then be counted. The Person having the greatest Number of Votes shall be the President, if such Number be a Majority of the whole Number of Electors appointed; and if there be more than one who have such Majority, and have an equal Number of Votes, then the House of Representatives shall immediately chuse by Ballot one of them for President; and if no Person have a Majority, then from the five highest on the List the said House shall in like Manner chuse the President. But in chusing the President, the Votes shall be taken by States, the Representation from each State having one Vote; A quorum for this Purpose shall consist of a Member or Members from two thirds of the States, and a Majority of all the States shall be necessary to a Choice. In every Case, after the Choice of the President, the Person having the greatest Number of Votes of the Electors shall be the Vice President. But if there should remain two or more who have equal Votes, the Senate shall chuse from them by Ballot the Vice President.

The Congress may determine the Time of chusing the Electors, and the Day on which they shall give their Votes; which Day shall be the same throughout the United States.

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; neither shall any person be eligible to that Office who shall not have attained to the Age of thirty five Years, and been fourteen Years a Resident within the United States.

In Case of the Removal of the President from Office, or of his Death, Resignation, or Inability to discharge the Powers and Duties of the said Office, the Same shall devolve on the Vice President, and the Congress may by Law provide for the Case of Removal, Death, Resignation or Inability, both of the President and Vice President, declaring what Officer shall then act as President, and such Officer shall act accordingly, until the Disability be removed, or a President shall be elected.

The President shall, at stated Times, receive for his Services, a Compensation, which shall neither be increased nor diminished during the Period for which he shall have been elected, and he shall not receive within that Period any other Emolument from the United States, or any of them.

Before he enter on the Execution of his Office, he shall take the following Oath or Affirmation:--"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."

Section 2

The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States; he may require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices, and he shall have Power to grant Reprieves and Pardons for Offenses against the United States, except in Cases of Impeachment.

He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

The President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session.

Section 3

He shall from time to time give to the Congress Information of the State of the Union, and recommend to their Consideration such Measures as he shall judge necessary and expedient; he may, on extraordinary Occasions, convene both Houses, or either of them, and in Case of Disagreement between them, with Respect to the Time of Adjournment, he may adjourn them to such Time as he shall think proper; he shall receive Ambassadors and other public Ministers; he shall take Care that the Laws be faithfully executed, and shall Commission all the Officers of the United States.

Section 4

The President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors.

INTRODUCTION TO ARTICLE II

The Constitution next vests all federal **executive/executive powers** in a President. The Executive Office of the President (EOP) was created in 1939 by President Franklin D. Roosevelt.[104] The EOP consists of many agencies which provide support for the huge presidential task of making crucial decisions for the United States of America.[105] Black's Law Dictionary defines "**executive**" as "The branch of government responsible for effecting and enforcing laws; the person or persons who constitute this branch."[106] This article refers to the office of the President, the Vice-President,

104. The White House. (2023, March 17). *Executive Office of the President | The White House*. https://www.whitehouse.gov/administration/executive-office-of-the-president/

105. *Ibid*.

106. EXECUTIVE, Black's Law Dictionary (12th ed. 2024).

independent federal agencies, including, but not limited to the "Department of Defense and the Environmental Protection Agency, the Social Security Administration and the Securities and Exchange Commission."[107] Although it appears to be limited with the president in head, the executive branch employs more than 4 million people.[108]

These individuals report to the cabinet or one of the following:

- Council of Economic Advisers
- Council on Environmental Quality
- Domestic Policy Council
- Gender Policy Council
- National Economic Council
- National Security Council
- Climate Policy Office
- Office of the Intellectual Property Enforcement Coordinator
- Office of Intergovernmental Affairs
- Office of Management and Budget
- Office of National Drug Control Policy
- Office of Public Engagement
- Office of Science and Technology Policy
- Office of the National Cyber Director
- Office of the United States Trade Representative
- Presidential Personnel Office and
- National Space Council.

"Because the president is elected, not appointed or born into the office like British royalty,"[109] history has shown us two divergent views of the Office of the President: the strong president or the weak president.

> "One view, the "strong president" view, favored by presidents such as Theodore Roosevelt essentially held that presidents may do anything not specifically prohibited by the Constitution. The other view, "weak president" view, favored by presidents such as William Howard Taft, held that presidents may only exercise powers specifically granted by the Constitution or delegated to the president by Congress under one of its enumerated powers."[110]

107. The White House. (2022, July 12). *The Executive Branch | The White House*. https://www.whitehouse.gov/about-the-white-house/our-government/the-executive-branch/#:~:text=The%20President%20is%20responsible%20for,Presidency%20should%20the%20need%20arise.
108. *The Executive Branch*, 2022.
109. Fryling, 2020.
110. Linder, D. (n.d.). *Separation of powers under the United States Constitution*. http://law2.umkc.edu/faculty/projects/ftrials/conlaw/separationofpowers.htm#:~:text=The%20first%20article%20of%20the,may%20establish.%22

President's Park also known as The United States White House - Executive Office of The President[111]

To view the full list of United States Presidents click here: https://www.whitehouse.gov/about-the-white-house/presidents/

ANALYSIS OF ARTICLE II

Section 1

John Adams, writing to his wife Abigail while Vice-President as well as considering the possibility of succeeding George Washington as President, noted "I am weary of the game, yet I don't know how I could live out of it. I don't love slight, neglect, contempt, disgrace, nor insult, more than others."[112]

111. The White House. (2022, July 12). *Presidents | The White House*. https://www.whitehouse.gov/about-the-white-house/presidents/
112. Boorstin & Boorstin, 1987, p. 35.

Abigail Adams - American First Lady, Abigail Adams, oil on canvas by Gilbert Stuart, 1800–15; in the National Gallery of Art, Washington, D.C. Courtesy National Gallery of Art, Washington, D.C., Gift of Mrs. Robert Homans, 1954.7.2[113]

Article II, §1 begins: "The executive power shall be vested in a President of the United States." At a minimum, this Vesting Clause establishes an executive office to be occupied by an individual. At the founding, the creation of a separate executive was hardly obvious. The Articles of Confederation created no separate executive; duties that we associate with the executive were handled first by congressional committees, then by "Secretaries" or "Boards" under congressional direction. Nor was

113. Caroli, B. B. (2023, July 11). *Abigail Adams | Biography & Facts*. Encyclopedia Britannica. https://www.britannica.com/biography/Abigail-Adams#/media/1/5087/232774

it self-evident that one individual would stand at the apex of the executive. Several states had plural executives (executive committees) and the notion of a plural executive had its backers at the Philadelphia Convention.

Few could disagree that the Vesting Clause establishes a unitary executive in the sense that it creates a single executive President. Throughout America's constitutional history, some politicians, judges, and scholars have argued that this minimal sense exhausts the content of the Clause.[114] Others have argued that the Clause does more and actually grants the President "the executive power." In recent years, advocates of this latter view have identified their position with the label "Unitary Executive."[115] But this label is a bit misleading, for we would do well to remember that the idea that the Constitution establishes a unitary executive is perhaps universally shared, at least in the minimalist sense outlined above.

The Court has, from time to time, endorsed the idea that the Vesting Clause vests powers independent of the rest of Article II. In a case involving presidential dismissal of a postmaster, *Myers v. United States* (1926), the Court claimed that the Vesting Clause granted authority to execute the law and to remove executive officials.[116] In a decision from the late nineteenth century, *In re Neagle* (1890), the Court upheld the authority of the President to assign a federal marshal to protect a Supreme Court Justice who was threatened by a disgruntled litigant, despite the absence of any statute granting that authority.[117] In *U.S. v. Curtiss-Wright Export Corp.* (1936), the Court famously announced that the President was the "sole organ of the nation in its external relations."[118] In the 21st century, the Court observed in *American Insurance Ass'n v. Garamendi* (2003) that the "historical gloss" on the executive power conferred upon the President the vast share of foreign affairs powers.[119]

Under the umbrella of the Executive Branch is the administrative state. This is where the real day-to-day work of government occurs. Agencies that exist in the Executive Branch include the Department of Justice, the Department of Homeland Security, the State Department, the Defense Department, the Federal Trade Commission, the Federal Communications Commission, the Department of Education, the Department of Commerce, the Department of Labor, the Federal Emergency Management Agency, the Office of Management and Budget, the Department of Treasury and Internal Revenue Service, the Occupational Health and Safety Administration, the Small Business Administration and the Environmental Protection Agency, among others. They are often known by their acronyms, such as DOJ, FTC, FCC, FEMA, IRS, OSHA, SBA and EPA. In the 1960s and its aftermath, a slew of new regulatory laws sought to address the excesses of economic growth, protecting clean air and water, ensuring worker safety, and policing auto and consumer product safety.

The Supreme Court, in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc. (1984)*, ruled that courts will defer to expert agencies when they interpret a law with ambiguous wording.[120] Judges will not second-guess that approach if the agency has made a reasonable choice, and if Congress has not spoken directly to the precise issue at question.[121] This is known as the "**Chevron Deference**."

114. Prakash, S., & Schroeder, C. (n.d.). *Interpretation: The Vesting Clause | The National Constitution Center.* Interactive Constitution. Retrieved May 31, 2021, from https://constitutioncenter.org/interactive-constitution/interpretation/article-ii/clauses/347
115. *Ibid.*
116. Myers v. United States, *272* U.S. *52* (1926).
117. *In re Neagle,* 135 U.S. 1 (1890).
118. *United States v. Curtiss-Wright Export Corporation,* 299 U.S. 304 (1936).
119. *American Insurance Ass'n v. Garamendi*, 539 U.S. 396 (2003).
120. 468 U.S. 837 (1984).
121. *Chevron deference*. (n.d.). LII / Legal Information Institute. https://www.law.cornell.edu/wex/chevron_deference

The Supreme Court has applied it over 100 times creating the basis of thousands of legal decisions (or nondecisions) within the federal courts.[122]

However, in 2024 the Court, in *Loper Bright Enterprises v. Raimondo*, ended the 40-year old precedent in Chevron in a 6-2 decision written by Chief Justice Roberts.[123] Instead of deferring to the expertise of agencies on how to interpret ambiguous language in laws pertaining to their work, federal judges now have the power to decide what a law means for themselves. Justice Elena Kagan, in dissent, remarked, "In one fell swoop, the majority today gives itself exclusive power over every open issue--no matter how expertise-driven or policy-laden--involving the meaning of regulatory law...As if it did not have enough on its plate, the majority turns itself into the country's administrative czar."[124]

A significant case which addresses legislative power, executive power, and judicial power and their relationship to one another is *Trump v. Mazars USA, LLP* (2020). The Supreme Court of the United States addresses the concept of separation of powers when they held Congressional subpoenas which include Presidential information "implicate special concerns regarding the separation of powers."[125] As a result, the case was remanded to the lower courts to account for these "special concerns of separation of powers."[126] Black's defines separation of powers as "The division of governmental authority into three branches of government — legislative, executive, and judicial — each with specified duties on which neither of the other branches can encroach."[127]

Graphic showing the three branches of the federal government

Separation of Powers[128]

Separation of powers has its foundation in three separate constitutional provisions as listed below:

Article I, Section. 1:

All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

Article II, Section. 1:

The executive Power shall be vested in a President of the United States of America.

Article III, Section. 1:

The judicial Power of the United States shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.[129]

Although the three constitutional sections listed above provides the foundation for the separation of powers doctrine, separation of powers is not literally stated in the United States Constitution. James Madison believed this doctrine should be explicit within our document; however, other members of Congress felt the three sections above supported an implicit understanding of the Constitution and any additional verbiage would equal repetitive language.[130] Ultimately, separation of power meets two goals:

1. "Prevents concentration of power (seen as the root of tyranny)"[131] and

122. *Chevron v. Natural Resources Defense Council, Inc.*, 468 U.S. 837 (1984).
123. *603 U.S. _____ (2024).*
124. *Loper Bright Enterprises v. Raimondo, 603 U.S. _____ (2024).*
125. *Trump v. Mazars USA, LLP*, 591 U.S. _ (2020).
126. *Id.*
127. SEPARATION OF POWERS, Black's Law Dictionary (12th ed. 2024).
128. Randall, M. (2020, May 4). *The Constitution*. Pressbooks. https://oer.pressbooks.pub/introtobusinesslaw/chapter/chapter-5/
129. Linder, D. (n.d.). *Separation of powers under the United States Constitution*. http://law2.umkc.edu/faculty/projects/ftrials/conlaw/separationofpowers.htm#:~:text=The%20first%20article%20of%20the,may%20establish.%22
130. *Ibid.*

2. "provides each branch with weapons to fight off encroachment by the other two branches."[132]

Additionally, separation of power was reinforced through the checks and balances doctrine. **Checks and balances** defined as "The theory of governmental power and functions whereby each branch of government has the ability to counter the actions of any other branch, so that no single branch can control the entire government."[133] Finally, checks and balances work to balance the control and responsibility found in the first section of Articles I (Legislative), II (Executive), and III (Judicial) creating the separation of powers.

Another significant case in this area of executive power was decided by the Supreme Court in *West Virginia v. Environmental Protection Agency (2022)*. The Court, by a 6-3 vote in a Roberts' majority opinion blocked many of the agency's potential efforts to curb carbon emissions from facilities that burn coal and other fossil fuels.[134] For the first time, the Court articulated a new "major questions doctrine," one that limited the power of agencies to act when a matter was really important.[135] Due to the "economic and political significance" of the regulation, Congress must give explicit authority or the agency cannot act.[136] The decision threatens any efforts by the EPA or other agencies to address the issue of climate change through regulation.[137]

The Constitution provides, in the second paragraph of Article II, §2, that "the President shall have Power, by and with the Advice and Consent of the Senate to make Treaties, provided two thirds of the Senators present concur."

ANALYSIS OF ARTICLE II

Section 2

Thus, treaty making is a power shared between the President and the Senate. In general, the weight of practice was to confine the Senate's authority to that of disapproval or approval, with approval including the power to attach conditions or reservations to the treaty.

For instance, the authority to negotiate treaties was assigned to the President alone as part of a general authority to control diplomatic communications. Thus, since the early Republic, the Clause has not been interpreted to give the Senate a constitutionally mandated role in advising the President before the conclusion of the treaty.[138]

131. *Ibid.*
132. *Ibid.*
133. CHECKS AND BALANCES, Black's Law Dictionary (12th ed. 2024).
134. *West Virginia v. Environmental Protection Agency*, 597 U.S. _ (2022).
135. *Id.*
136. *Id.*
137. Waldman, M. (2023). *The supermajority: How the Supreme Court Divided America*. Simon and Schuster.
138. McGinnis, J. O., & Shane, P. (n.d.). *Interpretation: Article II, Section 2: Treaty Power and Appointments | The National Constitution Center*. Interactive Constitution. Retrieved May 31, 2021, from https://constitutioncenter.org/interactive-constitution/interpretation/article-ii/clauses/346

ANALYSIS OF ARTICLE II

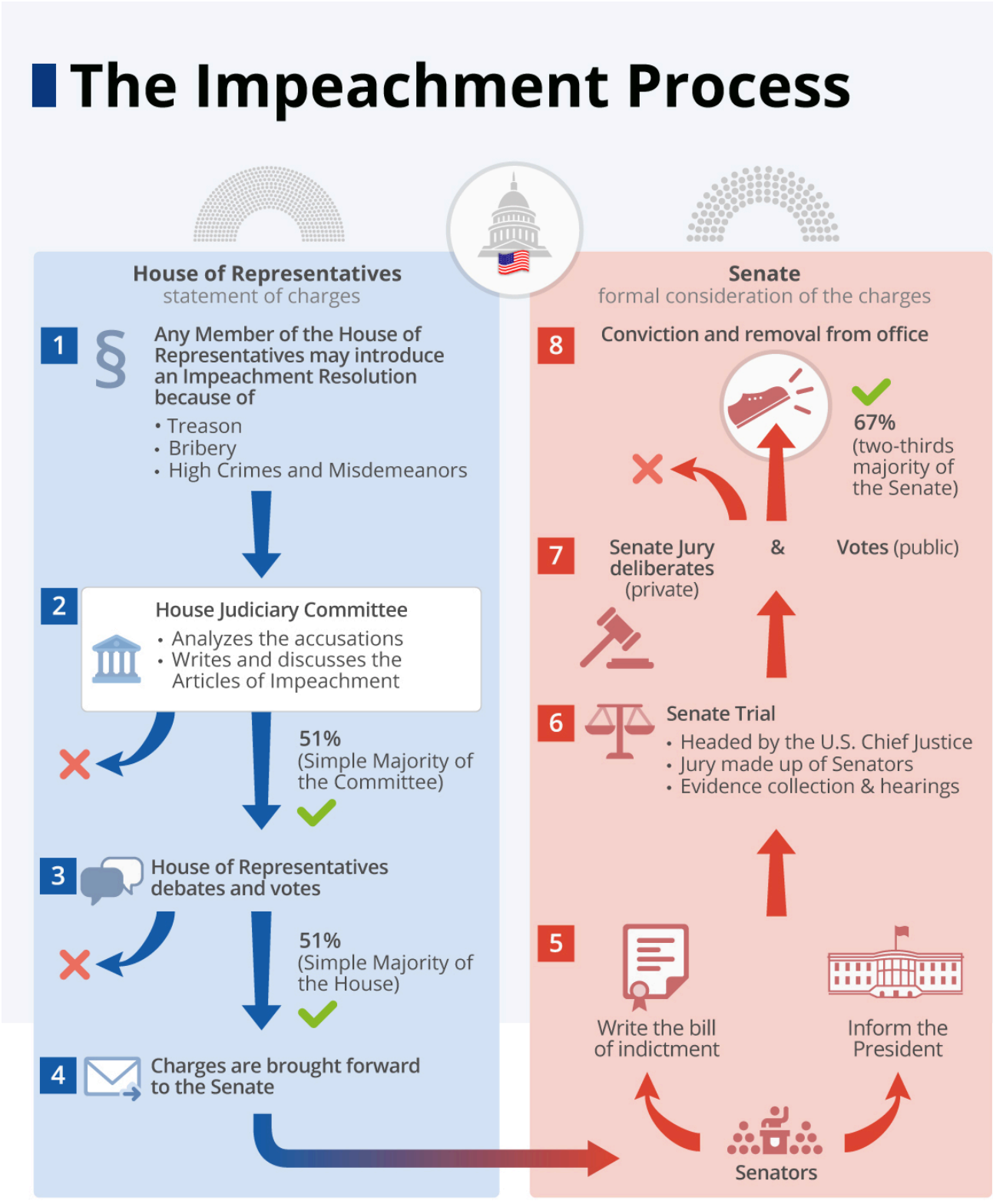
Section 3

The remainder of Paragraphs 2 and 3 of Article II deals with the subject of official appointments. With regard to diplomatic officials, judges and other officers of the United States, Article II lays out four modes of appointment. The default option allows appointment following nomination by the President and the Senate's "advice and consent." With regard to "inferior officers," Congress may, within its discretion, vest their appointment "in the President alone, in the courts of law, or in the heads of departments." The Supreme Court has not drawn a bright line distinguishing between inferior officers who might be appointed within the executive branch and inferior officers Congress may allow courts to appoint, provided only that, for judicial appointees, there be no "'incongruity' between the functions normally performed by the courts and the performance of their duty to appoint."[139]

The final section of Article II, which generally describes the executive branch, specifies that the "President, Vice President and all civil Officers of the United States" shall be removed from office if convicted in an impeachment trial of "Treason, Bribery, or other high Crimes and Misdemeanors."

Two clauses in Article I lay out the role of the House and the Senate in impeachments and in trials of impeachment. **Impeachment** is defined as "[a] quasi-judicial process by which a legislative chamber calls for the removal from office of a public official, or disqualification from future officeholding of a former officeholder, accomplished by presenting a written charge of the official's alleged misconduct; esp., the initiation of a proceeding in the U.S. House of Representatives against a federal official, such as the President or a judge."[140] In practice, impeachments by the House have been rare, and convictions after a trial by the Senate even less common. Three Presidents, one Senator, one cabinet officer, and fifteen judges have been impeached, and of those only eight judges have been convicted and removed from office.[141] Click here to see all Senate Impeachment trials: https://www.senate.gov/about/powers-procedures/impeachment/impeachment-list.htm. Finally, below is an infographic which explains The Impeachment Process.[142]

139. *Ibid.*
140. IMPEACHMENT, Black's Law Dictionary (12th ed. 2024).
141. Kinkopf, N., & Whittington, K. (n.d.). *Interpretation: Article II, Section 4 | The National Constitution Center.* Interactive Constitution. Retrieved May 31, 2021, from https://constitutioncenter.org/ interactive-constitution/interpretation/article-ii/clauses/34
142. Richter, F. (2021, January 13). The impeachment process. *Statista Daily Data*. https://www.statista.com/chart/9675/what-an-impeachment-would-look-like/



* According to Article I, Section 2 and 3 of the Constitution of the United States
Source: Statista Research

You will find more infographics at Statista.

ANALYSIS of Article II

Section 4

This sparse history has given Congress relatively few opportunities to flesh out the bare bones of the Constitutional text. The Impeachment Clause was included in the Constitution in order to create another check against abuses by government officials and to give Congress the ability to remove from power an unfit officer who might otherwise be doing damage to the public good. Unsurprisingly, most "civil officers of the United States" who have found themselves damaged by scandal have preferred to resign, rather than endure an impeachment. The House and Senate have refused to act on impeachment charges against individuals who were not then holding a federal office. Early on, the Senate decided that members of Congress should be expelled by their individual chambers rather than be subjected to an impeachment trial. Presidents have acted quickly to remove problematic members of the executive branch. As a practical matter, judges and Presidents have been the primary targets of impeachment inquiries.

Much of the controversy surrounding the Impeachment Clause has revolved around the meaning of "high Crimes and Misdemeanors," a phrase that is unique to the impeachment context.[143]

The Clause rules out the possibility of Congress impeaching and removing officials simply for incompetence or general unfitness for office. Impeachments are not a remedy for government officials who are bad at their jobs. It is a remedy for abuses of office, but the line between unfitness and abuse can blur.[144]

CONSTITUTIONAL CLIP

While still serving as a member of the House of Representatives, Gerald Ford once said that "impeachable offenses are whatever a majority of the House of Representatives considered them to be at a moment in history." One can only speculate as to whether his opinion changed after he became the country's 38th President.[145]

Critical Reflections:

143. *Ibid.*
144. *Ibid.*
145. *Ibid.*

1. Have the rights of the individual, state and federal government been properly separated by the Constitution? Use the Articles and Amendments to support your answer.
2. Understanding the powers that are granted by Articles I and II of the Constitution, are there too many powers relegated to one branch over the other? Explain why or why not.
3. Looking at present day politics, did the Framers have the right understanding of how the Constitution would be wielded to impeach the President twice in one term?
4. The vote for President is determined by members of the Electoral College. What are the arguments for and against elimination of the Electoral College, versus electing Presidents by means of the popular vote?

Chapter 2 - The Original United States Constitution & Its History - Part II

Article III, Article IV, Article V, Article VI, and Article VII

RICHARD J. FORST AND TAUYA R. FORST

LEARNING OBJECTIVES

After reading this chapter, you should be able to:

2.1 List the sources of the law.
2.2 Define jurisdiction.
2.3 Identify the structure of the federal and state court system.
2.4 Evaluate the procedure for selection of judges and justices.
2.5 Explain how judicial review originated.
2.6 Summarize the landmark case that defined the powers of the judicial review in *Marbury v. Madison*.
2.7 Explain the process of Amendment creation and ratification, including the Article that governs the process.

KEY TERMS

Certiorari
Checks and balances
Codes
Common Law
Full Faith and Credit Clause
Guarantee Clause
Jurisdiction
Privileges and Immunities Clause
Ratification
Stare Decisis
Statute
Supremacy Clause

INTRODUCTION OF ARTICLE III

As previously stated, Article III of the United States Constitution also known as the judicial branch, provides checks and balances on the Legislative and Executive branches of government. "Ultimate judicial power is given to the Supreme Court of the United States; there is no higher court to which an appeal may be taken."[1] Because of this ultimate judicial authority, the Supreme Court is often referred to as the "Court of Last Resort" as it is the highest court within the federal system and hears cases appealed from the state supreme courts as well.[2] As the Constitution evolved, the amendments had a profound effect on the Articles. As a result, we will outline how each article evolved as well as how it affected the execution of the government based upon the ratification of the amendments.

The law is an interesting mixture of past rules and common law (judicial decisions), codes, statutes, constitutions and case law. All of these sources tend to impact the law in a different manner.

Common law was originally derived from English judicial decisions. The collection of these judicial decisions is usually drawn as a comparison to statutory law. When lawmakers seek to give common law permanence, the process of converting common law into a statute begins.

Common law was thoroughly vetted by Justice Clarence Thomas in *Gamble v. United States* (2019).[3] In this case, the court granted **certiorari** (review) to discuss the defendant's double jeopardy claim. The defendant was found guilty in the Alabama state court for felon-in possession charges. After Gamble was convicted, he was charged with a similar offense within the federal statute. The United States insisted that charging an individual in both federal and state court does not violate double jeopardy because double jeopardy only applies when you are being tried for the same crime in the same jurisdiction. In *Gamble* (2019), Justice Thomas explores both common law and **stare decisis**. First, he addressed the parameters of stare decisis when he stated, "We should restore our *stare decisis* jurisprudence to ensure that we exercise mer[e] judgment, which can be achieved through adherence to the correct, original meaning of the laws we are charged with applying. In my view, anything less invites arbitrariness into judging."[4]

Typically, a **statute** is "[a] law enacted by a legislative body; specifically, legislation enacted by any lawmaking body, such as a legislature, administrative board, or municipal court."[5] The federal legislative body, Congress, creates federal statutes, or **"codes."** Federal codes are applicable to all areas with federal jurisdictions. Black's Law Dictionary defines jurisdiction as, "2. A court's power to decide a case or issue a decree."[6] Whereas the highest law of the land, the **United States Constitution**, comprises three parts: The Preamble, The Articles, and The Amendments, each one of these legal constructs impacts how we view the law and how justice is dispensed. The famed French political scientist, Alexis De Tocqueville, wrote about the American political and social system as he observed

1. Fryling, T. M. F. (2023). *Constitutional law in criminal justice*. Aspen Publishing, p. 7.
2. Fryling, 2023.
3. *Gamble v. United States*, 139 S. Ct. 1960 (2019).
4. *Ibid*.
5. STATUTE, Black's Law Dictionary (12th ed. 2024).
6. JURISDICTION, Black's Law Dictionary (12th ed. 2024).

it in the 1830s. He wrote: "There is almost no political question, in the United States, that does not sooner or later resolve itself into a judicial question."[7]

Click here for a visual for how cases proceed through the Illinois court system.
Click here for a visual for how cases proceed through the United States Federal court system.

Article III

**Highlighted sections indicate changes identified in other parts of the Constitution of the United States. Signed in convention September 17, 1787. Ratified June 21, 1788. A portion of Article III, Section 2, was changed by the 11th Amendment.*

Section 1

The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

Section 2

The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;–to all Cases affecting Ambassadors, other public Ministers and Consuls;–to all Cases of admiralty and maritime Jurisdiction;–to Controversies to which the United States shall be a Party;–to Controversies between two or more States;–between a State and Citizens of another State;–between Citizens of different States;–between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

The Trial of all Crimes, except in Cases of Impeachment; shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

Section 3

Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort. No Person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court.

7. De Tocqueville, A., Grant, S. D., & Kessler, S. (2001). Democracy in America (Abridged). Hackett Publishing, p. 122.

The Congress shall have Power to declare the Punishment of Treason, but no Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person attainted.

Judicial Branch

ANALYSIS of ARTICLE III

Section 1

The judicial power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior courts, shall hold their offices during good Behavior, and shall, at stated times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

17th Chief Justice John Roberts of the United States, Pictured Above is Roberts Court Formal Photo dated 083122[8]

The Constitution itself states that we will have a Supreme Court. This Court is separate from both the legislative (Congress) and the executive (the President) branches. Based upon Article III, Congress establishes all other federal courts. In 1789, Congress created the first federal judiciary, including the Supreme Court – with six Justices. Since the first Supreme Court of the United States took the bench, the number of justices has changed six times with the current composition taking effect in 1869 and

8. *Justices*(n.d.)https://www.supremecourt.gov/about/images/2022_Roberts_Court_Formal_083122_Web.jpg

remaining as such. The court's composition included as few as six justices and as many as 10.[9] This composition includes one Chief Justice and eight Associate Justices. Currently serving the court is the 17th Chief Justice, Chief Justice John Roberts.

He is joined by the following eight Associate Justices in order of seniority:

- Associate Justice Clarence Thomas,
- Associate Justice Samuel Alito,
- Associate Justice Sonia Sotomayor,
- Associate Justice Elena Kagan,
- Associate Justice Neil Gorsuch,
- Associate Justice Brett Kavanaugh,
- Associate Justice Amy Coney Barrett, and
- Associate Justice Ketanji Brown Jackson.

Additionally, Congress has increased the number of lower courts many times. For example, in 1901, Congress created space for about 100 federal judges; by 2001, that number was up to 850.[10]

All federal judges and the Justices of the Supreme Court are appointed by the President and confirmed by the Senate. The Framers of the Constitution were concerned that the federal government would not be effective unless it had courts to help enforce its laws. If processes were left to state courts, then the states that were hostile to the new federal government might thwart it at every turn.

Additionally, federal judges obtain their office through provisions set forth in Article II, which gives the President the power to "nominate" judges of the Supreme Court and lower courts, as well as provides the Senate the authority to "advise and consent." The question for contemporary debate asks whether the Senate has an obligation to act on nominations in any particular way.[12]

The lower courts consist of 94 federal district courts (the "trial courts"), and above the district courts but below the Supreme Court, 13 federal Courts of Appeals. (See link above for visual of how courts operate.) The 94 federal judicial districts are organized into 12 regional circuits, each of which has a Court of Appeals. The 13th has nationwide federal jurisdiction and hears specialized cases. The appellate court's task is to determine whether or not the law was applied correctly in the trial court. Appeal courts consist of three judges and do not use a jury. State court systems are similarly organized.[11]

For example, in 2016, Democratic President Barack Obama nominated Judge Merrick Garland to fill a vacancy on the Supreme Court of the United States.[13] However, in March 2021, President Joe Biden nominated him as the Attorney General (AG) of

9. *History and traditions*. (n.d.). https://www.supremecourt.gov/about/historyandtraditions.aspx
10. Garnett, R., & Strauss, D. (n.d.). *Interpretation: Article III, Section One | The National Constitution Center*. Interactive Constitution. Retrieved May 31, 2021, from https://constitutioncenter.org/interactive-constitution/interpretation/article-iii/clauses/45
11. United States Courts. (n.d.). *Court website links.* Retrieved May 31, 2021, from https://www.uscourts.gov/about-federal-courts/federal-courts-public/court-website-links
12. Resnik, J., & Walsh, K. (n.d.). *Interpretation: Article III, Section Two | The National Constitution Center*. Interactive Constitution. Retrieved May 31, 2021, from https://constitutioncenter.org/interactive-constitution/interpretation/article-iii/section/203
13. Elving, R. (2018, June 29). *What Happened with Merrick Garland in 2016 and Why it Matters Now*. NPR. https://choice.npr.org/index.html?origin=https://www.npr.org/2018/06/29/624467256/what-happened-with-merrick-garland-in-2016-and-why-it-matters-now

the United States. Under AG Garland, the 15000 employees of the AG's office have made their mark: to uphold the rule of law, to keep our country safe, and to protect civil rights."[14] Senator Mitch McConnell of Kentucky, the Senate Majority Leader, refused to convene any committees to consider the nomination or to allow the nomination to come to the Senate floor for a vote. McConnell declared any appointment by the sitting President to be null and void. McConnell further explained that the next Justice should be chosen by the next president, to be elected later that year.[15] There was no precedent for such an action since the period around the Civil War and Reconstruction. The Court had to convene that October with only eight Justices, divided often and deadlocked at 4-4 on a number of issues.[16]

Thus, the individuals who become judges gain their office by virtue of the decisions of elected officials. But, once the judges are appointed, the Constitution insulates their independence. Article III, §1 protects all federal judges by providing job security, while supporting a non-diminished salary. "Thus, we speak of such judges as "life-tenured," and some of them have sued (and sometimes won) when Congress has failed to provide them with cost-of-living increases or other salary benefits."[17]

Congress could have used its power granted by the Constitution to grant wide powers to the federal courts that could not be limited or rescinded. However, the "anti-Federalists," always fearful of a strong central government, either wanted no inferior federal courts at all below the Supreme Court or else wanted to give such courts as little jurisdiction as possible. They instead wanted original jurisdiction in most federal questions given to state courts, subject only to the appellate power of the Supreme Court. The final version of Article III was a political compromise which established a system of district and circuit courts. The courts' accessibility and convenience, in comparison to similar state courts, was thus limited. State courts retain original jurisdiction over most legal disputes, such as over crimes committed within the states themselves.

Note: Article III does not provide a guaranteed budget for the federal courts.

Federal courts are used as a check on the state courts. Recall Congress increased the number of federal judges over time, while expanding the federal courts' personnel in 1960s by creating the office of "magistrate" (now called magistrate judge). Additionally, in the 1980s, the office of "bankruptcy judge" was established. These officials have dedicated courtrooms and do a great deal of judicial work; their numbers doubled the size of the lower federal court judicial personnel. After the Civil War, Congress sought to create a "federal presence" by building impressive federal courthouses (often combined with post offices). Today, upwards of 500 federal courthouses now dot the landscape.[18]

14. *Takeaways from attorney general merrick garland's senate judiciary committee hearing*. (2023, March 1). CNN Politics. Retrieved July 19, 2023, from https://www.cnn.com/2023/03/01/politics/merrick-garland-senate-judiciary-committee-testimony/index.html
15. *Ibid.*
16. *Ibid.*
17. *Interpretation: Article III, Section 2 By Judith Resnik and Kevin C. Walsh | Constitution Cente*r. (n.d.). National Constitution Center – constitutioncenter.org. https://constitutioncenter.org/the-constitution/articles/article-iii/section/203#:~:text=Article%20III%2C%20Section%202%20creates,the%20parties%20come%20from%20different
18. Garnett, R., & Strauss, D. (n.d.).

CONSTITUTIONAL CLIP

Alexander Hamilton, in Federalist No. 78 ("The Federalist Papers"), stated judicial independence "is the best expedient which can be devised in any government to secure a steady, upright, and impartial administration of the laws."[19] Hence, federal judgeships are lifetime appointments, designed to exceed the terms of Presidents, Senators and members of the House of Representatives.

As recently as 1997, the Supreme Court further curbed the supremacy of the federal government by creating the "anti-commandeering rule," a rule that prohibits Congress from requiring state officials to perform federal duties, in this case, to participate in Congress's interim background-check program for firearms purchases.[20] The 5-4 decision in *Printz v. United States* (1997) held this provision of the Brady Handgun Violence Prevention Act violated the Tenth Amendment of the *Constitution.*[21]

In 2023, the Senate is considering imposing an ethics requirement on the Supreme Court known as the "Supreme Court Ethics, Recusal and Transparency Act." The potential legislation comes amid allegations of ethics breaches among the justices and reports of luxurious vacations paid for by private benefactors. The justices on the Supreme Court are the only members of the federal judiciary not currently subject to ethics requirements, except what they themselves determine to self-impose. In July 2023, in an Opposite the Editorial Page Opinion (or an "op-ed"), Justice Alito stated "I know this is a controversial view, but I'm willing to say it. No provision in the Constitution gives them [Congress] the authority to regulate the Supreme Court–period."[22] Meanwhile, two prominent Constitutional scholars, conservative former federal Judge J. Michael Luttig and liberal Harvard professor Laurence Tribe, stated Congress ***does*** have the power to impose a code of conduct for Supreme Court justices.[23] Others experts disagree. The disagreement is about the scope and extent of Congressional power over the Supreme Court granted in Article III of the Constitution.

ANALYSIS OF ARTICLE III

Section 2

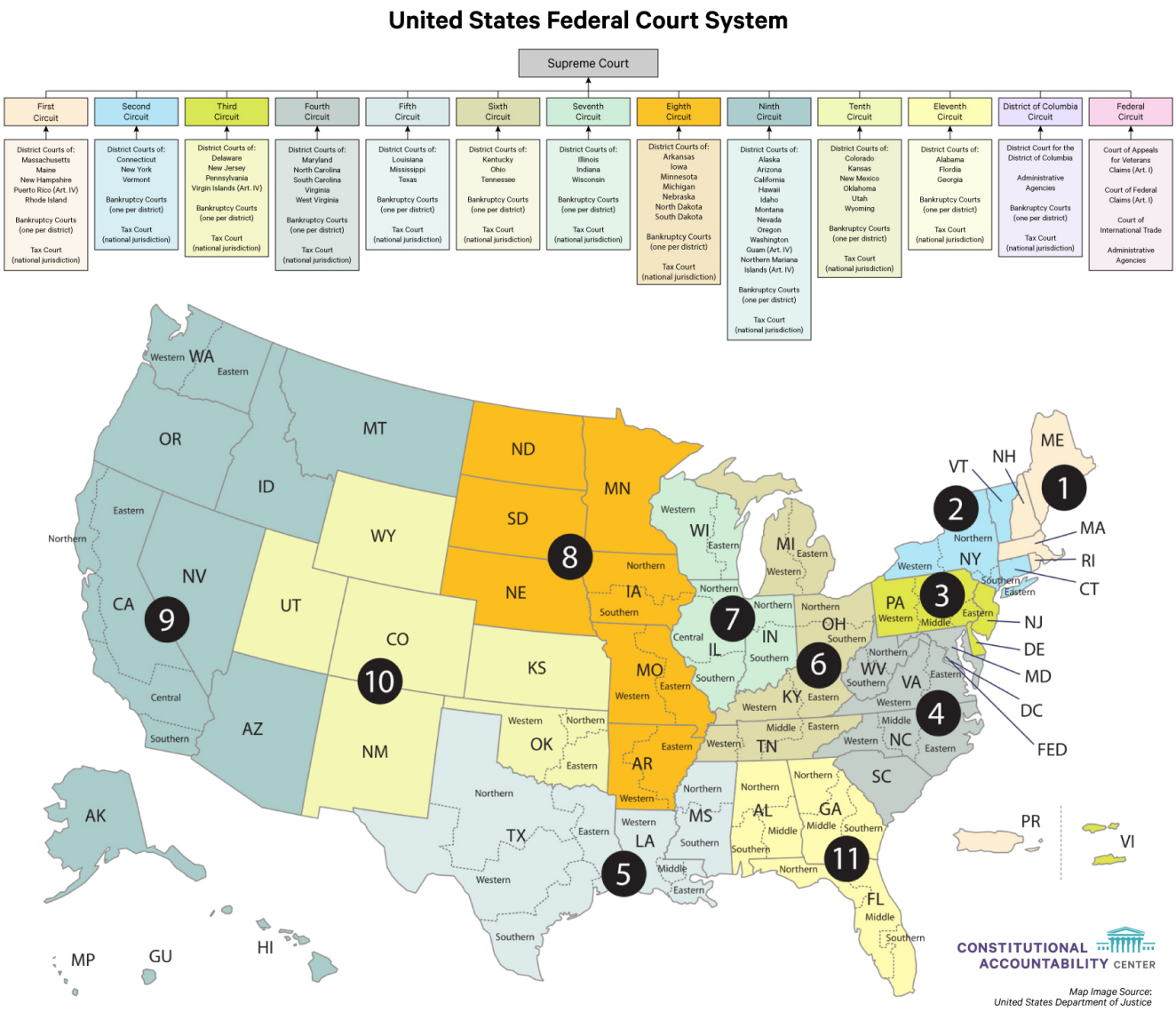
The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting

19. *Ibid.*
20. *Printz v. United States*, 521 U.S. 898 (1997).
21. *Ibid.*
22. Rivkin, D. B., Jr, & Taranto, J. (2023, July 28). Samuel Alito, the Supreme Court's Plain-Spoken defender. *WSJ*. https://www.wsj.com/articles/samuel-alito-the-supreme-courts-plain-spoken-defender-precedent-ethics-originalism-5e3e9a7
23. Barnes, R. (2023, July 28). Alito says Congress has no authority to police Supreme Court ethics. *Washington Post*. https://www.washingtonpost.com/politics/2023/07/28/alito-ethics-supreme-court-congress/

Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

The Trial of all Crimes, except in Cases of Impeachment; shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.



United States Federal Court System[24]

24. *U.S. Federal Courts 101 | Constitutional Accountability Center.* (2018, February 25). Constitutional Accountability Center. https://www.theusconstitution.org/u-s-federal-courts-101/

Importantly, the Judiciary Act of 1789 defined the broad grant of jurisdiction from Article III in a relatively narrow way. The federal courts were granted no common-law jurisdiction except for criminal offenses against the United States. Diversity cases were limited by a requirement that the amount in dispute exceed $500.00 (no small amount in 1789), as most disputes between citizens of different states would not be heard in federal court. The effect was to direct most disputes to state courts where local officials could have more control over judicial appointments, jurisdiction, and the makeup of juries.[25]

The Supreme Court was feeble in its first decade. It had three Chief Justices in that time. Justices joined and quit frequently.[26] John Jay declined a second term as Chief Justice, complaining that the Court lacked "energy, weight and dignity."[27]

The Supreme Court's use of judicial review power was established in the case of *Marbury v. Madison,* 5 U.S. 137 (1803).

For the first time, the Supreme Court declared a Congressional law unconstitutional, clarifying the roles of, and the checks and balances among, the three branches of the federal government (Executive, Legislative, and Judicial). Recall from Chapter 1, Black's Law dictionary defines **checks and balances** as "The theory of governmental power and functions whereby each branch of government has the ability to counter the actions of any other branch, so that no single branch can control the entire government."[28] The Supreme Court in *Martin v. Hunter's Lessee (1813)* established its power to decide if a state court had properly interpreted the federal Constitution.[29] The Court cited the Supremacy Clause of the Constitution, in Article VI, Clause 2, which makes the United States sovereign and the final arbiter of all cases that arise under the Constitution. Therefore, where a conflict exists between federal law and a state constitution or statute, the federal law and the Supreme Court of the United States' interpretation of said law will prevail.[30]

So the question became, what standards or criteria would a particular court apply to exercise its judicial review power of a statute or regulation, in the court's effort to ensure conformity with Constitutional principles? To answer this question, the authors turn your attention to an important concept to consider throughout your time of engaging with this text. Although the Constitution was written many years and centuries ago, the Supreme Court of the United States is tasked with applying and interpreting the Constitution to deal with today's issues. The Constitution is a living, breathing document which has relevance and importance to yesteryear, today, and forevermore. However, the Framers could not and did not consider some of the following topics when drafting the Constitution:

- DNA testing
- Government Surveillance
- Global positioning satellite (GPS) tracking
- Online privacy
- Social media

25. Elkins & McKitrick, 1993, p. 62-64
26. Waldman, M. (2023). *The supermajority: How the Supreme Court Divided America*. Simon and Schuster.
27. University of Virginia Press. (n.d.). *Founders Online: To John Adams from John Jay, 2 January 1801*. https://founders.archives.gov/documents/Adams/99-02-02-4745
28. CHECKS AND BALANCES, Black's Law Dictionary (12th ed. 2024).
29. *Martin's v. Hunter's Lessee*, 14 U.S. 304 (1816).
30. Fryling, T. M. F. (2023). *Constitutional law in criminal justice*. Aspen Publishing.

- Brain scans to predict behavior
- Cybercurrency
- Biometrics for facial recognition"[31]
- Assault weapons, designed for military use and quick efficient killing
- Artificial Intelligence (AI) or
- Equal treatment and power of the three branches (Legislative, Executive, and Judicial)

Thus the Supreme Court of the United States has relied upon many methods to interpret how the Constitution views the above areas as well as any additional challenges which may arise. In 2018, the Congressional Research Service examined eight of the most common methods of interpreting the Constitution. The Modes of Constitutional interpretation are:

1. Textualism
2. Original meaning
3. Judicial precedent
4. Pragmatism
5. Moral reasoning
6. National identity (ethos)
7. Structuralism and
8. Historical practices[32]

The eight modes are not exhaustive, but provide "ways of figuring out a particular meaning of a provision within the Constitution."[33] Thus, prior to delving into the constitutional debates, taking sides, or digging one's heels into a particular position, it is worth identifying why you may identify with a particular meaning. This provides context and space to allow you and those who you engage with around the constitution to explore, discuss, debate, and consider other interpretations of the same portions of the Constitution. Therefore, below we will take a deep dive into each of these methods of interpretation.

1. "Textualism – Textualism is a mode of interpretation that focuses on the plain meaning of the text of a legal document. Textualism usually emphasizes how the terms in the Constitution would be understood by people at the time they were ratified, as well as the context in which those terms appear. Textualists usually believe there is an objective meaning of the text, and they do not typically inquire into questions regarding the intent of the drafters, adopters, or ratifiers of the Constitution and its amendments when deriving meaning from the text."[34] Typically, this is the first method of interpretation, when available.[35]

2. "Original meaning – Whereas textualist approaches to Constitutional interpretation focus solely on the text of the document, originalist approaches consider the meaning of the Constitution as understood by at least some segment of the populace at the time of the Founding. Originalists generally agree that the Constitution's text had an "objectively identifiable" or public meaning at the time of the Founding that has

31. Fryling, T. M. F. (2023). *Constitutional law in criminal justice*. Aspen Publishing.
32. Murrill, B.J. (2018). *Modes of Constitutional interpretation: A CRS report prepared for members of Congress*.
33. *Ibid*.
34. *Ibid*.
35. Fryling, 2023.

not changed over time, and the task of judges and Justices (and other responsible interpreters) is to construct this original meaning."[36] In short, "what was the identifiable meaning of the text at the time it was written?"[37]

3. "Judicial precedent – The most commonly cited source of Constitutional meaning is the Supreme Court's prior decisions on questions of Constitutional law. For most, if not all Justices, judicial precedent provides possible principles, rules, or standards to govern judicial decisions in future cases with arguably similar facts."[38] This is also known as **stare decisis**. Remember to read this section later in the text.

4. "Pragmatism – Pragmatist approaches often involve the Court weighing or balancing the probable practical consequences of one interpretation of the Constitution against other interpretations. One flavor of pragmatism weighs the future costs and benefits of an interpretation to society or the political branches, selecting the interpretation that may lead to the perceived best outcome. Under another type of pragmatist approach, a court might consider the extent to which the judiciary could play a constructive role in deciding a question of Constitutional law."[39] This method of interpretation considers the costs of the Supreme Court's interpretation. An example might be whether police officers should be allowed the freedom to search anyone for any reason.[40]

5. "Moral reasoning – This approach argues that certain moral concepts or ideals underlie some terms in the text of the Constitution (e.g., "equal protection" or "due process of law"), and that these concepts should inform judges' interpretations of the Constitution."[41]

6. "National identity (ethos) – Judicial reasoning occasionally relies on the concept of a "national ethos," which draws upon the distinct character and values of the American national identity and the nation's institutions in order to elaborate on the Constitution's meaning."[42] This method of interpretation seems quite subject as it is inherent that one must first determine what the "distinct character and values" are before addressing its impact on cases. Additionally, not everyone agrees upon these same "distinct character and values" within the United States.

7. "Structuralism – Another mode of constitutional interpretation draws inferences from the design of the Constitution: the relationships among the three branches of the federal government (commonly called separation of powers); the relationship between the federal and state governments (known as federalism); and the relationship between the government and the people."[43]

8. "Historical practices – Prior decisions of the political branches, particularly their long-established, historical practices, are an important source of Constitutional meaning. Courts have viewed historical practices as a source of the Constitution's meaning in cases involving questions about the separation of powers, federalism, and individual rights, particularly when the text provides no clear answer."[44]

Once you have sufficiently identified the basic methods and modes of interpretation, it is the authors' hope that you will take your time and a blank approach to learning the Constitution, then carefully identifying which mode or modes of interpretation are at play in the opinion.

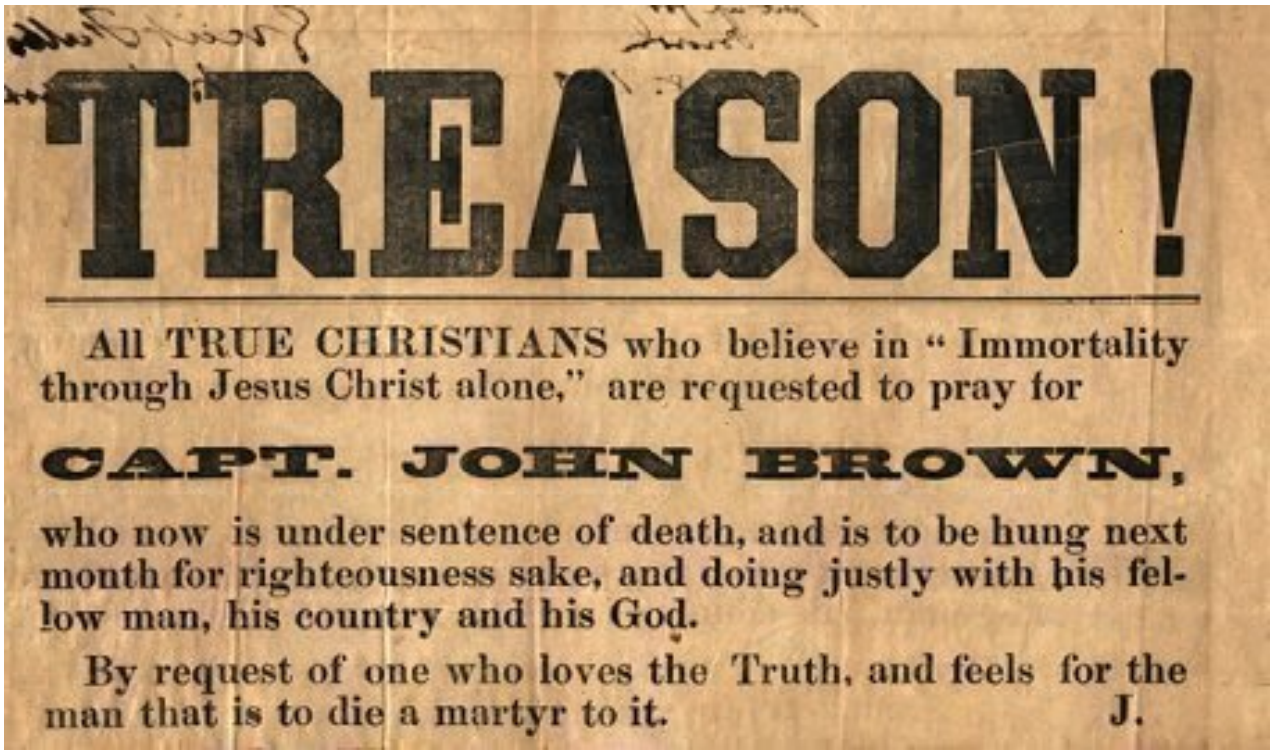
36. *Ibid.*
37. Fryling, 2023.
38. *Ibid.*
39. *Ibid.*
40. Fryling, 2023.
41. *Ibid.*
42. *Ibid.*
43. *Ibid.*
44. *Ibid.*

ANALYSIS OF ARTICLE III

Section 3

Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort. No Person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court.

The Congress shall have Power to declare the Punishment of Treason, but no Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person attainted.


TREASON !

All TRUE CHRISTIANS who believe in " Immortality through Jesus Christ alone," are requested to pray for

CAPT. JOHN BROWN,

who now is under sentence of death, and is to be hung next month for righteousness sake, and doing justly with his fellow man, his country and his God.

By request of one who loves the Truth, and feels for the man that is to die a martyr to it. J.

Example of Treason – Capt. John Brown

"On 16 October 1859 John Brown led eighteen men-thirteen whites and five blacks-into Harpers Ferry, Virginia. Three other members of his force formed a rearguard at a nearby Maryland farm. A veteran of the violent struggles between pro- and antislavery forces in Kansas, Brown intended to provoke a general uprising of African Americans that would lead to a war against slavery. The raiders seized the federal buildings and cut the telegraph wires. Expecting local slaves to join them, Brown and his men waited in the armory while the townspeople surrounded the building. The raiders and the civilians exchanged gunfire, and eight of Brown's men were killed or captured. By daybreak on 18 October, U.S. Marines under the command of Brevet Colonel Robert E. Lee stormed Brown's position in the arsenal's enginehouse and captured or killed most of his force. Five of the conspirators, including Brown's son Owen, escaped to safety in Canada and the North. Severely wounded and taken to the jail in Charles Town, Virginia, John Brown stood trial for treason against the commonwealth of Virginia, for murder, and for conspiring with slaves to rebel. On 2 November a jury convicted him and sentenced him to death. Brown readily accepted the sentence and declared that he had acted in accordance with God's commandments. Responding to persistent rumors and written threats,

> Henry A. Wise, governor of Virginia, called out state militia companies to guard against a possible rescue of Brown and his followers. On 2 December 1859, Brown was hanged in Charles Town."[45]
>
> "Treason is a unique offense in our Constitutional order – the only crime expressly defined by the Constitution which applies to Americans who have betrayed the allegiance they are presumed to owe to the United States. While the Constitution's framers shared the centuries-old view that all citizens owed a duty of loyalty to their home nation, they included the Treason Clause not so much to underscore the seriousness of such a betrayal, but to guard against the historic use of treason prosecutions by repressive governments to silence otherwise legitimate political opposition. Debate surrounding the clause at the Constitutional Convention thus focused on ways to narrowly define the offense and to protect against false or flimsy prosecutions."[46]

The Constitution specifically identifies what constitutes treason against the United States and, importantly, limits the offense of treason to only two types of conduct: (1) "levying war" against the United States; or (2) "adhering to [the] enemies [of the United States], giving them aid and comfort."[47] There have not been many treason prosecutions in American history – indeed, only one person has been indicted for treason against the United States – Adam G.[48] Gadahn was charged for treason as a result of his involvement with al-Qaeda propaganda videos in 2006.[49] Unfortunately, Gadahn would never face charges for his crime as he was killed by a Pakistian air strike instead. Treason may continue to prove a difficult case to charge because of its specificity.

Article IV — States, Citizenship, New States

***Highlighted sections indicate changes identified in other parts of the Constitution of the United States.** Signed in convention September 17, 1787. Ratified June 21, 1788. A portion of Article IV, Section 2, was changed by the 13th Amendment.*

Section 1

Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.

Section 2

The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.

A Person charged in any State with Treason, Felony, or other Crime, who shall flee from Justice, and be found in another State, shall on Demand of the executive Authority of the State from which he fled, be delivered up, to be removed to the State having Jurisdiction of the Crime.

45. *John Brown's Raid*. (n.d.). https://www.lva.virginia.gov/exhibits/deathliberty/johnbrown/index.htm
46. *Interpretation: Treason Clause | Constitution Center*. (n.d.). National Constitution Center – constitutioncenter.org. https://constitutioncenter.org/the-constitution/articles/article-iii/clauses/39
47. Crane, P., & Pearlstein, D. (n.d.). *Interpretation: Treason Clause | The National Constitution Center*. Interactive Constitution. Retrieved May 31, 2021, from https://constitutioncenter.org/interactive-constitution/interpretation/article-iii/clauses/39
48. *Ibid.*
49. *Ibid.*

No Person held to Service or Labour in one State, under the Laws thereof, escaping into another, shall, in Consequence of any Law or Regulation therein, be discharged from such Service or Labour, but shall be delivered up on Claim of the Party to whom such Service or Labour may be due.

Section 3

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.

The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State.

Section 4

The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence.

INTRODUCTION TO ARTICLE IV

Article IV of the United States Constitution serves a significant purpose. In short, it sets forth the expected relationship between states as it relates to laws. "It contains several provisions concerning the federalist structure of government established by the Constitution, which divides sovereignty between the states and the National Government."[50] Article IV further reminds states of the urgency of respect for other states' laws and orders, especially when states have codified different laws about a particular topic. In this way, Congress limited federal authority, while maintaining the sovereignty of state laws.

ANALYSIS OF ARTICLE IV

Section 1

Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.

50. *Overview of Article IV, Relationships between the states*. (n.d.). LII / Legal Information Institute. https://www.law.cornell.edu/constitution-conan/article-4/overview-of-article-iv-relationships-between-the-states

Full Faith and Credit Clause[51]

Most of the original Constitution focuses on creating the federal government, defining its relationship to the states and the people at large. Article IV addresses something different: the states' relations with each other, sometimes called "horizontal federalism." Its first section, the Full Faith and Credit Clause, requires every state, as part of a single nation, to give a certain measure of respect to every other state's laws and institutions. Black's Law Dictionary defines Full Faith and Credit Clause as the clause in the "[United States Constitution, Article] IV, § 1, which requires states to give effect to the acts, public records, and judicial decisions of other states."[52]

The first part of the Clause, largely borrowed from the Articles of Confederation, requires each state to pay attention to the other states' statutes, public records, and court decisions. The second sentence lets Congress decide how those materials can be proved in court and what effect they will have. The current implementing statute, 28 U.S.C. §1738, declares that these materials should receive "the same full faith and credit" in each state as offered in the state "from which they are taken."

51. Milner, J. (2018). Blog – AP US government and politics. *GoPoPro*. https://www.gopopro.com/vocab/2017/3/8/full-faith-and-credit-clause

52. FULL FAITH AND CREDIT CLAUSE, Black's Law Dictionary (12th ed. 2024).

*In recent years, the most controversial applications of the Full Faith and Credit Clause have involved family law.

Each state has slightly different laws about marriage, and marriages themselves typically are not treated as judgments receiving nationwide effect. Until recently, same-sex marriages formed in one state were not always recognized elsewhere. Congress attempted to use its power under the clause to slow the recognition of same-sex marriages by passing the Defense of Marriage Act (signed into law by former President Bill Clinton), but this was rendered obsolete by the Supreme Court's decision in *Obergefell v. Hodges* (2015).[53] The Defense of Marriage Act was partially overruled in 2012. The remainder of the Defense of Marriage Act was overruled in *Obergefell*. Additionally, another case overruled the federal protection of abortion in the *Dobbs v. Jackson Women's Health Organization (2022)* decision. After the *Dobbs v. Jackson Women's Health Organization (2022)* decision (which held that there is no Constitutional right to an abortion), Associate Justice Thomas indicated his desire to revisit many other landmark cases including *Obergefell v. Hodges*.[54] As a result, Congress responded with a law that will address same-sex and interracial marriages. The Respect for Marriage Act was introduced in response to Justice Thomas' comments in the *Dobbs* case. However, this area remains ambiguous as supporters and opponents struggle to determine if the Supreme Court of the United States will reverse itself in *Obergefell*.[55]

ANALYSIS OF ARTICLE IV

Section 2

The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.

A Person charged in any State with Treason, Felony, or other Crime, who shall flee from Justice, and be found in another State, shall on Demand of the executive Authority of the State from which he fled, be delivered up, to be removed to the State having Jurisdiction of the Crime.

No Person held to Service or Labour in one State, under the Laws thereof, escaping into another, shall, in Consequence of any Law or Regulation therein, be discharged from such Service or Labour, but shall be delivered up on Claim of the Party to whom such Service or Labour may be due.

53. Obergefell v. Hodges, 576 U.S. 644 (2015); Sachs, S., & Saunders, S. (n.d.). *Interpretation: Article IV, Section 1: Full Faith and Credit Clause | The National Constitution center*. Interactive Constitution. Retrieved May 31, 2021, from https://constitutioncenter.org/interactive-constitution/interpretation/article-iv/clauses/44

54. *Dobbs v. Jackson Women's Health Organization*, No. 19-1392, 597 U.S. _ (2022).

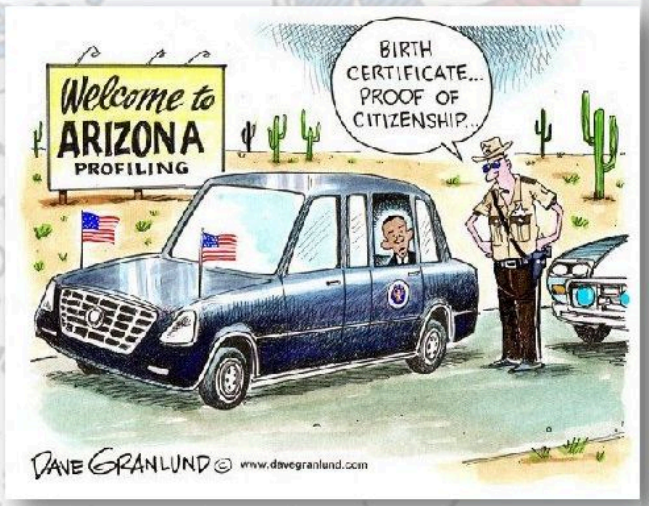
55. *Three minute legal talks: The Respect for Marriage Act | UW School of Law. (2022, December 13). UW School of Law.* https://www.law.uw.edu/news-events/news/2022/respect-for-marriage-act

ARTICLE IV Privileges and Immunities Clause

"The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States…"

5.) THREE '**REAL-LIFE' EXAMPLES** where the Privileges and Immunities Clause proves to be important for citizens of the U.S.

RIGHT TO TRAVEL, SPEED LIMIT, RIGHT TO OWN PROPERTY, JOB OPPORTUNITIES, TAX TREATMENT & PROTECTION OF HABEAS CORPUS



6.) TWO '**REAL-LIFE' EXAMPLES** where it might seem that the Privileges and Immunities Clause has been contradicted for citizens of the U.S.

COLLEGE TUITION (in state vs. out of state) & **HUNTING/FISHING LICENSES**

Article IV, §2 Examples of Privileges and Immunities[56]

Article IV, §2 sets forth three Clauses, each of which concerns the movement of persons throughout the Union.

The first of these, the Privileges and Immunities Clause, stipulates that the citizens of each state shall enjoy the "privileges and immunities of citizens" in the other states. Black's Law Dictionary defines Privileges and Immunities Clause as "[t]he constitutional provision [United States Constitutional Article] IV, §2, [Clause] 1 prohibiting a state from favoring its own citizens by discriminating against other states' citizens who come within its borders."[57] Conversely, where the interstate traveler is a fugitive from criminal justice, the second provision – the Extradition Clause – requires the person's forcible rendition to the state where the alleged crime occurred. Finally, the Fugitive Slave Clause (now obsolete) extended this rule of coercive rendition to interstate fugitives from slavery – that is, fugitives from injustice.

Unlike the other clauses of Article IV, the provisions in §2 vest in Congress no express enforcement power or duty. Instead, each uses a passive-voice verb – "shall be entitled" (in the first clause) and "shall be delivered up" (in the second and third clauses) – without any clear identification of the authority or authorities who are to ensure this entitlement or this rendition. The provisions mention only the persons entitled to the benefit: the *citizen*, under the Privileges and Immunities Clause.

56. Treason, J. M. B. F. I. '. W. J. C. (n.d.). *Article IV of the U.S.* https://slideplayer.com/slide/6417335/
57. PRIVILEGES AND IMMUNITIES CLAUSE, Black's Law Dictionary (12th ed. 2024).

Additionally, the *executive* of the state of the alleged crime as noted under the Extradition Clause with the *slaveholder* under the Fugitive Slave Clause.

The adoption of the Privileges and Immunities Clause addressed a key problem inherent in the new federal system. On July 4, 1776, the representatives of "one People" had declared that the thirteen "United Colonies" were "free and independent states."

From the beginning, the United States was marked by a tension between unity and multiplicity: one united people, but thirteen independent states. And from the beginning, this tension posed many challenges, including the threat that the several states' independence would turn former fellow British subjects into citizens of thirteen separate republics—mutual aliens, rather than one people.

As for the Fugitive Slave Clause, at the end of the day, since the word "slavery" was never mentioned in the Constitution, northerners could argue that the Constitution did not recognize the legality of slavery. However, southerners such as General Cotesworth Pinckney argued, "[w]e have obtained a right to recover our slaves in whatever part of America they may take refuge, which is a right we had not before."[58] Ultimately, the issue of slavery's constitutional status was far from settled.

ANALYSIS OF ARTICLE IV

Section 3

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.

The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State.

This Clause affords Congress the power to admit new states. Most of the discussion at the Constitutional Convention focused on the latter, limiting, portion of the clause—providing that new states can be carved out of or formed from existing states only with the consent of those existing states. Several convention delegates objected to this provision on the grounds that, because several of the existing large states laid claims to vast swathes of western territories and other lands, those states would never consent to form new states in those territories. Thus, the large states would only become larger and more powerful over time. But the prevailing sentiment at the Convention was that a political society cannot be split apart against its will.

While the consent requirement garnered the most discussion at the framing, it has come into play only a handful of times in American history. One such time was when Massachusetts consented to the formation of Maine. Most intriguingly, Virginia was treated as consenting to the formation of West Virginia at the outset of the Civil War. Although it was actually a breakaway, pro-Union province of Virginia that declared itself to be the lawful government of Virginia, then purported to give "Virginia's"

58. Gross, A., & Upham, D. (n.d.). *Interpretation: Article IV, Section 2: Movement of Persons Throughout the Union | The National Constitution Center.* Interactive Constitution. Retrieved May 31, 2021, from https://constitutioncenter.org/interactive-constitution/interpretation/article-iv/clauses/37

consent to the creation of the new state of West Virginia – which was to occupy that same breakaway corner of Virginia.[59]

CONSTITUTIONAL CLIP

The opening portion of the Clause—granting Congress the general power to admit new states—has played a far more significant role in American history. Only thirteen states ratified the Constitution pursuant to Article VII. All of the remaining thirty-seven states were subsequently admitted to the Union by Congress pursuant to this power.[60]

ANALYSIS OF ARTICLE IV

Section 4

The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence.

The **Guarantee Clause** requires the United States to guarantee to the states a republican form of

59. Biber, E., & Colby, T. (n.d.). *Interpretation: The admissions clause | The National Constitution Center.* Interactive Constitution. Retrieved May 31, 2021, from https://constitutioncenter.org/interactive-constitution/interpretation/article-iv/clauses/46

60. *Ibid.*

government and provide protection from foreign invasion and domestic violence. Although rarely formally invoked by Congress, the President, or the courts, there is some consensus on what it means.

At its core, the Guarantee Clause provides for majority rule. A republican government is one in which the people govern through elections. This is the constant refrain of the *Federalist Papers*. Alexander Hamilton, for example, noted in *The Federalist No. 57*: "The elective mode of obtaining rulers is the characteristic policy of republican government."[61]

Thus, the Guarantee Clause imposes limitations on the *type* of government a state may have. The Clause requires the United States to prevent any state from imposing rule by monarchy, dictatorship, aristocracy, or permanent military rule, even through majority vote. Instead, governing by electoral processes is constitutionally required.

However, the Guarantee Clause does not speak to the details of the republican government that the United States is to guarantee.

For example, it is difficult to imagine that those who enacted the Constitution believed the Guarantee Clause would be concerned with state denial of the right to vote on the basis of race, sex, age, wealth, or property ownership. Article I, §2 of the Constitution left voting qualifications in the hands of the states, although state authority in this area has been altered by subsequent amendments. The Guarantee Clause also does not require any particular form of republican governmental structure.[62]

Article V – Amendment Process

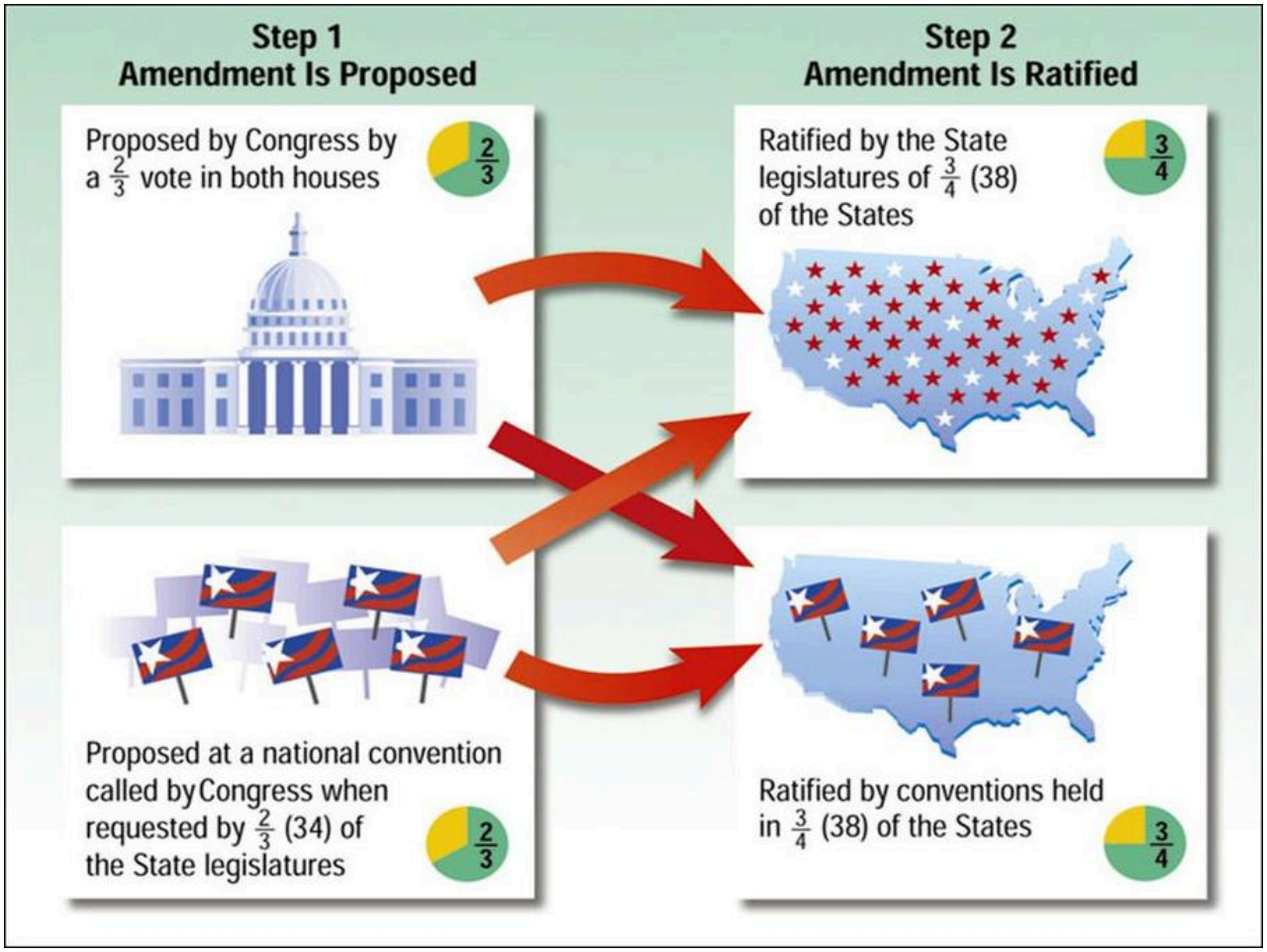
Signed in convention September 17, 1787. Ratified June 21, 1788

The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress; Provided that no Amendment which may be made prior to the Year One thousand eight hundred and eight shall in any Manner affect the first and fourth Clauses in the Ninth Section of the first Article; and that no State, without its Consent, shall be deprived of its equal Suffrage in the Senate.

61. The avalon project: The federalist papers. (2008). The Federalist Papers : No. 57. https://avalon.law.yale.edu/18th_century/fed22.asp

62. Please review the Appendix and ratification dates for each portion of the United States Constitution.[63]Chin, G., & Hawley, E. (n.d.). *The guarantee clause*. National Constitution Center. Retrieved November 19, 2020, from https://constitutioncenter.org/interactive-constitution/interpretation/article-iv/clauses/42

63.



America's Amoral Article V?[64]

INTRODUCTION TO ARTICLE V

The Constitution of the United States is the "...oldest written national constitution in operation, completed in 1787 at the Constitutional Convention of 55 delegates who met in Philadelphia, ostensibly to amend the Articles of Confederation."[65] Although the original Constitution (the Preamble and the Articles) was ratified in 1788, recall from Chapter 1, the first discussion of amendments occurred in 1787 during the Constitutional Convention.[66] In September 1789, Congress proposed the first 12 amendments which would later become the Bill of Rights, in its modified form of 10 amendments.[67] Formally, there has been more than 11,000 proposed amendments, but formally the Constitution has been amended 27 times.[68]

64. Guerra-Pujol, V. a. P. B. F. E. (2020, September 24). America's amoral Article V? Prior Probability. https://priorprobability.com/2020/09/17/americas-amoral-article-v/
65. The Editors of Encyclopaedia Britannica. (n.d.). *Constitution of the United States summary*. Encyclopedia Britannica. https://www.britannica.com/summary/Constitution-of-the-United-States-of-America
66. *Ibid.*
67. *Ibid.*
68. *U.S. Senate: Amending the Constitution*. (2019, September 23). https://www.senate.gov/reference/reference_index_subjects/Constitution_vrd.htm#:~:text=It%20has%20become%20the%20landmark,11%2C000%20amendments%20proposed%20since%201789.

Article V of the United States Constitution provides for change via a Constitutional convention to propose amendments, regardless of Congress's approval.[69] Those proposed amendments would then be sent to the states for ratification. Although rarely used, there are technically four methods of amending the Constitution of the United States. A close reading of the Constitution and substitute changes will help to explain each method. By way of introduction, the Constitution can be amended by two methods via Article V; however, two additional methods are identified below as a result of the changes identified:

1. Two-thirds Congressional proposal with Three-fourths ratification by state legislatures. (most amendments for this method)
2. Conventional proposal of states with ratification by state conventions. (never used)
3. Conventional proposal of states with ratification by state legislatures. (never used)
4. Congressional proposal with ratification by state conventions. (repeal of 18th Amendment by 21st Amendment)[70]

ANALYSIS OF ARTICLE V

Article V of the Constitution says how the Constitution can be amended—that is, how provisions can be added to the text of the Constitution. The Constitution is not easy to amend: only twenty-seven amendments have been added to the Constitution since it was adopted.

Article V spells out a few different ways in which the Constitution can be amended. One method—the one used for every amendment so far—is that Congress proposes an amendment to the states; the states must then decide whether to ratify the amendment. But in order for Congress to propose an amendment, two-thirds of each House of Congress must vote for it. And then three-quarters of the states must ratify the amendment before it is added to the Constitution. So if slightly more than one-third of the House of Representatives, *or* slightly more than one-third of the Senate, *or* thirteen out of the fifty states object to a proposal, it will not become an amendment by this route. In that way, a small minority of the country has the ability to prevent an amendment from being added to the Constitution.

The amendments to the Constitution have come in waves.

The first twelve Amendments, including the Bill of Rights, were added by 1804. Afterwards, there were no amendments for more than half a century. In the wake of the Civil War, three important Amendments were added: the Thirteenth (outlawing slavery) in 1865, the Fourteenth (mainly protecting equal civil rights) in 1868, and the Fifteenth (forbidding racial discrimination in voting) in 1870.

After the Civil War Amendments, another forty-three years passed until the Constitution was amended again; then four more Amendments (Sixteen through Nineteen) were added between 1913 and 1920. Seven more amendments were adopted at pretty regular intervals between 1920 and 1971. With the exception of one very unusual amendment (the 27th Amendment), there have been no

69. Government Publishing Office. (n.d.). *Proposed amendments not ratified by the states*. Gov Info. Retrieved July 19, 2023, from https://www.govinfo.gov/content/pkg/GPO-CONAN-1992/pdf/GPO-CONAN-1992-8.pdf

70. *U.S. Senate: Amending the Constitution*. (2019, September 23). https://www.senate.gov/reference/reference_index_subjects/Constitution_vrd.htm#:~:text=It%20has%20become%20the%20landmark,11%2C000%20amendments%20proposed%20since%201789.

amendments to the Constitution since 1971. The 27th Amendment was ratified in 1992, after first being proposed over two hundred years earlier.[71]

Article VI – Debts, Supremacy, Oaths, Religious Tests

Signed in convention September 17, 1787. Ratified June 21, 1788

All Debts contracted and Engagements entered into, before the Adoption of this Constitution, shall be as valid against the United States under this Constitution, as under the Confederation.

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.

The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution; but no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States.

Supreme Court Affirms No Religious Test for Public Office

Religious Tests[72]

INTRODUCTION TO ARTICLE VI

Article VI paves the way to establish the Constitution as the premier document for supreme authority in the United States. Additionally, Article VI has binding authority upon all state judges, barring states' law and constitution. Moreover, "...the U.S. government...remained bound by the obligations of the predecessor governments established under the Articles of Confederation and Continental Congresses."[73] All federal and state officials are required to make the United States Constitution their first loyalty regardless of their level of government. Finally, Article VI sought to protect public officials' religious privacy as this may not be required in order to hold office.[74]

ANALYSIS OF ARTICLE VI

Instead of giving Congress additional powers, the Supremacy Clause simply addresses the legal status of the laws that other parts of the Constitution empower Congress to make, as well as the legal status of treaties and the Constitution itself. The core message of the **Supremacy Clause** is simple:

71. For a more detailed discussion regarding the Twenty-seventh Amendment and the 200-year journey to ratification in Chapter 14.
72. Seering, L. (n.d.). *Supreme Court Affirms No Religious Test for Public Office – Freedom From Religion Foundation*. https://ffrf.org/ftod-cr/item/14443-supreme-court-affirms-no-religious-test-for-public-office
73. *Overview of Article IV, Relationships between the states*. (n.d.). LII / Legal Information Institute. https://www.law.cornell.edu/constitution-conan/article-4/overview-of-article-iv-relationships-between-the-states
74. *Overview of Article VI, Supreme Law*. (n.d.). LII / Legal Information Institute. https://www.law.cornell.edu/constitution-conan/article-6/overview-of-article-vi-supreme-law

the Constitution and federal laws (of the types listed in the first part of the Clause) take priority over any conflicting rules of state law. This principle is so familiar that we often take it for granted. Still, the Supremacy Clause has several notable features. To begin, the Supremacy Clause contains the Constitution's most explicit references to what lawyers call "**judicial review**" which is the idea that even duly enacted statutes do not supply rules of decision for courts to the extent that the statutes are unconstitutional. Legal scholars insist that the Supremacy Clause's reference to "the Laws of the United States which shall be made in Pursuance [of the Constitution]" itself incorporates this idea; in their view, a federal statute is not "made in Pursuance [of the Constitution]" unless the Constitution really authorizes Congress to make it. Other scholars say that this phrase simply refers to the lawmaking process described in Article I, and does not necessarily distinguish duly enacted federal statutes that conform to the Constitution from duly enacted federal statutes that do not. But no matter how one parses this specific phrase, the Supremacy Clause unquestionably describes the Constitution as "Law" of the sort that courts apply. This point is a pillar of the argument for judicial review. In addition, the Supremacy Clause explicitly specifies that the Constitution binds the judges in every state notwithstanding any state laws to the contrary.

Under the Supremacy Clause, the "supreme Law of the Land" also includes federal statutes enacted by Congress.

Within the limits of the powers that Congress gets from other parts of the Constitution, Congress can establish rules of decision that American courts are bound to apply, even if state law purports to supply contrary rules. Also, Congress has some authority to wholly limit state law or otherwise to restrict how state law interacts with topics. While the directives that Congress enacts are indeed authorized by the Constitution, the United States' congressional authority takes priority over both the ordinary laws and the constitution of each individual state.[75] During the ratification period, Anti-Federalists objected to the fact that federal statutes and treaties could override aspects of each state's constitution and bill of rights. While this feature of the Supremacy Clause was controversial, it was also unambiguous.[76]

After requiring all federal and state legislators and officers to swear or affirm to support the federal Constitution, Article VI specifies that "no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States." The prohibitive No Religious Test Clause banned a longstanding form of religious discrimination practiced both in England and the United States. The No Religious Test Clause of the Constitution provided a limited, but enduring textual commitment to religious liberty. Further, the clause promoted equality that has influenced the way Americans have understood the relationship between government and religion for the last two centuries. Justice Black reiterated this test in *Torcaso v. Watkins* (1961) as he emphasized

"[w]e repeat and again reaffirm that neither a State nor the Federal Government can constitutionally force

75. Nelson, C., & Roosevelt, K. (n.d.). *Interpretation: The supremacy clause | The National Constitution Center*. Interactive Constitution. Retrieved May 31, 2021, from https://constitutioncenter.org/interactive-constitution/interpretation/article-vi/clauses/31

76. *Ibid.*

a person 'to profess a belief or disbelief in any religion.' Neither can constitutionally pass laws or impose requirements which aid all religions as against nonbelievers, and neither can aid those religions based on a belief in the existence of God as against those religions founded on different beliefs."[77]

At the time the United States Constitution was adopted, religious qualifications for holding office also were pervasive throughout the states.

Delaware's constitution, for example, required government officials to "profess faith in God the Father, and in Jesus Christ His only Son, and in the Holy Ghost."[78] North Carolina barred anyone "who shall deny the being of God or the truth of the Protestant religion" from serving in the government.[79] Unlike the rule in England, however, American religious tests did not limit office-holding to members of a particular established church. Every state allowed Protestants of all varieties to serve in government. Furthermore, religious tests were designed to exclude certain people, often Catholics or non-Christians, from holding office based on their faith.[80]

As is true of virtually all Constitutional provisions, the No Religious Test Clause in Article VI only restricts *governmental* action. Private citizens do not violate the Constitution if they vote against a political candidate because of his or her religion. A harder question, which has provoked considerable contemporary debate, is whether the Clause extends beyond a ban against oaths and prohibits government officials from taking the religious views of an individual into account in selecting or confirming that individual for a federal position—such as an appointment to the Supreme Court.[81]

Article VII - Ratification

Signed in convention September 17, 1787. Ratified June 21, 1788

The Ratification of the Conventions of nine States, shall be sufficient for the Establishment of this Constitution between the States so ratifying the Same.

SIGNERS

Done in Convention by the Unanimous Consent of the States present the Seventeenth Day of September in the Year of our Lord one thousand seven hundred and Eighty seven and of the Independence of the United States of America the Twelfth. In witness whereof We have here unto subscribed our Names,

George Washington, President and deputy from Virginia

NEW HAMPSHIRE

John Langdon
Nicholas Gilman

77. *Torcaso v. Watkins*, 367 U.S. 488 (1961).
78. Brownstein, A., & Campbell, J. (n.d.). Interpretation: The no religious test clause | The National Constitution Center. Interactive Constitution. Retrieved May 31, 2021, from https://constitutioncenter.org/interactive-constitution/interpretation/article-vi/clauses/32
79. *Ibid.*
80. *Ibid.*
81. *Ibid.*

MASSACHUSETTS

Nathaniel Gorman
Rufus King

CONNECTICUT

William Samuel Johnson
Roger Sherman

NEW YORK

Alexander Hamilton

NEW JERSEY

William Livingston
David Brearley
William Paterson
Jonathan Dayton

PENNSYLVANIA

Benjamin Franklin
Thomas Mifflin
Robert Morris
George Clymer
Thomas Fitzsimons
Jared Ingersoll
James Wilson
Gouverneur Morris

DELAWARE

George Read
Gunning Bedford Jr.
John Dickinson
Richard Bassett
Jacob Broom

MARYLAND

James McHenry
Daniel of St. Thomas Jenifer
Daniel Carroll

VIRGINIA

John Blair
James Madison Jr.

NORTH CAROLINA

William Blount
Richard Dobbs Spaight
Hugh Williamson

SOUTH CAROLINA

John Rutledge
Charles Cotesworth Pinckney
Charles Pinckney
Pierce Butler

GEORGIA

William Few
Abraham Baldwin
Attest: William Jackson, Secretary

INTRODUCTION TO ARTICLE VII

"The controversies over Article VII that occurred during the ratification process were over the substance of the mandated ratification process, not over what the text actually mandated. Anti-Federalists and Federalists agreed on the meaning of "Ratification," "nine" and "States." The main dispute between Anti-Federalists and Federalists was whether the new Constitution could lawfully be ratified by nine states."[82]

According to the text of Article VII, once the conventions of nine states ratified the Constitution, then the document was valid. Thus, when New Hampshire became the ninth state to ratify on June 21, 1788, the Constitution became valid. This is further evidenced in *Owings v. Speed* (1820)[83] which follows:

"The Conventions of nine States having adopted the Constitution, Congress, in September or October, 1788, passed a resolution in conformity with the opinions expressed by the Convention, and appointed the first Wednesday in March of the ensuing year as the day, and the then seat of Congress as the place, 'for commencing proceedings under the Constitution.'

...The New Government did not commence until the old Government expired. It is apparent that the government did not commence on the Constitution being ratified by the ninth State; for these ratifications were to be reported to Congress, whose continuing existence was recognized by the Convention, and who were requested to continue to exercise their powers for the purpose of bringing the new Government into

82. *Interpretation: Article VII | Constitution Center*. (n.d.). National Constitution Center – constitutioncenter.org. https://constitutioncenter.org/the-constitution/articles/article-vii/interpretations/24#:~:text=The%20text%20of%20Article%20VII,End%20of%20story.

83. 18 U.S. (5 Wheat.) 420, 422–23 (1820).

operation. In fact, Congress did continue to act as a Government until it dissolved on the 1st of November, by the successive disappearance of its Members. It existed potentially until the 2d of March, the day proceeding that on which the Members of the new Congress were directed to assemble.

The resolution of the Convention might originally have suggested a doubt, whether the government could be in operation for every purpose before the choice of a President; but this doubt has been long solved, and were it otherwise, its discussion would be useless, since it is apparent that its operation did not commence before the first Wednesday in March 1789 . . . ."[84]

ANALYSIS OF ARTICLE VII

Article VII came to be viewed as having important implications for federalism and secession. Chief Justice John Marshall in *McCullough v. Maryland* (1819) argued that Article VII's requirement that the Constitution be ratified by the people in convention showed that it was not a compact between the states, but an emanation of the people as a whole.[85] According to Marshall, the conventions occurred at the state level, because of mere historical practice and convenience.[86]

By contrast, the Confederate States interpreted Article VII differently. They viewed each state's ratification as a decision by that state, acting through its sovereign people.[87] When these states attempted to secede, they often did so by having a convention adopt a provision repealing their prior ratification of the Constitution under Article VII.[88] Thus, these states viewed the Article VII ratification as an act of the people of the state that could be repealed.

Critical Reflections:

1. Do you think the Framers properly balanced the powers given to states vs. those given to the federal courts (government)? Why or why not?
2. Over the last half-century the installation of new U.S. Supreme Court justices has been mostly a partisan decision. Given that their appointment is for life, would you install a process to rebalance the Court so that it is more representative of both major political parties? Would this solve the problem over the next 50 years? Why or why not?
3. Does a requirement that members of Congress swear allegiance to the Constitution on a Bible violate the clause prohibiting religious tests?
4. Three Presidents have been impeached (one twice) by the U.S. House of Representatives, but none have been convicted and removed from office by the Senate. Should the Constitution be amended to allow for a majority vote to convict the President in the Senate? Why or why not?

84. *ArtVII.1 Historical Background on Ratification Clause*. (n.d.). Constitutional Annotated. Retrieved August 8, 2023, from https://constitution.congress.gov/browse/essay/artVII-1/ALDE_00000389/

85. *McCulloch c. Maryland*, 17 U.S. 316 (1819).

86. *Ibid.*

87. Graber, M., & Rappaport, M. (n.d.). Interpretation: Article VII | The National Constitution Center. Interactive Constitution. Retrieved May 31, 2021, from https://constitutioncenter.org/interactive-constitution/interpretation/article-vii/interps/24

88. *Ibid.*

Chapter 3 - Amendment I: Exploring Freedoms, Rights, Privileges & Their Differences

Amendment I

RICHARD J. FORST AND TAUYA R. FORST

LEARNING OBJECTIVES

After reading this chapter, you should be able to:

3.1 Identify the unfamiliar terms of the First Amendment.

3.2 Explain the three freedoms guaranteed by the First Amendment.

3.3 Summarize the two rights defined in the First Amendment.

3.4 Compare the difference between a freedom and a right.

3.5 Demonstrate examples of how the freedom and rights of the First Amendment apply to case law.

KEY TERMS

Abridge
Assemble
Assembly
Citizens United v. Federal Election Commission
Constitutional Freedom/Freedom
Constitutional Rights/Rights
Establishment Clause
Free Exercise Clause

Grievance
Peaceably
Petition
Political Expression
Prior Restraint
Press
Redress
Religion
Right
Symbolic Speech
Unlawful assembly
Verbal (Pure) Speech

Amendment I

Passed by Congress September 25, 1789. Ratified December 15, 1791. The first 10 amendments form the Bill of Rights.

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Understanding the Amendments

To fully understand the United States Constitution, we use a process which helps identify and distinguish components of the writings. First, we must determine how many parts (different rights and freedoms) exist in the First Amendment. This will require a literal reading of each part of the amendment. Next, we determine the parts. This allows us to understand the verbiage of the United States Constitution. Words matter. Lastly, we use these important words to identify from where these concepts originate. Let's get started.

INTRODUCTION TO AMENDMENT I

The original Constitution were completed as an exercise in compromise in 1776. The original Constitution is comprised of the Preamble and the Seven Articles. The Framers maintained a healthy appetite for change as they created Article V of the United States Constitution, recognizing the need for amendments. The Framers balanced the need for amendments with a high standard of achievement. **Note:** The First Amendment does not apply to private entities or persons. The First Amendment outlines governmental restrictions – federal, state, and local. The first 10 amendments together are dubbed the Bill of Rights – all ratified on the same date – December 15, 1791; however, the name might be contradictory in nature.

Similar to the other amendments of the Bill of Rights, Amendment I originally pertained to the actions of the federal government, without addressing actions by the states. However, state

constitutions (as adopted by each state) have their own versions of the Bill of Rights which parallel the United States Bill of Rights.[1] Unfortunately, these provisions were enforceable only in their own state courts. To this end, when the Fourteenth Amendment was ratified in 1868, the United States Constitution set forth prohibitions for the states which included preservation of such rights as liberty and due process. According to Britannica, the Supreme Court of the United States has slowly used the Fourteenth Amendment Due Process clause to apply most of the first 10 amendments (including Amendment I clauses) to state governments. In this instance, the clauses of Amendment I cover all governments (federal, state, and local) and all branches (legislative, executive, and judicial) as well as public employers and schools.[2]

CONSTITUTIONAL CLIP

"Madison's version of the speech and press clauses, introduced in the House of Representatives on June 8, 1789, provided: "The people shall not be deprived or abridged of their right to speak, to write, or to publish their sentiments; and the freedom of the press, as one of the great bulwarks of liberty, shall be inviolable." The special committee rewrote the language to some extent, adding other provisions from Madison's draft, to make it read: "The freedom of speech and of the press, and the right of the people peaceably to assemble and consult for their common good, and to apply to the government for redress of grievances, shall not be infringed." In this form it went to the Senate, which rewrote it to read: "That Congress shall make no law abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble and consult for their common good, and to petition the government for a redress of grievances." Subsequently, the religion clauses and these clauses were combined by the Senate. The final language was agreed upon in conference."[3]

As the Framers engaged in negotiating the verbiage of the amendment, they considered the context and framework for both constitutional freedoms and rights. Freedom or constitutional freedom are defined as "[a] basic liberty guaranteed by the Constitution or Bill of Rights, such as the freedom of speech."[4] Whereas right or constitutional right are defined as "[s]omething that is due to a person by just claim, legal guarantee, or moral principle"[5] "guaranteed by a constitution; [especially], one guaranteed by the U.S. Constitution or by a state constitution."[6] It is important to understand how the term "right" was used, not as we understand it today, but how the Framers would have regarded this term. Today, we speak of personal and individual rights, such as our fundamental right to keep and bear arms.

However, Campbell noted the Framers categorized rights into two categories – natural rights and

1. Volokh, E. (2020, October 15). First Amendment. Encyclopedia Britannica. https://www.britannica.com/topic/First-Amendment
2. *Ibid.*
3. Volokh, E. (n.d.). *Adoption and the common law background*. Legal Information Institute. Retrieved December 12, 2020, from https://www.law.cornell.edu/constitution-conan/amendment-1/adoption-and-the-common-law-background#:%7E:text=Madison's%20version%20of%20the%20speech,bulwarks%20of%20liberty%2C%20shall%20be
4. CONSTITUTIONAL FREEDOM, Black's Law Dictionary (12th ed. 2024).
5. RIGHT, Black's Law Dictionary (12th ed. 2024).
6. CONSTITUTIONAL RIGHT, Black's Law Dictionary (12th ed. 2024).

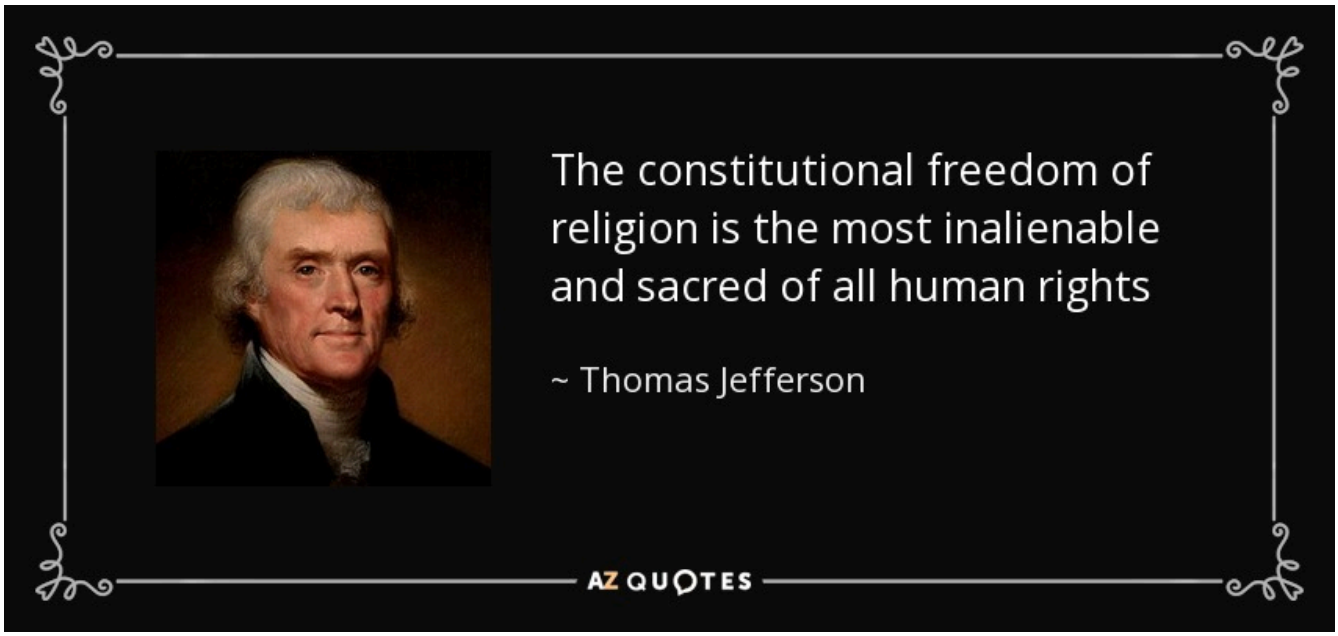
positive rights.[7] Campbell further warned that this framework is essential to the discussion when he stated, "[u]nless we approach the task of Constitutional interpretation on their terms rather than on ours, the First Amendment's original meaning will remain elusive."[8] Simply, natural rights are things which can be accomplished without governmental intervention such as eating, walking, and thinking.[9] Whereas, positive rights are those things which center on governmental authority such as right to jury trial.[10] It is with this analysis in mind that one should read the remainder of this chapter, the textbook, and consider the balance of the rights found in the United States Constitution.

Five Parts of the First Amendment

ANALYSIS OF AMENDMENT I

Part I — Freedom of Religion

Congress shall make no law respecting an establishment of religion



Thomas Jefferson Writings, 3rd United States President[11]

a. Establishment Clause

The right to choose how to express faith and worship includes expressing no religion. Individuals are allowed to practice or abstain from practicing religious beliefs, without governmental interference or promotion of religion. Religion is defined as

7. Campbell, J. (2018, July 9). *What did the First Amendment originally mean?* Richard Law. https://lawmagazine.richmond.edu/features/article/-/15500/what-did-the-first-amendment-originally-mean.html
8. *Ibid.*
9. *Ibid.*
10. *Ibid.*
11. Jefferson, T. (1984). *Thomas Jefferson: Writings (LOA #17): Autobiography / Notes on the State of Virginia / Public and Private Papers / Addresses / Letters*. Library of America, p.593.

> "[a] system of faith and worship [usually] involving belief in a supreme being and [usually] containing a moral or ethical code; [especially], such a system recognized and practiced by a particular church, sect, or denomination. In construing the protections under the Establishment Clause and the Free Exercise Clause, courts have interpreted the term *religion* broadly to include a wide variety of theistic and nontheistic beliefs."[12]

This right was also guaranteed by the United States Constitution Article VI, §3 and was discussed earlier in Chapter 2.

The Establishment Clause is misquoted typically. As a point of reference, the Establishment Clause is defined as "[t]he First Amendment provision that prohibits the federal and state governments from establishing an official religion, or from favoring or disfavoring one view of religion over another."[14] Most individuals who read the First Amendment want to believe that this clause denotes unlimited access to establishing a religion. In fact, none of the freedoms or rights is absolute. The courts determined this stance early on. This clause was specific to the government and its restriction against establishing a church that all in America would be subject to. Additionally, this clause outlined the ability for most to establish a religion, unless the religion interferes with the health and safety of those on American soil. In *Everson v. Board of Education* (1947), the court held that the purpose of this clause was primarily to create a separation between church and state.[15] Justice Hugo Black explained in simple, yet pointed words why this clause was included in the Bill of Rights.[16] Further, Justice Black delivered a clear and concrete analysis of what the First Amendment means by addressing its application to religion and church. Justice Black emphasized that:

> *"a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No*

"Madison's original proposal for a bill of rights provision concerning religion read: The civil rights of none shall be abridged on account of religious belief or worship, nor shall any national religion be established, nor shall the full and equal rights of conscience be in any manner, or on any pretence, infringed. The language was altered in the House to read: Congress shall make no law establishing religion, or to prevent the free exercise thereof, or to infringe the rights of conscience. In the Senate, the section adopted read: Congress shall make no law establishing articles of faith, or a mode of worship, or prohibiting the free exercise of religion. . . . It was in the conference committee of the two bodies, chaired by Madison, that the present language was written with its somewhat more indefinite respecting phraseology. Debate in Congress lends little assistance in interpreting the religion clauses; Madison's position, as well as that of Jefferson, who influenced him, is fairly clear, but the intent, insofar as there was one, of the others in Congress who voted for the language and those in the states who voted to ratify is subject to speculation."[13]

12. RELIGION, Black's Law Dictionary (12th ed. 2024).
13. Library of Congress. (n.d.). *Freedom of speech: Historical background | constitution annotated | Congress.gov | library of congress.* Constitution Annotated. Retrieved May 3, 2021, from https://constitution.congress.gov/browse/essay/amdt1-1-1/ALDE_00000390/#ALDF_00005678
14. ESTABLISHMENT CLAUSE, Black's Law Dictionary (12th ed. 2024).
15. *Everson v. Board of Education*, 330 U.S. 1 (1947).
16. *Id.*

person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance."[17]

The Supreme Court applied the religion clauses to the states beginning with the 1940s. This application exhibited a wide interpretation of the religion clauses. Specifically in *Everson v. Board of Education*, with a 5-4 decision which declared that the Establishment Clause forbids not only practices that "aid one religion" or "prefer one religion over another," but also those that "aid all religions."[18]

The Supreme Court addressed a scenario in which the Establishment Clause clashed with the Free Exercise Clause, "[t]he constitutional provision (U.S. Const. amend. I) prohibiting the government from interfering in people's religious practices or forms of worship,"[19] in Kennedy v. Bremerton School District (2022).[20] Kennedy was a public high school football coach, who engaged in prayer with a number of students during and after school games. His employer, the Bremerton, Washington School District, asked that he discontinue the practice in order to protect the school for a lawsuit based on violation of the Establishment Clause. Kennedy refused, was then fired, and sued the school district.[21] By a 6-3 vote, the majority held that the Free Exercise and Free Speech Clauses of the First Amendment protect an individual engaging in a personal religious observance from government reprisal.[22] Thus the Court struck down a long-standing precedent. In Lemon v. Kurtzman (1971), the Court held that the First Amendment prohibited government from providing resources to establish religion unless there is a "legitimate secular purpose."[23]

b. Free Exercise Clause

or prohibiting the free exercise thereof

The government gives all persons the freedom or ability to engage in religion without hindrance. Although, Free Exercise is part of the Freedom of Religion, this does not mean that it is absolute. One example of a limit on the Free Exercise clause is practicing a religion where poisonous snakes are being

17. *Id. at 15-16.*
18. Ibid.
19. FREE EXERCISE CLAUSE, Black's Law Dictionary (12th ed. 2024).
20. Kennedy v. Bremerton School District, 597 U. S. ___(2022).
21. Ibid.
22. Id.
23. Lemon v. Kurtzman, 403 U.S. 602 (1971).

The sacred practice of snake handling began in 1909 in the Church of God, when members of its church interpreted scriptures literally.[24] The participants believed that handling poisonous snakes was integral to their worship experience. Although, the practice of snake handling has claimed many lives, the courts have refused to extend the Free Exercise protection in an effort to block the restrictions placed by the government.[25]

handled and can kill its participants. In most instances, the government restricts this freedom through the balancing of reasonable health restrictions. A case of this magnitude has not reached the Supreme Court of the United States; however, several states have weighed in with their opinions. Tennessee, Kentucky, Connecticut, and Alabama have all identified some restriction on who can handle the poisonous creatures as well as the protocols for children who may be affected as noted in Harden v. State (1948).[26]

This balance between Free Exercise and medical treatment heightens the legal debate. Religious beliefs extend into debates regarding whether an individual receives medical treatment. Also, these beliefs are apparent as individuals examine how one receives medical treatment. This may include, but is not limited to, "Do Not Resuscitate" orders, decisions to receive organ transplants, and blood transfusions. Blood transfusions, or should we say, the denial of blood transfusions has been an important tenet for Jehovah Witnesses and other religions for years. Although individual members are allowed to deny their own blood transfusion treatment; the court has determined that this decision may not be made for a child suffering a life-threatening illness where a health expert deems blood transfusion as critical.[27] Even in a situation involving a 25-year-old woman, the federal judge ordered a transfusion against the married woman's request.[28]

This balancing act continues to be problematic as the Court determines its interest and proper place in such a polarizing topic. Once again, the Supreme Court of the United States refuses to review a case on this topic for either adults or children. Lower courts have upheld opinions for those who want to execute Free Exercise as well as those who believe these topics violate the government's right to restrict the Free Exercise clause for the health and well-being under the state's purview. It is extremely important to note that: "Forty-six states have statutes that allow parents to use their religious beliefs as a defense against prosecution for withholding medical treatment from their children."[29] One must consider other aspects of this discussion. If states allow the Free Exercise clause as a defense to the previously mentioned statutes, then obviously the states have considered whether or not these items should be crimes. A state could have determined that these actions are not punishable; thus, it appears that the government intended to have restrictions dismissing any rights to absolutism.

However, in *Wisconsin v. Yoder* (1972), the Supreme Court noted that "only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of

24. Vile, J. (n.d.). Snake handling. The First Amendment Encyclopedia. Retrieved May 1, 2021, from https://www.mtsu.edu/first-amendment/article/928/snake-handling
25. Ibid.
26. Harden v. State, 188 Tenn. 17 (Tenn. Supreme Court, 1948).
27. Gruberg, M. (n.d.). Blood Transfusions and Medical Care against Religious Beliefs. The First Amendment Encyclopedia. Retrieved May 1, 2021, from https://www.mtsu.edu/first-amendment/article/908/blood-transfusions-and-medical-care-against-religious-beliefs
28. *Ibid.*
29. *Ibid.*

religion."[30] In 2022, the Supreme Court ruled that the State of Maine may not exclude religious schools from a state tuition program. The majority opinion in *Carson v. Makin* (2022), penned by Chief Justice Roberts, held that states that choose to subsidize private schools may not discriminate against religious ones.[31]

Furthermore, the Supreme Court addressed the balancing act in a 2023 decision, *303 Creative LLC v. Elenis (2023)* decided by a 6-3 vote.[32] Justice Gorsuch, writing for the majority, held that the First Amendment prohibits Colorado from forcing a website designer to create expressive designs speaking messages with which the designer disagrees.[33]

In this case, a website designer wanted to expand her services to include wedding websites, but did not want to offer those websites to same-sex couples because of her religious belief that same-sex marriages are "false" and contrary to God's design.[34] A Colorado law bars discrimination because of disability, race, creed, color, sexual orientation, gender identity, marital status, national origin or ancestry in a place of accommodation.[35] For Justice Gorsuch, the Colorado law was unconstitutionally compelling speech by the website designer.[36] In dissent, Justice Sotomayor wrote, "...if a business chooses to profit from the public market, which is established and maintained by the state, the state may require the business to abide by a legal norm of nondiscrimination."[37]

CONSTITUTIONAL CLIP

"More recent decisions, however, evidence a narrower interpretation of the religion clauses. Indeed, in *Employment Division, Oregon Department of Human Resources v. Smith* (1990) the Court abandoned its earlier view and held that the Free Exercise Clause *never* "relieve[s] an individual of the obligation to comply with a 'valid and neutral law of general applicability.'" [38] On the Establishment Clause the Court has not wholly repudiated its previous holdings, but recent decisions have evidenced a greater sympathy for the view that the clause bars "preferential" governmental promotion of some religions but allows governmental promotion of all religion in general. Nonetheless, the Court remains sharply split on how to interpret both clauses."[39]

30. *Wisconsin v. Yoder,* 406 U.S. 205, 215 (1972).
31. *Carson v. Makin*, 596 U.S. ___ (2022).
32. *303 Creative LLC v. Elenis et al.*, 600 U.S. ____(2023).
33. *Id.*
34. *Id.*
35. *The 303 Creative decision and expressive conduct*. (n.d.). National Constitution Center – constitutioncenter.org. https://constitutioncenter.org/blog/the-303-creative-decision-and-expressive-conduct
36. *Ibid.*
37. *303 Creative LLC v. Elenis et al.*, 600 U.S. ____, at 7 (2023).
38. 494 US 872 (1990).
39. Library of Congress (n.d.).

c. Cases — Applying the Freedom of Religion

In *Jacobson v. Massachusetts* (1905), the Supreme Court upheld compulsory smallpox vaccinations despite individual religious beliefs.[40] The court noted that personal freedoms must, at times, be relinquished for the benefits of the larger society.[41] However, in 1988, Ginger and David Twitchell were charged with manslaughter in the death of their 2-year-old son. The Twitchells sought to treat their son's bowel obstruction through spiritual means. In *Commonwealth v. Twitchell and Commonwealth v. Twitchell*, Massachusetts' highest court overturned their conviction, ruling that the couple had not received a fair trial.[42]

Additionally, the Illinois Supreme Court held in the case of *In re Estate of Brooks* (1965) that a county judge's ordered transfusion for a Jehovah's Witness was an unconstitutional invasion of a person's religious beliefs.[43] In similar cases, a Milwaukee judge refused to order blood transfusions for a 6-year-old boy whose mother objected.[44] Consider how in 1982, a Chicago man who was a Jehovah's Witness who needed a leg amputation was given court-ordered blood transfusions to keep him alive so that his children would have a father.[45] Another Jehovah's Witness, injured in a road accident, refused blood and was transferred to Chicago to receive an experimental blood substitute, but died.[46] Each of these instances emphasize the method, facts, and legal standards used to apply the Freedom of Religion clause. Without question, the court remains committed to provide as much support to one's religious freedom as available once all rights (federal, state, and individual) are fully balanced.

ANALYSIS OF AMENDMENT I

Part II — Freedom of Speech

or abridging the freedom of speech

40. *Commonwealth v. David R. Twitchell and Commonwealth v. Ginger Twitchell*, 617 N.E.2d 609 (1993).
41. *Id.*
42. *Id.*
43. *In Re Estate of Brooks*, 205 N.E.2d 435 (1965).
44. Gruberg, M. (n.d.)
45. *Ibid.*
46. *Ibid.*

AFP Contributor/AFP via Getty Images

Freedom of Speech[47]

The Constitution refers to an abbreviated form of the freedom of speech. It is highly emphasized and shortened as simply "freedom of speech," but in fact the authors of this textbook believe the abridging portion of the Constitution should be closely examined to identify what was meant by this non-absolute freedom. Free Speech may take many forms, but typically falls in one of two categories generally, verbal/pure speech and symbolic speech. In most instances again, individuals refuse to believe that Freedom of speech or free speech (really shortened and identified in a supportive manner) is absolute. The judicial branch and the legislative branch tend to work simultaneously as well as individually to interpret this freedom. However, both branches agree that freedom of speech is not and can not be absolute as its protection is meant to be balanced with state, federal, and individual perspectives. Furthermore, although the amendment's verbiage states "or abridging freedom of speech" (**abridge** meaning "to reduce or diminish") it has long been held for more than two centuries that the freedom of speech is restricted by its impact on other freedoms.[48]

a. Verbal Speech

In this context, **verbal speech** is "[t]he expression or communication of thoughts or opinions in spoken words; something spoken or uttered."[49] In short, the verbal speech indicates that the government can not administer penalties of imprisonment, fines, or other punishment on persons or organizations contingent on what they say, unless extraordinary circumstances occur. Yelling fire in a crowded movie theatre, making anti-war statements in a protest, as well as speaking against racial and social justice in a Black Lives Matter protest are constitutionally protected verbal speech as held in *Cox v. Louisiana*

47. Npr. (2022, April 4). What's really behind America's "Free speech problem." *NPR*. https://www.npr.org/2022/04/04/1090894221/whats-really-behind-americas-free-speech-problem
48. ABRIDGE, Black's Law Dictionary (12th ed. 2024).
49. SPEECH, Black's Law Dictionary (12th ed. 2024).

(1965).[50] The court held that anti-abortion protesters are constitutionally protected even if their speech incites opponents.[51]

b. Symbolic Speech

Also, symbolic speech is "[c]onduct that expresses opinions or thoughts, such as a hunger strike or the wearing of a black armband. • Symbolic speech does not enjoy the same constitutional protection that pure speech does."[52] In short, the **symbolic speech** indicates that the government can not administer penalties of imprisonment, fines, or other punishment on persons or organizations contingent on their behavior meant to convey their thoughts with actions, things, experiences or anything or than words, unless extraordinary circumstances occur. The Supreme Court of the United States has noted symbolic speech includes students who wear armbands, burn an American flag, burn crosses, and view child pornography according to *New York v. Ferber* (1982).[53] The court held that child pornography which depicts sexual conduct is unconstitutional as it may provide an incentive to create an environment of sexual abuse for children.[54]

c. Political Expression

In the highly controversial decision of *Citizens United v. Federal Election Commission (2010),* a bare majority of the Roberts' Court overturned two prior rulings. The Roberts' Court held that the First Amendment protects corporations' and unions' direct expenditures for candidates for federal office.[55] In a 5-4 majority opinion, Justice Anthony Kennedy found that corporations and unions are entitled to First Amendment protection for political expression and the restrictions on their ability to endorse or oppose individual candidates are unconstitutional.[56] In fact, the activities such as voting and actively opposing governmental actions adds validity to the American government.[57] "It ensures accountability of the government and prevents them from stifling critical views. However, this right is subject to restrictions, and cannot extend to violence or any other activity that disrupts public order."[58] Previously, legal donations had to come from Political Action Committees (PACs), not directly from corporations and unions. In the first five years following *Citizens United (2010)*, campaign spending exploded. Over time, some of the donations came from millions of individuals, the new "Super PACs, " raising unlimited amounts from the wealthy, spent $3 billion on federal races.[59] Incumbent candidates learned to fear a well-funded primary challenge more than general election swing voters. In 2010, billionaires spent around $31 million in federal races. By 2020 it was $1.2 billion.[60]

50. *Cox v. Louisiana,* 379 U.S. 536 (1965).
51. *Id.*
52. SPEECH, Black's Law Dictionary (12th ed. 2024).
53. *New York v. Ferber,* 458 U.S. 747 (1982).
54. *Id.*
55. O'Brien, D. M., & Silverstein, G. (2020). *Constitutional Law and Politics: Struggles for power and governmental accountability.*
56. *Citizens United v. Federal Election Commission,* 558 U.S. 310 (2010).
57. Nyaaya. (2022, August 23). What is the Freedom of Political Expression – Nyaaya. https://nyaaya.org/legal-explainer/what-is-the-freedom-of-political-expression/.
58. *Ibid.*
59. Waldman, M. (2023). *The supermajority: How the Supreme Court Divided America.* Simon and Schuster. p. 84-85.
60. *Ibid.*

d. Cases — Applying the Freedom of Speech

Similarly, additional cases apply the Freedom of Speech clause. In *Brandenburg v. Ohio* (1969), the Supreme Court held that the First and Fourteenth Amendments protected speech advocating violence at a Ku Klux Klan rally because the speech did not call for imminent lawless action.[61] The court relied upon a two-prong test which states that

(1) speech may be unconstitutional if it is "directed at inciting or producing imminent lawless action"[62] and

(2) it is "likely to incite or produce such action."[63]

More recently, in *Counterman v. Colorado (2023)*, the Supreme Court held that for the government to establish that a Defendant's statement is a "true threat" unprotected by the First Amendment, the State must prove that the Defendant had some subjective understanding of the statement's threatening nature, based on a showing no more demanding than recklessness.[64] Over a period of several years, the Defendant allegedly sent threatening messages to the other party through Facebook.[65] The Supreme Court, in a *7-2* majority opinion written by Justice Kagan, overturned the Defendant's conviction for harassment, after finding that the Defendant was unaware that his statements would be perceived as threatening.[66]

Whereas in *Miller v. California* (1973), the court looked to rules for obscenity. The court outlined the rules for obscenity, while providing state and local governments flexibility in determining the perimeters of obscenity.[67] The modified three-prong test adopted from *Roth v. United States* (1957) and *Memoirs v. Massachusetts* (1966), included:

(a) "whether 'the average person, applying contemporary community standards' believes the work appeals to the prurient interest,

(b) whether the work depicts or describes specific sexual conduct defined by the applicable law; and

(c) whether the work lacks serious literary, artistic, political, or scientific value."[68] Therefore, the Supreme Court of the United States provided the additional context for determining the constitutionality of obscenity as it remained ambiguous prior to the *Miller* decision.

ANALYSIS OF AMENDMENT I

Part III — Freedom of the Press

or of the press

Freedom of the Press – Democracy without Independent Press is Lethal[69]

61. *Brandenburg v. Ohio,* 395 U.A. 444 (1969).
62. *Id.* at 447.
63. *Id.*
64. *Counterman v. Colorado, 600 U.S. ___(2023).*
65. *Id.*
66. *Id.*
67. *Miller v. California,* 413 U.S. 15 (1973).
68. *Id.*; *Roth v. United States,* 354 U.S. 476 (1957); *Memoirs v. Massachusetts,* 383 U.S. 413 (1966).
69. Manmeet. (2023). Democracy without Independent Press is Lethal. *The Legal Observer*. https://thelegalobserver.com/democracy-without-independent-press-is-lethal/

It is important to note that per Black's Law, **press** includes "the news media; print and broadcast news organizations collectively."[70] The definition of the Freedom of the Press recognizes the enormous depths and breadths of this clause which were considered by the Framers. Currently, this expansive definition would include television, internet, digital content, radio, and as well as streaming are all subject to the "press."

a. Verbal

This would include all outlets of verbal or spoken word press such as television, radio, and streaming platforms. In short, the verbal press indicates that the government may not attribute penalties of imprisonment, fines, or other punishment on persons or organizations contingent on verbal press, unless extraordinary circumstances occur.

b. Printed

This would include all outlets of printed word press such as magazines, books, and newspapers. In short, the printed press indicates that the government may not attribute penalties of imprisonment, fines, or other punishment on persons or organizations contingent on verbal press, unless extraordinary circumstances occur.

c. Cases — Applying the Freedom of Press

In *Near v. Minnesota* (1931), the court established the definition of the freedom of press.[71] The court noted that government officials can't censor or prohibit a publication in advance with exception; however, this activity might be the cause for additional proceedings.[72] *Near v. Minnesota* (1931) provided the beginning framework for the definition of press, but future cases would address additional aspects of the freedom of press. In *New York Times Co. v. United States* (1971), the court reviewed whether President Richard Nixon's efforts to prevent the publication of classified information known as the *Pentagon Papers* violated the First Amendment.[73] In this instance, the court held that the government did not present a compelling interest that would overcome "the heavy presumption against" prior restraint.[74] **Prior restraint** is defined as "[a] governmental restriction on speech or publication before its actual expression; esp., any government-sponsored measure to prevent a communication from reaching the public, as by requiring a license to speak, prohibiting the use of the mails, or obtaining an injunction."[75] Although the court indicated Nixon's efforts violated the First Amendment, the court was definitive in noting that this rule of prior restraint is not without exception. Black's Law Dictionary identifies important moments when prior restraint exceptions occur. Therefore, prior restraints violate the First Amendment unless special circumstances arise such as obscene speech, defamatory speech, or the speech amounts to the legal standard of clear and present danger to society.[76]

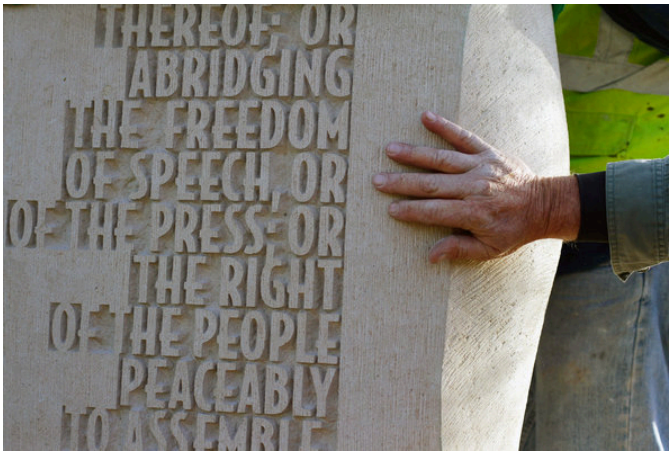
70. PRESS, Black's Law Dictionary (12th ed. 2024).
71. *Near v. Minnesota*, 283 U.S. 697 (1931).
72. *Id.*
73. *New York Times Co. v. United States*, 403 U.S. 713 (1971).
74. *Id.*
75. PRIOR RESTRAINT, Black's Law Dictionary (12th ed. 2024).
76. Ibid.

ANALYSIS OF AMENDMENT I

Part IV — Right of the People Peaceably to Assemble

or the right of the people peaceably to assemble,

Below the photograph is a picture of "[a] construction worker [who] helped guide one of the 10 limestone slabs of the Bill of Rights as it was installed near the Arizona State Capitol in December 2012."[77]



The fourth part of the first amendment is quite different from all other parts. As identified by the National Constitution Center, the right to peaceably assemble requires more than one individual to complete.

Note: The last two parts of Amendment I are typically referred to as political rights. These rights are combined in analysis as the 'freedom of expression.'

Accordingly, this particular right may give the reader pause to identify it as an individual right as it can not be effectuated without additional people. Furthermore, analysis surrounding this part of Amendment I really focuses on preparation made prior to effectuating this particular right. Finally, the right to peaceably assemble usually manifests as non-verbal or symbolic speech such as picketing, marching, and protesting. The Supreme Court has extended this right from federal jurisdictions to state jurisdictions in *De Jonge v. Oregon* (1937).[78]

CONSTITUTIONAL CLIP

The Democratic-Republican Societies, suffragists, abolitionists, religious organizations, labor activists, and civil rights groups have all invoked the right to assemble in protest against prevailing norms. When the Supreme Court extended the right of assembly beyond the federal government to the states in its unanimous 1937 decision *De Jonge v. Oregon*, it recognized that "the right of peaceable assembly is a right cognate to those of free speech and free press and is equally fundamental."[79]

77. Gonchar, M. (2016, December 15). *Text to Text | The Bill of Rights and 'The Bill of Rights We Deserve.'* The Learning Network. https://archive.nytimes.com/learning.blogs.nytimes.com/2014/09/25/text-to-text-the-bill-of-rights-and-the-bill-of-rights-we-deserve/
78. *De Jonge v. Oregon*, 299 U.S. 353 (1937).
79. *Id.*

Additionally, this part of the First Amendment is erroneously referred to in so many outlets as a freedom. The 14th Amendment and many of the state constitutions extends this right to the states as well.[80] However, similar to freedoms being inherent and not absolute, rights are regulated by governmental entities and are restricted as well. The government must institute reasonable, content neutral restrictions. These restrictions speak to time, place and manner of the activity which is being sought.[81]

Therefore, one must apply the three-prong test below to begin the content-neutral restrictions test.

1. The regulation must be content neutral.
2. It must be narrowly tailored to serve a significant governmental interest.
3. It must leave open ample alternative channels for communicating the speaker's message.[82]

a. What kinds of restrictions would pass as content neutral?

Following the content neutral discussion, we define the "freedom of assembly." It does not exist in Black's Law Dictionary. Equally refreshing and disturbing is that its entry points to the right of assembly. This important fact is refreshing as the leading resource on defining legal terms recognizes that the fourth part of the First Amendment is in fact a right and not a freedom as shown in most cartoons and erroneously quoted by elected officials when discussing the First Amendment.

Unfortunately, it remains equally disturbing because it fails to include an important part of the fourth portion which reads "peaceably to assemble." The authors recognize that most scholars would skip over this verbiage, but we submit that it is this phrase that should cast light on this amendment. It appears that most readers look to define this right, by what it does not allow – unlawful assembly. According to Black's, **unlawful assembly** is defined as "a meeting of three or more persons who intend either to commit a violent crime or to carry out some act, lawful or unlawful, that will constitute a breach of the peace."[83] **Assemble** defined is the concept "(of people) gather[ing] together in one place for a common purpose."[84] Whereas, **assembly** is "[a] group of persons who are united and who meet for some common purpose."[85]

In addition, defining a term by using the term in the definition is never appropriate; however, this definition of assemble has problems for many other reasons. For example, the definition speaks of two ways unlawful assembly can occur. Obviously, a crime or unlawful act makes sense – what doesn't make sense is the indication that a lawful act which "constitutes a breach of the peace." This may be interpreted in many ways, but essentially this particular ambiguity was struck down by the Supreme Court of the United States in *City of Chicago v. Morales* (1999).[86] The court invalidated an ordinance meant to address gang activity as vague when Justice John Paul Stevens reminded parties that regular individuals who are standing around for a lawful purpose would have no way of knowing if this

80. *Hague v. Committee for Industrial Organization*, 307 U.S. 496 (1939).
81. *Ward v. Rock Against Racism*, 491 U.S. 781 (1989).
82. *Id.*
83. UNLAWFUL ASSEMBLY, Black's Law Dictionary (12th ed. 2024).
84. Oxford University Press. (2021). Assemble. In Oxford English Dictionary. https://www.oed.com/view/Entry/11787?rskey=1ZFpny&result=2&isAdvanced=false#eid
85. Oxford University Press. (2021). Assembly. In Oxford English Dictionary. https://www.oed.com/view/Entry/11795?redirectedFrom=assembly#eid
86. *City of Chicago v. Morales*, 527 U.S. 41 (1999).

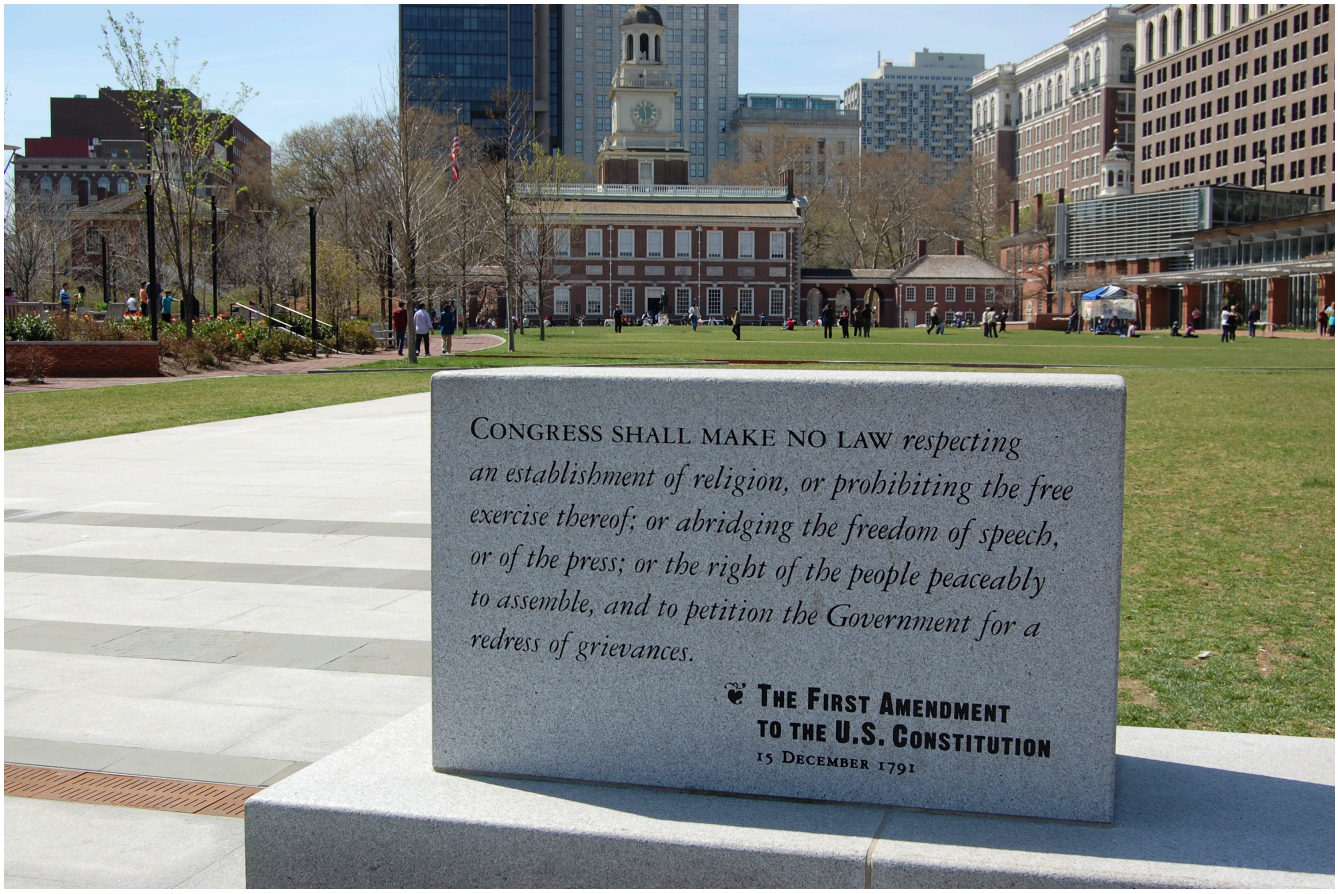
activity would violate the statute.[87] Thus, the unlawful assembly definition would be invalidated as a reasonable interpretation per Justice Stevens.

Furthermore, many people misquote the Constitution inserting peacefully, rather than peaceably. The term peacefully as it relates to **right of assembly** is a Constitutional right – guaranteed by the First Amendment – of the people to gather peacefully for public expression of religion, politics, or grievances. As you review this portion of the amendment, concentrate on identifying the differences between peacefully and peaceably. **Peaceably** is defined as being in a way that does not involve or cause argument or violence. Whereas, **peacefully** is defined as being in a way that does not involve a war, violence or argument. How does peaceably differ from peacefully? Which would you prefer in analyzing your right to peaceably assemble? How does the terms affect the context of the remainder of the terms in this portion of the amendment?

ANALYSIS OF AMENDMENT I

Part V — Right to Petition the Government for A Redress of Grievances

and to petition the government for a redress of grievances



Whatever happened to the right to petition?[88]

The last part identifies the fifth part of the First Amendment which is a response to issues identified

87. *Id.*

88. *Whatever happened to the right to petition?* | Penn Today. (2020, December 1). Penn Today. https://penntoday.upenn.edu/news/whatever-happened-right-petition

prior to the establishment of America. In this instance, many of our forefathers recalled how King George III ignored colonists' petitions for redress of grievances. According to the National Constitution Center, an issue which arose in 1844 from then House of Representatives member John Quincy Adams dared to bring petitions from slaves who requested their freedom.[89] In response, House leadership imposed a limit on petitions creating, in essence, a voluntary ignorance of petitions. This part of the First Amendment is erroneously referred to in so many outlets as a freedom. The verbiage of the First Amendment is intricately connected to the fourth portion of the First Amendment. You will note that the fourth portion explicitly identifies that section as a right, while the comma as well as the word "and" (**, and**) reminds the reader that the right for this section is implicit.

Cases — Applying Right to Petition

> "The Clause's reference to a singular "right" has led some courts and scholars to assume that it protects only the right to assemble in order to petition the government. But the comma after the word "assemble" is residual from earlier drafts that made clearer the Founders' intention to protect two separate rights."[90]

How is this implicit right protected? In *NAACP v. Button (1963),* states were precluded from barring the National Association for the Advancement of Colored People (NAACP) from gathering people to serve as litigants to federal petitions as a challenge and protest to segregation.[91] The court held that the NAACP activities were protected under the United States First Amendment, Right to Petition.[92]

Comparatively, in *Buckley v. American Constitutional Law Foundation* (1999), the court held Colorado's requirements involving petition circulators as unconstitutional.[93] The court struck down Colorado's initiative-petition law due to its mandated requirements for people circulating petitions must be a registered voter, wear identification brandishing one's name and address, as well as file monthly disclosures.[94]

According to Black's Law, **redress** and **grievance** are defined respectively as "relief or remedy" and "[a]n injury, injustice, or wrong that potentially gives ground for a complaint."[95] This portion of the First Amendment provides options for those who feel harmed by the government to request relief for those harms. Again the redress is limited based upon the activity of the grievance. As a result of this right, many of the people in the United States have used various forms of a petition to harms caused by the government. A **petition** is defined as "[t]o make a formal request, esp. in writing; to entreat, solicit, or supplicate."[96] The petition sets forth a standard and format identified by the governing entity for the particular activity. Petitioning the government for a relief of harms is well established and dates back

89. Inazu, J., & Neuborne, B. (n.d.). Interpretation: Right to assemble and petition | The National Constitution center. Interactive Constitution. Retrieved May 19, 2021, from https://constitutioncenter.org/interactive-constitution/interpretation/amendment-i/interps/267
90. *Ibid.*
91. *NAACP v. Button,* 371 U.S. 415 (1963).
92. *Id.*
93. *Buckley v. American Constitutional Law Foundation, Inc.*, 525 U.S. 182 (1999).
94. *Id.*
95. GRIEVANCE, Black's Law Dictionary (12th ed. 2024); REDRESS, Black's Law Dictionary (12th ed. 2024).
96. PETITION, Black's Law Dictionary (12th ed. 2024).

to the 18th Century.[97] Individuals are encouraged to follow this practice as a tradition and effective method of disposing of grievances.

According to Law Professor Gregory Mark explained the complicated background of the petition as "a social, political, and intellectual story ... of a constitutional and legal institution. Understood properly, it tells us about popular participation in politics, especially by disenfranchised groups."[98] These disenfranchised groups include, but are not limited too, women, African-Americans, Native Americans, and convicted felons to name a few.[99] Typically petitions are divided into four categories: political petitions, legal petitions, public purpose petitions, and internet petitions. The political petition is defined as a document which "have a specific form, address a specific rule set by the state or federal government. Typical examples include nominating petitions filed by political candidates to get on a ballot, petitions to recall elected officials, and petitions for ballot initiatives."[100] Additionally, legal petitions are defined as a document used to "ask a court to issue a specific order in a pending case or lawsuit, typically filed by attorneys according to court rules using specific forms."[101]

Whereas a public purpose petition is defined as a tool that "ask officials to take or not take a specific action. They might be addressed to policymakers, government bodies, or administrative agencies."[102] The petitions have minimal or a literally absent requirements.[103] Finally, the internet petitions are defined as documents which "are conducted entirely online. They are not always specific as to what actions to take and do not follow established civic or political processes. They are effective at raising public awareness about an issue."[104] Each of these legal documents serve different purposes. Finally, whereas all petitions can bring about change, the public purpose and internet petitions serve as informational and a grassroots approach to change.

Critical Reflections:

1. Explain how the First Amendment affects whether or not an individual must accept a vaccine to ward off a public nuisance disease (Covid-19).
2. How does peaceably compare to peacefully? How does one determine if individuals are peaceably assembling? Should we refer to this section as unlawful assembly? Why or Why not?
3. Evaluate the concept of natural rights vs. positive rights given the Framers' intentions in the First Amendment.
4. Describe examples of freedoms or rights within the First Amendment. What conditions may exist to make these activities become Constitutional violations?

97. *Ibid.*
98. Right to petition. (n.d.). https://www.americanbar.org/groups/public_education/publications/insights-on-law-and-society/volume-20/issue-1/learning-gateways–right-to-petition/.
99. Ibid.
100. Ibid.
101. Ibid.
102. Ibid.
103. Ibid.
104. Ibid.

Chapter 4 - Amendment II: Balancing Federal, State, and Individual Rights

Amendment II

RICHARD J. FORST AND TAUYA R. FORST

LEARNING OBJECTIVES

After reading this chapter, you should be able to:

4.1 Identify the unfamiliar terms of the Second Amendment.
4.2 Describe the two parts of the Second Amendment.
4.3 Summarize the right defined by the Second Amendment.
4.4 Analyze the development of case law defining the rights defined by the Second Amendment.
4.5 Compare the rights of the Second Amendment through the federal, state, and individual position.
4.6 Explain the progression of the Second Amendment from its origin to its current position.
4.7 Describe the three interpretations of the Second Amendment.

KEY TERMS

Commerce Clause
Free State
Grand Jury Indictment
Infringe[d]
Infringement

Militia
National Firearms Act of 1934
Operative Clause
Per Curiam
Prefatory Clause
Presentment
Right to Bear Arms

Amendment II

Passed by Congress September 25, 1789. Ratified December 15, 1791. The first 10 amendments form the Bill of Rights.

A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.

Getting Started

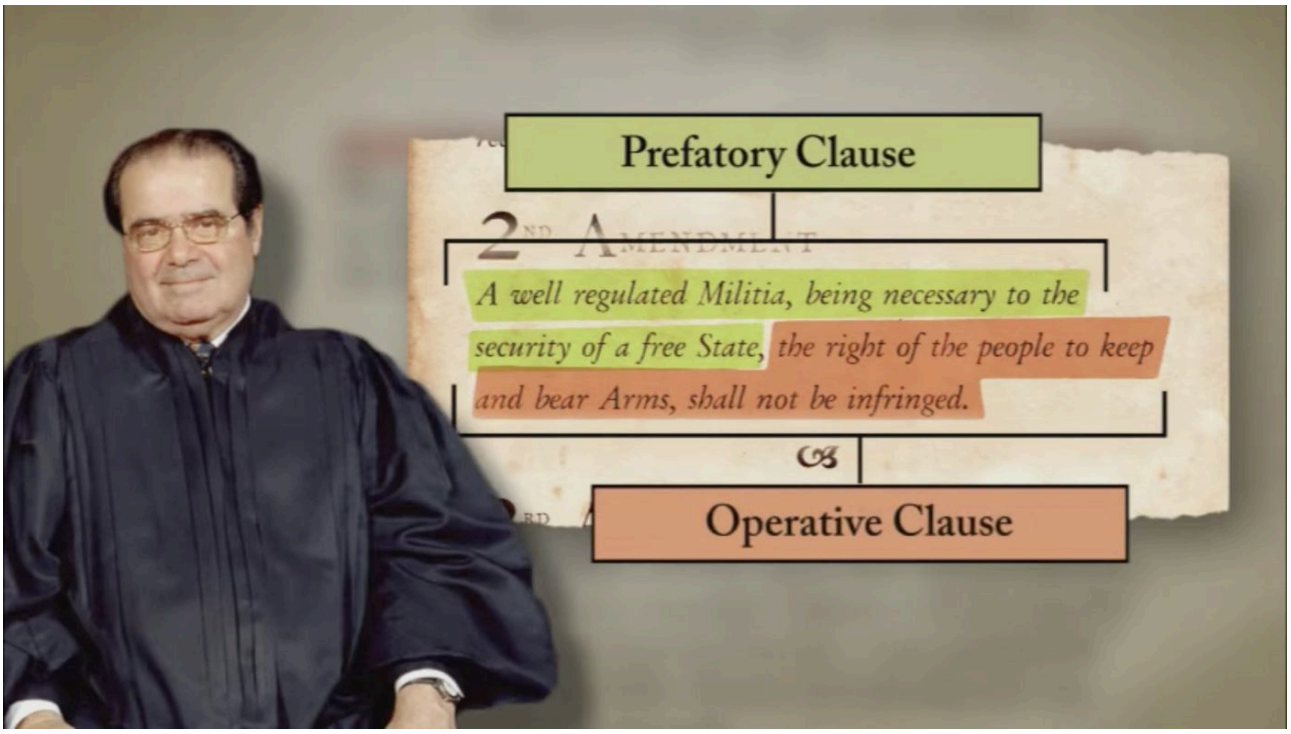
First, determine how many parts exist in the Second Amendment. This will require a literal reading of each part of the amendment. Once we determine the parts, we can understand the verbiage of the United States Constitution. The Second Amendment on its face elicits strong feelings which tend to silo those who disagree. Moreover, it is important to bring an open mind to this discussion as you study, learn and apply the varied factors which affect the Second Amendment.

Reenactment of a Musket Shooting *Picture taken by Tauya Forst – Savannah, Georgia

INTRODUCTION TO AMENDMENT II

Once we determine the parts of the Second Amendment, we can understand the verbiage of the United States Constitution. The Second Amendment on its face elicits strong feelings which tend to silo those who disagree. Moreover, it is important to bring an open mind to this discussion as you study, learn, and apply the varied factors which affect the Second Amendment.

Pictured above is a musket, the weapon used during the Civil War.[1] This weapon was contemplated during the debates surrounding the Second Amendment. This photograph was taken by the authors during a visit to a historical site in Savannah, Georgia. The man pictured produced a reenactment of the use and discharge of this musket for historical context as he explained the use of the weaponry. A musket takes one and one half minutes to load. "Early muskets were often handled by two persons and fired from a portable rest."[2] One shot would kill a person immediately; however, due to the lack of training and inferior parts, soldiers took more than 20 shots to hit an individual.[3]



Justice Antonin Scalia with the Two Clauses of the Second Amendment – Prefatory and Operative Clause[4]

Debate regarding the Second Amendment centers around the prefatory clause and the intentions of the founding fathers.[5] Militia is the term to understand with regard to the Second Amendment.

1. T. Forst (2016). *Recreating the use of a musket*. Photograph, Savannah, GA.
2. Britannica, T. Editors of Encyclopaedia (2020, March 12). *Musket*. Encyclopedia Britannica. https://www.britannica.com/technology/musket
3. *Ibid.*
4. Anneberg Public Policy Center (n.d.). Justice Antonin Scalia in "Second Amendment: D.C. v. Heller and McDonald v. Chicago." Retrieved August 1, 2023 from https://www.annenbergpublicpolicycenter.org/guns-in-america-annenberg-classroom-releases-second-amendment-film/
5. Harr, S. J., Hess, K. M., Orthmann, H. C., & Kingsbury, J. (2017). *Constitutional Law and the Criminal Justice System* (7th ed.). Wadsworth Publishing.

According to Black's Law Dictionary, **militia** is defined as "[a] body of citizens armed and trained, [especially] by a state, for military service apart from the regular armed forces."[6]

Battle of Lexington – A line of minutemen being fired upon by British troops during the Battle of Lexington in Massachusetts, April 19, 1775.[7]

Militia has been defined and interpreted two ways. It often refers to those individuals who are eligible to serve in an emergency situation, if need be. The other meaning includes those who are formally trained, equipped, organized, uniformed and prepared to be deployed. The second meaning refers to those who are enrolled in the National Guard. As explained in Black's Law Dictionary, according to the United States "Constitution, [the government] recognizes a state's right to form a 'well-regulated militia' but also grants Congress the power to activate, organize, and govern a federal militia" through Art. I, §8, cl. 15-16.[8]

Nevertheless, these individuals are excepted from the rule of presentment and/or the grand jury indictment. According to Black's Law Dictionary defines **presentment** as "[a] formal written accusation returned by a grand jury on its own initiative, without a prosecutor's previous indictment request."[9] Equally important to note that currently, [p]resentments are obsolete in the federal courts."[10] Additionally, a **grand jury indictment** is defined as "[t]he formal written accusation of a crime, made by a grand jury and presented to a court for prosecution against the accused person."[11] The term indictment hails from the French root word enditer and indicates "an accusation found by an inquest of twelve or more upon their oath."[12]

6. MILITIA, Black's Law Dictionary (12th ed. 2024).
7. The Editors of Encyclopaedia Britannica. (1998b, July 20). Militia | Definition, History & facts. Encyclopedia Britannica. https://www.britannica.com/topic/militia#/media/1/382443/163474
8. *Ibid.*
9. PRESENTMENT, Black's Law Dictionary (12th ed. 2024).
10. *Ibid.*
11. INDICTMENT, Black's Law Dictionary (12th ed. 2024).
12. *Id.*

CONSTITUTIONAL CLIP

"By 1862, most Union soldiers were equipped with rifled muskets, and many carried the Model 1861. This meant that the average infantryman was far more lethal than in previous wars, with a highly accurate long-range weapon. Tactics and training lagged behind, however, and most infantrymen on both sides struggled to hit targets at range or utilize the weapon's sights effectively. For the Confederacy, the Enfield Pattern 1853 represented the most readily available small arm, and was highly sought after. Because of Confederate manufacturing limitations, the Enfield made up the majority of their rifles carried by the infantry by war's end. While almost identical in terms of range and accuracy as the Springfield Model 1861, most of the Enfields purchased by the Confederacy were made by contractors, and suffered from inferior parts and difficulties with interchangeability. Given the choice, many Confederate soldiers preferred the Springfield, but picked the Enfield over all other options."[13]

Grammatically, Fielding Fryling identifies three interpretations of the Second Amendment.[14]

CONSTITUTIONAL CLIP

THREE INTERPRETATIONS OF AMENDMENT II

"*First*, it can be argued that the Second Amendment consists of an opening justification phrase followed by a declarative clause. Under this interpretation, the opening phrase is essential to the main clause, and this interpretation would result in a protection of the right to bear arms if a person is serving in the militia.

Second, another possible interpretation views the first phrase as one nonexclusive example of one instance in which individuals have the right to bear arms. Using this interpretation, the Second Amendment would protect the individual right to bear arms for more reasons than just military purposes.

Third, yet another possible interpretation views the first clause as explanatory; that militia service is the reason that we allow people to keep and bear arms, but that other restrictions do not exist. Thus, the fact that the second part of the

13. *A glossary of small arms across three wars*. (2022, June 28). American Battlefield Trust. https://www.battlefields.org/learn/articles/glossary-small-arms-across-three-wars#:~:text=By%201862%2C%20most%20Union%20soldiers,highly%20accurate%20long%2Drange%20weapon.
14. Fryling, T. F. M. (2014). Constitutional law in criminal justice. Wolters Kluwer.

amendment guarantees the right to bear arms to "the people" means that all citizens can bear arms, not just those involved in the militia."[15]

Of extreme importance and note: The Supreme Court of the United States ***explicitly denied*** an individual right to keep and bears arms in *United States v. Cruikshank* (1875).[16] Through Chief Justice Morrison Waite, the court held

> "The right there specified is that of 'bearing arms for a lawful purpose.' This is not a right granted by the Constitution. Neither is it in any manner dependent upon that instrument for its existence. The second amendment declares that it shall not be infringed; but this, as has been seen, means no more than that it shall not be infringed by Congress."[17]

As a result of *United States v. Cruikshank* (1875) and Fryling's possible explanations, the interpretation of the Second Amendment involves balancing federal, state, and individual rights – a familiar theme contained in the United States Constitution. In this way, it is important to read this chapter and review the included timeline to determine when the federal, state, and individual rights are in the forefront of the explanation. This balancing act requires all parties to regard the Second Amendment in a realistic framework. It is important to note that political viewpoints provided inappropriate interpretations of the Second Amendment as explained by then-National Rifle Association's (NRA) President Karl T. Frederick.[18]

"I have never believed in the general practice of carrying weapons," said then-NRA President Karl T. Frederick at a Congressional hearing over the National Firearms Act of 1934.[19] "I do not believe in the general promiscuous toting of guns. I think it should be sharply restricted and only under licenses."[20] Mr. Frederick's beliefs exemplify the historical differences in the understanding of the Second Amendment. At the time of the 1791 ratification of the Second Amendment, the Framers and the U.S. Congress exercised authority over the understanding of the Amendment. Recall, amendments are subject to change by the following legal actions: Congressional, State, and local acts, as well as Supreme Court cases. In these legal actions, federal, state, and ultimately individual rights are identified and acknowledged.

According to Harr, the stricter interpretation of the three listed above set a standard for states to either adopt and/or modify gun restrictions as their influence begins to unfold.[21] In the states' rights debate, proponents note there is a need to protect and modify Art. I, §8, cl. 2, which speaks to the Commerce Clause of Congress. According to Black's Law Dictionary, the **Commerce Clause** is in the "[United States Constitution Art. I, §8, cl. 3], which gives Congress the exclusive power to regulate commerce among the states, with foreign countries, and with Indian tribes."[22] Additionally proponents

15. *Id.*
16. *United States v. Cruikshank*, 92 U.S. 542 (1875).
17. *Id.* at para. 17.
18. Rodriguez, V. (2019, May 1). This footnote provides a link to a timeline of the second amendment and gun control in the U.S.: *Seventeen*. https://www.seventeen.com/life/a19643402/second-amendment-gun-control-history/
19. *Ibid.*
20. *Ibid.*
21. *Harr*, 2017.
22. COMMERCE CLAUSE, Black's Law Dictionary (12th ed. 2024).

frequently cite Art. I, §8, cl. 15 which speaks to the militia and reserving certain rights to the states. The Commerce Clause quoted below serves as the legal foundation for much of the federal government's regulatory authority, but this section directly points to the connection of the militia.

> "To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress;"[23]

Further, proponents claim Art. I, §1, cl. 15 was adopted with the primary purpose of preserving the state militia. In support, courts have consistently interpreted the Second Amendment as allowing states to regulate private gun ownership.[24] Furthermore, states have interpreted this clause as their ability to preserve the power to defend against foreign and domestic enemies, and thus reduces the need for a large standing army.[25]

Federal rights v. States' Rights[26]

Individual Rights[27]

23. Art. I, §8, cl. 15.
24. United States Senate. (2020, January 21). *U.S. senate: Constitution of the united states*. Constitution of the United States. https://www.senate.gov/civics/constitution_item/constitution.htm
25. *Ibid.*
26. States' Rights vs. Federal Authority (Discussion). (n.d.). The American Civil War. http://morgenstern-civilwar.weebly.com/states-rights-vs-federal-authority-discussion.htm

Although the federal rights and states' rights arguments exist, it is important to balance the third entity of rights – the individual rights. As stated previously, an individual rights' interpretation guarantees the **right to bear arms** to all citizens. According to Black's Law Dictionary, the right to bear arms is defined as "[t]he constitutional right of persons to own firearms."[28] Unlike the states', the individual rights' proponents see the Second Amendment as primarily guaranteeing the right of the people, not the states.[29]

Additionally, proponents claim that the Framers of the United States Constitution intended for states' rights to be subservient to individual rights. Unfortunately, Harr notes that the historical treatment of individual rights versus states' rights interpretation shows the courts consistently supporting the states' rights interpretation.[30] Finally, the Supreme Court has interpreted this Amendment in very few cases; however, this text will examine and analyze the important legal changes which support the evolution of the Second Amendment over the course of American history.

ANALYSIS OF AMENDMENT II

Two Clauses of the Second Amendment

a. Prefatory Clause (State's rights) – Announces a purpose, but does not necessarily restrict operative clause. ("A well regulated Militia, being necessary to the security of a free State,") In an effort to help understand this section, we will define security in this context.

b. Operative Clause (Individual rights) – Identifies that action to be taken or prohibited. ("the right of the people to keep and bear Arms shall not be infringed") To this end, **infringe** means "to encroach upon in a way that violates law or the rights of another."[31]

Four Parts of the Second Amendment

Part I: *A well regulated Militia*

The Framers of the Bill of Rights, mainly James Madison, adapted the wording of the Amendment from nearly identical clauses from the original thirteen state constitutions.[32] During the Revolutionary War era, "militia" referred to groups of men who banded together to protect their communities, towns, and colonies.[33] Once the United States declared its independence from Great Britain in 1776, these groups of men banded together to protect states as well.

At that time, Americans widely held that governments used soldiers to oppress the people and thought the federal government should only be allowed to raise armies (with full-time, paid soldiers)

27. Brown, C., Esq. (2022). How Does The Constitution Limit Individual Rights? *The Brown Firm PLLC*. https://www.brownfirmpllc.com/how-does-the-constitution-limit-individual-rights/.
28. RIGHT TO BEAR ARMS, Black's Law Dictionary (12th ed. 2024).
29. Harr, 2017.
30. Ibid.
31. Definition of infringe. (2023). In *Merriam-Webster Dictionary*. https://www.merriam-webster.com/dictionary/infringe#:~:text=fringe%20in%2D%CB%88frinj-,infringed%3B%20infringing,or%20the%20rights%20of%20another.
32. Shaw, W. L. (1966). The Interrelationship of the United States Army and the National Guard. *Mil. L. Rev*, 39–84. https://www.loc.gov/law/mlr/Military_Law_Review/27-100-1.pdf
33. *Ibid*, p.44.

when facing foreign adversaries.[34] For all other purposes, they believed the government should turn to part-time militias, or ordinary civilians using their own weapons. But as militias had proved insufficient against the British, the Constitutional Convention gave the new federal government the power to establish a standing army, even in peacetime as described in the Third Amendment.[35]

Difference between Federalists and Anti-federalists[36]

However, opponents of a strong central government (the "Anti-Federalists") argued that this federal army deprived states of their ability to defend themselves against oppression. They feared that Congress might abuse its Constitutional power of "organizing, arming and disciplin[ing] the Militia" by failing to keep militiamen equipped with adequate arms.[37] Shortly after the U.S. Constitution was ratified by the States, Madison proposed the Second Amendment to empower state militias for protection. It established the principle, held by both Federalists and Anti-Federalists, that the government did not have the authority to disarm citizens.[38]

34. *Ibid.*
35. History.com Editors. (2020, August 26). *Second amendment*. HISTORY. https://www.history.com/topics/united-states-constitution/2nd-amendment, p. 1.
36. Akirn. (n.d.). *Difference Between Federalist And Anti Federalists | annahof-laab.at*. http://annahof-laab.at/typo3conf/ext/custom/analysis-of-body-and-mind/difference-between-federalist-and-anti-federalists.php
37. U.S. Const. Art. I, §8.
38. History.com Editors. (2020, August 26). *Second amendment*. HISTORY. https://www.history.com/topics/united-states-constitution/2nd-amendment, p. 2.

What is special about the Amendment is the inclusion of an opening clause — a preamble, if you will — that seems to set out its purpose. No similar clause is a part of any other Amendment as noted by Professor Sanford Levinson.[39]

Consider, for example, the Virginian George Mason who refused to sign the United States Constitution because of its lack of a Bill of Rights. He questioned, "Who are the Militia? They consist now of the whole people."[40] Similarly, the "Federal Farmer," a *nom de plume* for one of the most important Anti-Federalist opponents of the Constitution, referred to a "militia, when properly formed, [as] in fact the people themselves."[41]

Part II: *, being necessary to the security of a free state,*

James Harrington, a renowned Anti-Federalist writer feared all future republicans (not the formal Republican Party – as it did not exist at the time, but those who believed in a republican form of government) and disdained a standing army, composed of professional soldiers. Harrington and his fellow republicans viewed a standing army as a threat to freedom, to be avoided at almost all costs. Thus, says Professor Edmund Morgan, "A militia is the only safe form of military power that a popular government can employ; and because it is composed of the armed yeomanry, it will prevail over the mercenary professionals who man the armies of neighboring monarchs."[42]

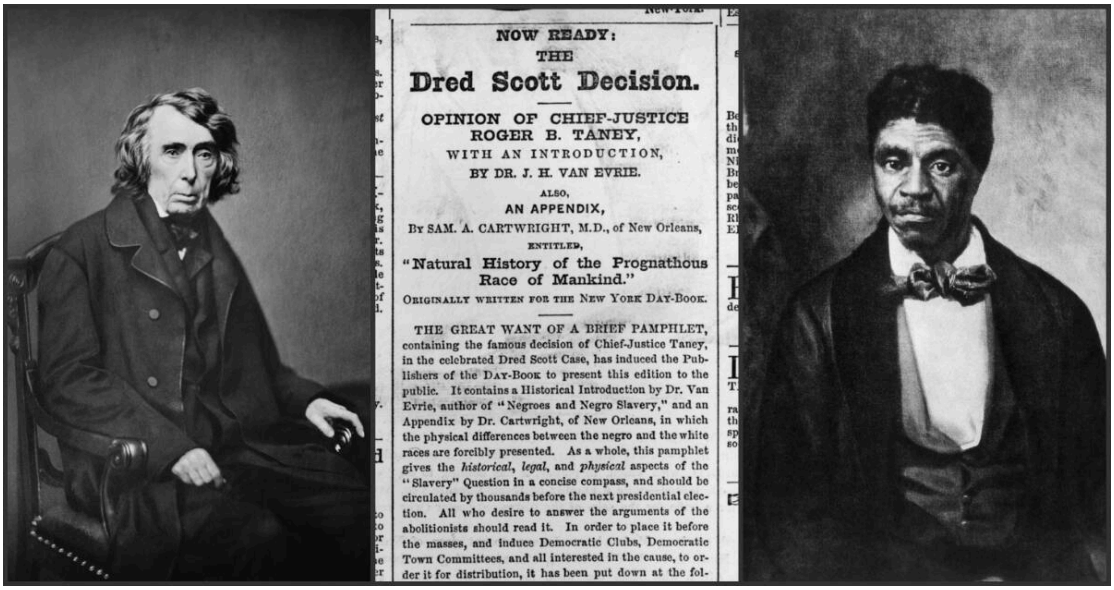
Anti-Federalists were concerned that their own "free states" would be overrun by the central government's standing army. According to Black's Law Dictionary, **free state** as "[a] political community organized independently of all others."[43] This phrase, set apart by commas at the beginning and end of the phrase, purports to explain the need for the protection of the Second Amendment.[44]

Part III: *the right of the people to keep and bear arms, shall not be infringed.*

The third phrase of the Second Amendment, again delineated by commas indicates a separate thought being conveyed from the others. The Amendment establishes a right, much like the rights established in the First Amendment. What is this right to keep and bear arms? Who has it? Are "the people" individuals, or are they members of a local state army, a "militia?" And do the members of the "militia" have the right to keep arms in their possession at all times? Are they able to only keep arms in their homes or while participating in militia activities?

As for the last phrase, does it mean there can be no regulations, restrictions, or limitations on the right? Or are some permissible?

39. Levinson, S. (1988). The embarrassing second amendment. *The Yale Law Journal*, 637–659. https://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=7254&context=ylj
40. *Ibid*, p. 688.
41. *Ibid.*
42. Morgan, E. S. (1989). *Inventing the people: The rise of popular sovereignty in england and america* (Revised ed.). W. W. Norton & Company, p.85-87.
43. STATE, Black's Law Dictionary (12th ed. 2024).
44. *Ibid.*



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"Natural History of the Prognathous Race of Mankind."
Originally written for the New York Day-Book.

THE GREAT WANT OF A BRIEF PAMPHLET, containing the famous decision of Chief-Justice Taney, in the celebrated Dred Scott Case, has induced the Publishers of the Day-Book to present this edition to the public. It contains a Historical Introduction by Dr. Van Evrie, author of "Negroes and Negro Slavery," and an Appendix by Dr. Cartwright, of New Orleans, in which the physical differences between the negro and the white races are forcibly presented. As a whole, this pamphlet gives the *historical*, *legal*, and *physical* aspects of the "Slavery" Question in a concise compass, and should be circulated by thousands before the next presidential election. All who desire to answer the arguments of the abolitionists should read it. In order to place it before the masses, and induce Democratic Clubs, Democratic Town Committees, and all interested in the cause, to order it for distribution, it has been put down at the fol-

Dred Scott v Sandford, 60 U.S. 393 (1857)[45]

Cases

CONSTITUTIONAL CLIP

The strongest version of the Anti-Federalist argument held the individual right to bear arms to be a "privilege and immunity of United States citizenship" of membership in a liberty-enhancing political order. This individual right included keeping arms that could be taken up against tyranny wherever found, including the state government. Ironically, the principal citation supporting this argument is to Chief Justice Taney's egregious opinion in the infamous *Dred Scott* (1857) decision where he suggested that an uncontroversial attribute of citizenship, in addition to the right to migrate from one state to another, was the right to possess arms.[46] The logic of Taney's argument at this point seems to be that, because it was inconceivable that the Framers could have genuinely imagined blacks having the right to possess arms, it follows that they could not have envisioned them as being citizens, since citizenship entailed that right. Taney's seeming recognition of a right to arms is heavily relied upon for opponents of gun control.[47]

45. The National Judicial College. (2020, March 31). *Roger B. Taney: One Decision Makes a Legacy, Part II*. https://www.judges.org/news-and-info/reflections-from-the-bench-roger-b-taney-one-decision-makes-a-legacy-part-ii/
46. *Dred Scott v. Sandford, 60 U.S. 393, 417 (1857).*
47. *Levinson*, 1988, p. 651.

Part IV: *Evolution of the Second Amendment — Balancing Federal, State and Individual Rights*

Professor Laurence Tribe of Harvard Law School asserts that the history of the Second Amendment "indicate[s] that the central concern of [its] framers was to prevent such federal interferences with the state militia as would permit the establishment of a standing national army and the consequent destruction of local autonomy."[48] The Second Amendment began with the ratification in 1791, however, several key cases created the foundation for the ratification. In the next section, note the key cases that provided the complete evolution of how the amendment progressed. Moreover, the Second Amendment leverages these cases to provide support to current arguments for and against the Second Amendment's status today. A comprehensive approach to this analysis is included in the below, entitled Second Amendment Timeline.

Cases

In *United States v. Miller* (1939), the Court held ***unanimously*** that Congress could prohibit the possession of a sawed-off shotgun because that sort of weapon had no reasonable relation to the preservation or efficiency of a "well-regulated Militia."[49]

48. Tribe, L. (1988). *American Constitutional Law, 2d (University Treatise Series)* (2nd ed.). Foundation Press.
49. *United States v. Miller*, 307 U.S. 174, 178 (1939).

Jack Miller of United States v. Miller, 307 U.S. 174 (1939)[50]

Miller, along with another robber, was charged with moving a sawed-off shotgun in interstate commerce in violation of the National Firearms Act of 1934. The **National Firearms Act of 1934** (NFA) "...imposed a tax on the making and transfer of firearms defined by the Act, as well as a special (occupational) tax on persons and entities engaged in the business of importing, manufacturing, and dealing in NFA firearms. The law also required the registration of all NFA firearms with the Secretary of the Treasury."[51] Among other things, Miller and a compatriot failed to register the shotgun, as required by the NFA. The court below dismissed the charge, accepting Miller's argument that the Act violated the Second Amendment.

The arch-conservative Justice James McReynolds of the Supreme Court wrote the opinion. The Supreme Court reversed the District Court stating "the Second Amendment doesn't guarantee the right to keep and bear a sawed-off *shotgun*."[52] Interestingly, Justice McReynolds emphasized that there was no evidence showing that a sawed-off shotgun "at this time has some reasonable relationship to the preservation or efficiency of a well regulated militia."[53] However, "[c]ertainly it is not within judicial notice that this weapon is any part of the ordinary military equipment or that its use could contribute to the common defense."[54]

It is possible Miller could offer a tenable argument to show that he was keeping or bearing a weapon that clearly had a potential military use. Justice McReynolds went on to describe the purpose of the Second Amendment as "assur[ing] the continuation and render[ing] possible the effectiveness of [the militia].[55] He contrasted the militia with troops of a standing army, which the Constitution forbade the states to keep without the explicit consent of Congress."[56] The sentiment of the time strongly disfavored standing armies; the common view was that adequate defense of country and laws could be secured through the Militia-civilians primarily, soldiers on occasion.

50. *Frye on the 2nd Amendment and the Peculiar Story of U.S. v. Miller*. (n.d.). http://legalhistoryblog.blogspot.com/2007/04/frye-on-2nd-amendment-and-peculiar.html
51. *Id.*
52. *U.S. v. Miller*, 1939.
53. *Id.*
54. *Id.*
55. *Id.*
56. *Id.*

Associate Justice James Clark McReynolds delivered majority opinion in U.S. v. Miller (1939)[57]

"Justice McReynolds noted further that "the debates in the Convention, the history and legislation of Colonies and States, and the writings of approved commentators [all] [s]how plainly enough that the Militia comprised all males physically capable of acting in concert for the common defense."[58]

Additionally, Justice John Paul Stevens gave his first-hand historical context of *Miller.* Justice Stevens acknowledged "[w]hen I joined the Court in 1975, that holding [in *Miller*] was generally understood as limiting the scope of the Second Amendment to uses of arms that were related to military activities.[59] During the years when Warren Burger was Chief Justice, 1969 to 1986, Justice Stevens noted "no judge or justice expressed any doubt about the limited coverage of the amendment, and I cannot recall any judge suggesting that the amendment might place any limit on state authority to do anything." [60] Five years after his retirement, during a 1991 appearance on the "MacNeil/Lehrer News Hour," Burger himself remarked that the Second Amendment "has been

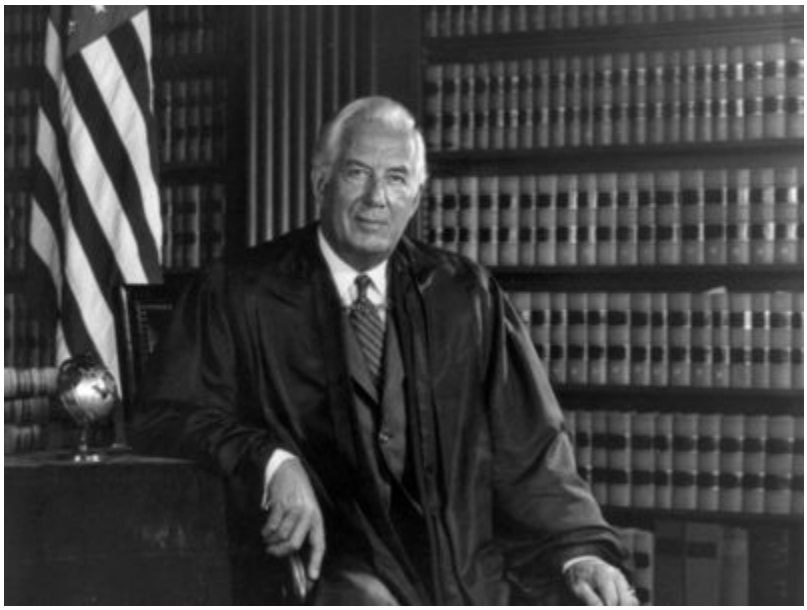
57. Supreme Court Historical Society. (2022, June 23). *Previous associate justices: James Clark McReynolds, 1914-1941 | Supreme Court Historical Society*. https://supremecourthistory.org/associate-justices/james-clark-mcreynolds-1914-1941/

58. *Id* at 179.

59. Stevens, J. J. P. (2014). *Six Amendments: How and Why We Should Change the Constitution* (Illustrated ed.). Little, Brown and Company, p. 76.

60. *Ibid.*

the subject of one of the greatest pieces of fraud, I repeat the word 'fraud,' on the American public by special interest groups that I have ever seen in my lifetime.'"[61] To say that the Second Amendment is engulfed in controversy is a mere understatement. However, most justices agree the controversy leaves the American public clueless regarding the true Second Amendment evolution as the historical explanations culminate into political debates.[62]



Warren Burger, Chief Justice of the United States, 1969-1986[63]

CONSTITUTIONAL CLIP

Justice James Clark McReynolds, who wrote the Court's unanimous opinion in *U.S. v. Miller* (1939), was known for his anti-Semitic and racist views. Justice William Howard Taft called him "selfish to the last degree" and "fuller of prejudice than any man I have ever known."[64] McReynolds refused to speak to Justice Louis Brandeis, a Jew, for three years, to sit near him during Court ceremonies, or to sign any opinions written by him. He was also given to venting about "un-Americans" and "political subversives."[65]

61. *Ibid.*
62. *Ibid.*
63. The Editors of Encyclopaedia Britannica. (2023a, June 21). *Warren E. Burger | 15th Chief Justice of US Supreme Court*. Encyclopedia Britannica. https://www.britannica.com/biography/Warren-E-Burger#/media/1/85053/92650
64. *Ibid.*
65. *Ibid.*

B. THE CURRENT STATE OF THE SECOND AMENDMENT

Cases

In *Printz v. United States* (1997), the Court held that certain interim provisions of the Brady Handgun Violence Prevention Act violated the Tenth Amendment to the United States Constitution.[66] The Court created the "anti-commandeering rule," which provides that the federal government cannot "commandeer" local or state officials to implement and enforce federal regulations.[67] In this case, universal background checks on gun purchases. This was the first venture by the Supreme Court into Second Amendment territory since *U.S. v. Miller* (1939). The majority opinion, penned by Justice Antonin Scalia in a 5-4 decision, was a forerunner to the cases that followed.[68]

An Introduction to Constitutional Law » D.C. v. Heller with Dick Heller[69]

Another landmark case which addresses the Second Amendment is *District of Columbia v. Heller* (2008).[70] In a 5-4 decision, the Supreme Court held in *Heller* that a civilian has a right to keep a handgun in his home for purposes of self-defense. Justice Antonin Scalia, writing for the slim majority, challenged the constitutionality of a 32-year-old handgun ban in Washington, D.C., and found, "The handgun ban and the trigger-lock requirement (as applied to self-defense) violate[s] the Second

66. *Printz v. United States*, 521 U.S. 898 (1997).
67. *Id.*
68. *Id.*
69. *An Introduction to Constitutional Law » District of Columbia v. Heller*. (n.d.). Nearer.com. https://conlaw.us/case/district-of-columbia-v-heller-2008/
70. District of Columbia v. Heller, 554 U.S. 570 (2008).

Amendment."[71] At the same time, the Court recognized the existence (and, later, fundamentality) of an individual right to keep and bear arms for private purposes like self-defense in the home, the Court also noted that this right, "[l]ike most rights, . . . [are] not unlimited."[72]

Meet the Plaintiffs: McDonald v. Chicago, 561 U.S. 742 (2010)[73]

"Meet the plaintiffs: These four Chicago residents (from left), Adam Orlov, David and Colleen Lawson, and Otis McDonald, ... sued to repeal the city's ban on handgun possession."[74]

In *McDonald v. Chicago* (2010), the Supreme Court's 5-4 landmark decision emphasized the fact that the Second Amendment applies to state and local governments, by incorporation through the Fourteenth Amendment.[76]

Thus, Justice Stevens stated that nothing in either the *Heller* or the *McDonald* majority opinion poses any obstacle to the adoption of such preventive measures as a ban on the sale of assault weapons or more complete background checks on purchasers of firearms.[77] Stevens further argues that the Court did *not* overrule *Miller.* Rather, the Court ruled that only weapons of a specific caliber were in the protected class deserving of Second Amendment protection.

As examples of constitutionally acceptable limitations, the Court noted prohibitions on carrying concealed weapons, on the possession of firearms by felons and the mentally ill, as well as laws forbidding carrying firearms in sensitive places such as schools and government buildings. Additionally, prohibitions existed which imposed conditions and qualifications on the commercial sale of arms — specifically identified by the majority opinion as permissible regulations.[75]

71. *Id.*
72. *Id.*
73. *On Otis McDonald and his lawsuit challenging Chicago's 1982 handgun ban.* (n.d.). Chicago Magazine. https://www.chicagomag.com/chicago-magazine/january-2010/in-their-sights-lawsuit-challenging-chicagos-1982-handgun-ban-to-be-heard-by-supreme-court/.
74. *Id.*
75. *District of Columbia v. Heller,* 2008.
76. McDonald v. Chicago, 561 U.S. 742 (2010).
77. Elkins & McKitrick, 1993.

Machine guns and sawed-off shotguns might be helpful for self-defense, but they do not satisfy the "in common use" requirement.

Are Stun Guns Protected By Second Amendment? Supreme Court Suggests Yes[78]

The "in common use" requirement was tested in *Caetano v. Massachusetts (2016)*, a per curiam opinion. The Supreme Judicial Court of Massachusetts upheld a Massachusetts law prohibiting the possession of stun guns after examining "whether a stun gun is the type of weapon contemplated by Congress in 1789 as being protected by the Second Amendment."[79] SCOTUS ruled that "this is inconsistent with *Heller*'s clear statement that the Second Amendment "extends . . . to . . . arms . . . that were not in existence at the time of the founding," reversing the Massachusetts high court.[80] In a concurring opinion, Justice Samuel Alito stated,

> "[t]his reasoning defies our decision in *Heller*, which rejected as 'bordering on the frivolous' the argument 'that only those arms in existence in the 18th century are protected by the Second Amendment.' Also, the decision below does a grave disservice to vulnerable individuals like Caetano who must defend themselves because the State will not."[81]

Thus, the Supreme Court extended the scope of weaponry protected by *Heller* to stun guns.[82]

78. Totenberg, N. (2016, March 21). Are Stun Guns Protected By Second Amendment? Supreme Court Suggests Yes. *NPR*. https://www.npr.org/2016/03/21/471316349/supreme-court-suggests-stun-guns-are-protected-by-second-amendment.
79. *Caetano v. Massachusetts*, 136 S. Ct. 1027, 1027-1028 (2016).
80. *Id.* at 1028.
81. *Id.*
82. *Fourth Amendment*. (n.d.). LII / Legal Information Institute. Retrieved December 7, 2020, from https://www.law.cornell.edu/constitution/fourth_amendment

Black's Law Dictionary defines a per curiam opinion as "[(o]f an appellate judicial opinion) attributed to the entire panel of judges who have heard the appeal and not signed by any particular judge on the panel."[83]

C. WHERE THE SECOND AMENDMENT STANDS TODAY

Cases

Recall from our Article III Judicial branch discussion, President Donald Trump nominated three justices to the Supreme Court of the United States. Once nominated, the justices must then receive a simple majority vote of the Senate. In April 2017, the Republican majority in the Senate abolished the filibuster for Supreme Court confirmation hearings, thus ending debate on the nomination of Neil Gorsuch to the Court, and allowing the majority to confirm Gorsuch. Confirmations of Trump appointees Brett Kavanaugh and Amy Coney Barrett soon followed. Senate confirmation allows a check and balance on the composition of the Supreme Court of the United States.

83. PER CURIAM, Black's Law Dictionary (12th ed. 2024).

New York State Rifle & Pistol Association v. Bruen, 597 U.S. _ Fitzgerald, S. (2022)[84]

These appointments were controversial, to say the least. In 2022, the Supreme Court heard a challenge to concealed carry gun laws, seeking to extend the right established in *Heller* to possess guns in the home, to now do so in public. In *New York State Rifle & Pistol Association v. Bruen* (2022), the challengers claimed that New York's 109-year-old special permitting process for carrying a firearm outside the home violates the Second Amendment.[85] The Court held by a vote of 6-3, with all the conservative justices in the majority, in an opinion written by Justice Clarence Thomas, that the New York State law violates the Second Amendment (and Fourteenth Amendment) and invalidated the concealed carry rules in the law.[86] The new test for legislation and regulations, articulated by Justice Thomas, "requires courts to assess whether modern firearms regulations are consistent with the Second Amendment's text and historical understanding."[87]

Therefore, the new composition of the Supreme Court of the United States has the possibility to afford the expansion and clarification of current landmark cases, while producing new landmark cases.[88] In the fall of 2023, the Court will hear oral argument in *United States v. Rahimi*, a case in which the Court will decide if a Congressional law prohibiting the possession of firearms by persons subject to domestic-violence restraining orders, violates the Second Amendment.[89]

Below is an interactive timeline of the evolution of the Second Amendment. How does this timeline help you understand which rights were balanced by whom and when?

An interactive H5P element has been excluded from this version of the text. You can view it online here: https://cod.pressbooks.pub/usconstitutionalive2e/?p=30#h5p-1

Timeline Sources[90]

Critical Reflections:

1. How does the information and Musket reenactment picture help you understand what the forefathers anticipated when they wrote the Second Amendment? What additional factors should we consider as we explore how the Second Amendment evolved?
2. Second Amendment enthusiasts insist that the individual's right to bear arms are supreme against states' and federal rights based on the wording and layout of the Amendment. Do you

84. SCOTUS Strikes Down New York's Restrictive Carry Law. *CRPA*. https://crpa.org/news/blogs/nysrpa-v-bruen-decision-is-in/.
85. *New York State Rifle & Pistol Association v. Bruen*, 597 U.S. _____ (2022).
86. *Id.*
87. *Id.* at 23.
88. Washington Post. (2021, April 27).
89. United States v. Rahimi. (n.d.) *Oyez*. Retrieved July 15, 2023, from https://www.oyez.org/cases/2023/22-915
90. Gray, S. (2021, April 29). Here's a timeline of the major gun control laws in america. Time. https://time.com/5169210/us-gun-control-laws-history-timeline/; Right to bear arms timeline. (n.d.). Shmoop. Retrieved June 1, 2021, from https://www.shmoop.com/study-guides/civics/right-to-bear-arms/timeline; Rodriguez, V. (2019, May 1). A timeline of the second amendment and gun control in the U.S. Seventeen. https://www.seventeen.com/life/a19643402/second-amendment-gun-control-history/

agree? Explain why or why not?

3. Should Congress act to place more controls on the sale of guns given the increased frequency of mass homicides in our country? Would such an act encroach too heavily on the right to bear arms? Why or why not?
4. While not the shortest, the Second Amendment leaves a lot to be interpreted. How would you modify it to reflect more clarity? Be sure to include the forefathers' intentions.
5. Should Congressional tools for argument such as the filibuster be eliminated at critical times in order for one party to gain advantage over another when facing the lifetime appointment of a Supreme Court Justice?
6. Is the right defined in the Second Amendment an individual right, states' right or a collective (federal) right?

Chapter 5 - Amendment IV: The Rule & The Exceptions to The Rule...Not Privacy

Amendment IV

RICHARD J. FORST AND TAUYA R. FORST

LEARNING OBJECTIVES

After reading this chapter, you should be able to:

5.1 Identify the unfamiliar terms of the Fourth Amendment.
5.2 Explain the two parts of the Fourth Amendment.
5.3 Define search. Define stop. Define seizure. Define arrest. Define warrant.
5.4 Compare the differences among search, stop, seizure, and arrest.
5.5 Describe the exceptions to the warrant requirement in the Fourth Amendment.
5.6 Compare the differences between a search with a warrant and search without a warrant.
5.7 List the advantages of obtaining a warrant prior to a search.
5.8 Explain the exclusionary rule.
5.9 Identify when the exclusionary rule applies.
5.10 Define the fruit of the poisonous tree.
5.11 Explain what happens to evidence and a court case when applying the exclusionary rule.

KEY TERMS

Admissible evidence
Affidavit
Inadmissible
Motion to Suppress

Agent	Plain view/Plain sight doctrine
Attenuation Doctrine	Probable Cause
Bright-line Rule	Qualified Immunity
Case-by-Case Rule	Reasonableness Clause
Consent	Reasonable Suspicion
De-escalation	Search Incident to Lawful Arrest
Exceptions	Stop-and-Frisk
Exigent Circumstances Doctrine	Unreasonable search and seizure
Exclusionary Rule	Use of Force
Fruit of the Poisonous Tree	Warrant
Harmless Error Doctrine	

Getting Started

First determine how many parts exist in the Fourth Amendment. This will require a literal reading of each part of the amendment. Once we determine the parts, we can understand the verbiage of the United States Constitution. The Fourth Amendment is usually followed by statements which include unlawful, illegal and **unreasonable searches and seizures** (words found in the actual United States Constitution). Please note a reading of the Fourth Amendment indicates its important rule which you will find later in the chapter. In *Terry v. Ohio* (1968), Chief Justice Warren explained that the Fourth Amendment applied to all situations in which a law enforcement agent "accosts an individual and restrains [his or her's] freedom to walk away."[1] Therefore, we define unreasonable search and seizures here. According to Cornell Law's Legal Information Institute,

> "An unreasonable search and seizure is a search and seizure executed
>
> 1) without a legal search warrant signed by a judge or magistrate describing the place, person, or things to be searched or seized or
>
> 2) without probable cause to believe that certain person, specified place or automobile has criminal evidence or
>
> 3) extending the authorized scope of search and seizure.
>
> An unreasonable search and seizure is unconstitutional, as it is in violation of the Fourth Amendment, which aims to protect individuals' reasonable expectation of privacy, against government officers."[2]

Amendment IV

Passed by Congress September 25, 1789. Ratified December 15, 1791. The first 10 amendments form the Bill of Rights.

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

1. *Terry v. Ohio*, 392 U.S. 1, 16 (1968).
2. *Unreasonable search and seizure*. (n.d.). LII / Legal Information Institute. https://www.law.cornell.edu/wex/unreasonable_search_and_seizure#:~:text=An%20unreasonable%20search%20and%20seizure,has%20criminal%20evidence%20or%203).

Fourth Amendment Word cloud from United States Courts[3]

INTRODUCTION TO AMENDMENT IV

In most scenarios where an agent conducts a search without a warrant, one question remains. Are the actions of the agent reasonable according to the Fourth Amendment? To adequately address this question, we must first define and identify which agents are subject to the Fourth Amendment. Black's Law Dictionary defines an **agent** as "[s]omeone who is authorized to act for or in place of another; a representative."[4] There are many types of agents identified as being subject to the Fourth Amendment such as: law enforcement agents, federal law enforcement agents, officers, police officers, cops, deputies, sheriffs, detectives, marshals, patrolmen, patrolwomen, peace officers, and troopers to name a few. Similar to other amendments in the Bill of Rights, the Fourth Amendment is a direct response to the experience of the colonists.

The Fourth Amendment's direct response was addressed in the *Saman Case* (1603). The Fourth Amendment addressed the Crown's unauthorized entry of the King's men in legal arenas.[5] Saman's case celebrated the concept that "[e]very man's house is his castle" and balanced the homeowner's right against unlawful entry of the King's agents with the agents' authority to enter to effectuate an arrest.[6] This authority is known as a writ of assistance. The writ of assistance is a "...a writ issued by a superior colonial court authorizing an officer of the Crown to enter and search any premises suspected of containing contraband."[7] History notes that this writ and its impact was said to be the catalyst for the American Revolution in 1761.[8]

Although the Fourth Amendment remains central to American history, Steinberg notes that legal

3. *Fourth Amendment activities*. (n.d.). United States Courts. https://www.uscourts.gov/about-federal-courts/educational-resources/educational-activities/fourth-amendment-activities
4. AGENT, Black's Law Dictionary (12th ed. 2024).
5. United States Congress. (n.d.). *Fourth amendment: Historical background | constitution annotated | congress.gov | library of Congress*. Constitution Annotated. Retrieved April 10, 2021, from https://constitution.congress.gov/browse/essay/amdt4-1
6. 5 Coke's Repts. 91a, 77 Eng. Rep. 194 (K.B. 1604).
7. Fourth amendment, 2021.
8. *Ibid.*

scholars maintain four differing interpretations of its meaning.[9] First, most legal analysts believed the Fourth Amendment Framers sought to force a warrant preference rule as well as a basic reasonable standard for searches and seizures. Unfortunately, there is little to no historical support for this and the next interpretation.[10] Second, the most widely regarded interpretation is an objective and original framers' view of the Fourth Amendment which indicated that the Fourth Amendment was meant to apply to searches of homes. Third, Professor Akhil Reed Amar provided an interpretation which centers on the warrant as a threatening tool which requires governmental limitations. Fourth, scholars note and dismiss the final interpretation based upon the Fourth Amendment's ambiguous history as meritless. Accordingly, the expansion of the Fourth Amendment may appear contradictory in nature, considering its original focus.

ANALYSIS OF AMENDMENT IV

Two Parts of the Fourth Amendment

Part I: Reasonableness Clause

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated,

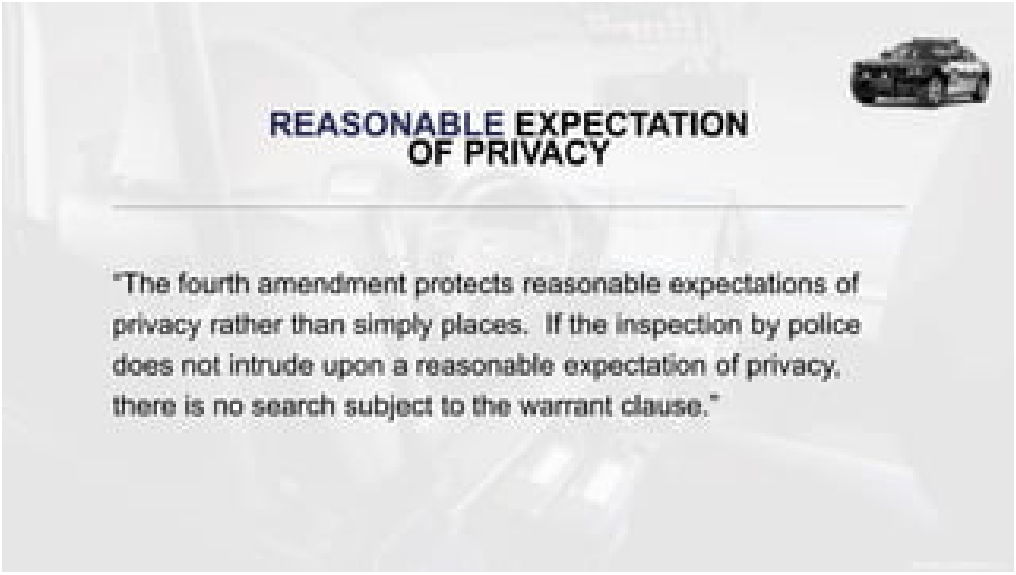
Reasonable is a difficult term to define. In the legal realm, the reasonable person standard was identified to help judges and legal scholars articulate what is appropriate, fair, and moderate regarding a particular action or set of circumstances. This term calls for much deliberation and is typically reduced to judicial interpretation. In *Cass v. State* (1933), the court noted that a reasonable analysis requires "...having the faculty of reason, rational, governed by reason not immoderate or excessive, honest, equitable, [and] tolerable."[11]

Reasonable encompasses many aspects for consideration when applying this concept in a case. Of course, one can not define reasonable using the same word (reasonable) in its definition. But we must note that the **reasonableness clause** is one of the two clauses of the Fourth Amendment. The reasonableness clause sets forth the requirement for searches and seizures with a warrant. In fact, "[a]ll searches and seizures under the Fourth Amendment must be reasonable and no excessive force shall be used. Reasonableness is the ultimate measure of the constitutionality of a search or seizure."[12] This would not be a definition, but simply a restatement. For this reason, we must delve into other examples of how the court views this ambiguous term.

The Supreme Court of the United States (SCOTUS) defined reasonableness in the *United States v. Knights* (2001) case as a balancing of individual rights against both federal and state rights.[13] Reasonableness of a search is set forth with specificity in *Wyoming v. Houghton* (1999). SCOTUS explained reasonableness of a search and determined "...by assessing, on the one hand, the degree to

9. Steinberg, D. (2008). The uses and misuses of the fourth amendment history. *Journal of Constitutional Law, 10(3)*, 581–606. https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=1212&context=jcl
10. *Ibid.*
11. *Cass v. State*, 124 Tex. Crim. 208, 61 S.W.2d 500 (1933).
12. *Fourth Amendment*. (n.d.). LII / Legal Information Institute. https://www.law.cornell.edu/wex/fourth_amendment#:~:text=Reasonableness%20Requirement,of%20a%20search%20or%20seizure.
13. *United States v. Knights*, 534 U.S. 112 (2001).

which it intrudes upon an individual's privacy and, on the other hand, the degree to which it is needed for the promotion of legitimate governmental interests."[14]



Reasonable Expectation of Privacy[15]

In evaluating whether an individual's Fourth Amendment rights have been violated by a search, a court must first determine that the individual had a "reasonable expectation of privacy." The Supreme Court held in *O'Connor v. Ortega* (1987) that a doctor in a public hospital had a reasonable expectation of privacy in his office because it was occupied by him only. Additionally, he occupied it for more than 17 years. Dr. Ortega was accused of stealing funds from patients and sexual harassment. The Court held that the reduced expectations of privacy that public employees face on the job are only those that are work related to the agency. Being an employee means that a person should expect that private items in their office are actually private.[16] The Court determined that it was not reasonable to search through all of Doctor Ortega's private items in his office; therefore, the search violated the Fourth Amendment.[17]

CONSTITUTIONAL CLIP

14. *Wyoming* v. *Houghton*, 526 U.S. 205, 300 (1999).
15. *Introduction to 4th search and seizure Arkansas*. (n.d.). https://www.slideshare.net/ClaySmith37/introduction-to-4th-search-and-seizure-arkansas
16. *O'Connor v. Ortega*, 480 U.S. 709 (1987).
17. *Id.*

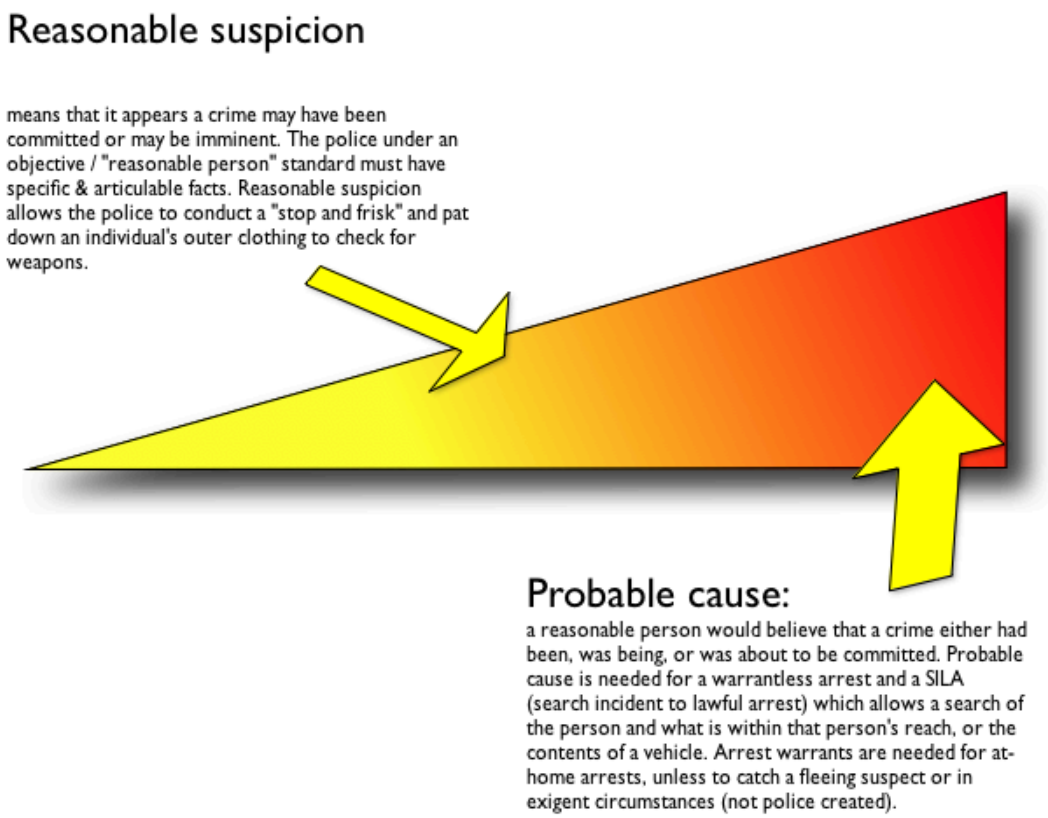
As previously noted, individual rights must always be balanced with those of the federal and state governments. This theme is interwoven throughout the entire United States Constitution as the foundation of the document was meant to be a check and balance upon the cooperative efforts of individuals, states, and federal government.

Additionally, reasonableness requires a specific analysis of a long held legal standard for searching – probable cause. Chief Justice Warren further cautioned in *Terry v. Ohio* (1968), one should note that the law enforcement agent's actions are central to reviewing the actions of the suspect as opposed to viewing the suspect's actions as central while determining the validity of the law enforcement agent's actions.[18] Thus, law enforcement agents must seek to describe their supportive evidence to a stop-and-frisk based upon "... specific and articulable facts which, taken together with rational inferences from those facts," would draw the conclusion from a neutral magistrate or (judge) that the law enforcement agent "...of reasonable caution would be warranted in believing that possible criminal behavior was at hand and that both an investigative stop and a frisk was required."[19]

Furthermore, Black's Law Dictionary defines stop-and-frisk as "[a] police officer's brief detention, questioning, and search of a person for a concealed weapon when the officer reasonably suspects that the person has committed or is about to commit a crime."[20] As identified, stop-and-frisk includes a legal mechanism for search and seizures with or without a warrant. "The stop-and-frisk, which can be conducted without a warrant or probable cause, was held constitutional by the Supreme Court in *Terry v. Ohio* (1968)."[21] Reasonable suspicion must exist for both the stop and the frisk.

18. *Terry v. Ohio*, 392 U.S. 1 (1968).
19. *Id. at 22.*
20. STOP-AND-FRISK, Black's Law Dictionary (12th ed. 2024).
21. STOP-AND-FRISK, Black's Law Dictionary (12th ed. 2024).

Reasonable Suspicion



Reasonable suspicion v. Probable cause[22]

Therefore, reasonable suspicion requires a review of four specific questions:

1. Does the agent have a warrant for the search?
2. Does the agent believe that the person has committed, will commit or is presently committing a crime?
3. Does the agent have the ability to provide specific and articulable facts about this crime prior to the search?
4. Does the agent believe that the person may be "... armed and presently dangerous?"[23]

The Bright-Line Rule or Totality of the Circumstances

When the courts determine if a search is unreasonable, they apply one of two viewpoints: the bright-line rule or the totality of the circumstances test. The **bright-line rule** is defined as the ability "[t]o decide a legal point; to make an official decision about a legal problem."[24] Furthermore, the Bright-line rule is a controversial test, but legal practitioners tend to believe that it provides a simplistic approach to completing analysis.

22. *LibGuides: Verde, Brandon: Introduction*. (n.d.). https://avemarialaw.libguides.com/CriminalProcedure
23. *Id.*
24. BRIGHT-LINE RULE, Black's Law Dictionary (12th ed. 2024).

a. Evaluating Legality of Searches

Within the legal arena, in *Schneckloth v. Bustamonte* (1973), the two-part issues before the court were

1) whether the the court of appeals erred when it held that the search of the car was invalid because the state failed to show consent given with knowledge that it could be withheld and

2) whether the claims relating to search and seizure are available to a prisoner filing a writ of habeus corpus?[25]

In fact, the law enforcement agents would have the breadth and depth necessary to appropriately manage realistic investigations. Therefore, the court held "whether consent is voluntary can be determined from the totality of the circumstances. It is unnecessary to prove that the person who gave consent knew that he had the right to refuse."[26] Further, in *Ohio v. Robinette* (1996), the court extended the analysis indicating that "[r]easonableness, in turn, is measured in objective terms by examining the totality of the circumstances."[27] Most courts implore the totality of the circumstances test using a case-by-case analysis. According to Black's Law Dictionary, **totality of the circumstances** test is defined as "[a] standard for determining whether hearsay (such as an informant's tip) is sufficiently reliable to establish probable cause for an arrest or search warrant."[28]

Ultimately, the courts follow one of two viewpoints (as to whether a search is deemed unreasonable or not): apply one rule to all cases (bright-line rule) or what more courts tend to choose more often, the totality of the circumstances (case-by-case rule). A **case-by-case rule** is defined as a legal process "used to describe decisions that are made separately, each according to the facts of the particular situation."[29] Totality of the circumstances is based upon all the evidence presented to the judge, not just one factor. The totality consideration determines whether probable cause for a warrant exists.[30] In this instance, the judge's consideration involves whether a reasonable person would trust what officers have set forth.[31] If the judge is not convinced of these claims, a judge may request that an officer return with additional information to support his or her claim.[32] The latter viewpoint appears to be more inclusive in its application which tends to discount biases in the opinion processes.

Part II: Warrant Clause

and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

On the other hand, the Warrant clause sets forth the specific requirements for conducting a search. Further, it provides the specific items necessary to validate a search when executing the search according to a warrant. A **warrant** is defined as "[a] writ directing or authorizing someone to do an act, especially one directing a law enforcer to make an arrest, a search, or a seizure."[33] Warrants are a necessary component for law enforcement agents to conduct searches such as a search warrant, an arrest warrant, an administrative warrant, a bench warrant, and a seizure warrant.

25. 412 U.S. 218 (1973).
26. *[[meta.pageTitle]]*. (n.d.-b). [[Meta.siteName]]. https://www.oyez.org/cases/1972/71-732.
27. *Ohio v. Robinette*, 519 U.S. 33, 39 (1996).
28. TOTALITY-OF-THE-CIRCUMSTANCES TEST, Black's Law Dictionary (12th ed. 2024).
29. case-by-case. (2023). https://dictionary.cambridge.org/us/dictionary/english/case-by-case.
30. Steinberg, 2008.
31. *Ibid.*
32. *Ibid.*
33. WARRANT, Black's Law Dictionary (12th ed. 2024).

However, if one believes reasonableness is difficult to define, then probable cause may follow in stride. The Fourth Amendment (ratified 1791) sets the legal standard stage of how an agent will be aware of their ability to identify probable cause. Probable cause was first interpreted by the Supreme Court in *Locke v. United States* (1813) when the court defined the term by stating what it is not.[34] Chief Justice John Marshall formulated how we should review this constitutional verbiage. As he explained probable cause is defined as the ability to determine a "means less than evidence which would justify condemnation or conviction," by acknowledging an officer's responsibility to prove "more than bare suspicion" as noted in *Brinegar v. United States* (1949).[35]

Probable Cause

In essence, probable cause is a term which requires context of a fact pattern to fully understand. Consider the different ways probable cause may arise. Probable cause may arise as an agent obtains a warrant from a magistrate – a probable cause affidavit. Probable cause may arise as an officer in the field conducting a warrantless search – probable cause standard. Further, **probable cause** is defined by Black's Law Dictionary as "[a] reasonable ground to suspect that a person has committed or is committing a crime or that a place contains specific items connected with a crime."[36] Finally, probable cause may arise in a hearing conducted by a judge to hold over a client – a probable cause hearing. Legal standards for probable cause may be explained using an objective or subjective approach depending upon the way each of the probable cause options are leveraged in the criminal justice system. In this instance, probable cause is explained in an objective manner.

At any rate, probable cause requires an agent to explain the reason and purpose of the search prior to conducting the search.

In *Brinegar* (1949), the courts ruled that it was reasonable to infer that Brinegar transported liquor as the agent observed Brinegar loading liquor. As a result, Brinegar was arrested for transporting liquor previously.[37] Brinegar personally confirmed his use of liquor when questioned by the officers. Consequently, the liquor was **admissible evidence** and Brinegar was charged and convicted of violating the Federal Liquor Enforcement Act. According to Black's Law Dictionary, admissible evidence is defined as "[s]omething (including testimony, documents, and tangible objects) that tends to prove or disprove the existence of an alleged fact; anything presented to the senses and offered to prove the existence or nonexistence of a fact."[38] The judge recognized how the explanation may appear in hindsight, but maintained the decorum of a factual or contextual analysis in confirming probable cause existed at the time of arrest. ***Thus it is important to remember as law enforcement agents utilize probable cause that it is done so with the rule in*** **mind.** The rule of the Fourth Amendment indicates that all searches must be conducted through the legal standard of probable cause as previously explained.

This general rule provides the necessary protections for how law enforcement agents should conduct searches as well as what level of expectation persons who come in contact with agents should expect.

34. *Locke v. United States*, 11 U.S. 339 (1813).
35. *Brinegar v. United States*, 338 U.S. 160, 176 (1949).
36. PROBABLE CAUSE, Black's Law Dictionary (12th ed. 2024).
37. *Brinegar v. United States*, 1949.
38. EVIDENCE, Black's Law Dictionary (12th ed. 2024).

In this instance, the rule of the Fourth Amendment states that any search must occur with a search warrant which requires three items per the Fourth Amendment.

First, the agent must obtain probable cause to believe that the searched items support that a crime has or will occur.

Second, the agent must particularly describe the place to be searched and the persons or things to be seized.

Third, the agent must obtain an oath or affirmation of the searched items which support that a crime has or will occur.

If all three items exist, then this information will culminate into a judge's signature affixed to a warrant.

As we begin to study case law and the affects of local, state, and federal statutory law, we recognize that exceptions to this rule are common. **Exceptions** are defined as "...formal objection[s] to a court's ruling by a party who wants to preserve an overruled objection or rejected proffer for appeal."[39] However, it is important that those who seek to enforce the rule of the Fourth Amendment, immediately make the connection to the possibility of any exceptions which may exist.

CONSTITUTIONAL CLIP

Exceptions were meant to work in tandem with the rule, not instead of the rule. In other words, agents should concentrate on probable cause where available as any other legal standard works to reduce the authority and scope of the search resulting in a limited search.

39. EXCEPTION, Black's Law Dictionary (12th ed. 2024).

Execution of a Warrant

Warrant Execution[40]

A police officer must execute a warrant once it has been issued by a judge or magistrate. A private citizen cannot execute a warrant. When a police officer executes a warrant, the media or other third parties cannot accompany the officer. This rule was set forth in *Wilson v. Layne* (1999), when the Supreme Court considered whether a newspaper reporter and photographer should be permitted to accompany the police on the execution of a warrant.[41] In keeping with the framers' interest in protecting the right to privacy in homes, the Court indicated this practice was impermissible. The Court reasoned that police action pursuant to a warrant is reasonable only if the action is related solely to the objectives of the warrant.[42] In this case, the Fourth Amendment expectation of privacy trumped the First Amendment freedom of the press.[43]

Generally, search warrants should be executed as soon as possible after they are issued. Federal rules require execution within ten days of issuance. Searches should be conducted within daytime hours (6:00 a.m. to 10:00 p.m.), unless the alleged criminal activity is occurring at night, such as drug activity. In addition, a "no-knock" warrant can be requested if officers can demonstrate that knocking and announcing their presence would put them or others in danger. In order to obtain such an order, the Supreme Court held in *United States v. Ramirez* (1998) that an officer need merely prove that he has reasonable suspicion that he should not knock.[44] How long must an officer wait after knocking and announcing to enter? In *United States v. Banks* (2003), the Court held 15 to 20 seconds was a reasonable wait time. The Supreme Court of the United States posited that the officer could assume that 15 to 20 seconds is enough time for the suspect to begin destroying evidence.[45]

40. *Warrant execution*. (n.d.). http://www.taconeconsulting.com/law-enforcement-military/warrant-training/
41. *Wilson v. Layne*, 526 U.S. 603 (199).
42. *Id.*
43. *Id.*
44. *United States v. Ramirez*, 523 U.S. 65 (1998).
45. *United States v. Banks*, 540 U.S. 31 (2003).

Each knock and announce case must be considered based upon its own facts and the totality of the circumstances, including the following factors:

1. The size, design and layout of the premises [to be searched or seized];
2. The nature of the offense, including the possibility of destroying evidence and the possibility that the suspect will be dangerous; and
3. The time of day that the search is being conducted.[46]

a. Cases

Chimel was arrested when law enforcement agents served a valid arrest warrant. Agents requested to look around Chimel's home and Petitioner denied the request. Agents did not receive consent from Chimel or his wife. Although consent was denied, agents persisted to search Chimel's home and obtained items which were used to convict Chimel. The Supreme Court in *Chimel v. California* (1969) held that the items used were unconstitutionally obtained – due to the lack of consent obtained "on the basis of the lawful arrest."[47] It is of note that this was a warrantless search as it could not be connected to the lawful arrest or another constitutional grounds to legally execute the search. Hence, it was not a search "incident to that arrest."[48]

It is important to recall that the general rule for conducting a search is that one must obtain a warrant. Recall, the legal standard for the Fourth Amendment requires probable cause in order to conduct searches. However, in some instances, a lesser legal standard appears to be constitutional.

CONSTITUTIONAL CLIP

In *Terry v. Ohio* (1968), the landmark case which reduced the legal standard of probable cause to reasonable suspicion was created within a limited context.[49] Reasonable suspicion, as a new limited legal standard allowed agents to search in uniquely specific circumstances, while placing legal restrictions on the atypical search.[50]

While patrolling a familiar area, a detective (with 39 years of experience) observed Terry and others proceed alternately back and forth along the same route, viewing the same store more than 20 times. The detective suspected Terry and friends were "casing the building" (reviewing the area for a possible robbery) in *Terry v. Ohio* (1968).[51] The detective approached and began a brief questioning before he patted down Terry to check for a weapon. The detective continued to question everyone as he moved Terry and others into the store. Ultimately, the detective recovered weapons from Terry and friends. Terry was arrested and charged with carrying a concealed weapon. Defense counsel moved to suppress

46. Fryling, T. M. F. (2023). *Constitutional law in criminal justice*. Aspen Publishing, p. 131-134.
47. *Chimel v. California*, 395 U.S. 752 (1969).
48. Id. at 755-768.
49. 392 U.S. 1 (1968).
50. *Id.*
51. Id.

this evidence. The court held that the evidence was constitutionally obtained.[52] The court recognized and introduced a new legal standard of reasonable suspicion.[53] Finally, reasonable suspicion is limited and must include the analysis that the agent does not have probable cause.[54]

The agent may conduct a limited search of the person's outer garments without probable cause if the agent has:

1) reasonable suspicion to believe that the person has committed, is committing, or is about to commit a crime **and**

2) a reasonable belief that the person "may be armed and presently dangerous."[55]

Terry balances constitutional protections from law enforcement interference without the proof required for probable cause with the duty of an agent to investigate suspicious actions and probable crime. *Terry* requires the ability to prove reasonable suspicion prior to conducting the limited scope search (also known as **Stop-and-Frisk** and *Terry* stop). In fact, *Terry* defines reasonable suspicion within the dissenting opinion as it relates to specific and articulable facts.[56] Additionally, Black's Law Dictionary notes **reasonable suspicion** is a particularized and objective basis, supported by specific and articulable facts, for suspecting a person of criminal activity. Thus, this definition helps outline when the general rule of probable cause does not apply, but an exception for searching.[57]

Part III: Searches With A Warrant

a. Comparative Table 5.1: Types and Legal Authority are missing below. Please complete this information

52. *Id.*
53. *Id.*
54. *Id.*
55. Id.
56. *Id.*
57. *Id.*

Legal tool	Searches	Stops	Seizures	Arrests
Elements	(1) the warrant must be filed in good faith by a law enforcement officer; (2) the warrant must be based on reliable information showing probable cause to search; (3) the warrant must be issued by a neutral and detached magistrate; and (4) the warrant must state specifically the place to be searched and the items to be seized.	When a police officer has a reasonable suspicion that an individual is armed, committing, or about to commit, in criminal conduct, the officer may briefly stop and detain an individual for a pat-down search of outer clothing. A Terry stop is a seizure within the meaning of Fourth Amendment.	Two elements must be present to constitute a seizure of a person. First, there must be a show of authority by the police officer. Presence of handcuffs or weapons, the use of forceful language, and physical contact are each strong indicators of authority. Second, the person being seized must submit to the authority. An individual who ignores the officer's request and walks away has not been seized for Fourth Amendment purposes.	a. Restraint of liberty; b. Intent to make an arrest; c. Comprehension by the detainee that he/she is under arrest.
Types (Student should complete these options)				
Legal Authority (Student should complete these options)				
Definition	An exploration of a person's body, property, or other private area conducted by a peace officer for supporting	Temporary restraint that prevents a person from walking or driving away.	Act or instance of taking possession of a person or property by legal right or process.	A seizure or forcible restraint by legal authority; Taking or keeping of a person in custody by legal authority

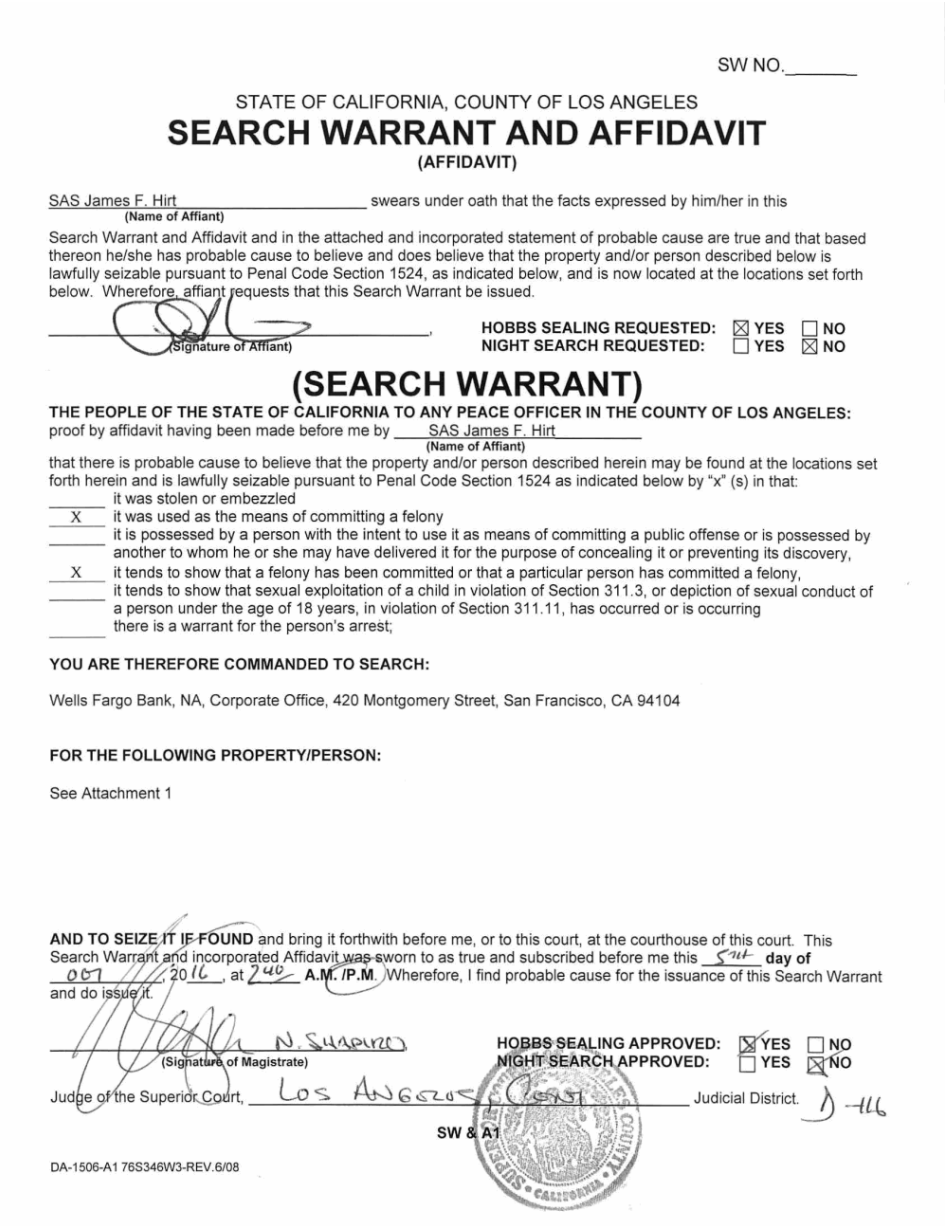
b. General Warrant

The rule of the Fourth Amendment identifies how a peace officer should execute a search and/or seizure. The search and/or seizure must be done with a warrant according to the following requirements:

a. probable cause;

b. judge's signature supported by

c. oath or affirmation **(typically an affidavit)**.



SW NO._____

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

SEARCH WARRANT AND AFFIDAVIT

(AFFIDAVIT)

SAS James F. Hirt (Name of Affiant) swears under oath that the facts expressed by him/her in this Search Warrant and Affidavit and in the attached and incorporated statement of probable cause are true and that based thereon he/she has probable cause to believe and does believe that the property and/or person described below is lawfully seizable pursuant to Penal Code Section 1524, as indicated below, and is now located at the locations set forth below. Wherefore, affiant requests that this Search Warrant be issued.

(Signature of Affiant)

HOBBS SEALING REQUESTED: ☒ YES ☐ NO
NIGHT SEARCH REQUESTED: ☐ YES ☒ NO

(SEARCH WARRANT)

THE PEOPLE OF THE STATE OF CALIFORNIA TO ANY PEACE OFFICER IN THE COUNTY OF LOS ANGELES:
proof by affidavit having been made before me by SAS James F. Hirt (Name of Affiant)
that there is probable cause to believe that the property and/or person described herein may be found at the locations set forth herein and is lawfully seizable pursuant to Penal Code Section 1524 as indicated below by "x" (s) in that:

_____ it was stolen or embezzled
X it was used as the means of committing a felony
_____ it is possessed by a person with the intent to use it as means of committing a public offense or is possessed by another to whom he or she may have delivered it for the purpose of concealing it or preventing its discovery,
X it tends to show that a felony has been committed or that a particular person has committed a felony,
_____ it tends to show that sexual exploitation of a child in violation of Section 311.3, or depiction of sexual conduct of a person under the age of 18 years, in violation of Section 311.11, has occurred or is occurring
_____ there is a warrant for the person's arrest;

YOU ARE THEREFORE COMMANDED TO SEARCH:

Wells Fargo Bank, NA, Corporate Office, 420 Montgomery Street, San Francisco, CA 94104

FOR THE FOLLOWING PROPERTY/PERSON:

See Attachment 1

AND TO SEIZE IT IF FOUND and bring it forthwith before me, or to this court, at the courthouse of this court. This Search Warrant and incorporated Affidavit was sworn to as true and subscribed before me this 5th day of OCT, 2016, at 240 **A.M. /P.M.** Wherefore, I find probable cause for the issuance of this Search Warrant and do issue it.

N. SHADNEY (Signature of Magistrate)

HOBBS SEALING APPROVED: ☒ YES ☐ NO
NIGHT SEARCH APPROVED: ☐ YES ☒ NO

Judge of the Superior Court, LOS ANGELES COUNTY Judicial District. 1-116

SW & A1

DA-1506-A1 76S346W3-REV.6/08

Wells Fargo Search Warrant and Affidavit[58]

According to the Fourth Amendment, searches can not be conducted without a warrant. This general rule is important as all agents must conduct the search according to a warrant **unless an exception to a warranted search exists.** Generally, warrants must be executed after agents knock-and-announce their presence. This rule serves in several capacities – namely to prevent loss of human life, to provide officer safety, protect a person's precedential right to privacy and to protect said person from sudden and explosive intrusion in their homes.

58. Times, N. Y. (2018, May 10). Wells Fargo Search warrant and affidavit. *The New York Times*. https://www.nytimes.com/interactive/2016/10/20/business/dealbook/document-Wells-Fargo-Search-Warrant-and-Affidavit.html

c. No-Knock Warrant — Special Conditions Warrant

The history of the No-Knock Warrant began in *Ker v. California* (1963) where a law enforcement agent believed the petitioner was involved in the sale of marijuana and purchased marijuana from a known drug dealer.[59] Additionally, the prosecution noted that if the drug dealer was known to the agent, the law enforcement agent is then justified in conducting a search without a warrant.[60] The court examined the collection of the evidence based upon the reasonableness of the Fourth Amendment. The court further remarked that the law enforcement agent's belief which developed prior to the search was founded upon the federal standard of relying upon the compliance of the state law.[61] In this instance, the state law was followed, while agents entered into the location quietly to protect officer's from possible danger. Hence, the defendant was constitutionally subject to both a lawful arrest as well as a search incident to arrest which yielded constitutional evidence.[62] This incident followed President Richard Nixon's commencing of his campaign slogan of the "war on drugs."

CONSTITUTIONAL CLIP

President Richard Nixon vowed to tame the beast of drugs through the use of the No-Knock warrant. The increased use of No-Knock warrants was a product of the country's "war on drugs," a series of federal and local policies aimed at cracking down on recreational drug use. President Nixon launched the campaign in the 1970s, but it gained momentum in the 1980s under President Ronald Reagan.[63]

This controversial No-Knock warrant yielded many problems, then and now. In response to the current problems, some jurisdictions have passed legislation which bans and/or limits its use. **Note:** Federal law allows for No-Knock warrants for potential federal crimes, as explained earlier in this chapter. This exception to the execution of the general warrant rule continues to support its use by claiming that it protects the rights of the accused and supports officer safety. Increasing the use of the No-Knock warrant proved to be problematic with the rise of civilians being caught in the cross hairs.

In *Richards v. Wisconsin* (1997), Richards sought to clarify how the No-Knock Warrant was expanded from a personal dwelling to a motel room.[64] In this case, the Supreme Court found that the agent did not violate the Fourth Amendment. The court reviewed a No-Knock warrant for a hotel room whereby the verbiage supporting the No-Knock portion of the warrant was removed. Subsequently,

59. *Ker v. California, 374 U.S. 23* (1963).
60. *Id.*
61. *Id.*
62. *Id.*
63. Norwood, C. (2020, June 12). *The war on drugs gave rise to 'No-Knock' warrants. Breonna Taylor's death could end them.* PBS NewsHour. https://www.pbs.org/newshour/politics/the-war-on-drugs-gave-rise-to-no-knock-warrants-breonna-taylors-death-could-end-them
64. *Richards v. Wisconsin*, 117 S. Ct. 1416 (1997).

the agents operated as if the warrant was a No-Knock warrant due to their thoughts of danger in the room. According to the court, "the police must have a reasonable suspicion that knocking and announcing their presence, under the particular circumstances, would be dangerous or futile, or that it would inhibit the effective investigation of the crime by, for example, allowing the destruction of evidence."[65]

Breonna's Law was the legislation created to limit No-Knock warrants in light of a fatal shooting of an unarmed Black woman, Breonna Taylor. Breonna endured an unwarranted attack in her home by the Louisville Police Department looking for the wrong suspect in the wrong home. The agents failed to knock and announce, but erroneously executed a No-Knock Warrant.[66]

Ultimately, this legislation has ignited a call to action for all agencies who still support No-Knock Warrants. Unfortunately, every good initiative can turn sour. Opponents of this initial movement bought a domain page bearing Taylor's name in an effort to support "good cops."[67]

65. *Id. at 1421.*

66. Brown, M., & Duvall, T. (2020, June 30). *Fact check: Louisville police had a "no-knock" warrant for Breonna Taylor's apartment*. USA TODAY. https://eu.usatoday.com/story/news/factcheck/2020/06/30/fact-check-police-had-no-knock-warrant-breonna-taylor-apartment/3235029001/

67. *Ibid.*

Breonna Taylor, Image art by @arielsinhaha[68]

"Louisville's Metro Council voted unanimously to pass Breonna's Law. The bill was rightfully named in honor of Breonna Taylor, an award-winning EMT, essential worker, and daughter who worked tirelessly to help others and who was killed in her home by Louisville police officers... Breonna's Law effectively outlaws "no-knock" warrants and requires body cameras to be turned on before and after every search."[69]

d. Special Conditions Warrant

These are limited searches that the court considers reasonable because societal needs are thought to outweigh the individual's normal expectation of privacy:

1. Prison
2. Probation and parole searches

68. *UPDATED! Quick signature: Justice for Breonna Taylor!* (2021, February 1). MomsRising. https://www.momsrising.org/blog/updated-quick-signature-justice-for-breonna-taylor.

69. *UPDATED! Quick signature: Justice for Breonna Taylor!* (2021, February 1). MomsRising. https://www.momsrising.org/blog/updated-quick-signature-justice-for-breonna-taylor

3. Drug testing for certain occupations
4. Administrative searches of closely regulated businesses
5. Community caretaking searches
6. Public school searches[70]

Part V: Searches Without A Warrant

a. Consent

Consent is the number one exception to the warrant requirement. Consent is important in a warrantless search because it allows an unchecked, unrestricted access to the items or persons being searched. **Consent** is defined as "[a] voluntary yielding to what another proposes or desires; agreement, approval, or permission regarding some act or purpose, especially given voluntarily by a competent person; legally effective assent."[71] Agents must be careful to meticulously document that the consent was relevant and voluntary. Consent is particularly appealing to law enforcement agents as it is approval without restrictions. Recall, warrants have restrictions and this makes consent appealing to law enforcement agents. On the other hand, consent may be revoked at any moment. This disadvantage makes consent unappealing to law enforcement agents. Therefore, consent is the best exception and the worst exception for warrantless searches.

b. Exigent-Circumstances Doctrine

Exigent-circumstances doctrine is another exception to the warrant requirement. This exception exists in specific situations which include maintaining safety of persons' lives and imminent danger to persons from a suspect. **Exigent-circumstances doctrine** (or exigent circumstances) is defined as "[t]he rule that emergency conditions may justify a warrantless search and seizure, [especially] when there is probable cause to believe that evidence will be removed or destroyed before a warrant can be obtained."[72] Exigent circumstances are also referred to as an emergency circumstance.

One such instance which explored exigent circumstances was pursuit of a misdemeanant. In *Lange v. California* (2021), as a result of the defendant's writ of certiorari, the court reviewed a common application of exigent circumstances in an effort to provide guidance to all lower courts.[73] The defendant suggested that the court should examine this concept because most warrantless searches are predecessors to misdemeanor prosecutions. Specifically, the defendant wanted the court to address the following issue: "Does pursuit of a person who a police officer has probable cause to believe has committed a misdemeanor categorically qualify as an exigent circumstance sufficient to allow the officer to enter a home without a warrant?"[74]

In a unique opinion, SCOTUS held 9-0 that "[u]nder the Fourth Amendment, pursuit of a fleeing misdemeanor suspect does not always or categorically qualify as an exigent circumstance justifying a warrantless entry into a home." Justice Kagan penned the opinion joined by Justice Thomas in part. Specifically, Justice Kagan wrote "[t]he Court has recognized exigent circumstances when an officer

70. *Ibid.*
71. CONSENT, Black's Law Dictionary (12th ed. 2024).
72. EXIGENT-CIRCUMSTANCES DOCTRINE, Black's Law Dictionary (12th ed. 2024).
73. *Lange v. California*, 594 US _ (2021).
74. *Id.*

must act to prevent imminent injury, the destruction of evidence, or a felony suspect's escape."[75]

CONSTITUTIONAL CLIP

Exigent is defined as "[a] situation in which a police officer must take immediate action to effectively make an arrest, search, or seizure for which *probable cause exists*, and thus may do so without first obtaining a warrant.

Exigent circumstances may exist if

(1) a person's life or safety is threatened,

(2) a suspect's escape is imminent, or

(3) evidence is about to be removed or destroyed."[76]

c. Plain View Doctrine

Additionally, plain view, sometimes referred to as plain sight, allows agents to search without a warrant. For reference, **plain view/plain sight doctrine** is defined as "The rule permitting a police officer's warrantless seizure and use as evidence of an item seen in plain view from a lawful position or during a legal search when the officer has *probable cause* to believe that the item is evidence of a crime."[77] According to the definition, the legal standard which must be met is probable cause. As a result, there are two ways to obtain evidence in this capacity. An agent may conduct a warrantless seizure if the evidence being confiscated is done through the agent's own senses – touch, taste, smell, sight, or hearing. The law enforcement agent's assessment of legal evidence through their five senses must be completed pursuant to a legal stance of the agent. In *Maryland v. Macon* (1985), the court noted an example of a plain view exception which the court held did not violate the defendant's Fourth Amendment unreasonable search and seizure rights.[78] The court noted that the actions of the law enforcement agents were lawful.[79] Specifically, the court stated these lawful actions of entering the bookstore was open and intentional for all to see.[80] Further, this does not infringe on the defendant's legitimate expectation of privacy preventing the legal finding of a reasonable search within the meaning of the Fourth Amendment.[81]

Equally important, the plain view/sight/feel doctrine is not without limitations. According to *Minnesota v. Dickerson* (1993), the court reviewed the actions of a law enforcement agent when he conducted a limited outer garment pat down search based upon the defendant's vague actions, while

75. Lange v. California. (n.d.). *Oyez*. Retrieved August 27, 2023, from https://www.oyez.org/cases/2020/20-18.
76. EXIGENT CIRCUMSTANCES, Black's Law Dictionary (12th ed. 2024).
77. PLAIN-VIEW DOCTRINE, Black's Law Dictionary (12th ed. 2024).
78. *Maryland v. Macon*, 472 U.S. 463 (1985).
79. *Id.*
80. *Id.*
81. *Id.*

exiting a known cocaine building.[82] The court determined that the warrantless search based upon reasonable suspicion remains limited to discovering weapons which may harm the officer or others.[83] Additionally, this limited or protective search may not supersede the boundaries of *Terry v. Ohio (1968)* which set the perimeters of all pat down searches.[84]

Finally, if the search supersedes these boundaries then a taint occurs. According to Black's Law Dictionary, a taint is defined as "[t]o contaminate or corrupt [evidence]."[85] Additionally, this taint, also known as the original taint of the evidence is deemed inadmissible. According to Black's Law Dictionary, **inadmissible** is defined as "(Of evidence) excludable by some rule of evidence."[86] Furthermore, any additional evidence collected as a result of the first or original taint, is deemed inadmissible as well. However, a plain view/plain sight/plain feel exception may occur pursuant to a warranted seizure, only if the officer has probable cause to believe that a crime will or did occur.[87]

d. Search Incident to Lawful Arrest

Criminal Justice 4th & 5th Amendments Flashcards | Quizlet

Search incident to lawful arrest[88]

Search Incident To Lawful Arrest is "[a] warrantless search of a suspect's person and immediate vicinity, no warrant being required because of the need to keep officers safe and to preserve evidence."[89] Legal scholars differentiate between a search incident to lawful arrest and a protective search based upon its scope of search. Most scholars suggest that a search incident to arrest must remain in the immediate vicinity of the arrest. Remember, these arrests are limited as they are being conducted without a warrant.

Part VI: Applications of the Fourth Amendment

a. Use of Force

According to Black's Law Dictionary, **use of force** is defined as "[t]he principle that a law-enforcement officer may legally resort to force, even deadly force, in the appropriate circumstances."[90] Use of Force remains a controversial topic in law enforcement circles as agents weigh their views on reasonableness while present in the situation and the judicial, legislative, and executive branches all balance their perspective views regarding the situation. As noted many times over, there is no-single, go to definition for this term. In short, you will see this concept used in various ways. It is of utmost importance that those who read this section, do so with an eye toward the referenced definition.

82. *Minnesota v. Dickerson*, 508 U.S. 366 (1993).
83. *Id.*
84. *Id.*
85. TAINT, Black's Law Dictionary (12th ed. 2024).
86. INADMISSIBLE, Black's Law Dictionary (12th ed. 2024).
87. *Id.*
88. *Criminal justice 4th and 5th amendments*. (n.d.). [Slide show]. https://quizlet.com/395124418/criminal-justice-4th-5th-amendments-flash-cards/
89. SEARCH INCIDENT TO ARREST, Black's Law Dictionary (12th ed. 2024).
90. USE-OF-FORCE DOCTRINE, Black's Law Dictionary (12th ed. 2024).

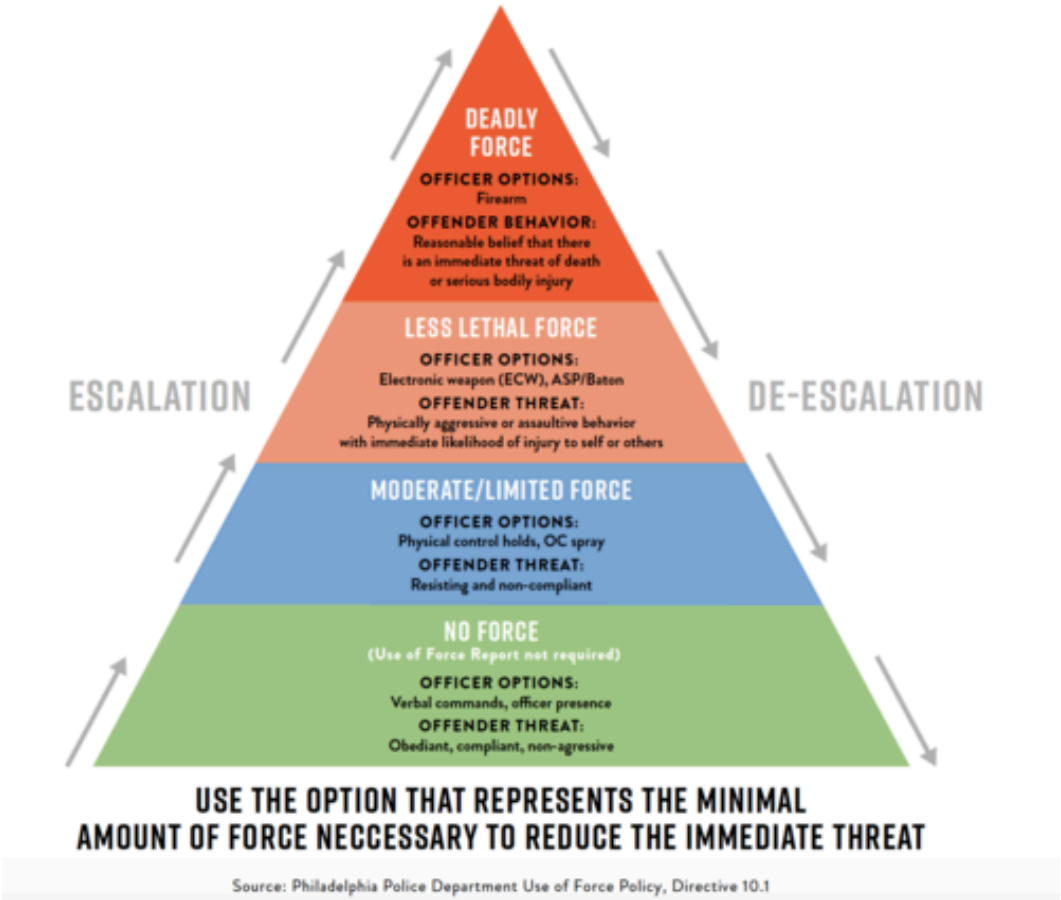
When used in our text, we center use of force as a legal analysis which requires an independent neutral magistrate or arbiter to weigh the agent's response to the suspect's force. Specifically, the arbiter must assess whether the amount of the physical response by an agent is commiserate to the amount of force from the suspect? This analysis attempts to review the actions by the agent from every plausible side. Whereas, the International Association of the Chiefs of Police have agreed that **use of force** is defined as an "amount of effort required by police to compel compliance by an unwilling subject."[91]

We must note that use of force embeds an escalating approach to compelling compliance. This approach is typically referred to as the use of force continuum and is widely referenced and adopted by most agencies. Importantly, for our purposes, agents should concentrate on de-escalation. **De-escalation** is defined as "tactics and technique actions used by officers, when safe and feasible without compromising law enforcement priorities, that seek to minimize the likelihood of the need to use force during an incident and increase the likelihood of voluntary compliance as much as possible."[92] It is important that both suspect and agent return home safely. After all, a suspect is not a convicted felon, therefore, the suspect should be allowed to proceed through the criminal justice system where appropriate. Additionally, if a suspect becomes a convicted felon, this does not mean that one will or has been sentenced to death. Therefore, each suspect should live to have their proverbial "day in court," determining their guilt or non-guilt. Agents are restricted via the law with how and when they can compel compliance, therefore we will explore these options after reviewing the use of force continuum.

b. De-escalation

De-Escalation and Escalation Continuum[93]

91. International Association of the Chiefs of Police (2001). *Police Use of Force in America*. Alexandria, Virginia.
92. *The call for de-escalation training*. (n.d.). [Slide show; Power point slides]. IACP. https://www.theiacp.org/sites/default/files/Engel_Use%20of%20Force%20and%20De-escalation_FINAL.pdf
93. International Association of the Chiefs of Police (2001).



"1. When Safe, Feasible, and Without Compromising Law Enforcement Priorities, Officers Shall Use De-Escalation Tactics in Order to Reduce the Need for Force.

(a). Officers shall conduct a threat assessment so as not to precipitate an unnecessary, unreasonable, or disproportionate use of force by placing themselves or others in undue jeopardy.

(b). Team approaches to de-escalation are encouraged and should consider officer training and skill level, number of officers, and whether any officer has successfully established rapport with the subject. Where officers use a team approach to de-escalation, each individual officer's obligation to de-escalate will be satisfied as long as the officer's actions complement the overall approach.

(c). Selection of de-escalation options should be guided by the totality of the circumstances with the goal of attaining voluntary compliance; considerations include:

Communication

Using communication intended to gain voluntary compliance, such as:

– Verbal persuasion

– Advisements and warnings (including TASER spark display to explain/warn prior to TASER application), given in a calm and explanatory manner.

Exception: Warnings given as a threat of force are not considered part of de-escalation.

– Clear instructions

– Using verbal techniques, such as Listen and Explain with Equity and Dignity (LEED) to calm an agitated subject and promote rational decision making

– Avoiding language, such as taunting or insults, that could escalate the incident

Considering whether any lack of compliance is a deliberate attempt to resist rather than an inability to comply based on factors including, but not limited to:

– Medical conditions
– Mental impairment
– Developmental disability
– Physical limitation
– Language barrier
– Drug interaction
– Behavioral crisis
– Fear or anxiety

Time

Attempt to slow down or stabilize the situation so that more time, options and resources are available for incident resolution.

– Scene stabilization assists in transitioning incidents from dynamic to static by limiting access to unsecured areas, limiting mobility and preventing the introduction of non- involved community members

– Avoiding or minimizing physical confrontation, unless necessary (for example, to protect someone, or stop dangerous behavior)

– Calling extra resources or officers to assist, such as CIT or Less-Lethal Certified officers

Distance

Maximizing tactical advantage by increasing distance to allow for greater reaction time.

Shielding

Utilizing cover and concealment for tactical advantage, such as:

– Placing barriers between an uncooperative subject and officers
– Using natural barriers in the immediate environment"[94]

Reviewing More Use Of Force Analysis[95]

Degree of Force	Methodization
Agent Presence - No force is used. Best option.	Mere presence works to diffuse a situation. Note: agent must present as professional and nonthreatening.
Agent Verbalization - Force is not-physical.	Continue nonthreatening manner in commands
Empty-Hand Control - Officers use bodily force to gain control of a situation.	Soft technique. Officers use grabs, holds and joint locks to restrain an individual.
Less-Lethal Methods - Officers use less-lethal technologies to gain control of a situation.	Blunt impact. Officers may use a baton or projectile to immobilize a combative person.
Lethal Force - Officers use lethal weapons to gain control of a situation. Should only be used if a suspect poses a serious threat to the officer or another individual.	Officers use deadly weapons such as firearms to stop an individual's actions.

94. *8.100 – De-Escalation – police manual | seattle.gov.* (n.d.). Seattle Police Department Manual. Retrieved May 14, 2021, from https://www.seattle.gov/police-manual/title-8—use-of-force/8100—de-escalation

95. International Association of the Chiefs of Police (2001).

Part VII: Violations of the Fourth Amendment

As law enforcement agents seek to use the Fourth Amendment, the guarantees of the amendment must be met. According to the verbiage of the Fourth Amendment, the rule requires law enforcement agents to obtain a warrant prior to a search. Of course, we have noted above that some exceptions exist to this rule; however, every action must include behavior free from unreasonable search and seizures as well as be supported by probable cause (unless conducting a limited search). Although these requirements remain constant, some agents knowingly or unknowingly engage in behavior adverse to the Fourth Amendment. In these instances, the defendant will file a motion to suppress the evidence. A **motion to suppress** is "[a] usu. pretrial motion to exclude evidence from a criminal trial; esp., a request that the court prohibit the introduction of illegally obtained evidence."[96] When reviewing a motion to suppress, a judge will determine if:

Remember, probable cause must exist prior to a judge approving the warrant or the law enforcement agent conducting the search.

1. Police misconduct occurred (this requires evidence of the illegality of the law enforcement's actions) **and**
2. If such elements existed at the time of the agent's actions.[97]

If both conditions are met, then the judge ***may*** grant the motion to suppress ***if and only if no other exceptions exist.***

- If the judge denies the motion to suppress, then the evidence may be used during the trial.
- If the judge grants the motion to suppress, then the illegally or unconstitutionally obtained evidence can not be used during the trial.

It is important to note that a case may proceed without the illegally obtained evidence if additional evidence, testimony, and facts to sustain the charges. Otherwise, the defendant or their attorney may file a motion to dismiss the charges against the defendant. In this case, the court would dismiss the charges according to a procedural defect. Essentially, the defendant attests that the prosecution can no longer sustain the charges against them and files a motion to dismiss. As a result, the judge will determine if the remaining elements support the current charges. Therefore, a violation of the Fourth Amendment has many ramifications and may impact the evidence before the court and any additional evidence which law enforcement agents obtained after the initial illegal evidence was obtained. The next section outlines in detail how this evidence may be in danger of suppression as well.

The motion to dismiss the case is "[a] request that the court dismiss the case because of settlement, voluntary withdrawal, or a procedural defect."[98]

96. MOTION TO SUPPRESS, Black's Law Dictionary (12th ed. 2024).
97. *Ibid.*
98. MOTION TO DISMISS, Black's Law Dictionary (12th ed. 20249).

a. Exclusionary Rule

1. DETERMINING IF THE EXCLUSIONARY RULE APPLIES

Prior to *Weeks v. U.S.* (1914), the courts did not address a formal sanction for illegally or unconstitutionally obtained evidence. In *Weeks*, the court noted that evidence collected from two unconstitutional warrantless searches should have been inadmissible in the trial court. In creating this new concept of the Exclusionary Rule, Justice William R. Day writing for the majority opinion in the landmark case of *Weeks* explained why these facts merited a departure from judicial support typically extended to law enforcement regarding the Fourth Amendment.[99] The Supreme Court decision in *Mapp v. Ohio* (1961) established that the exclusionary rule applied to evidence illegally obtained in violation of the Fourth Amendment.[100]

CONSTITUTIONAL CLIP

"If letters and private documents can thus be seized and held and used in evidence against a citizen accused of an offense, the protection of the Fourth Amendment, declaring his right to be secure against such searches and seizures, is of no value, and...might as well be stricken from the Constitution. The efforts of the courts and their officials to bring the guilty to punishment, praiseworthy as they are, are not to be aided by the sacrifice of those great principles established by years of endeavor and suffering which have resulted in...the fundamental law of the land."[101]

For most college and law students (and even some attorneys), the exclusionary rule is a difficult concept to grasp as it requires several steps. A defendant files a motion and has the burden of proof to suppress the questionable evidence. ***Note: the is a shift in the burden of proof from the prosecutor which occurs in most other criminal hearings.***

The judge will consider three factors in their analysis:

1. Did police misconduct occur? There are many ways to show police misconduct. Two examples of police misconduct may be illegally obtained evidence without a warrant or obtaining evidence with a faulty warrant. At any rate, the exclusionary rule does not enter a legal analysis ***unless and until*** the ***trigger of police misconduct*** occurs.
2. Once police misconduct occurs, then the judge must determine if probable cause exists?
3. Finally, if probable cause exists, then the judge must determine if the defendant was searched illegally?[102]

99. *Id.*
100. *Mapp v. Ohio*, 367 U.S. 643 (1961).
101. *Weeks v. U.S.* (1914).
102. *Mapp v. Ohio* (1961).

If steps one through three are met, then "any evidence collected from the search *may* be excluded from evidence at trial."[103] However, most significant to this analysis is that the inquiry *does not end here.*

Now, the burden of proof shifts to the prosecutor to provide an exception to the exclusionary rule which will deem the evidence admissible. If the prosecution proves that a legal exception to the exclusionary rule exists, then the motion to suppress will be granted and the evidence is deemed inadmissible. Comparatively, if the prosecution proves that a legal exception to the exclusionary rule exists, then the motion to suppress will be denied and the evidence is deemed admissible. Let's review the five exceptions to the exclusionary rule and their differences.

2. IDENTIFYING THE EXCEPTIONS TO THE EXCLUSIONARY RULE

CONSTITUTIONAL CLIP

Now that the judge has determined that the exclusionary rule is applicable, the next logical question that follows is – Does an exception to the Exclusionary rule exist?

IMPORTANT NOTE:

The analysis for the exclusionary rule does not end when we determine that it applies in a particular case. Once the judge determines the exclusionary rule applies, then the judge must ask if any exceptions exist. There are five exceptions which may be analyzed in response to the exclusionary rule being triggered. The first exception is the Attenuation Doctrine. **Attenuation Doctrine** is defined as "[a] rule that excludes or suppresses evidence obtained in violation of an accused person's constitutional rights. The rule providing that evidence obtained by illegal means may nonetheless be admissible if the connection between the evidence and the illegal means is sufficiently remote."[104]

103. *Id.*
104. ATTENUATION DOCTRINE, Black's Law Dictionary (12th ed. 2024).

The Supreme Court revisited and reintroduced the Attenuation Doctrine in *Wong Son (1963)* when the court held that the governmental agent's unlawful entry of the first defendant's home tainted any subsequent statements made by the defendant.[106] Thus, the court deems evidence admissible when the connection between the police misconduct is weak "or has been interrupted by an intervening circumstance so that the violation is not served by suppression."[107]

In determining if the attenuation rises to the level of a valid exception, the court in *Brown v. Illinois* (1975) notes three relevant factors:

> The Attenuation Doctrine was first identified in *Nardone v. U.S. (1939)* when the government used indirect evidence of illegal wiretapping. The court held that a "[s]ophisticated argument may prove a causal connection between information obtained through illicit wiretapping and the Government's proof. As a matter of good sense, however, such connection may have become so attenuated as to dissipate the taint."[105]

1. The amount of time between the unconstitutional conduct and the discovery of evidence. Generally the closer in time the more likely the evidence will likely be suppressed.
2. The presence of intervening circumstances. Here, the intervening circumstance was the discovery of the valid arrest warrant.
3. The court evaluates the purpose and flagrancy of the official misconduct. The more flagrant the misconduct the more it needs to be deterred. Negligence, errors in judgment etc., are not enough. Systemic or recurrent police misconduct is required.[108]

Thus, Attenuation Doctrine may apply if the exclusionary rule is triggered and the three relevant factors are met. If this analysis occurs and the attenuation doctrine applies, then the evidence is deemed admissible.

Another exception to the exclusionary rule is the **Inevitable Discovery Doctrine**. This rule is defined when the "... evidence obtained indirectly from an illegal search is admissible, and the illegality of the search is harmless, if the evidence would have been obtained nevertheless in the ordinary course of police work."[109] This exception was first noted in *Nix v. Williams* (1984) when the court held that the defendant's statement, identifying where the body of his victim was located, was obtained illegally.[110] The court supported its holding with the Inevitable Discovery Doctrine as "the discovery and condition of the victim's body was properly admitted at respondent's second trial on the ground that it would ultimately or inevitably have been discovered even if no violation of any constitutional provision had taken place."[111] It is important to note that ***the burden shifts to the prosecution*** to establish "by a preponderance of evidence that the information ultimately or inevitably would have been discovered by lawful means."[112] The sole purpose of the exclusionary rule is to address police misconduct, but if the evidence is discovered regardless of the misconduct then it should be admissible. Therefore, the evidence obtained by illegal means is admissible, if a legal means of obtaining the evidence is available.

105. *Nardone v. United States*, 308 U.S. 338, 341 (1939).
106. *Wong Sun v. United States*, 371 U.S. 471 (1963).
107. *Utah v. Strieff*, 136 S.Ct. 2056 (2016).
108. *Brown v. Illinois*, 422 U.S. 590 (1975).
109. INEVITABLE DISCOVERY RULE, Black's Law Dictionary (12th ed. 2024).
110. *Nix v. Williams*, 467 U.S. 440 (1984).
111. *Id.*
112. *Id.*

Next, we examine Independent Source Doctrine as an exception to the Exclusionary Rule. This Doctrine allows evidence illegally obtained to be admitted, if the evidence could be obtained by an autonomous line of investigation. The **Independent Source Doctrine** is defined as "...[t]he rule providing — as an exception to the fruit-of-the-poisonous-tree doctrine — that evidence obtained by illegal means may nonetheless be admissible if that evidence is also obtained by legal means unrelated to the original illegal conduct."[113] The court in *Murray v. United States (1988)* and *Nix v. Williams* (1984) emphasized that evidence illegally obtained can be determined clean if it would have been discovered in the same condition anyway through legal means not related to the original illegal source.[114] Similar to the Inevitable Discovery Doctrine, the ***burden of proof shifts to the prosecution*** to establish the valid Independent Source of the evidence. To this end, the evidence would be admissible if the Independent Source Doctrine is applied.

Additionally, the **Good Faith Doctrine** is an exception to the exclusionary rule. It states that "...evidence obtained under a warrant later found to be invalid (especially because it is not supported by probable cause) is nonetheless admissible if the police reasonably relied on the notion that the warrant was valid."[115] The Supreme Court upheld law enforcement agent's illegal seizure of a large quantity of drugs based upon the agent's belief that the warrant was sufficient in *U.S. v. Leon* (1984).[116] Although the court determined that the warrant was insufficient for the seizure, the court indicated in its analysis that the exclusionary rule should be weighed in circumstances where law enforcement agent's do not exhibit bad behavior, but instead really act in good faith.[117] Accordingly, evidence is admissible if the Good Faith Doctrine is applied to law enforcement's reliance on a legal statute later deemed invalid.

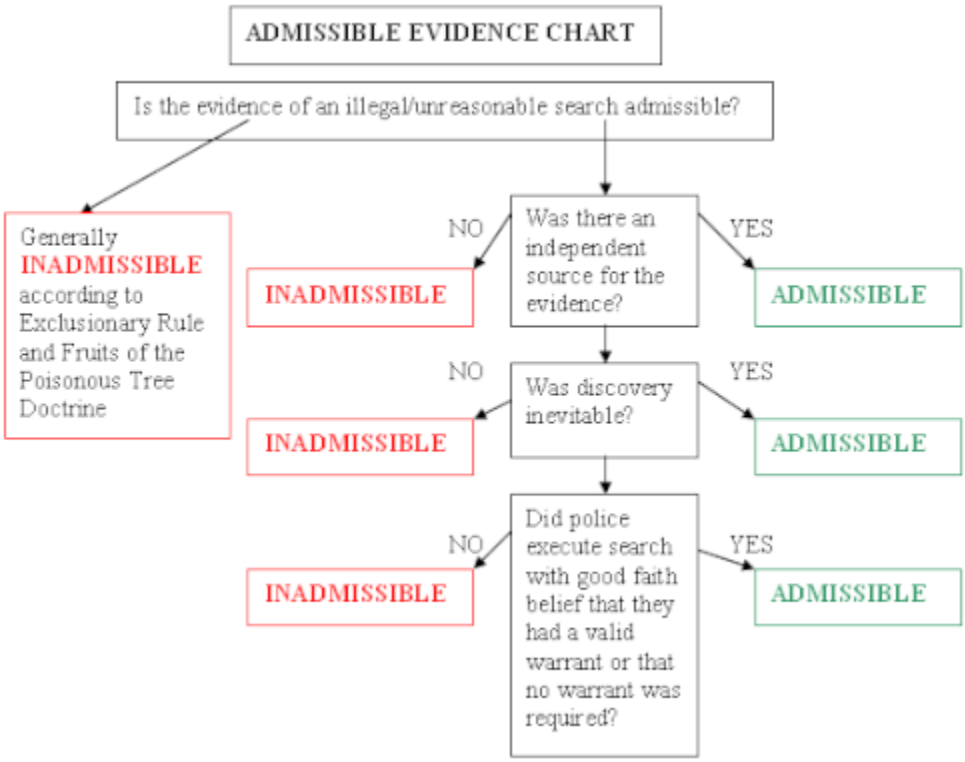
Finally, the Harmless Error Doctrine is noted as an exception to the exclusionary rule. **Harmless Error Rule** is defined as "[t]he doctrine that an unimportant mistake by a trial judge, or some minor irregularity at trial, will not result in a reversal on appeal."[118] The Harmless Error Doctrine is distinguished from all other exceptions as it addresses mistakes by trial judges, whereas the other exceptions address mistakes raised by law enforcement agents. Of all of the exceptions to the Exclusionary Rule mentioned above, Epps posits that defendants raise the Harmless Error Doctrine more than any other exception.[119] Unfortunately, courts continue to acknowledge a lack of continuity within the test or approach for harmless error. According to Epps, *Chapman* (1967) reminds us that harmless error is a difficult concept for the courts' to navigate as the automatic reversal test does not apply to all harmless error cases.[120] Additionally, harmless error is dubbed a mystery as the process remains elusive. Judicially created, harmless error integrates the necessary Constitutional protections in the criminal trial procedure as well as adverse policies that underpin criminal statutes. Harmless error appears to be more palatable because of its intentional flexibility. Courts continue to struggle with implementation as a consensus surrounding standard of application remains. Therefore, Pondolfi notes courts should engage in a specific analysis which includes examining their explicit Constitutional

113. INDEPENDENT SOURCE DOCTRINE, Black's Law Dictionary (12th ed. 2024).
114. *Murray v. U.S.*, 487 U.S. 533 (1988); *Nix v. Williams, 467 U.s. 431* (1984).
115. GOOD FAITH DOCTRINE, Black's Law Dictionary (12th ed. 2024).
116. *U.S. v. Leon*, 468 U.S. 897 (1984).
117. *Id.*
118. HARMLESS ERROR RULE, Black's Law Dictionary (12th ed. 2024).
119. Epps, D. (2018, June). *Harmless errors and substantial rights*. Harvard Law Review. https://harvardlawreview.org/wp-content/uploads/2018/06/2117-2186_Online.pdf
120. *Ibid.*

support, legislative reinforcement, and historical weight.[121] As a result, evidence is admissible if the Harmless Error Doctrine is applied to specific cases. These cases mistakenly allowed the jury to hear prejudicial testimony, then attempt to correct the record by striking the same testimony, while ordering the jury to ignore the same testimony.

Although the analysis of police misconduct spans the Exclusionary Rule, the five exceptions (Attenuation, Independent Source, Inevitable Discovery, Good Faith, and Harmless Error) dictate that one additional aspect should be examined. After a motion to suppress is denied, illegal evidence is deemed inadmissible. Furthermore, all evidence which followed the initial illegal evidence is inadmissible as well. In fact, this legal concept is referred to as fruit of the poisonous tree.

b. Exclusionary Rule and the Fruit of the Poisonous Tree



Exclusionary Rule and Fruit of the Poisonous Tree[122]

As we close the loop in the analysis of the Exclusionary Rule, the understanding of the exceptions and the admissibility of any evidence obtained as a result of the illegal search requires examination of one additional doctrine. Most constitutional scholars agree that fruit of the poisonous tree is a legal extension of the Exclusionary Rule.

> The Fruit of the Poisonous Tree as a legal concept was first applied in *Silverthorne v. U.S. (1920)*, when the court noted that the "Fourth Amendment protects a corporation and its officers from compulsory production of the corporate books and papers for use in a criminal proceeding against them when the information upon which the subpoenas were framed was derived by the Government through a previous unconstitutional

121. Pondolfi, R. (1974). P*rinciples for application of the harmless error standar*d. The University of Chicago Law Review, 616–634. https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=3816&context=uclrev

122. The exclusionary rule. (n.d.). https://lawshelf.com/coursewarecontentview/the-exclusionary-rule

search and seizure."[123]

However, Justice Felix Frankfurter didn't create the term Fruit of the Poisonous Tree until almost 20 years after *Silverthorne* in *Nardone v. U.S.* (1939).[124] The Fruit of the Poisonous Tree Doctrine is dependent upon the status of the originally tainted evidence.

CONSTITUTIONAL CLIP

The exclusionary rule sets forth a requirement that the evidence, illegally obtained, be excluded from admission in a criminal trial. The fruit of the poisonous tree takes the assessment one step further by excluding evidence that stemmed from the primary illegality, the poisonous tree.

Fruit of the Poisonous Tree Doctrine is defined as "[t]he rule that evidence derived from an illegal search, arrest, or interrogation is inadmissible because the evidence (the "fruit") was tainted by the illegality (the 'poisonous tree')."[125] Similar to the exclusionary rule, fruit of the poisonous tree must follow the analysis regarding exceptions. If a defendant alleges the evidence is subject to the fruit of the poisonous tree, then the evidence will be admissible if the independent source, inevitable discovery, attenuation, good faith and/or harmless error applies. Under this doctrine, if the defendant's drugs are located as a result of an unreasonable search and seizure of his car, the the drugs seized are also inadmissible as the drugs were the "fruit" (direct extension) of the original tainted search.

123. *Silverthorne v. U.S.*, 231 U.S. 385 (1920).
124. *Nardone v. United States*, 308 U.S. 338, 341 (1939).
125. FRUIT OF THE POISONOUS TREE DOCTRINE, Black's Law Dictionary (12th ed. 2024).

It is worth noting that if police misconduct occurs, a defendant is not automatically entitled to relief or remedy against a law enforcement agent. Normally, these actions are protected by qualified immunity. Qualified immunity is defined as "[i]mmunity from civil liability for a public official who is performing a discretionary function, as long as the conduct does not violate clearly established constitutional or statutory rights."[126]

Operationally, law enforcement agents who perform their job functions enjoy legal protections from being personally sued by a defendant known as qualified immunity. Critics of qualified immunity believe qualified immunity supports illegal and unconstitutional activity of law enforcement agents, creating a difficult environment for other law enforcement agents who approach their work both legally and constitutionally. As a result of law enforcement's overreliance on qualified immunity, the exclusionary rule may prove to be the sole relief available to defendants who allege violations of their Constitutional rights involving unreasonable search and seizures. In fact, qualified immunity applies to law enforcement agents who violate a defendant's rights. Therefore, Cornell Law School Legal Information Institute asserts, illegally obtained evidence against a defendant is allowed except in scenarios where the defendant demonstrates its authority for standing to properly object to the noted illegal activity.[127]

Part VII: Bringing the Fourth Amendment into the Digital Age

Cellular device

images

Supreme Court brings Fourth Amendment into the Digital Age with Cell Phone Ruling[128]

Recall the discussion from earlier in this chapter, explaining the Supreme Court's holding in *Chimel v. California* (1969) where the items used were unconstitutionally obtained due to the lack of consent obtained "on the basis of the lawful arrest."[129] In *Riley v. California* (2014), the Supreme Court brought the Fourth Amendment into the digital age, holding that the warrantless search exception following an arrest exists for the purposes of protecting officer safety and preserving evidence, neither of which is at issue in the search of digital data.[130] Chief Justice Roberts, writing for a unanimous Court, characterized cell phones as minicomputers with massive amounts of private information, which distinguished them from other personal items such as a wallet or purse.[131] Therefore, "[t]he *Riley* court

126. QUALIFIED IMMUNITY, Black's Law Dictionary (12th ed. 2024).
127. *History and scope of the amendment*. (n.d.). LII / Legal Information Institute. Retrieved November 14, 2020, from https://www.law.cornell.edu/constitution-conan/amendment-4/history-and-scope-of-the-amendment
128. *Supreme Court brings Fourth Amendment into the Digital Age with Cell*. (2016, January 27). Joseph Greenwald & Laake, PA. https://www.jgllaw.com/blog/supreme-court-brings-fourth-amendment-digital-age-cell-phone-ruling
129. *Chimel v.* California, 395 U.S. 752 (1969).
130. *Riley v. California*, 573 U.S. 373 (2014).
131. *Id.*

established a rare bright-line rule under the Fourth Amendment when it declared that data searches of cell phones – regardless of type – are unlawful incident to arrest."[132]

Additionally, the court examined other important data for cell phone usage. In *Carpenter v. United States* (2018), the court discussed the 12,898 location points obtained from the petitioner, Timothy Carpenter's phone.[133] In this case, the court established a position on significant performance and functioning cell phone data which is gathered from cell sites. When this information is generated the cell site captures it, stores it and generates a time-stamped record known as cell-site location information (CSLI).[134] Thus the question before the court "...whether the Government conducts a search under the Fourth Amendment when it accesses historical cell phone records that provide a comprehensive chronicle of the user's past movements."[135] First and foremost, the court noted that "[t]he government's acquisition of Timothy Carpenter's cell-site records from his wireless carriers was a Fourth Amendment search.[136] [Second], the government did not obtain a warrant supported by probable cause before acquiring those records." [137] The court reminded law enforcement agent's that they have this new highly scientific tool to assist in investigations, but the court declined "to grant the state unrestricted access to a wireless carrier's database of physical location information [to accomplish these goals]."[138] Thus, the Fourth Amendment's application was further expanded by the Supreme Court of the United States.

Critical Reflections:

1. Analyze whether checks such as the exclusionary rule and other doctrines leveraged by the courts have balanced unlawful search and seizures by police/government agents. Why or why not?
2. As a result of the wrongful deaths and/or "incidents" that have occurred in the last 10 years, the concept of No Knock warrants are being revisited by the courts. Will legislatures introduce changes to improve the execution of this warrant? Why or why not?
3. Explain any challenges/changes there could be in the Use of Force Continuum and De-escalation over the next 10 years given today's policing climate. Illustrate how all stakeholders may be affected.

132. *The U.S. Supreme Court says 'No' to Cell-Phone searches Incident to arrest | Illinois State Bar Association*. (n.d.). ISBA IBJ. https://www.isba.org/ibj/2014/09/ussupremecourtsaysnocell-phonesea

133. *Carpenter v. United States*, 585 U.S. _ (2018).

134. *Id.*

135. *Id.*

136. *Id.*

137. Howard, K. (2023, August 7). *Carpenter v. United States – SCOTUSblog*. SCOTUSblog. https://www.scotusblog.com/case-files/cases/carpenter-v-united-states-2/

138. *Carpenter v. United States*, 2018.

Chapter 6 - Amendment V: Indictment, Double Jeopardy, Due Process, Self-Incrimination & Just Compensation

Amendment V

RICHARD J. FORST AND TAUYA R. FORST

LEARNING OBJECTIVES

After reading this chapter, you should be able to:

6.1 Identify the unfamiliar terms of the Fifth Amendment.

6.2 Summarize the differences between a right and a privilege.

6.3 Summarize each method in which a criminal can be charged with respect to the Fifth Amendment.

6.4 Describe what element(s) must be present for double jeopardy to occur.

6.5 Explain when double jeopardy attaches in a bench or jury trial.

6.6 Explain when the Miranda warning should be delivered.

6.7 Compare the differences between substantive and procedural due process.

6.8 Determine which factors are utilized to decide if a taking or regulation transpired.

6.9 Explain which entity or entities acted to limit the powers of the federal government's taking abilities and by which measures.

KEY TERMS

Double Jeopardy Clause	No Bill
Due Process	Offense
Eminent Domain	Presentment
Grand Jury	Public Use
Indictment	Privilege
Information	Rules of Evidence
Invoke	Taking
Just Compensation	True Bill
Miranda Warning	Waiver

Amendment V

Passed by Congress September 25, 1789. Ratified December 15, 1791. The first 10 amendments form the Bill of Rights.

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.

United States Courts Workcloud[1]

INTRODUCTION TO AMENDMENT V

Named amongst the Bill of Rights, Amendment V shares a similar historical foundation as the other nine amendments. It provides notable protections as well as the framework for the Miranda Warnings. The basis of its approach is traced to both the Fifteenth and Sixteenth centuries which proved to be an ambiguous, legal timeframe. However, it is clear that the emergence of certain newly allowed legal procedures supported by the Crown were contrary to the customary traditional law.[2] While this internal battle of justice and the law continue to unfold, jurists began openly identifying blatant disregards for justice as it related to the codified law. Furthermore, one of the most influential portions of the Fifth Amendment, the privilege against self-incrimination, began and ended with a revolution. Originally, the revolution involved religion, but later the revolution concluded with the state question.[3] Specifically, different sects of the Protestants battled other groups regarding the privilege against self-incrimination. These battles brewed between the Anglicans & Calvinists or the Crown & the Parliament. Thus, the privilege exists today within the American system due to England's shift in faith to Anglican in the Sixteenth century as well as the Calvinists who became involved in the battle of injustices.[4] Therefore, the Fifth Amendment in America reveals five key components.

ANALYSIS OF AMENDMENT V

Part I: Right to Presentment or Grand Jury Indictment

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;

1. *United states court workcloud*. (n.d.). United States Courts. Retrieved August 2, 2023, from https://www.uscourts.gov/sites/default/files/fifth_amendment_wordcloud_0.pdf
2. Kemp, J. (1958). The background of the fifth amendment in english law: A study of its historical implications. *William and Mary Law Review*, *1*(2), 247–286. https://scholarship.law.wm.edu/cgi/viewcontent.cgi?article=3341&context=wmlr
3. *Ibid.*
4. *Ibid.*

Grand Jury Indictments[5]

This section frames how a criminal case begins which takes into account two variables:

1. Whether the crime involved a violation of state or federal laws; and
2. The seriousness of the crime is (i.e., felony vs. misdemeanor or other category of crime).

When prosecutors examine a case, there are many options available to them to proceed with criminal charges. One option is a **grand jury** defined as "[a] body of ([usually] 16 to 23) people who are chosen to sit permanently for at least a month — and sometimes a year — and who, in ex parte proceedings, decide whether to issue indictments."[6] One may believe that every case begins with a grand jury. In fact, this is untrue. Cases may begin through information, presentment, a grand jury indictment and/or complaint of witness. According to Black's Law Dictionary, **information** "is a formal criminal charge made by a prosecutor without a grand-jury indictment."[7] Whereas, an information, also known as a bill of information, is prevalent when prosecutors charge defendants with misdemeanors. Ironically, some states allow prosecutors the use of information as a charging mechanism in felonies, as well. Each state provides their own policy and process when charging defendants.

In some rare instances, states allow presentment as a charging mechanism. A **presentment** "is a formal written accusation returned by a grand jury on its own initiative, without a prosecutor's previous indictment request."[8] Recall, a presentment is an *outdated* legal tool; however, some prosecutors are allowed to use presentments to help toll the statute of limitations on a case. The justices in *State v. Baker* (2018) emphasized the timing and prosecutor's inability to circumvent proper

5. *Grand jury hands down 285 indictments in Martinsville*. (2020, February 19). BTW21. https://www.btw21.com/post/grand-jury-hands-down-285-indictments-in-martinsville
6. GRAND JURY, Black's Law Dictionary (12th ed. 2024).
7. INFORMATION, Black's Law Dictionary (12th ed., 2024).
8. PRESENTMENT, Black's Law Dictionary (12th ed., 2024).

jurisdiction as a means to obtaining charges and/or indictments.[9] Presentment is primarily a process of the past by which individuals of the grand jury "initiated an independent investigation and asked that a charge be drawn to cover the facts should they constitute a crime."[10] However, this process is rarely used now due to the attorneys' ability to provide expertise and direction to grand juries.

Another process important to charging an individual is an indictment. Indictments are conducted by grand juries. Grand juries and petit juries differ, but are routinely used interchangeably.

CONSTITUTIONAL CLIP

Grand juries typically contain 16-23 members, not to be confused with petit or trial jury which typically contains 6-12 members.

Grand juries provide a very unique perspective to the criminal justice system. Their purpose is to provide an unbiased approach to the charging of individuals after hearing the most compelling evidence from the prosecutor. In 99% of jurisdictions, the defendant is not present and unable to speak in the grand jury proceeding; however, some states allow the defendant to testify. The grand jury has become a fast favorite of prosecutors. Although prosecutors have options for charging defendants, many prosecutors chose the grand jury process to obtain a true bill for criminal charges instead of a preliminary hearing. During this process, prosecutors present their case without any information from the defense. Critics note that the grand jury process tends to negatively bias the defendant. At first blush this concept seems unfair, until one remembers the purpose of the grand jury. The grand jury process reviews whether the prosecutor possesses enough evidence to criminally charge a defendant; as opposed to finding a defendant guilty or not guilty of a crime. Depending upon the jurisdiction, the grand jury requires either a 2/3 or 3/4 agreement for an indictment.[11] If the grand jury believes enough evidence exists, then they deliver a "true bill." The standard for delivering a true bill differs from state to state and jurisdiction to jurisdiction.

9. *State v. Baker*, 808 S.E.2d 805 (N.C. Ct. App. 2018)
10. PRESENTMENT (12th ed., 2024).
11. *How does a grand jury work?* (2020, November 9). Findlaw. https://www.findlaw.com/criminal/criminal-procedure/how-does-a-grand-jury-work.html#:%7E:text=Grand%20juries%20do%20not%20need,(depending%20on%20the%20jurisdiction).

According to the American Law and Legal Library, "'In many states the grand jury is directed to indict only if the evidence before it establishes probable cause to believe that the accused committed the felony charged; in other [states], [the grand jury] is directed to indict "when all the evidence taken together, if unexplained or uncontradicted, would warrant a conviction of the defendant."'[12]

The **true bill** or an **indictment** for the defendant allows prosecutors to provide "formal written accusation of a crime, made by a grand jury and presented to a court for prosecution against the accused person."[13]
On the other hand, what occurs if the grand jury determines the evidence does not support a true bill? If the grand jury determines the evidence does not support a true bill, then a "no bill" is delivered as the evidence is insufficient to hold a defendant accountable for the crime. A **no bill**: is "[a] grand jury's notation that insufficient evidence exists for an indictment on a criminal charge."[14]

True Bill v. No Bill[15]

In this instance, the secrecy of the grand jury is of utmost importance to protect the identity of those who will never see criminal charges. In this way, critics of the grand jury note that the grand jury has become a mere technicality lacking true authority of its own. Furthermore, they state that the grand jury will side with prosecutor's as a rubber stamp of justice.

12. *Ibid.*
13. INDICTMENT, Black's Law Dictionary (12th ed., 2024).
14. NO BILL, Black's Law Dictionary (12th ed., 2024).
15. *No bill*. (n.d.). Criminal Defense Matter. Retrieved August 2, 2023, from https://criminaldefensematters.com/wp-content/uploads/2019/10/Screen-Shot-2019-09-08-at-10.06.46-AM-300×295.png

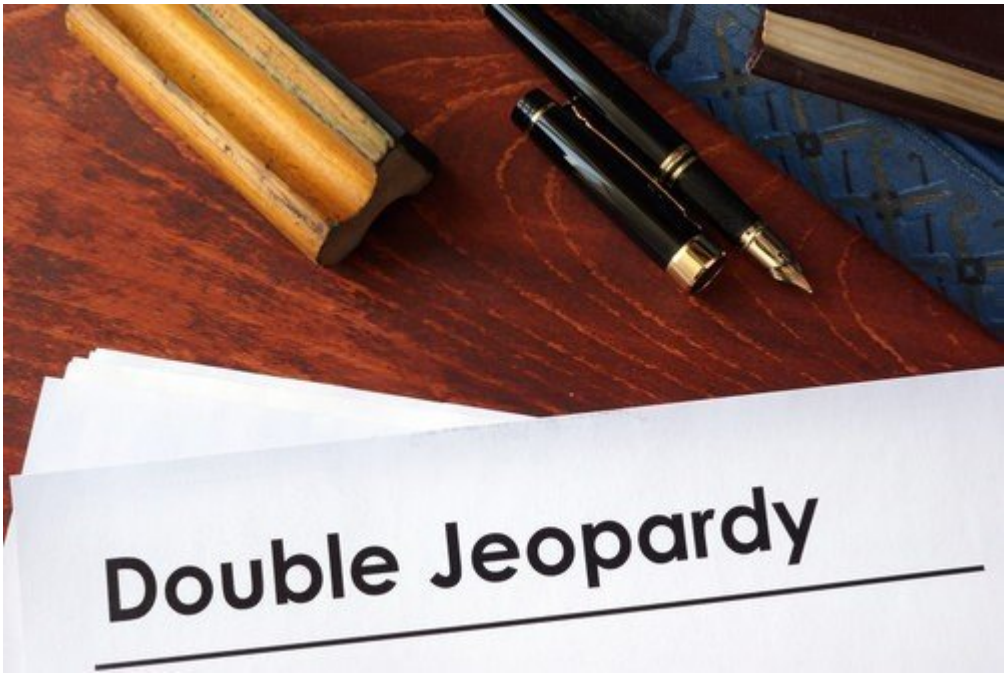
On August 1, 2023, a special prosecutor issued a historical indictment for former President Donald J. Trump. Read both indictments here[16] What stands out to you about the indictment as it relates to Amendment V? What requirements are addressed in the indictment itself?

Finally, a Prosecutor may issue a complaint or a criminal complaint defined as "[a] formal charging instrument by which a person is accused of a crime, usu. a misdemeanor or violation in a sworn statement."[17] The complaint is typically weighted and presented from the perspective of a law enforcement agent. In fact, "[c]riminal complaints are typically filed by the prosecutor in cooperation with the police officer(s) who made the arrest." According to Legal Match, the victim of a crime will individually file a criminal complaint against a suspect in some instances.[18] Additionally, this right contains an exception to the rule.[19] Remember, the Constitution includes the following verbiage "...*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;*"[20]
The Framers made a definitive point to address how a case should proceed, but created a caveat or exception. The language "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" speaks to exactly when the rule of the right to presentment or grand jury indictment should be applied and when other rules will apply. Finally, the Framers noted that this right applies to all military members or the militia (Air Force, Army, Marines or Navy, National Guard as well as Reserves).

Part II: Right Against Double Jeopardy

nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb;

16. *Read the indictment*. (n.d.). AP News. https://apnews.com/trump-election-2020-indictment.
17. CRIMINAL COMPLAINT, Black's Law Dictionary (12th ed., 2024).
18. Wishnia, J. (2021, March 29). *How to file a criminal complaint*. LegalMatch Law Library. https://www.legalmatch.com/law-library/article/criminal-complaint-lawyers.html
19. *Ibid.*
20. U.S. Const. art. I, § 3



Right Against Double Jeopardy[21]

This section of the Fifth Amendment is widely quoted, erroneously applied, and continuously referenced. The right against double jeopardy is an important foundation of the criminal justice process; however, it is rarely applied correctly. In fact the double jeopardy clause is evidenced in the Fifth Amendment. However, the double jeopardy clause "does not prevent postacquittal appeals by the government if those appeals could not result in the defendant's being subjected to a second trial for substantially the same offense before a second fact-trier. *See U.S. v. Wilson, 420 U. S. 332...(1975).*" Here the Constitution refers to the term offence. Significantly, the term offence means and it is interchangeable with the term offense. Most scholars note there is no definitional difference between these two terms; however, there is, in fact, a dialectal difference.[23] Black's Law acknowledges that "[t]he terms 'crime,' 'offense,' and 'criminal offense' are all said to be synonymous, and ordinarily used interchangeably."[24] Thus, when an individual engages in an alleged offense, they are against a law, ordinance, or statute.

Offence is primarily used with British audiences, where the term offense is better suited for American audiences.[22]

21. Shouse, N. (2023, March 21). *State and federal charges for same crime – Double jeopardy?* Shouse Law Group. https://www.shouselaw.com/ca/blog/federal-crimes/is-it-double-jeopardy-to-charge-someone-in-state-and-federal-court/
22. Ticak, M. (2023). Offence vs. Offense—What Is the Difference? | Grammarly. *Offence Vs. Offense—What Is the Difference? | Grammarly*. https://www.grammarly.com/blog/offence-offense/#:~:text=The%20difference%20is%20that%20offense,in%20other%20English%2Dspeaking%20countries.
23. *Offence vs. Offense—What is the difference?* (n.d.). Https://Www.Grammarly.Com/Blog/Offence-Offense/#:~:Text=Offense%20can%20also%20be%20spelled,In%20other%20English%2Dspeaking%20countries%3A&text=The%20adjective%20derived%20from%20offense,American%20and%20British%20English%20alike. Https://Law.Jrank.Org/Pages/1261/Grand-Jury-Screening-Procedures.Html. Retrieved May 17, 2021, from https://www.grammarly.com/blog/offence-offense/#:~:text=Offense%20can%20also%20be%20spelled,in%20other%20English%2Dspeaking%20countries%3A&text=The%20adjective%20derived%20from%20offense,American%20and%20British%20English%20alike.https://law.jrank.org/pages/1261/Grand-Jury-Screening-procedures.html
24. OFFENSE, Black's Law Dictionary (12th ed., 2024).

Let's continue our analysis of the language of this section of Amendment V, by discussing the term jeopardy.

The term jeopardy is often disregarded or defined incorrectly. Black's defines jeopardy as "the risk of conviction and punishment that a criminal defendant faces at trial."[25] Again it is important to use Black's Law Dictionary to define legal terms, as one will see this does not meet the lay definition of jeopardy. Jeopardy according to this section, underscores one's ability to be convicted and penalized for an offense.[26] How and/or when does double jeopardy attach, preventing the defendant from being tried twice for the same offense? Let's continue our analysis of a possible conviction with examining its affect on a bench trial versus a jury trial. In a jury trial, double jeopardy occurs once the jury is empaneled, whereas in a bench trial jeopardy attaches after the first witness is sworn.[27] According to *Downum v. United States* (1963) and *Crist v. Bretz* (1978), the court confirmed the Constitutional guarantee against being tried twice for a crime.[28] Both courts note that the defendant's right attaches when the jury is empaneled and given the oath for the second trial.[29] Finally, there are few exceptions to this right against double jeopardy. Acquittal through fraud or retrial in a court where the court lacked jurisdiction are exceptions as well. Finally, *Martinez v. Illinois* (2014) supported the expansion of right against double jeopardy rule as it applied to all courts – both federal and state courts.[30]

> "The Illinois Supreme Court's error was consequential, for it introduced confusion into what we have consistently treated as a bright-line rule: A jury trial begins, and jeopardy attaches, when the jury is sworn."[31]

Thus, this section underlines the thought that a person is not subject which is defined as "to place before consideration, judgment, and disposition," to conviction and punishment of the same crime twice for the same offense.[32] ***It is important to note that the same offence must be held in the same jurisdiction.*** There are many examples of charges being levied under the state's jurisdiction, an acquittal occurring, and the federal filing suit based upon the same facts using a federal law or code. *Thus, the question which remains: "Does the analysis include the same offense for the same crime?"*

Part III: Privilege Against Self-Incrimination

nor shall be compelled in any criminal case to be a witness against himself,

25. JEOPARDY, Black's Law Dictionary (12th ed., 2024).
26. *Ibid.*
27. *Ibid.*
28. *Downum v. United States*, 372 U.S. 734 (1963); *Crist v. Bretz*, 437 U.S. 28 (1978).
29. *Id.*
30. *Martinez v. Illinois*, 572 U.S. 833 (2014).
31. *Martinez v. Illinois*, (2014).
32. SUBJECT, Black's Law Dictionary (12th ed., 2024).

Self-Incrimination[33]

Prior to this clause we have only reviewed and identified freedoms and rights as contained in the United States Constitution. Each word holds significant and unique meaning; hence, identifying something as a freedom or a right provides a completely different meaning to the clause. In this section, we will review a privilege. According to Black's a **privilege** "grants someone the legal freedom to do or not to do a given act. [Privilege] immunizes conduct that, under ordinary circumstances, would subject the actor to liability."[34]

CONSTITUTIONAL CLIP

Simply stated, a privilege provides legal justification as to why an individual will not be required to engage in an action.

Furthermore, a privilege within a legal realm may also coincide with the rules of evidence. According to Black's Law Dictionary, it defines **Rules of Evidence** as "[t]he body of law regulating the admissibility of what is offered as proof into the record of a legal proceeding."[35] Rules of Evidence provide parameters as to what is appropriately admitted in court. In fact, privileged information is not subject to disclosure or discovery due to the nature of its content. According to Cornell Law "...privileges exist not because of a fear that information provided will be inaccurate, but because there are public policy reasons that

33. *Self-incrimination*. (n.d.). IAS GYN Predict the Unpredictable. Retrieved August 2, 2023, from https://iasgyan.in/ig-uploads/images/SELF-INCRIMINATION.png
34. PRIVILEGE, Black's Law Dictionary (12th ed., 2024).
35. EVIDENCE, Black's Law Dictionary (12th ed., 2024).

the information should not be disclosed."[36] Some common examples of privilege are attorney-client privilege, clergy privilege, spousal privilege, and of course privilege against self-incrimination.

What privilege is guaranteed in this section of the Fifth Amendment? The privilege against self-incrimination or more commonly known as I plead the Fifth. Black's defines **self-incrimination** as "[t]he act of indicating one's own involvement in a crime or exposing oneself to prosecution, especially by making a statement.[37] Black's Law Dictionary seeks to remind actors and those who may use this privilege that it is not absolute in its execution as the information, if obtained with a third party present, is not privileged. If this does not occur, then the privilege against self-incrimination operates as "an evidentiary rule that gives a witness the option to not disclose the fact asked for, even though it might be relevant."[38] The privilege may be waived under certain conditions, but the general policy surrounding the privilege must be regarded. Waiving a privilege requires a full disclosure by the entity seeking to obtain information. Waiving a privilege entails one abandoning, renouncing or surrendering a privilege that one was technically entitled to exercise.[39]

No entity or governmental agent may compel a witness to provide evidence, testimony or information which may culminate in criminal prosecution.[40] Furthermore, defendant's can not be penalized if they chose to waive this privilege. Operationally, the prosecutor and law enforcement agents should methodically build their cases with valid evidence regardless of the defendant making statements against one's self. Finally, the privilege against self-incrimination only applies to testimony and/or verbal answers to questioning or grand jury requests.[41]

Therefore, a defendant can not invoke the privilege against self-incrimination if asked to produce hair samples, handwriting samples, or voice recordings.

The right against self-incrimination extends to civil, administrative, and grand jury proceedings if raised by a defendant or prospective defendant. Further, if there is an increased interest in the investigating agents for criminal activity, then this amendment and its clause would apply under the criminal activity investigation as well. An example of instances in civil incidents where defendants have a right against self-incrimination are connections to tax documents and discussion related to the tax documents.

How does the privilege against self-incrimination impact a defendants' confessions? Miranda warnings are foundational to the discussion of a defendant's confession under the privilege against self-incrimination. Providing a suspect with Miranda warnings is very important and should occur at pivotal times during the criminal process, but ***must*** occur when custodial interrogation occurs.[42]

In contrast, how does the privilege against self-incrimination impact defendant's confessions outside of Miranda warnings? First, the authors acknowledge that the court does review confessions made outside of the Miranda warnings. This review is based upon the totality of the circumstances test. As previously discussed, the totality of the circumstances test includes a comprehensive approach for the entire situation which helps determine if the confession fulfills the voluntary and admissible or

36. Legal Information Institute. (n.d.). *Self-incrimination*. LII / Legal Information Institute. Retrieved October 2, 2020, from https://www.law.cornell.edu/wex/self-incrimination
37. SELF INCRIMINATION, Black's Law Dictionary (12th ed., 2024).
38. *Ibid.*
39. Legal Information Institute, n.d.
40. *Ibid.*
41. Richards, E. (2009, April 19). *Privilege against Self-Incrimination*. Privilege against Self-Incrimination. https://biotech.law.lsu.edu/map/PrivilegeagainstSelf-Incrimination.html
42. *Miranda v. Arizona*, 384 US 436 (1966).

involuntary and inadmissible.

CONSTITUTIONAL CLIP

According to Marcus, the Supreme Court regards the following factors when addressing voluntariness of a defendant's confession while viewing it within a totality of circumstances test:

a. Suspect vulnerabilities (age, health, intelligence quotient (IQ), impact of videotaping, valid Miranda warnings),
b. Interrogating factors (duration of interrogation),
c. Place of questioning,
d. Use of deception (lies, processes, threats, and trickery), and
e. Promises[43]

Thus, most cases speak directly to critics surrounding confessions subject to privilege against self-incrimination requiring a complete and anticipatory argument if intended for use. Additionally, Marcus warns "[m]any judges allow confessions into evidence in cases in which police interrogators lied and threatened defendants or played on the mental, emotional, or physical weaknesses of suspects" once the actions are reviewed in terms of totality of the circumstances as listed above.[44]

Part IV: Right to Due Process

nor be deprived of life, liberty, or property, without due process of law.

43. Marcus, P. (2006). It's Not Just About Miranda: Determining the Voluntariness of Confessions in Criminal Prosecutions. *Valparaiso University Law Review*, 601–644. https://scholarship.law.wm.edu/cgi/viewcontent.cgi?article=1069&context=facpubs
44. Marcus, 2006, p. 643.

You Get Due Process[45]

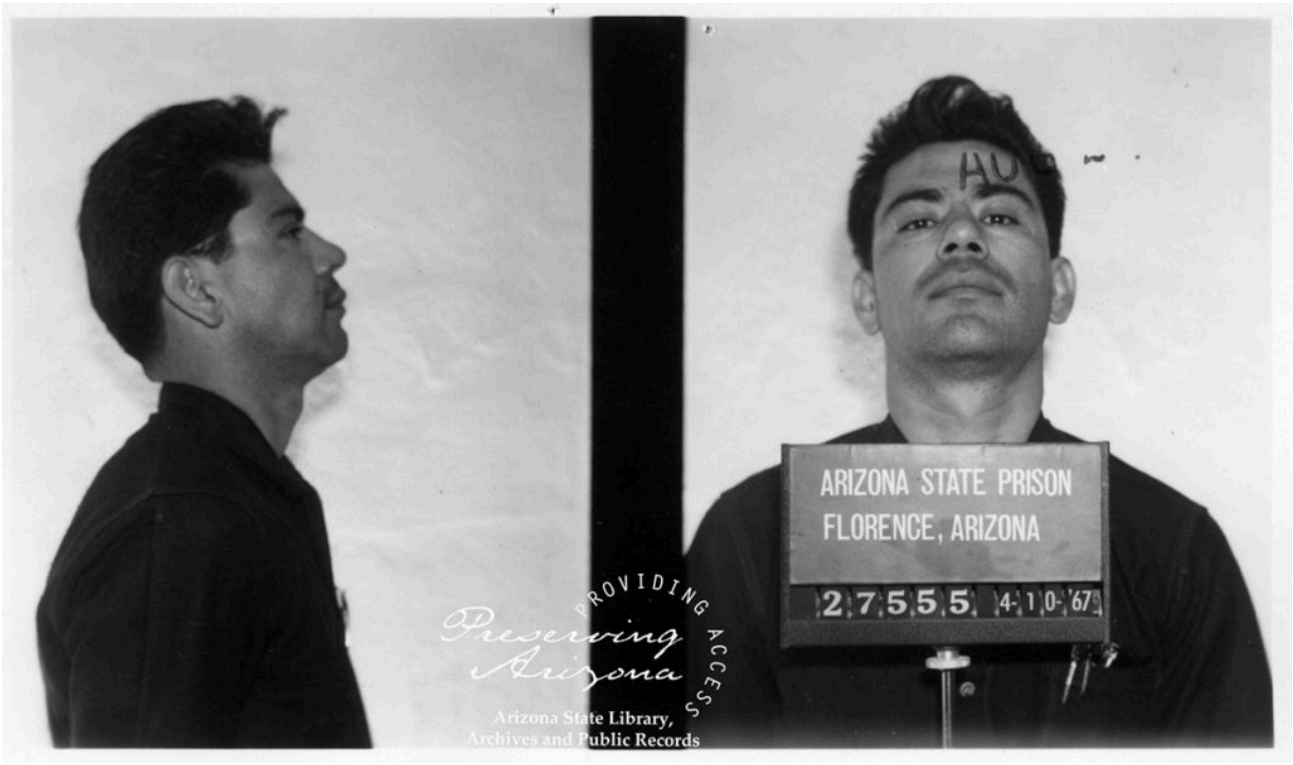
The Framers of the United States Constitution used specific language to indicate that individuals on American soil are entitled to a procedure which allows a just and fair hearing prior to governmental entities attempting to take anyone's life (death eligibility), liberty (jail, prison, parole, and to some extent probation sentencing), or property (personal and real). This procedure is identified as due process of the law. What is due process? Black's defines **due process** as "the conduct of legal proceedings according to established rules and principles for the protection and enforcement of private rights, including notice and the right to a fair hearing before a tribunal with the power to decide the case."[46] For the most part, due process is an important tenet of the Constitution and represents an equitable approach to legal proceedings. Similarly, due process falls under two categories: substantive and procedural.

According to Black's, **substantive due process** is "the doctrine that the Due Process Clauses of the 5th and 14th Amendments require legislation to be fair and reasonable in content and to further a legitimate governmental objective."[47] Substantive due process really examines the essence of how the law itself is written, created, and legitimized.[48] Additionally, substantive due process is when we ask ourselves was this law written in a way that is fair and equitable to all who may be charged? An example of a violation of substantive due process would be Congress passing a bill which sets an official religion for the United States of America with the President showing their approval by signing it into law. For more explanation of Substantive Due Process, review Chapter 10 in this textbook.

45. *You get due process!*(n.d.). LinkedIn. Retrieved August 2, 2023, from https://media.licdn.com/dms/image/C5612AQEr8y2y7FYNKg/article-cover_image-shrink_600_2000/0/1567960882457?e=2147483647&v=beta&t=kGCOjb8TDaj1hy5RXyHVhTqQPeOULy7H20rYzx8dJXc
46. DUE PROCESS, Black's Law Dictionary (12th ed., 2024)
47. SUBSTANTIVE DUE PROCESS, Black's Law Dictionary (12th ed., 2024)
48. *Id.*

Conversely, procedural due process is defined as "the minimal requirements of notice and a hearing guaranteed by the Due Process Clauses of the 5th and 14th Amendments, especially if the deprivation of a significant life, liberty, or property interest may occur.[49] Procedural due process notes that if two defendants are charged with the same crime, then they will be afforded the same protections, such as a jury trial, within the criminal justice system regardless of their race, socioeconomic status, gender, religion, ethnicity, and so forth. By way of example, two defendants charged with the same possession of drugs charge with the same evidence and same criminal history should proceed through the criminal justice system in the same way. When anything veers or creates a different result for the same charges, this is an example of a procedural due process violation. Finally, a complete analysis of a procedural due process violation should include a thorough analysis of any exceptions which may apply.

a. Miranda v. Arizona



Ernesto Miranda – Miranda v. Arizona, 384 U.S. 436 (1966)[50]

As such, the Due Process in the Fifth Amendment must include a full discussion of *Miranda v. Arizona* (1966).[51] The landmark case, *Miranda v. Arizona* (1966), combined four cases with four separate sets of plaintiffs and defendants. In this significant case, the court articulated defendants' Constitutional rights which law enforcement agents' must use when a defendant is in custodial interrogation. In *Miranda*, the suspect was interrogated regarding a kidnapping and rape. During the interrogation, agents secured a verbal confession and written confession admissible at trial. Miranda's defense attorney objected to both confessions based upon Miranda's lack of counsel during

49. PROCEDURAL DUE PROCESS, Black's Law Dictionary (12th ed., 2024)

50. Arizona State Library (n.d.). *Ernesto Miranda, 1963.* Archives and Public Records, History and Archives Division, Phoenix, Photo #00-0517. Retrieved August 2, 2023 from https://backstoryradio.org/shows/you-have-the-right-to-remain-silent/

51. *Miranda v. Arizona*, 384 U.S. 436 (1966).

questioning as well as a failure for *Miranda* being advised about this privilege against self-incrimination and right to remain silent. Law enforcement agents testified *Miranda* was aware of legal rights, but was not informed of his right to counsel during interrogation.[52] Ultimately, Miranda was convicted and appealed his case. The Supreme Court would change the protocol for law enforcement agents based upon rights and privileges which suspects possessed, but may not understand or know exist. Cornell Law emphasized the courts' stance on the flow of interrogation noting, "[w]here the individual answers some questions during in-custody interrogation, he has not waived his privilege, and may invoke his right to remain silent thereafter."[53]

CONSTITUTIONAL CLIP

Furthermore, the Miranda warning as identified in *Miranda v. Arizona* (1966) includes the Fifth Amendment's self-incrimination right, the Sixth Amendment's right to counsel as well as the Fourth Amendment's Constitutional protections. It does not contain specific language and can vary by state. The warning must include some variation of the following elements:

1. You have the right to remain silent.
2. Anything you say can and will be used against you in a court of law.
3. You have the right to an attorney.
4. If you cannot afford an attorney, one will be appointed for you.[54]

. The Miranda warnings are usually followed by a verbal acknowledgment that the suspect has heard and understood the warning. Remember, courts have held that specific words contained in Mirandaare not necessary to comply with the warnings. However, giving the Miranda warnings are just the beginning of the safeguards of a suspect's Constitutional rights.

After the Miranda warning is given, a person in custody can **invoke** or waive his or her rights. If the detainee invokes their rights, then they will "put into legal effect or call for the observance of the Constitutional protections" within the Fifth Amendment.[55] The detainee may waive their rights which manifests as "abandon[ing], renounc[ing], or surrender[ing] (a claim, privilege, right, etc.)."[56] One such waiver is the jury waiver which includes "[t]he voluntary relinquishment or abandonment — express or implied — of a legal right or advantage."[57] It is important to note that most legal authorities require that those who invoke the waiver must do so knowingly, freely and voluntarily. Black's Law Dictionary

52. *Id.*
53. Legal Information Institute, n.d.
54. *Ibid.*
55. *Ibid.*
56. *Ibid.*
57. WAIVER, Black's Law Dictionary (12th ed. 2024).

emphasizes the standards of a waiver in its definition. "The voluntary relinquishment or abandonment — express or implied — of a legal right or advantage..." The party alleged to have waived a right must have had both knowledge of the existing right and the intention of forgoing it [in order for it to be fully effectuated.][58] At this juncture, all questioning must cease with a call for an attorney. If questioning should restart, then the detainee must agree to proceed without counsel present (agents should memorialize this agreement) as silence can not be construed as a waiver.

Thus, it is imperative that law enforcement agents are clear as to the suspect's intention when Miranda warnings are necessary. Every situation does not require Miranda warnings. One such incident is when a witness is being questioned about their general impressions of a victim. However, Miranda warnings may be required if the witness becomes a suspect and the questioning becomes custodial interrogation. Therefore, agents should be careful to advise and inform suspects of Miranda warnings soon and often. Consider what occurs if the Miranda warning requirement is violated.

b. Exclusionary Rule

Exclusionary Rule[59]

If the Miranda warning is not given, and a suspect fails to waive their rights, the exclusionary rule may be triggered as discussed in the Fourth Amendment. The exclusionary rule could apply and nullify any statements made causing the evidence to be inadmissible. Thus, this is a case of fruit of the poisonous tree as explained under the Fourth Amendment.

58. *Ibid.*

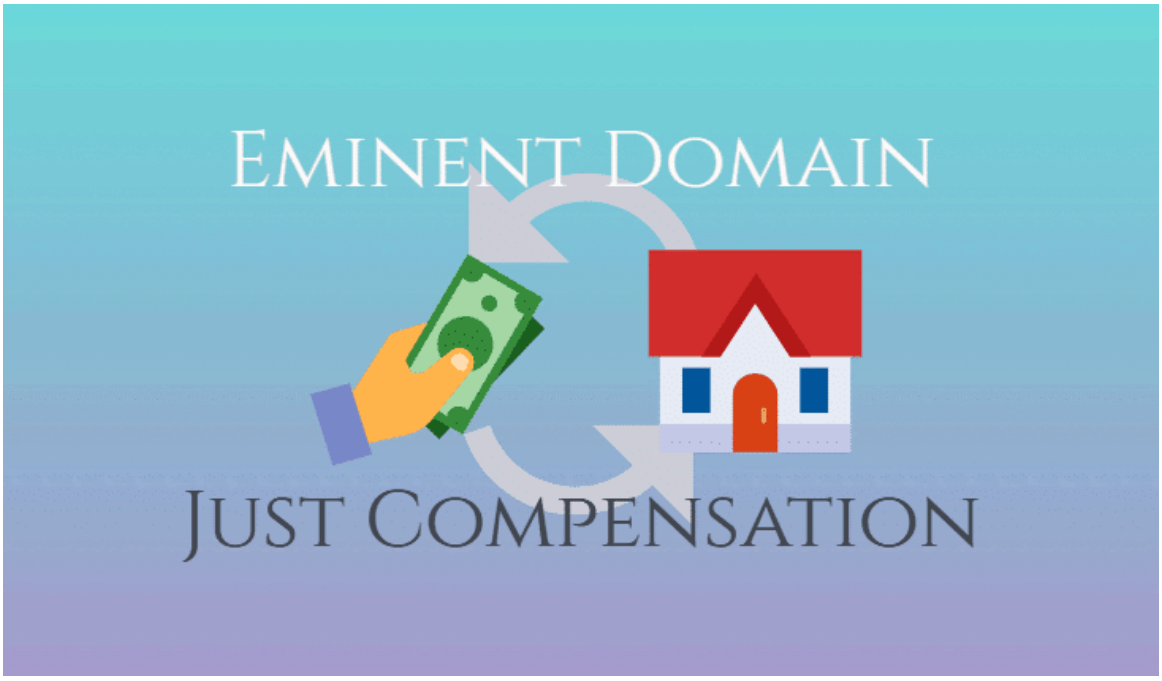
59. The Blue Diamond Gallery. (n.d.). *Exclusionary rule*. The Blue Diamond Gallery. https://pix4free.org/assets/library/2021-05-12/originals/exclusionary_rule.jpg

Part V: Right to Just Compensation for Private Property

nor shall private property be taken for public use, without just compensation.

The right to just compensation according to this section does not necessarily equal the amount of money a property owner desires or feels is an appropriate value based upon their love and attachment for their property. The **just compensation** is held as the fair marketable value of the private property which is required from the governmental entity. This process for the government to acquire the land is known as eminent domain. According to Black's, **eminent domain** involves "[t]he inherent power of a governmental entity to take privately owned property, especially land, and convert it to public use, subject to reasonable compensation for the taking."[60] Note a **taking** is defined as "[t]he government's actual or effective acquisition of private property either by ousting the owner or by destroying the property or severely impairing its utility. There is a taking of property when government action directly interferes with or substantially disturbs the owner's use and enjoyment of the property."[61] These standards must be evaluated before determining a taking has occurred.

a. Eminent Domain



Just Compensation and Eminent Domain relationship[62]

Courts broadly interpret the Fifth Amendment to allow the government to seize property if doing so will increase the general public welfare. Eminent domain refers to the power of the government to take private property and convert it into public use. The Fifth Amendment provides that the government may only exercise this power if they provide just compensation to the property owners. In *Kelo v. City*

60. EMINENT DOMAIN, Black's Law Dictionary (12th ed., 2024)
61. TAKING, Black's Law Dictionary (12th ed. 2024)e.
62. The Geyser. (2023, June 13). *Is the NSF plan unconstitutional?* https://www.google.com/url?sa=i&url=https%3A%2F%2Fwww.the-geyser.com%2Fis-the-nsf-plan-unconstitutional%2F&psig=AOvVaw3rtHC3drJ60OdO1vA6bg3A&ust=1691096999625000&source=images&cd=vfe&opi=89978449&ved=0CBAQjRxqFwoTCJCM0LHxvoADFQAAAAAdAAAAABAE

of New London (2005), the Supreme Court allowed a taking when the government used eminent domain to seize private property to facilitate a private development.[63] The Court considered the taking to be a public use because the community would enjoy the furthering of economic development. Further, the *Kelo* court determined that a governmental claim of eminent domain is justified if the seizure is rationally related to a conceivable public purpose.[64]

CONSTITUTIONAL CLIP

The analysis according to *Kelo* begins with answering a few questions:

a. Is eminent domain present?

b. if a regulation occurs, then is the regulation a taking?

c. Is just compensation being offered for the taking?

d. Finally, does the taking include meet the public use requirement?

As such, the *Kelo* decision significantly broadened the government's takings power. This caused significant controversy and states were quick to act to quell concerns about this expansion of power. In response to *Kelo*, many states have passed laws which have restricted governments' takings abilities. One example is – implementing a stricter definition of what constitutes a "public use" which requires a heightened level of scrutiny to justify an action categorized as a taking.[65]

b. When is a Regulation a Taking?

Lesson 6: Constitutional Law: Land Use, Commerce and Federalism

What constitutes a taking?[66]

After determining if eminent domain exists, then one must determine if a regulation is present? If such a regulation exists, then one must determine if the regulation is a legal government taking? How do you determine if a legal taking has occurred? According to *Pa Coal Co. v. Mahon* (1922), the Supreme Court of the United States held that government regulation will not be deemed a taking unless the regulation severely damages the value of the property.[67] Sometimes, a government regulation infringes upon private property ownership to such an extent that the regulation can be considered a taking, thus requiring just compensation. In *United States v. Dickinson* (1947), the Supreme Court held that even if the government does not physically seize private property, the action is still a taking "when inroads

63. *Kelo v. City of New London*, 545 U.S. 469 (2005).
64. *Id.*
65. *Id.*
66. *Lesson 6: Constitutional law: Land use, commerce, and federalism*. (n.d.). https://water.mecc.edu/courses/Env227/taking.jpg
67. *Pa Coal v. Mahon*, 260 US 393 (1922).

are made upon an owner's use of it to an extent that, as between private parties, a servitude has been acquired either by agreement or in course of time."[68]

CONSTITUTIONAL CLIP

Additionally, Cornell Law identified a series of Supreme Court cases regulatory takings cases which developed a 4-part test to determine whether a regulation is considered to be a taking.

1. Is the regulation a taking under *Loretto v. Teleprompter Manhattan CATV Corp (1982)?*
   A government regulation is a taking when the government authorizes a permanent physical occupation of real/personal property

2. Is the regulation a taking under *Lucas v. South Carolina Coastal Council (1992)?*
   The regulation is a taking when the regulation causes the loss of all economically beneficial/productive uses of the land, unless the regulation is justified by background principles of property law/nuisance law

3. Is the regulation a taking under *Nollan-Dolan v. California Coastal Commission (1987)?*
   - The regulation is a taking if the government demands an exaction that lacks a nexus with a legitimate state interest or lacks proportionality to project's impacts
   - Exaction – a requirement that the developer provides specified land, improvements, payments, or other benefits to the public to help offset the project's impacts

4. Is the regulation a taking under the *Penn Central Transportation Co. v. City of New York* (1978) balancing test?

   Here a court will look at 3 factors:

   The character of the governmental action involved in the regulation
   A. If the government's action is a physical action, rather than a "regulatory invasion," then the action is almost certainly a taking

   - The extent to which the regulation has interfered with the owner's reasonable investment-backed expectations for the parcel as a whole
   - The regulation's economic impact on the affected prop owner[69]

c. Just Compensation Requirement

After determining that the government taking was valid, then one must determine if the just compensation requirement has been met. In *Kohl v. United States (1875)*, the Supreme Court held that the government may seize property through the use of eminent domain, as long as it appropriates just compensation to the legal owner of the property.[70] How does one identify when just compensation exists? In *Loretto v. Teleprompter Manhattan CATV Corp* (1982), the Supreme Court clarified that when

68. *United States v. Dickinson*, 331 U.S. 745 (1947).
69. Legal Information Institute, n.d.
70. *Kohl v. United States*, 91 U.S. 367 (1875).

the government engages in a taking and implements a permanent physical occupation of the property, then the property owner must be given just compensation.[71]

Perhaps, just compensation's definition sheds some light on the standard as it is "...a payment by the government for property it has taken under eminent domain — [usually] the property's fair market value, so that the owner is theoretically no worse off after the taking."[72] The court further defined just compensation based upon the size of the area which the government takes. The court clarified that just compensation must occur regardless if the area is small and the government's use does not greatly affect the owner's economic interest. Therefore, the court reiterated ***any*** governmental taking warrants just compensation.

d. Public Use Requirement

Notice Private Dumpster Not For Public Use[73]

Lastly, if a governmental taking is deemed to have met the just compensation requirement, then the public use requirement must be reviewed. What is public use? According to Black's, **public use** is defined as "[a] legitimate public purpose for the condemnation of private property."[74] Thus, any analysis of public use must include determining "[i]f property is taken for a legitimate public purpose

71. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982).
72. *Id.*
73. **Notice private dumpster not for use.* (n.d.). Waste Stickers. https://cdn1.bigcommerce.com/server1000/c8863/products/713/images/1679/WS810104_73620.1645890012.1000.1000.jpg?c=2
74. PUBLIC USE, Black's Law Dictionary (12th ed., 2024)

— one that is within the scope of the government's police power."[75] If one determines, the government taking was for a legitimate public purpose, then "...the public-use requirement is satisfied, regardless of who physically uses the property once it is taken."[76] In *Kelo*, the Supreme Court held that general benefits which a community would enjoy from the furthering of economic development is sufficient to qualify as a "public use."[77] Therefore, the court's review for a public use is expansive establishing most government takings as valid.

Critical Reflections:

1. Critics assert that grand juries are not their own entity. Instead, critics believe grand juries are an extension of the prosecutor's office. Read the Trump indictment listed above at Footnote 15. Barring your political affiliations, assess the indictment based upon the language and legal format. Does the indictment meet the legal standards necessary for a "true bill?" Why or why not?
2. If due process is a right held by the Fifth Amendment, then why is it implemented differently throughout the criminal justice system?
3. Should the government be allowed to use eminent domain? Why or why not?

75. *Ibid.*
76. *Ibid.*
77. *Kelo v. City New London* (2005).

Chapter 7 - Amendment VI: Speedy & Public Trial, Impartial Jury, Nature & Cause, Confront Witnesses, Compulsory Process, & Counsel

Amendment VI

RICHARD J. FORST AND TAUYA R. FORST

LEARNING OBJECTIVES

After reading this chapter, you should be able to:

7.1 Define the unfamiliar terms of the Sixth Amendment.
7.2 Explain the parts of the Sixth Amendment, including rights and freedoms.
7.3 Explain what constitutes the right to a speedy and public trial.
7.4 Identify which clause provides the defendant with a specific understanding of their charges.
7.5 Describe the considerations necessary for impartiality in a trial.
7.6 Compare and contrast the different types of subpoenas.
7.7 Determine which factors are used to establish indigence.

KEY TERMS

Challenge
Challenge by the array
Challenge for cause
Compulsory process
Jury
Peremptory challenge
Petit Jury
Process

Confrontation Clause	Speedy Trial
Defense	Subpoena
Impartial Jury	Subpoena ad testificandum
Indigent	Subpoena duces tecum
In Forma Pauperis	Trial
Voire dire	

Amendment VI

Passed by Congress September 25, 1789. Ratified December 15, 1791. The first 10 amendments form the Bill of Rights.

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.

United States Courts – Sixth Amendment workcloud[1]

1. *Six amendment activities: United states courts*. (n.d.). United States Courts. https://www.uscourts.gov/sites/default/files/styles/sidebar/public/sixthamendment.png?itok=VCPeb_R_

INTRODUCTION TO AMENDMENT VI

As previously stated, the Sixth Amendment is part of the Bill of Rights. The Sixth Amendment's claim to fame began with statesman and four-time Prime Minister William Gladstone when he stated, "[j]ustice delayed, is justice denied."[2] The Sixth Amendment's language supports the common theme of the United States Constitution as it balances federal, state, and individual rights in the speedy and public trial. In total, the Sixth Amendment includes six categories of protections and all protections are applicable to the state governments through the Fourteenth Amendment. According to the National Constitution Center, the history of the criminal justice system was highlighted in an effort to provide the foundation which explains Amendment Six.[3] Most of the basic principles in the Sixth Amendment (such as the Right to Speedy and Public Trial as well as the Right to Counsel) did not exist at the founding of America. Thus, the Framers sought to address these lasting discrepancies which produced inconsistencies.

Through the protections of the Sixth Amendment, the framers intended to implement a stable adversarial process as opposed to the European inquisitorial system. It is important to note, a **process** is defined as "[t]he proceedings in any action or prosecution."[4] However, the European system emphasized a system where judges take an active role in the trial including explaining the issues, identifying evidence, and questioning witnesses.[5] In contrast, the American criminal justice process requires adversaries to conduct their own investigation, present relevant favorable evidence, and argue one's point of view during the trial.

Furthermore, criminal justice professionals including law enforcement agents changed as a result of the Sixth Amendment's ratification.[6] In fact, police departments expanded their responsibilities, while prosecutors removed the voice of victims. Defendants were given the ability to hire lawyers when able to do so. Finally, criminal trials grew longer and more complex.

One of the most important Supreme Court holdings helped implement the right to counsel. The Supreme Court of the United States has diligently heard cases where the Sixth Amendment is reviewed. The Supreme Court of the United States concluded in *Barker v. Wingo* (1972) that the Sixth Amendment's right to a "speedy and public trial" has a specific meaning which includes failure to commence a trial in a timely manner. Further, SCOTUS held that a

> "In some communities, charities or local governments set up public defender offices, offering free lawyers to all or some defendants accused of sufficiently serious crimes. Judges developed rules of evidence and procedure and gave the lawyers a say in selecting and instructing juries, so trials grew longer and more complex."[7]

2. Foot, M. Richard Daniell (2021, May 15). *William Ewart Gladstone. Encyclopedia Britannica*. https://www.britannica.com/biography/William-Ewart-Gladstone
3. Biber, E., & Colby, T. (n.d.). *Interpretation: The Admissions Clause* | The National Constitution Center. Interactive Constitution. Retrieved May 31, 2021, from https://constitutioncenter.org/interactive-constitution/interpretation/article-iv/clauses/46
4. PROCESS, Black's Law Dictionary (12th ed. 2024).
5. Biber & Colby (n.d.)
6. *Ibid.*
7. *Ibid.*

violation of this meaning carries a penalty resulting in a dismissal of all charges entirely.[8] On the other hand, the Court has stated "speedy" has a more lenient interpretation in which delays of several years are permissible. Finally, the Court has identified the "public" aspect of the trial right as meaning closed to the public and/or the media only for "overriding" reasons, such as national security, public safety, or a victim's serious privacy interests.[9] Finally, we will highlight the Sixth Amendment as it encompasses six parts which provide additional protections within the criminal trial and its proceedings.

ANALYSIS OF AMENDMENT VI

Six Parts of Amendment VI

Part I: Right to Speedy and Public Trial

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial,

The Right To A Speedy Trial, Don't Forget Public[10]

The concept of a speedy and public trial is layered with various definitions, nuances, and other aspects of the defendant's Constitutional rights. The question which remains is why is there a need for a speedy trial? Harr responds that a defendant enjoys the assumption of innocence until proven guilty as well as the right for their criminal charges to be decided as quickly as possible.[11] Thus, the response begs the question – what is a speedy trial? According to Black's Law Dictionary, the **speedy trial** refers to "a trial that the prosecution, with reasonable diligence, begins promptly and conducts

8. 407 US 514 (1972).
9. *Ibid.*
10. *The right to a speedy trial*. (n.d.). constitutionus.com. https://constitutionus.com/wp-content/uploads/elementor/thumbs/the-right-to-a-speedy-trial-pl6efyi5vnd56w50kppjbbg1a33et02psetw97b60i.jpg.webp
11. 1. Harr, J., Hess, S., Orthmann, K, Kingsbury, J. (2014). *Constitutional law & the criminal justice system*. (7th ed.). Boston, MA: Cengage Learning Publishers.

expeditiously."[12] SCOTUS has identified and established what is meant by "speedy." In *Betterman v. Montana* (2016), the court emphasized that this right only begins with the period after the defendant has been charged with a crime, but before a conviction is entered.[13] The court further determined that the right to a speedy trial may not be extended to postponing the sentencing for fourteen months after a guilty plea had been issued.[14] In its rationale, the court reminded parties that once a defendant is convicted, then they are no longer defendants, but officially felons or misdemeanants.[15] Therefore, the right of a speedy trial within the Sixth Amendment cannot be extended after conviction.

How does the court determine if a delay violates the defendant's Constitutional right of a speedy trial?

CONSTITUTIONAL CLIP

According to *Barker v. Wingo* (1972), the court identified four relevant factors for establishing a violation of speedy trial.

- Firstly, the court will review the length of the delay.
- Secondly, the court must review the reason for the delay.
- Thirdly, the court examines the assertion of the defendant's right.
- Finally, the court balances all factors with prejudice to the defendant (viewing all factors through a lens which favors the defendant the most).[16]

Once the court determines that the defendant's right to a speedy trial was denied **and** a violation has occurred, then the court has two options. The court may dismiss the indictment or reverse the conviction, according to *Strunk v. United States* (1973).[17] If an indictment for the defendant is in process, then the indictment will be dismissed. However, if this violation occurs after the defendant's conviction, then the conviction will be reversed. Either way a violation of a speedy trial carries a significant penalty for prosecutors according to *Strunk v. United States* (1973).

In addition to the speedy trial, the defendant is entitled to a public trial. A public trial is "a trial that anyone may attend or observe."[18] There are many reasons why the right to a public trial is important to our security as a country. Fundamentally, in evaluating the secret manner in which witch hunts and other trials were conducted, the Sixth Amendment was meant to help contradict these myths. *In re Oliver* (1948), outlines the reasons why America is against these archaic means of executing justice.[19]

12. TRIAL, Black's Law Dictionary (12th ed. 2024).
13. *Betterman v. Montana*, 578 U.S. _ (2016).
14. *Id.*
15. *Id.*
16. *Barker v. Wingo*, 407 U.S. 514 (1972).
17. *Strunk v. United States*, 412 U.S. 434 (1973).
18. TRIAL (2019).
19. In re Oliver, 333 U.S. 257 (1948).

The public trial was held as an important hallmark within the criminal justice system. In fact, SCOTUS "has cited many civic and process-related purposes served by open trials: they help to ensure the criminal defendant a fair and accurate adjudication of guilt or innocence; they provide a public demonstration of fairness; they discourage perjury, the misconduct of participants, and decisions based on secret bias or partiality."[20]

Part II: Right to an Impartial Jury

by an impartial jury of the State and district wherein the crime shall have committed, which district shall have been previously ascertained by law,

The Right to an Impartial Jury[21]

The right to an impartial jury refers to the petit jury or trial jury. First, a jury is defined as "[a] group of persons selected according to law and given the power to decide questions of fact and return a verdict in the case submitted to them."[22] Additionally, the jury process is both important and complex. The **petit jury**, as you recall, is defined as "[a] jury (usu. consisting of 6 or 12 persons) summoned and empaneled in the trial of a specific case."[23] One such part begins with the voir dire process. Voir dire is a French term meaning "to speak the truth."[24] The petit jury is the foundation of the American criminal jury

20. Public Trial. (n.d.). LII / Legal Information Institute. Retrieved May 15, 2021, from https://www.law.cornell.edu/constitution-conan/amendment-6/public-trial
21. *Right to impartial jury*. (n.d.). Law Offices of Alex Ransom. https://s3.thingpic.com/images/QJ/JFBiD2h8h7a8Pmfz1hYw5RRy.jpeg ote content here.
22. JURY, Black's Law Dictionary (12th ed. 2024).
23. JURY, Black's Law Dictionary (12th ed. 2024)
24. VOIR DIRE, Black's Law Dictionary (12th ed. 2024)

system. **Voir dire** is defined as "[a] preliminary examination of a prospective juror by a judge or lawyer to decide whether the prospect is qualified and suitable to serve on a jury."[25] In short, voir dire describes the process for jury selection during a criminal or civil trial when prospective jurors are questioned by judges or lawyers to establish the jurors' acceptability for the trial. According to Frederick, voir dire includes a focus on (1) backgrounds, (2) experiences, (3) opinions, (4) beliefs, and (5) values.[26] There are specific ways for voir dire to be deemed effective. Why do attorneys need to conduct an effective voir dire? The voir dire process may help the attorney identify a favorable or disfavorable juror.

CONSTITUTIONAL CLIP

According to Frederick, an expert jury specialist, there are 11 tips to facilitate effective voir dire:

1. **Adopt the proper orientation.**
2. **Set the stage for jurors.**
3. **Get them talking.**
4. **Ask open-ended questions.**
5. **Avoid the Socially Desirable Response Bias.**
6. **Focus on difficulty vs. ability.**
7. **Use alternative route to uncover bias.**
8. **Design questions using "bad" answers.**
9. **Harness the power of "reflective" questions.**
10. **Keep jurors participating.**
11. **Be persistent.**[27]

As attorneys seek to complete voir dire and identify potential jurors, they are entitled to two types of challenges. A **challenge** is "[a]n act or instance of formally questioning the legality or legal qualifications of a person, action, or thing."[28]

The challenge is typically supported by one of three reasons:

- challenge by the array,
- peremptory challenge or
- a challenge for cause.

25. *Ibid.*
26. *11 must-dos from a voir dire master*. (n.d.). American Bar Association. Retrieved February 22, 2021, from https://www.americanbar.org/news/abanews/publications/youraba/2019/march-2019/11-tips-for-effectively-conducting-voir-dire/
27. *Ibid.*
28. CHALLENGE, Black's Law Dictionary (12th ed. 2024).

A challenge to the array includes "[a] legal challenge to the manner in which the entire jury panel was selected, [usually] for a failure to follow prescribed procedures designed to produce impartial juries drawn from a fair cross-section of the community."[29] A challenge by the array is uncommon, but when used points to a select challenge rooted in problems with building an impartial jury from a fair process of the defendant's peers (or the community). In comparison, the **peremptory challenge** outlines where an attorney uses "[o]ne of [their] limited number of challenges that do not need to be supported by a reason unless the opposing party makes a prima facie showing that the challenge was used to discriminate on the basis of race, ethnicity, or sex."[30] The peremptory challenge is valid unless there is a prima facie showing, based upon a three-step approach to analyzing the validity of the peremptory challenge. The Batson challenge empowered attorneys to raise a challenge to a peremptory challenge if it were based upon race. In *Batson v. Kentucky* (1986), the court held that Batson made a "prima facie showing that the challenge was based on race" evidenced by the prosecutor striking all remaining Black jurors and marking a B next to their names.[31] In response to the prima facie finding, the prosecution responded with two race-neutral reasons for the peremptory strike. The prosecutor indicated his reasoning for one of the Black jurors, stating that the juror appeared "very nervous" and questioned his commitment to the trial from his lack of time for the actual trial. The court noted that the reasons were "pretextual" in nature for discrimination.[32]

Robbennolt and Taksin identify a three step approach to analyzing a challenge to a peremptory strike.

"First, the objecting party objecting to the strike must present facts that "raise an inference" that the strike was racially based.

Second, the party who made the strike must present a 'neutral explanation.'

Finally, the trial court must determine whether the party objecting to the strike has established 'purposeful discrimination.'"[33]

Finally, the challenge for cause may be employed during voir dire as well. The **challenge for cause** is based upon "[a] party's challenge supported by a specified reason, such as bias or prejudice, that would disqualify that potential juror."[34] One example of being removed for cause, would be if the juror knew the prosecutor, the defendant, or the defense attorney. Hence, there are many reasons why an attorney may employ a challenge, but challenges should only be instituted to help the defendant gain a representative jury which should provide a greater probability for an impartial jury.

According to Black's Law Dictionary, an **impartial jury** is defined as "[a] jury that has no opinion about the case at the start of the trial and that bases its verdict on competent legal evidence."[35] This portion of the amendment speaks to the impartiality as well as the jurisdiction of where the crime occurred. The State and district may be identified according to the law, ordinance or statute where the crime occurs. Thus, the impartiality of a jury is based upon the composition of the jury as well as the jurisdiction. However, impartiality is not based upon definition alone. In *Taylor v. Louisana* (1975), SCOTUS created a precedent for determining an impartial jury.

29. CHALLENGE TO THE ARRAY, Black's Law Dictionary (12th ed. 2024).
30. PEREMPTORY CHALLENGE, Black's Law Dictionary (12th ed. 2024).
31. *Batson v. Kentucky*, 476 U.S. 79 (1986).
32. *Id.*
33. Robbennolt, J., & Taksin, M. (2009, January). *Jury selection, peremptory challenges and discrimination*. American Psychological Association. https://www.apa.org/monitor/2009/01/jn
34. CHALLENGE (2019).
35. JURY, Black's Law Dictionary (12th ed. 2024).

CONSTITUTIONAL CLIP

The Supreme Court of the United States developed a two-prong impartiality test. Impartiality rests upon two questions:

1. Is "the selection of a petit jury from a representative cross section of the community?"[36] *This is an essential component of the Sixth Amendment right to a jury trial.*
2. "Whether the jury is willing to make a decision based upon an unbiased approach to the evidence and law in this case?"[37]

The first prong may be further complicated by the three elements which are required to overcome such a designation. The burden of proof shifts from the prosecutor to the defendant to prove

(1) that the proposed excluded group is a 'distinctive' group in the community;

(2) that the representation of this group wherein jury pools are selected is not fair and reasonable in relation to the number of such persons in the community; and

(3) most importantly – that this underrepresentation is due to systematic exclusion of the group in the jury process.[38] After the defendant overcomes this burden, then he or she must address the second prong.

Recall that the second prong determines whether the jury is willing to make a decision based upon an unbiased approach to the evidence and law in the current case.[39] The court held that being unbiased is demonstrated by allowing the jurors to decide the case based only on the evidence presented by the attorneys. Further, the Court has held that in the absence of an actual showing of bias, a defendant is not entitled to a specific jury composition.[40] A violation of a defendant's right to an impartial jury may be evidenced when the jurors are subjected to pressure or influence which could impair the freedom of action. In these instances, the court must conduct a hearing to determine whether impartiality exists of one's own free will.

Another aspect of the Defendant's right to an impartial jury, is the question of whether the jury must reach a unanimous verdict to convict. Prior to 2020, only two states, Louisiana and Oregon, allowed juries to convict defendants of serious crimes with less than a unanimous vote, 10-2 rather than 12-0.[41] In *Ramos v. Louisiana* (2020), SCOTUS in a unique majority (Justices Gorsuch, Ginsburg, Breyer, Sotomayor, and Kavanaugh) united to hold that the Sixth Amendment requires unanimity

36. *Taylor v. Louisiana*, 419 U.S. 522 (1975).
37. *Id.*
38. *Duren v. Missouri*, 439 U.S. 357, 364 (1979).
39. *Taylor*, 1975.
40. *Frazier v. United States*, 335 U.S. 497 (1948).
41. Breslow, J. (2023, May 14). The Supreme Court outlawed split juries, but hundreds remain in prison anyway. *NPR*. https://www.npr.org/2023/05/14/1175226037/supreme-court-ramos-louisiana-split-juries-oregon

in verdict for a criminal defendant.[42] This case is an example of how the court should work when addressing cases through an unbiased lens. The background of this historic decision follows. After the Supreme Court invoked the Fourteenth Amendment and ruled that Blacks could not be excluded from juries in *Strauder v. West Virginia (1880)*, Louisiana held a constitutional convention in 1898 to allow for jury convictions by a 9-3 vote, for the sole purpose of ensuring that in the event three Blacks made it onto a jury, a Black defendant could still be convicted by the 9-white person majority.[43] The Louisiana constitution was amended in 1973 to require the agreement of ten jurors.[44] Louisiana finally amended the state constitution by referendum in 2018 to require unanimous verdicts for serious crimes.[45] However, the referendum was not retroactive to cases brought prior to 2019, when the new law became effective. [46]

The Supreme Court, in *Ramos v. Louisiana (2020)*, held by a vote of 6-3 that the Sixth Amendment right to a jury trial–as incorporated against the states by way of the Fourteenth Amendment–requires a unanimous verdict to convict a defendant of a serious offense.[47] But the Louisiana Supreme Court refused to apply the decision of the U.S. Supreme Court retroactively, resulting in hundreds of individuals remaining in Louisiana prisons after having been convicted by split jury verdicts.[48] Specifically, in *Edwards v. Vannoy* (2021), the court held in a 6-3 verdict that the *Ramos v. Louisiana jury-unanimity rule* does not apply retroactively to defendant's with split verdicts.[49] Unfortunately, the court split along partisan lines for this decision with Justices Gorsuch, Roberts, Kavanaugh, Barrett, Alito, and Thomas in the majority followed by Breyer, Kagan, and Sotomayor dissenting.

Part III: Right to Understand Components of Criminal Charges Against a Defendant

and to be informed of the nature and cause of accusation;

42. *Ramos v. Louisiana*, 590 US _ (2020).
43. Breslow, 2023.
44. *Ibid.*
45. *Strauder v. West Virginia*, 100 U.S. 303 (1880); *Ibid.*
46. *Ibid.*
47. *Ramos v. Louisiana*, 590 U.S. ___(2020)
48. *Id.*
49. *Edwards v. Vannoy*, 593 US _ (2021).

Criminal Charges[50]

This clause explains both why a defendant and how a defendant would be charged. This information must be given with specificity. This disclosure extends beyond the present to provide the defendant with the ability to prepare himself or herself for future prosecution. The defendant is looking for information which may be contained in "the indictment [and this will] apprise him of the crime charged with such reasonable certainty." Defendants should obtain this information from the verbiage of the statute, law or ordinance as these sources of law provide the most specific and accurate components of the criminal charges.[51]

The nature and cause of action, otherwise known as the Notice Clause in the Sixth Amendment, does not contain any specifics such as who, what, when, and where nor provides its purpose. However, other parts of the United States Constitution as well as other legal authorities help shape this section. The necessary specifics are revealed through other provisions in the amendments, articles and/or preamble, by contextual history, and by relevant judicial opinions. For example, according to the Fifth Amendment, if the accused is charged with an infamous federal crime the accusation must be made by the indictment of a grand jury.[52] For lesser federal crimes or misdemeanors, an information drafted by a prosecutor or a complaint will suffice. It should be noted that each state has different requirements and indictments as not required by the Fourteenth Amendment.[53]

Part IV: Right to Address Those Who Will Testify Against the Defendant

to be confronted with witnesses against the him;

50. *Criminal charges*. (n.d.). Halt.org Law Directory. https://www.halt.org/wp-content/uploads/2023/05/Criminal-Charges.jpg
51. *United States v. Cruikshank*, 92 U.S. 542 (1876).
52. Frankel, M. E. (1986, updated 2018). *Grand Jury*. Encyclopedia.Com. https://www.encyclopedia.com/social-sciences-and-law/law/law/grand-jury
53. *Ibid.*

The Confrontational Clause[54]

The right to address potential prosecutorial witnesses is central to supporting a fair and impartial trial within our criminal justice system. Every defendant has a right to appear and confront those who will testify against him or her in a trial. Thus, this section is entitled the "Confrontation Clause" of the Sixth Amendment.[55] In particular, the **confrontation clause** has two key components. The Sixth Amendment provision generally guarantees a criminal defendant's right: 1. to confront an accusing witness face-to-face and 2. to cross-examine that witness.[56] Let us examine these components more closely.

First, the right to address witnesses allows the defendant to be present in a hearing or trial against the defendant.[57] This right aligns closely with all substantive and procedural due process claims within Federal rules, codes and/or laws, as well as Constitutional amendments to allow a complete support for the defendant during a trial. Specifically, Federal Rules of Criminal Procedure 43 entitled "Defendant's presence" indicates when a defendant is required, when a defendant is not required, and when a defendant can waive their requirement to appear. Even still, the right to be present at a trial or hearing against the defendant may be challenged if the witness is at-risk physically, mentally, or any other risks

54. Law, G. (2019, September 20). *The right to confront your accusers – Gilles Law, PLLC*. Gilles Law, PLLC. https://gilleslaw.com/confront-your-accusers/
55. *Confrontation*. (n.d.). Justia Law. Retrieved May 18, 2021, from https://law.justia.com/constitution/us/amendment-06/10-confrontation.html
56. *Ibid.*
57. *Ibid.*

are present. Even with these risks, the defendant is entitled to examine the witness by some similar means such as closed-circuit television.[58]

Second and equally important to note is that the "Confrontation Clause" allows the defendant to cross-examine any prosecutorial witnesses in criminal charges against the defendant. Its significance emphasizes how one may prove their plea of not guilty. Defendants are allotted two basic pleas of guilty and not guilty. Innocence is not a plea supported by our adversarial system. Innocence must be established in a separate evaluation. Some legal scholars make the distinction between actual innocence and legal innocence.

Actual innocence is impossible to prove in a legal setting, but indicates no guilt; whereas legal innocence indicates the prosecutor's inability to prove beyond a reasonable doubt the elements of a crime.

Finally, with respect to the Confrontation clause, three exceptions exist for the right to confront witnesses against a defendant:

1. Minors or other special categories of persons, who may suffer irreparable harm when they are face-to-face with a defendant, may testify in chambers or "in camera."[59] This provides privacy and protection for the witness. In camera is defined as "**1.** In the judge's private chambers. **2.** In the courtroom with all spectators excluded. **3.** (Of a judicial action) taken when court is not in session."[60]

2. "[D]eclarations made by a speaker who was both on the brink of death and aware that he was dying," and

3. "Statements of a witness who was 'detained' or 'kept away' by the 'means or procurement' of the defendant."[61]

The Supreme Court recently limited the ability of defendants to confront witnesses against them, in the case of *Samia v. United States (2023)*.[62] In this case, three individuals were tried jointly for murder and conspiracy to commit murder. One of the co-defendants signed a confession that he was in the getaway vehicle when the victim was murdered.[63] The confession was admitted into evidence, and Defendant Samia was not allowed to confront and cross-examine the confessing co-defendant.[64] The Judge instructed the jury not to infer Samia's guilt from the confession.[65] All three were convicted. The Supreme Court, on review, held that the Confrontation Clause of the Sixth Amendment was not violated by the admission of a non-testifying co-defendant's confession that did not directly inculpate the defendant and was subject to a limiting instruction from the trial Judge.[66] The vote was 6-3 and Justice Thomas wrote the majority opinion.[67] In dissent, Justice Ketanji Brown Jackson wrote, "The introduction of a 'testimonial' statement from an unavailable declarant violates the Confrontation Clause unless the defendant had a prior opportunity for cross-examination," citing *Crawford v. Washington, 541 U.S. 36, 59, 68 (2004)*. [68]

58. *Maryland v. Craig*, 497 U.S. 836, (1990).
59. *Confrontation*. (n.d.).
60. IN CAMERA, Black's Law Dictionary (12th ed. 2024).
61. *Confrontation*. (n.d.).
62. *Samia v. U.S.*, 599 U.S. ___ (2023).
63. *Id.*
64. *Id.*
65. *Id.*
66. *Id.*
67. *Id.*
68. *Id.*

Part V: Right to Gather Witnesses to Support the Defendant's Claims

to have compulsory process for obtaining witnesses in his favor,

Strengthening the Sixth[69]

According to Black's Law Dictionary, **compulsory process** is "[a] process, with a warrant to arrest or attach included, that compels a person to appear in court as a witness."[70] This process may take many forms as indicated by the definition. Although witnesses may attend voluntarily, compulsory process indicates the legal forcing of witnesses to be present with or without documents. The right to gather supporting defense witnesses may end in a warrant and/or a subpoena. Refer to Chapter 5 for the various forms and types of warrants. With respect to a subpoena, the defendant and their team has many options available as well. According to Black's Law Dictionary, **subpoena** is defined as "[a] writ or order commanding a person to appear before a court or other tribunal, subject to a penalty for failing to comply.[71]

69. *Access to witnesses and evidence*. (n.d.). Strengthening the Sixth. https://www.strengthenthesixth.org/focus/Access-to-Witnesses-and-Evidence
70. PROCESS, Black's Law Dictionary (12th ed. 2024).
71. SUBPOENA, Black's Law Dictionary (12th ed. 2024).

> "The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies. Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, [the accused] has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law."[72]

Significant in this definition is the consequence of penalty if a compliancy from the witness does not occur. For purposes of our text, we will focus on two types of compulsory processes, specifically **subpoena ad testificandum and subpoena duces tecum** which references both the right to confront witnesses and any procedural and substantive due process rights.

A. SUBPOENA AD TESTIFICANDUM

The subpoena ad testificandum is used most often and is referred to as simply a subpoena. It helps to ensure that defendants are able to give a complete accounting of their defense within a jurisdiction appropriate courtroom. The defendant is granted access to witnesses by means of their own voices under oath. Further, the subpoena states specifics of where the testimony will occur, who must appear, when the witness must appear as well as why the witness must appear. Black's explains **subpoena ad testificandum** as "[a] subpoena ordering a witness to appear and give testimony."[73] Finally, the right to compulsory process is not absolute and is true of all freedoms and rights in the United States Constitution.

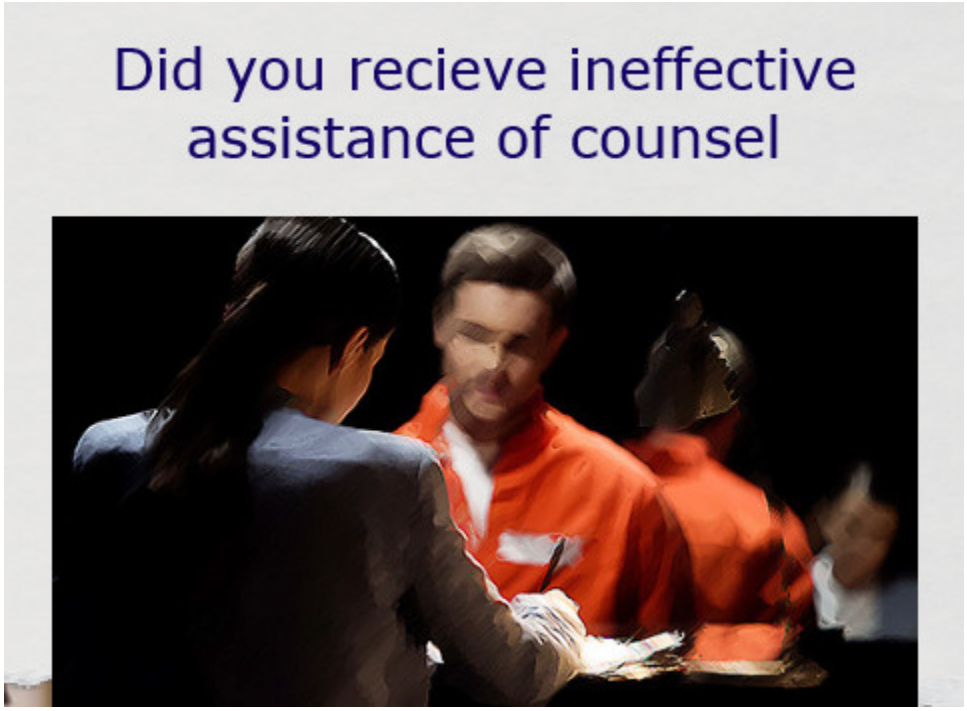
B. SUBPOENA DUCES TECUM

Whereas, the right to compel witnesses with documents occur as subpoena ad testificandum but not nearly as much. This instrument provides the accused with the ability to collect both testimony and relevant and appropriate documents for the accused's defense. **Subpoena duces tecum** is defined as "[a] subpoena ordering the witness to appear in court and to bring specified documents, records, or things."[74] This is a fundamental right for any defendant charged within our criminal justice system.

Part VI: Right to Assistance of Counsel

and to have the Assistance of Counsel for his defence.

72. *Washington v. Texas*, 388 U.S. 14 (1967).
73. SUBPOENA (Black's Law Dictionary (12th ed. 2024).
74. SUBPOENA (2019).



Did you receive ineffective assistance of counsel?[75]

According to Black's Law Dictionary, "**Defense** is defined [as] that which is alleged by a party proceeded against in an action or suit, as a reason why the plaintiff should not recover or establish that which he seeks by his complaint or petition."[76] This right was well established for all criminal defendants who face more than six months of incarceration as a penalty for a criminal charge. The Supreme Court of the United States has recognized an indigent petitioner or defendant in several cases since *Gideon v. Wainwright* (1963) where the court acknowledged this Sixth Amendment right. Gideon was a man who received an elementary education and was charged with breaking and entering in Florida.[77]

In *Gideon* (1963), the Court held defendants who face possible prison time are entitled to court-appointed lawyers, paid for by the government.[78] Since Gideon, the court has *extended this right* to defendants where jail time is actually imposed and in misdemeanors with suspended sentences. Additionally, children in delinquency proceedings, no less than adults in criminal courts, are entitled to appointed counsel when facing the loss of liberty."[79]

75. *Did you receive ineffective assistance of counsel?* (n.d.). Jaleel Law. https://defenseadvocates.com/wp-content/uploads/2022/07/ineffective-assistance-of-counsel1.jpg
76. DEFENSE, Black's Law Dictionary (12th ed. 2024).
77. Chicago Appleseed Fund for Justice & Chicago Council of Lawyers. (2015, August). *Ensuring the Public Defense of Indigent Criminal Defendants in Cook County*. The Collaboration for Justice. http://www.chicagoappleseed.org/wp-content/uploads/2015/08/Aug-2015-Indigent-Defense-1.pdf
78. Gideon v. Wainwright, 372 U.S. 375 (1963).
79. *Id.*

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As a result, "court-appointed lawyers (usually public defenders) must deliver "effective" assistance to defendants—meaning that they must adequately advise the defendants of the potential consequences of pleading guilty *and* provide a reasonably competent defense if defendants choose to go to trial."[80]

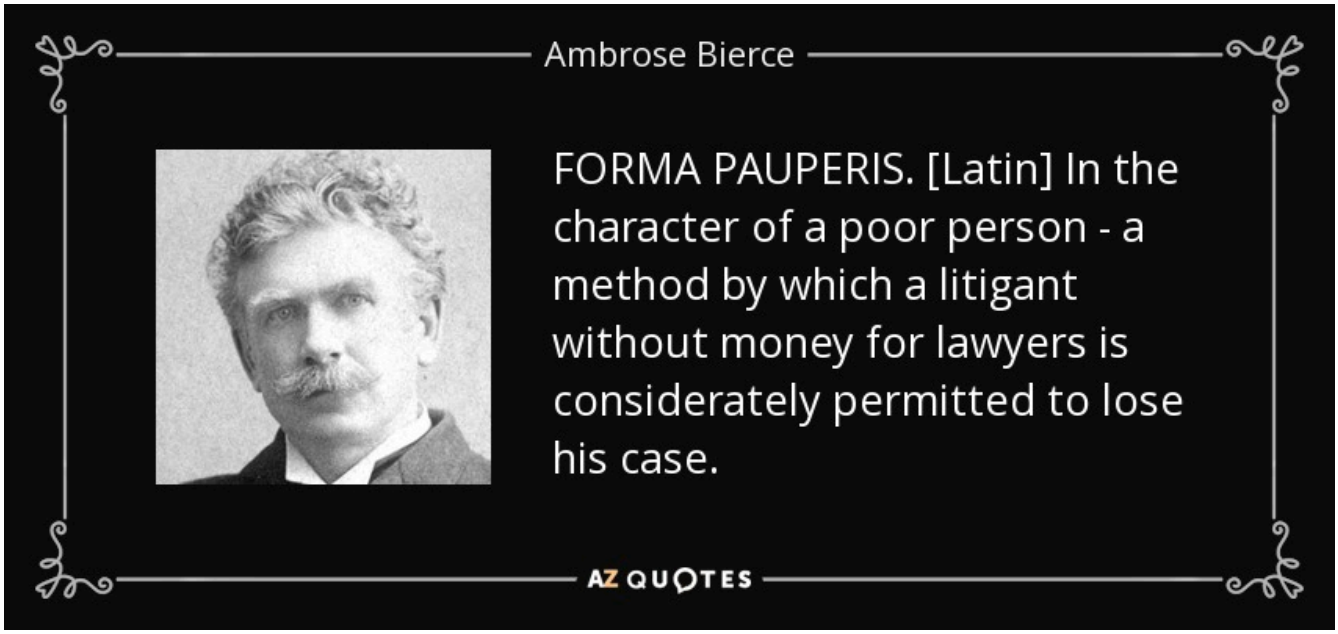
But the test for effectiveness is quite lax. Courts routinely condone mediocre lawyering, often because the conviction seems to have been inevitable no matter how the lawyer performed their duties. The Supreme Court of the United States has consistently stated that the Sixth Amendment guarantees an indigent criminal defendant the right to state-funded counsel in criminal cases.

Thus, the two-prong question which remains for the court: 1. Does the proposed charge meet the requisite penalty for incarceration? 2. Does the defendant meet the legal determination of indigency?

The court may quickly make the determination of requisite penalty by reviewing the penalties from the law. Upon a determination that the charge meets the penalty, the only question which remains is whether or not a judge will deem the defendant legally indigent? If the judge deems the defendant indigent, then the defendant will have an attorney appointed. If it is determined that a defendant is indigent, then the defendant is entitled to the appointment of counsel. **Indigent** is defined as "[s]omeone who is found to be financially unable to pay filing fees and court costs and so is allowed to proceed *in forma pauperis*."[81] Typically, a defendant indicates he or she is unable to afford legal representation. In most cases, a judge will conduct an evaluation for indigency. However, if a defendant receives public assistance, this evaluation is waived. In this case, the judge appoints an attorney if all other requirements are met. Once this occurs, SCOTUS notes that "failure to appoint counsel as required by the Sixth Amendment serves as a jurisdictional bar to a valid conviction, rendering Constitutionally infirm all convictions in which the indigent criminal defendant is not represented by appointed counsel."[82]

Once a judge makes a finding of indigency, a defendant may proceed *in forma pauperis*. Black's Law Dictionary notes **in forma pauperis** is "Latin for 'in the manner of a pauper'[83] which results in an indigent person who is permitted to disregard filing fees and court costs."[84]

80. Id.
81. IN FORMA PAUPERIS, Black's Law Dictionary (12th ed. 2024).
82. *Ibid.*
83. *Ibid.*
84. *Ibid.*



Forma pauperis from Ambrose Bierce, an American short story writer[85]

As a point of reference, in Illinois, the judge determines indigency through the methods found in *735* ILCS *5/5-105* (2019 State Bar Edition) in civil cases and *725* ILCS *5/113-3* (2000 State Bar Edition) in criminal cases. These statutes identify definitions associated with indigency; qualifications for meeting the status of indigency; methods for requesting a finding of indigency; responsibilities in a prosecution or defense of a civil or criminal matter; evidence of indigency; and the method for applying for indigency. For further reference and a sample form, click here.

Furthermore, SCOTUS has extended an indigent petitioner's right to have certain fees and costs waived in domestic relations cases as well.[86] Although an indigent defendant is entitled to an attorney, how does the court know when a defendant qualifies for an attorney? Should the court only regard the indigency of a defendant to determine an appointment of an attorney?

The courts have found several instances where a defendant is entitled to have an attorney present. The Supreme Court has identified critical stages as to when this right is Constitutional.[87] **A critical stage** is considered "[a] point in a criminal prosecution when the accused's rights or defenses might be affected by the absence of legal representation."[88]

CONSTITUTIONAL CLIP

85. *Ambrose Bierce Quote*. (n.d.). A-Z Quotes. https://www.azquotes.com/quote/871181
86. *Boddie v. Connecticut*, 401 U.S. 371 (1971).
87. *Rothgery v. Gillespie County*, 554 U.S. 191 (2008).
88. *Id.*

Just as police misconduct triggers the exclusionary rule, a critical stage triggers the accused's right to counsel according to Black's Law Dictionary. The Supreme Court has identified each of the following stages as critical per the Sixth Amendment context:

- Custodial interrogations both before and after commencement of prosecution
- Preliminary hearings prior to commencement of prosecution where "potential substantial prejudice to defendant[s'] rights inheres in the . . . confrontation"
- Lineups and show-ups at or after commencement of prosecution
- During plea negotiations and at the entry of a guilty plea
- Arraignments
- During the pre-trial period between arraignment and the beginning of trial
- Trials
- During sentencing
- Direct appeals as of right
- Probation revocation proceedings and parole revocation proceedings to some extent[89]

Additionally, the court has acknowledged that simply providing an attorney does not meet the standard of this right. The Sixth Amendment does not provide for an equal match in which both attorneys (prosecutor and defense attorney) have the same skills, experience, and resources; however, each attorney should have a baseline of what the court deems effective assistance of counsel. As a result, SCOTUS has combined the baseline of effective assistance with two important cases, *Strickland v. Washington* (1984) and *United States v. Cronic* (1984), to set the standard for identifying effective assistance of counsel.

Strickland v. Washington (1984) implemented a two-part test (to the final disposition of a case) for effectiveness:

1. Whether the attorney's actions were reasonable and
2. Whether those actions would prejudice the final disposition of the case.[90]

Additionally, ineffective assistance of counsel may be the result of denial of an attorney or constructive denial of an attorney.[91] An example of actual denial of an attorney occurred in *Chronic*, when the court determined that an attorney was missing at critical stages of the trial. However, in *Powell v. Alabama* (1932), the court's approach to legal representation is an example of constructive denial of an attorney. The court determined that a ***real estate attorney (with little to no capital trial experience)*** appointed for the nine Black male defendants for a ***capital rape case*** was ineffective. Specifically, the court noted that "attorneys must be qualified and trained to help defendants advocate for their stated interests."[92] The attorney's lacked of training in capital rape cases would surely harm these already vulnerable defendants. Although imperfect, the Constitution and the Sixth Amendment stands as a mechanism ready to address fair and just criminal trial proceedings as evidenced with the six sections represented in this chapter.

89. Sixth Amendment Center. (2020, March 30). Effective assistance at critical stages. https://sixthamendment.org/the-right-to-counsel/effective-assistance-at-critical-stages/

90. *Strickland v. Washington*, 466 U.S. 668 (1984)

91. EFFECTIVE ASSISTANCE, Black's Law Dictionary (12th ed. 2024).

92. *Ibid.*

Critical Reflections:

1. Is each part of the Sixth Amendment equally important? Why or why not?
2. During the criminal justice process, when is the accused entitled to have a lawyer present?
3. Review https://www.legalrightscenter.org/juries.html. What additional information do you learn about voir dire, peremptory challenges, and jury duty.
4. Is it ever logical for a defendant to proceed in a criminal case without an attorney? Why or why not?
5. According to the 6th Amendment, are there more opportunities for the defendant's Constitutional rights to be violated before or after an accused comes into custody?

Chapter 8 - Amendment VIII: Defining Excessive and Cruel & Unusual Punishment

Amendment VIII

RICHARD J. FORST AND TAUYA R. FORST

LEARNING OBJECTIVES

After reading this chapter, you should be able to:

8.1 Define the unfamiliar terms of the Eighth Amendment.
8.2 Explain the parts of the Eighth Amendment, including rights and freedoms.
8.3 Determine how reasonable bail helps indigent defendants to avoid appearing guilty.
8.4 Compare the different bail options that may be available to a defendant.
8.5 Describe how the excessive fines clause has been leveraged by government to seize personal property.
8.6 Explain what factors are used to determine if something is cruel and unusual punishment.
8.7 Explain the factors used to determine if a fine is excessive.

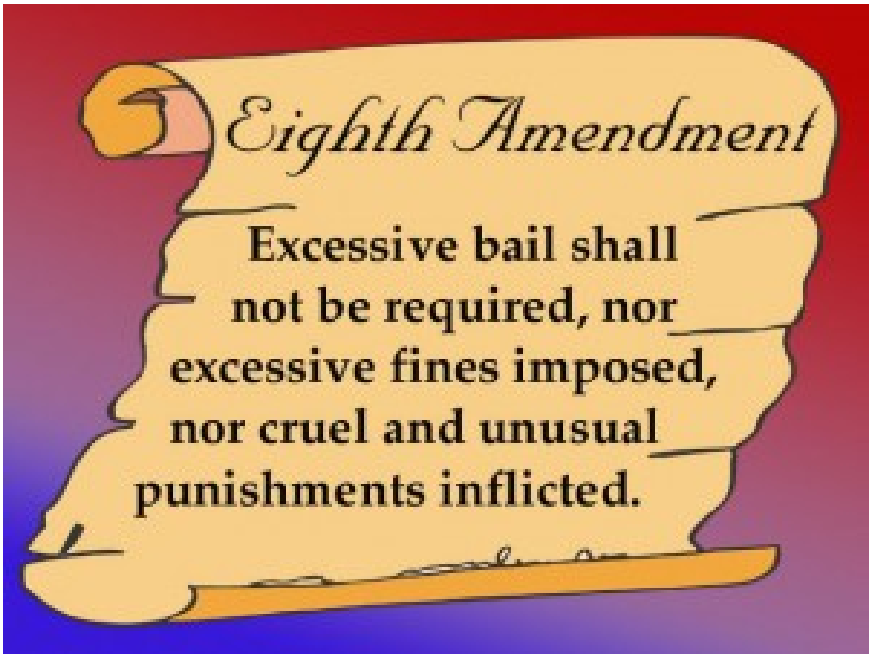
KEY TERMS

Bail
Bail Bond
Cash Bail
Cruel and Unusual Punishment
Excessive Fine
Fine
Imprisonment
Property
Recognizance
Writ of certiorari

Amendment VIII

Passed by Congress September 25, 1789. Ratified December 15, 1791. The first 10 amendments form the Bill of Rights.

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.



Eighth Amendment: Banning Cruel and Unusual Punishment[1]

INTRODUCTION TO AMENDMENT VIII

As previously discussed, Amendment VIII is part and parcel of the Bill of Rights of the United States Constitution as introduced by James Madison. This amendment, in its uniqueness, is almost an exact duplicate of the English Bill of Rights of 1689 (formerly known as An Act Declaring the Rights and Liberties of the Subject and Settling the Succession of the Crown).[2] The American Bill of Rights, Amendment VIII states "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted," while the British Bill of Rights includes this language "That excessive bail ought not to be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."[3]

Following the English's example, the American Eighth Amendment has it roots in the Titus Oates case. Oates was tried by the court system for multiple crimes culminating in executions of many people

Myth: Every defendant is entitled to bail.

1. Shestokas, D. J. (2016). Eighth Amendment: Banning cruel and unusual punishment. *David J. Shestokas*. https://www.shestokas.com/constitution-educational-series/eighth-amendment-banning-cruel-and-unusual-punishment/
2. Britannica, T. Editors of Encyclopaedia (2020, March 19). *Bill of Rights. Encyclopedia Britannica*. https://www.britannica.com/topic/Bill-of-Rights-British-history
3. Levy, M. (2018, July 12). *Eighth Amendment. Encyclopedia Britannica*. https://www.britannica.com/topic/Eighth-Amendment

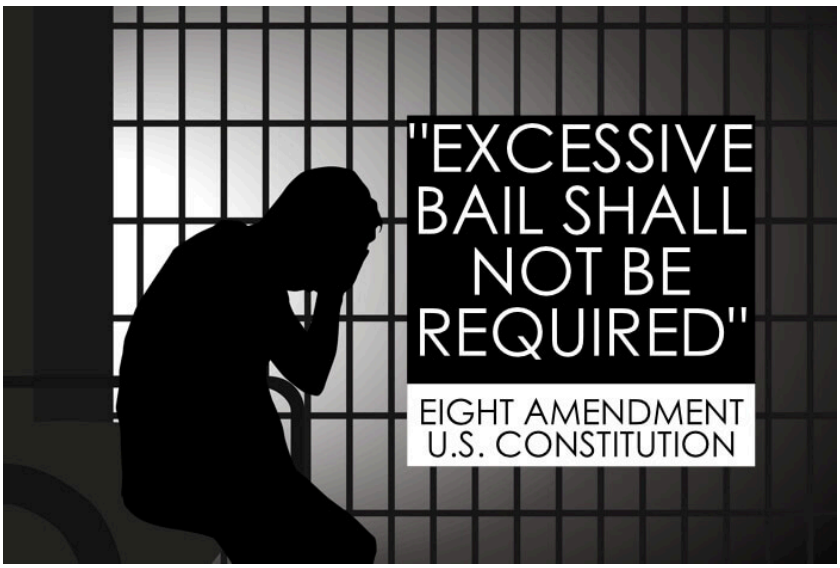
who he wrongfully accused.[4] As you may imagine, Oates' trial ended without an execution, but included harsh penalties.[5] As a result, there was a need to address how punishments are meted out and when they are appropriate and proportional. In England "cruel and unusual punishment" was outlawed allowing judicial discretion to reasonably adhere to standards against "cruel and unusual" punishment.[6] However, this approach resonated with the United States of America and the Framers began discussions to include the American Bill of Rights (amendments), once the original Constitution was ratified. Thus, the Eighth Amendment boasts of three key portions which underscore how defendants are to be treated within the American criminal justice system.

ANALYSIS OF AMENDMENT VIII

Three Parts of Amendment VIII

Part I: Right Against Excessive Bail

Excessive bail shall not be required,



Excessive Bail Shall Not Be Required[7]

When reviewing Amendment VIII, one portion leads most discussions. However, bail is a foundational piece of the American criminal justice system and has been broadly and widely debated. Bail allows for great judicial and prosecutorial discretion. In *Bell v. Wolfish* (1979), the Court introduced a stricter view of the presumption of innocence, indicating it is "a doctrine that allocates the burden

4. Bessler, J. (2019). A century in the making: The glorious revolution, the american revolution, and the origins of the U.S. Constitution's eighth amendment. *William & Mary Bill of Rights Journal, 27*, 989–1077. https://scholarworks.law.ubalt.edu/cgi/viewcontent.cgi?article=2086&context=all_fac
5. *Ibid.*
6. *Ibid.*
7. Barnett, B. (2016b, September 21). *"Excessive Bail Shall Not Be Required" | Bail is Not Intended to be Punishment*. Fort Worth Criminal Defense, Personal Injury, and Family Law. https://www.bhwlawfirm.com/excessive-bail-punishment-texas/

of proof in criminal trials," while denying that it "appli[es] to a determination of the rights of a pretrial detainee during confinement before his trial has even begun.[8]"

Bail Schedule[9]

Because of this view, judges understand that the right against excessive bail does not support a right to bail for all detainees in all cases. According to Black's Law Dictionary, **bail** is defined as "[a] security such as cash, a bond, or property; esp., security required by a court for the release of a criminal defendant who must appear in court at a future time."[10] There are four common types of bail which exist within the United States bail system:

- release on one's own recognizance,
- cash bail,
- property bond, and
- cash bond.

Each of these types of bail produces an ability to allow the accused to answer to criminal charges while remaining in the community. If an accused seeks bail, then the best option is receiving bail on one's own recognizance. Being released on **one's own recognizance or release on recognizance** is the least pretrial condition, as it only requires the accused to sign a promise to return to court to answer for pending criminal charges. Black's defines this concept as "[t]he pretrial release of an arrested person who promises, usu. in writing but without supplying a surety or posting bond, to appear for trial at a later date."[11] Further, this type of release bears no financial burden for the accused. There are many factors which a judge will consider when determining if a defendant is a good match for release on one's own recognizance.

The judge considers personal aspects of the accused to determine eligibility such as:

1. criminal history,
2. the seriousness of criminal charges,

8. Bell v. Wolfish, 441 U.S. 520, 533 (1979)
9. *Bail schedule*. (n.d.). [Slide show]. NACDL. https://www.nacdl.org/getattachment/76e01bfc-9e62-4838-97cb-4db3f5bb21ee/bail-presentation.pdf
10. BAIL, Black's Law Dictionary (12th ed. 2024).
11. RELEASE ON RECOGNIZANCE, Black's Law Dictionary (12th ed. 2024).

3. propensity to flee from the trial as well as
4. the accused's behavior within the community.

According to Black's Law Dictionary, **recognizance** is defined as "[a] bond or obligation, made in court, by which a person promises to perform some act or observe some condition, such as to appear when called, to pay a debt, or to keep the peace; specif., an in-court acknowledgment of an obligation in a penal sum, conditioned on the performance or nonperformance of a particular *act*."[12]

Bail should never be used as a punishment.

Remember, bail ensures the accused will appear for trial and all pretrial required hearings. A judge may include additional conditions such as no or limited contact with the alleged victim. After all, the accused is seeking pre-conviction release meaning the accused has not been convicted of a crime; therefore, they should be considered ***innocent until proven guilty***. This presumption of innocence supports the accused in their appearance before the court. When the accused appears without shackles, handcuffs, detention garments, and a disheveled look, the trier of fact (either jurors or judge) may inadvertently attach some level of guilt. However, when the accused is dressed in a suit and tie [suit or dress], having rested at home the night before the hearing, he [she] may be viewed more favorably.[13]

Another method for obtaining bail is via the option of cash bail. **Cash bail** is defined as "[a] sum of money (as opposed to a surety bond) posted to secure a criminal defendant's release from jail."[14] Research from the Prison Policy Initiative states almost half a million people are detained and awaiting trial in the United States. "Many are jailed pretrial simply because they can't afford money bail, others because a probation, parole, or ICE office has placed a hold"[15] on their release. The number of people in jail pretrial has nearly quadrupled since the 1980s."[16]

In February 2021, Governor J.B. Pritzker signed a bill which places Illinois in the forefront of criminal justice as it as been in other areas such as juvenile justice. Governor Pritzker signed "a landmark criminal justice reform package into law..., making the state among the first to eliminate the use of cash bail."[17]

12. *Ibid.*
13. Etemad, N. (2019). To shackle or not to shackle? the effect of shackling on judicial decision-making. *Review of Law and Social Justice, 28*(2). https://gould.usc.edu/students/journals/rlsj/issues/assets/docs/volume28/Spring2019/2-4-etemad.pdf
14. BAIL, Black's Law Dictionary (12th ed. 2024).
15. Rabuy, B., & Kopf, D. (2016, May 10). *Detaining the poor: How money bail perpetuates an endless cycle of poverty and jail time [Press release]*. Prison Policy Initiative. https://www.prisonpolicy.org/reports/incomejails.html
16. *Ibid.*
17. Evans, E., & Oceguera, R. (2021, February 23). Illinois criminal justice reform ends cash bail, changes felony murder rule. Injustice Watch. https://www.injusticewatch.org/news/2021/illinois-criminal-justice-reform-cash-bail-felony-murder/#:%7E:text=Harper)-,Illinois%20Gov.,the%20use%20of%20cash%20bail.&text=%E2%80%9CToday%20is%20a%20historic%20first,%2C%E2%80%9D%20said%20Illinois%20State%20Sen.

"True Commitment To Justice": Illinois Becomes The First State To End Cash Bail[18]

Dubbed the Pretrial Fairness Act, the Safety, Accountability, Fairness and Equity-Today (or SAFE-T) Act of 2021 was enacted to make changes to the Illinois' criminal justice system. Originally, the statute was scheduled to take effect on January 1, 2023. "Nonviolent defendants who cannot pay for release will no longer remain incarcerated before trial, reversing a measure that opponents say criminalizes poverty. Instead, judges must impose the least restrictive conditions necessary to ensure a defendant's appearance in court."[19] In reality, the measure was a bipartisan, multiagency attempt to address criminal justice reform in Illinois. Although litigation persisted from across the state, the historical implementation will occur. "The Illinois Supreme Court ... upheld the constitutionality of a state law ending cash bail, ordering implementation in mid-September."[20] The 5-2 ruling creates a path for those charged with minor, nonviolent offenses to be released in a pretrial basis. On the other hand, the ruling is clear to note that those who are at risk for avoiding trial, have violent tendencies, and/or deemed a threat to the public, will remain detained as was the case prior to this act.[21] Both opponents and supporters of this historic approach to cash bail weighed in from the bench. '"The Illinois Constitution of 1970 does not mandate that monetary bail is the only means to ensure criminal defendants appear for trials or the only means to protect the public," Justice Mary Jane Theis wrote in the ruling."[22] While those who oppose this act spoke from a textualist mode of interpretation, 'Justices David Overstreet and Lisa Holder White both dissented from the ruling, calling the end to the state's cash bail a "direct violation of the plain language of our constitution's bill of rights.'"[23]

18. *Roland martin unfiltered daily digital show*. (n.d.). Retrieved August 3, 2023, from https://i.ytimg.com/vi/YLxZjokzlqo/maxresdefault.jpg
19. Evans & Oceguera, 2021.
20. Franklin, J. (2023, July 18). Illinois Supreme Court rules in favor of ending the state's cash bail system. *NPR*. https://www.npr.org/2023/07/18/1188349005/illinois-ends-cash-bail-system-state-supreme-court
21. *Ibid.*
22. *Ibid.*
23. *Ibid.*

August 2014 photo shows a statue outside of the Illinois Supreme Court in Springfield, IL[24]

Yet another option for obtaining bail is the bail bond system. **Bail bond** is defined as "[a] bond given to a court by a criminal defendant's surety to guarantee that the defendant will duly appear in court in the future and, if the defendant is jailed, to obtain the defendant's release from confinement."[25] This option allows an accused to use a bail bondsperson to make an appropriate payment arrangement if the accused is unable to pay the full bail amount. "In return for the defendant's putting up a percentage of the total bond, usually 10 percent, the bondsperson will guarantee the remaining amount to the court should the defendant not be present for any court appearance."[26]

An interactive H5P element has been excluded from this version of the text. You can view it online here: https://cod.pressbooks.pub/usconstitutionalive2e/?p=39#h5p-2

Part II: Right Against Excessive Fines also known as Excessive Fines Clause

nor excessive fines imposed,

24. Perlman, S., /AP. (2023, July 18). *Illinois supreme court rules in favor of ending the state's cash bail system*. NPR. https://www.npr.org/2023/07/18/1188349005/illinois-ends-cash-bail-system-state-supreme-court
25. BOND, Black's Law Dictionary (12th ed. 2024).
26. American Bar Association. (2019, September 9). *How courts work*. https://www.americanbar.org/groups/public_education/resources/law_related_education_network/how_courts_work/bail/

Excessive Fines Photograph[27]

When discussing the Eighth Amendment, legal discussions almost automatically go to cruel and unusual punishment. However, the second part of the amendment is almost always ignored. Right against excessive fines imposed within this portion of the amendment points to common aspects of penalty for criminal offenses. Judicial discretion is significant if the fines are not purely proscribed by law. Recall we identified all of the sources of law as described in Chapter 2. As mentioned each level of government – federal, state, and local, refer to the law differently. Codes, statutes, and ordinances, respectfully, lists and provides penalty for criminal matters. According to Fuller, criminal penalties include incarceration (prison), detention (jail), parole, death penalty, probation, fines, or any combination of those punishments.[28]

Criminal fines are included in codes, statutes, and ordinances and may be named solely or in conjunction with other penalties. In general, fines are included in response to less serious offenses, non-violent crimes, which carry pecuniary or theft issues. According to Black's Law Dictionary, a **fine** is "[a] pecuniary criminal punishment or civil penalty payable to the public treasury."[29] Fines are typically seen in the criminal and civil statutes. Fines may arise in a case for various reasons.

Within criminal fines, the U.S. Supreme Court discussed the Excessive Fines Clause in an unanimous and unusual decision. In *Timbs v. Indiana* (2019), the court explored the central question of whether the Excessive Fines Clause of the Eighth Amendment would apply to the states under the Fourteenth Amendment. The case involved the forfeiture of the accused's Land Rover, after he was involved in a drug arrest where $1200 fines and costs were at issue. Justice Kagan pointed out in the argument, the issue includes both the incorporation and scope of the Excessive Fines Clause. The Court decided that the Excessive Fines Clause applies to the states, the question is how to determine what the fine should be and when is the fine excessive. The Supreme Court of the United States

27. Eggert, B. (2019, February 22). Excessive fines and fees a thing of the past for local governments. *IC System*. https://www.icsystem.com/excessive-fines-and-fees-a-thing-of-the-past-for-local-governments/
28. Fuller, J. (2018). *Intro to Criminal Justice*. Oxford University Press, Oxford (1st Edition).
29. FINE, Black's Law Dictionary (12th ed. 2024).

vacated the Supreme Court of Indiana which allowed the forfeiture of the Land Rover and remanded the case for further proceedings consistent with the Eighth Amendment.

According to Black's Law Dictionary, an **excessive fine** is defined as "[a] fine that is unreasonably high and disproportionate to the offense committed."[30]

CONSTITUTIONAL CLIP

"The Excessive Fines Clause limits the government's power to extract payment as punishment for an offense. A fine is excessive when it is grossly disproportionate to the gravity of the offense that it was designed to punish *United States v. Bajakajain* (1998).[31] Courts must also defer to the legislature regarding the appropriate range of punishment for an offense."[32] Therefore, judges are required to follow the intent of the law makers when sentencing defendants to fines.

Is the fine excessive?

According to *United States v. Jose* (2007), there are three factors which courts consider when determining if a fine is excessive:

1. Whether the statute was designed to punish the accused;
2. The amount of other approved penalties; and
3. The harm caused by the accused.[33]

Upon completion of the analysis, the court will deem the fine within the proper range and/or excessive range per these factors. Black's notes an example of an excessive fine as a civil forfeiture in which the property was not an instrumentality of the crime and the worth of the property was not proportional to the owner's culpability.[34] Property in this context means "[c]ollectively, the rights in a valued resource such as land, chattel, or an intangible."[35] It is common to describe property as a "bundle of rights."[36] Can you think of different types of cases and forfeitures of property where the court would deem the fine excessive?

30. *Ibid.*
31. *United States v. Bajakajain*, 524 U.S. 321 (1998)
32. Carroll, P. (2020, April 5). *Issues of excessive fines coming to a court near you.* Trends In State Courts. https://www.ncsc.org/trends/monthly-trends-articles/2019/issues-of-excessive-fines-coming-to-a-court-near-you#:%7E:text=A%20claim%20based%20upon%20the,it%20was%20designed%20to%20punish.
33. LII / Legal Information Institute. (n.d.). *Excessive fines*. Retrieved March 25, 2021, from https://www.law.cornell.edu/wex/excessive_fines
34. FINE, Black's Law Dictionary (12th ed. 2024).
35. PROPERTY, Black's Law Dictionary (12th ed. 2024).
36. *Ibid.*

Part III: Right Against Cruel and Unusual Punishments

nor cruel and unusual punishments inflicted.

Right against cruel and unusual punishment[37]

When discussing the Eighth Amendment, legal discussions reflexively go to cruel and unusual punishment. Even more typical is how such discussions conclude that the Amendment refers only to death eligible cases. According to Black's Law Dictionary, **cruel and unusual** punishment is defined as "[p]unishment that is torturous, degrading, inhuman, grossly disproportionate to the crime in question, or otherwise shocking to the moral sense of the community."[38] The phrase "cruel and unusual" is ambiguous and sometimes convoluted as applied under the Eighth Amendment. This phrase generates much division, dialogue, and disagreement. In fact, most individuals who formulate an opinion on cruel and unusual punishment have not viewed or been closely involved in a case where it is applied to death penalty, capital punishment or death eligible cases. So the question really becomes, does the court view all capital punishment cases as cruel and unusual as noted under the Eighth Amendment?

According to the *Congressional Quarterly's* (1979), the court has not deemed the "...death penalty as invariably cruel and unusual."[39] The court has generally indicated that it would apply the amendment to prohibit punishments it found barbaric or disproportionate to the crime punished."[40] It is important that we ask the correct question in the death penalty dialogue. According to the Equal Justice Initiative, "The question we need to ask about the death penalty in America is not whether someone deserves to die for a crime. The question is whether we deserve to kill."[41] The question sparks more discussion

37. *What is the 8th Amendment?* (n.d.). https://www.sportsmansbailbonds.com/blog/what-is-the-8th-amendment
38. CRUEL AND UNUSUAL PUNISHMENT, Black's Law Dictionary (12th ed. 2024).
39. *Congressional Quarterly's Guide to the U.S. Supreme Court 575* (Elder Witt ed., 1979)
40. *Ibid.*
41. *Children in adult prison.* (2021, January 13). Equal Justice Initiative. https://eji.org/issues/children-in-prison/

than provide answers. The authors of this textbook believe this is appropriate as many legal discussions end in more questions, than answers.

The Supreme Court of the United States noted that the Eighth Amendment's Right Against "cruel and unusual punishment" applies to many categories of identified prisoner rights. Prisoner rights on this topic, include, but are not limited to the following:

- "The right to humane facilities and conditions
- The right to be free from sexual crimes
- The right to be free from racial segregation
- The right to express condition complaints
- The right to assert their rights under the Americans with Disabilities Act
- The right to medical care and attention as needed
- The right to appropriate mental health care
- The right to a hearing if they are to be moved to a mental health facility."[42]

These important rights are afforded to incarcerated individuals subject to the United States Constitution and the laws, codes, and acts of the United States of America. These rights are guaranteed regardless of the prisoner's alleged or confirmed crime, degree of heinousness, and/or the their sentence.[43] Accordingly, this text will delve deeper into four categories associated with the Eighth Amendment's "cruel and unusual punishment."

Four Categories applying Cruel and Unusual Punishment

There are four categories to which the Supreme Court of the United States applies the third part of the Eighth Amendment. The phrase "cruel and unusual punishment" as noted above began in a case for harsh and severe prisoner's sentencing. Therefore, this current application remains in alignment with the Supreme Court in *Weems v. United States* (1910). The Court would extend this concept to three additional categories.

1. Death Penalty
2. Imprisonment
3. Age, and
4. Prisoner's Rights as evidenced in the sections to follow.

42. Findlaw.com's team (Ed.). (2017, July 20). *Rights of inmates.* Findlaw.com. Retrieved July 17, 2023, from https://www.findlaw.com/civilrights/other-constitutional-rights/rights-of-inmates.html

43. *Ibid.*

a. Death Penalty

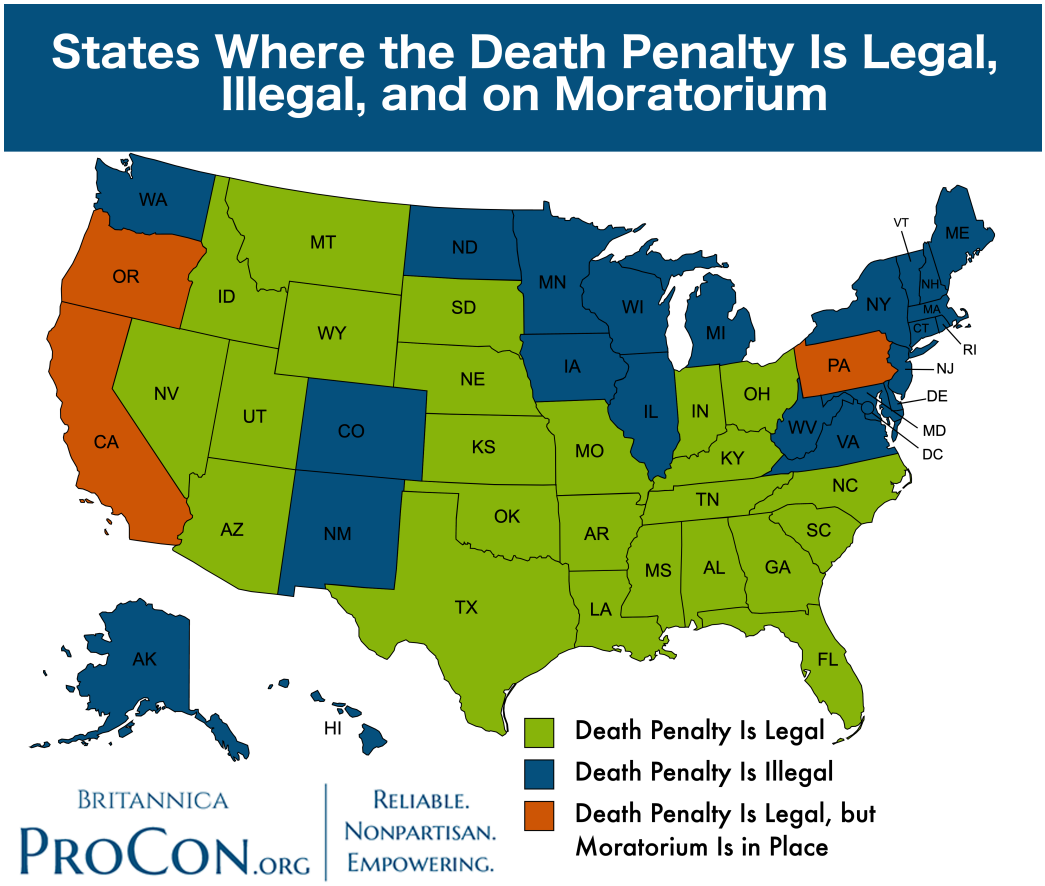
CONSTITUTIONAL CLIP

At the beginning of the 20th century, the Supreme Court held in *Weems v. United States* (1910) that excessive punishments disproportionate to the crime may also be 'cruel and unusual.'[44] Although the case does not involve the death penalty, the Court identified the perimeters for cruel and unusual punishment.

> "... [T]he Court held that punishment is cruel and unusual if it is grossly excessive for the crime. Paul Weems, a government official in the Philippines, was convicted of falsifying pay records. Under a territorial law inherited from the Spanish penal code, Weems was sentenced to *cadeña temporal*, a punishment involving fifteen years of hard labor in chains, permanent deprivation of political rights, and surveillance by the authorities for life. Since the Philippine Bill of Rights was Congress's extension to the Philippines of rights guaranteed by the Constitution, the meaning of cruel and unusual punishment was the same in both documents."[45]

On May 24, 2021, the U.S. Supreme Court denied a writ of certiorari from a Missouri death row inmate, Ernest Johnson.[46] Recall from Chapter 2 how a case proceeds to the Supreme Court of the United States. A **writ of certiorari** is "[a]n extraordinary writ issued by an appellate court, at its discretion, directing a lower court to deliver the record in the case for review ... The U.S. Supreme Court uses certiorari to review most of the cases that it decides to hear."[47] It is this power which allowed the court to shape its destiny. According to Wright, "[c]ertiorari control over the cases that come before the Court enables the Court to define its own institutional role."[48]

44. *Weems v. United States*, 217 U.S. 349 (1910).
45. "Weems v. United States 217 U.S. 349 (1910)." *Encyclopedia of the American Constitution*. . .Retrieved June 30, 2023 from Encyclopedia.com: https://www.encyclopedia.com/politics/encyclopedias-almanacs-transcripts-and-maps/weems-v-united-states-217-us-349-1910
46. *Johnson v. Precythe*, 593 U.S. ____ (2021)
47. CERTIORARI, Black's Law Dictionary (12th ed. 2024).
48. Charles Alan Wright et al., *Federal Practice and Procedure* §4004, at 22 (2d ed. 1996).



States with the Death Penalty, Death Penalty Bans, and Death Penalty Moratoriums[49]

The application for a writ included Johnson's request for a firing squad instead of the lethal injection which he believed could lead to an excruciating death.[50] The defendant suffers from epilepsy as a result of a brain tumor as well as damage caused by surgery to remove the tumor. He contends that he will experience excruciating seizures if Missouri executes him by lethal injection of the drug pentobarbital. The court's requirement for four justices to agree to consider the case (otherwise known as granting the writ of certiorari) was a 6-3 decision, with all of the Republican appointees in the majority and the Democratic appointees in the minority. Justice Sonia Sotomayor wrote in the dissent, "Missouri is now free to execute [the inmate] in a manner that, at this stage of the litigation, we must assume will be akin to torture given his unique medical condition."[51]

49. ProCon.org. (2023, April 24). *Death penalty states, bans and moratoriums – ProCon.org*. Death Penalty. https://deathpenalty.procon.org/states-with-the-death-penalty-and-states-with-death-penalty-bans/
50. *Johnson v. Precythe*, 2021.
51. Washington Post, "New law makes inmates choose electric chair or firing squad," May 17, 2021

CONSTITUTIONAL CLIP

On May 14, 2021, Governor Henry McMaster of South Carolina signed Act 43 that forces South Carolina death row inmates to choose how to die: electric chair or firing squad.[52] The law was passed to expedite executions, which had been halted since 2011 due to a shortage of the drugs needed to execute by lethal injection. South Carolina Supreme Court placed a stay on Richard Moore as he was the first prisoner subject to execution under this law. Subsequently, the choice of execution remains unresolved as the South Carolina Supreme Court heard arguments of constitutionality of this act.

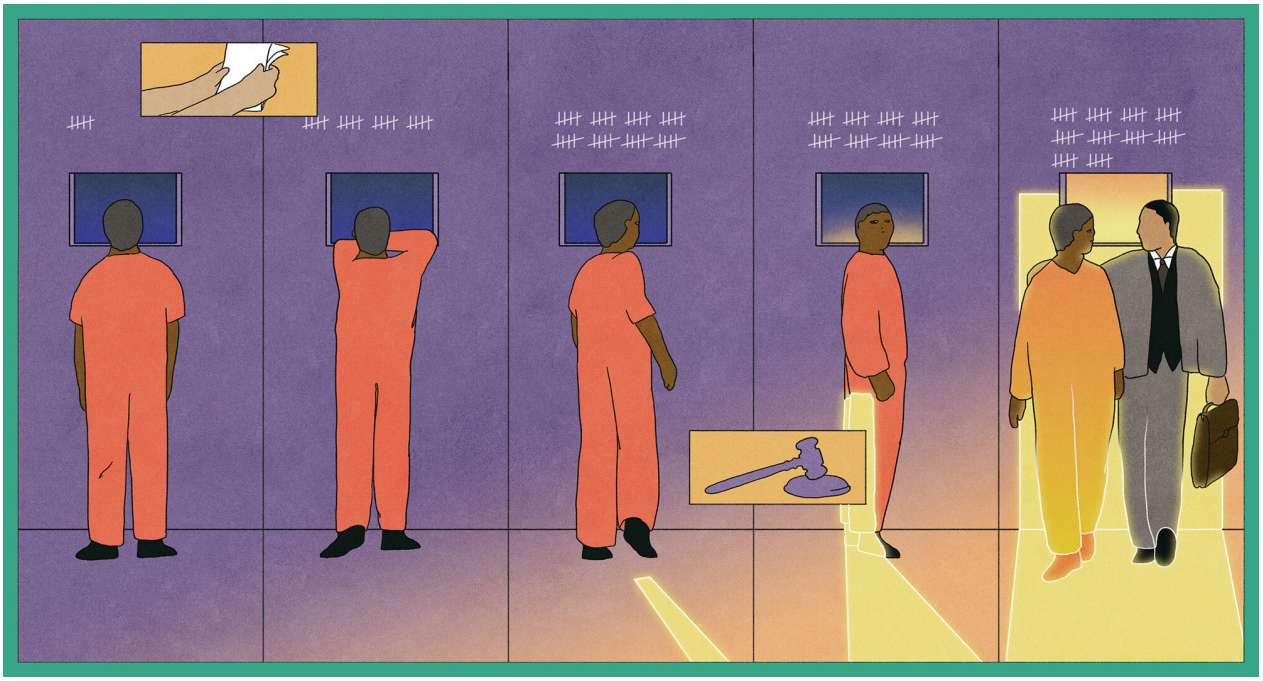
Further complicating this matter is how a death row prisoner may feel when he dies. In June 2022, the Supreme Court of the United States decided a case in which a Georgia death row inmate requested death by firing squad as opposed to the state authorized death by lethal injection due to his "severely compromised" veins.[53] Michael Nance was arrested, convicted, and sentenced to death in 2002 for shooting and killing a bystander after a bank robbery in 1993. Subsequently, Nance has requested habeas review of this sentence. The motion was denied. Later, Nance brought a "suit under §1983 to enjoin Georgia from using lethal injection to carry out his execution. Lethal injection is the only method of execution that Georgia law now authorizes. Nance alleges that applying that method to him would create a substantial risk of severe pain [due to the condition of his collapsed veins.]"[54] This suit was dismissed as untimely, while the 11th Circuit court rejected the suit based upon its categorization as a second and subsequent habeas petition.

Thus, Nance appealed the decision to the Supreme Court of the United States. Writing for the court in a 5-4 decision, Justice Kagan stated "a death row inmate may attempt to show that a State's planned method of execution, either on its face or as applied to him, violates the Eighth Amendment's prohibition on 'cruel and unusual' punishment." As a result, the Supreme Court granted Nance the ability to pursue his lawsuit against the state of Georgia for death by firing squad.

Do you agree with the court? In your opinion did the court get it right? Why or why not?

52. *Ibid.*
53. *Nance v. Ward*, 597 US _ (2022).
54. *Id.*

b. Imprisonment



Empowering Prosecutors to Review Older Sentences[55]

The cruel and unusual punishment as penalty suggests evaluation of the Eighth Amendment must include proportionality of the crime as it relates to several key factors. The Supreme Court of the United States emphasized the proportionality of punishment of any crime – felony or misdemeanor, as noted in *Solem v. Helm* (1983).[56] The *Solem* factors include

- "the severity of the offense,
- the harshness of the penalty,
- the sentences imposed on others within the same jurisdiction, and
- the sentences imposed on others in different jurisdictions."[57]

We must remember that the Supreme Court of the United States has the ability to overturn itself as previously stated in Chapter 2. Thus, this case set the application for cruel and unusual punishment while inmates are in confinement or **imprisonment**. According to Black's Law Dictionary, imprisonment is defined as "[t]he act of confining a person, [especially] in a prison"[58] or "[a] building or complex where people are kept in long-term confinement as punishment for a crime, or in short-term detention while waiting to go to court as criminal defendants; [specifically], a state or federal facility of confinement for convicted criminals, [especially] felons."[59] In *Harmelin v. Michigan* (1991), the

55. Nadel, M., & Lee, C. (2022b, November 11). Prosecutors in these states can review sentences they deem extreme. few do. *The Marshall Project*. https://www.themarshallproject.org/2022/11/11/prosecutors-in-these-states-can-review-sentences-they-deem-extreme-few-do-it
56. *Solem v. Helm, 463 U.S. 277 (1983).*
57. *Id.*
58. IMPRISONMENT, Black's Law Dictionary (12th ed. 2024).
59. PRISON, Black's Law Dictionary (12th ed. 2024).

court overturned their prohibition on disproportionality, but noted that the defendant's life sentence without the possibility of parole is an unconstitutional extreme case which could violate the Eighth Amendment.[60]

According to Cornell Law, a later holding affirmed how the court regards the disproportionality standard affirming in *Lockyer v. Andrade (2003)*, that proportionality is not the norm, but is only available in "exceedingly rare" and "extreme cases."[61]

Despite the stated desire for proportionality in *Solem v. Helm* (1983), the reality in today's America is quite different.

Additionally, Alexander in "The New Jim Crow," reported the overwhelming majority of people swept into the system of mass incarceration are charged with nonviolent crimes and drug offenses. In 2019, data reported by the Vera Institute of Justice revealed that police make more than ten million arrests each year, but only 5% of those arrests are for violent offenses.[62] Drug crimes remain the largest category of arrests. According to the Pew Research Center, eight out of ten people on probation and two-thirds of the people on parole have been convicted of nonviolent crimes.[63] Almost half, 48%, of people in state prisons today have been convicted of nonviolent crimes.[64] The statistic is actually worse than it appears, because those convicted of violent crimes generally serve much longer sentences, skewing their share of the prison population upward. Therefore, while the punishment of non-violent offenders may be considered cruel, it is anything but unusual.[65]

60. *Harmelin v. Michigan*, 501 U.S. 957 (1991)
61. *Lockyer v. Andrade*, 538 U.S. 63 (2003)
62. Alexander, M. (2020). *The new jim crow (mass incarceration in the age of colorblindness – 10th anniversary edition)* (1st ed.). NEW PRESS.
63. Sawyer, W., & Wagner, P. (2020, March 24). *Mass incarceration: The whole pie 2020 [Press release]*. https://www.prisonpolicy.org/reports/pie2020.html#slideshows/slideshow1/2
64. *Ibid.*
65. Alexander, 2020.

c. Age

14-year-old Allen Miller from Miller v. Alabama[66]

In Just Mercy: A Story of Justice and Redemption, Attorney Bryan Stevenson recounts many first-hand accounts of how human nature engages in cruel and unusual punishment according to his laymen's definitions as explored in many of his cases.[67] Attorney Stevenson represented clients who alleged age as a mitigating factor for their reduction in sentencing based upon the disproportionality of the crime. Juveniles have many issues and challenges as they "act impulsively, recklessly, and irresponsibly."[68]

Attorney Stevenson and the Equal Justice Initiative invited the Supreme Court of the United States to further expand the application of age within the cruel and unusual punishment as it reviewed a combined case in *Miller v. Alabama* (2012).[70] In *Miller,* the court held that mandatory life without the possibility of parole is unconstitutional amongst juveniles. Unfortunately, the court ***did not*** summarily dismiss all life without the possibility of parole sentences noting that if they are part and parcel of a

Because of the juveniles' diminished ability to critically think and behave, Stevenson argued in *Graham v. Florida* (2011) that "barred life-without-parole sentences for juveniles convicted of nonhomicide offenses" is cruel and unusual punishments.[69]

66. Totenberg, N. (2012, March 20). Do juvenile killers deserve life behind bars? *NPR*. https://www.npr.org/2012/03/20/148538071/do-juvenile-killers-deserve-life-behind-bars
67. Stevenson, B. (2015). *Just mercy: A story of justice and redemption* (Reprint ed.) One World.
68. *Children in adult prison*. (2021, January 13). Equal Justice Initiative. https://eji.org/issues/children-in-prison/
69. *Stevenson*, 2015.
70. *Miller v. Alabama*, 567 US _ (2012).

juveniles' sentence, then it should occur few and far in *between.*[71] "The Court did not ban all juvenile life-without-parole sentences, but held that requiring judges to consider 'children's diminished culpability, and heightened capacity for change' should make such sentences "uncommon."[72] Therefore, it appears the Supreme Court of the United States is set forth the legal standard for determining if defendant's Eighth Amendment rights amount to cruel and unusual punishment.

Although *Miller v. Alabama* was a pivotal juvenile decision, approximately one-quarter of states changed their stance on juvenile sentences. These states "applied Miller retroactively to people already serving the banned sentence and granted them new sentencing hearings."[73] Furthermore, "a handful of states, including Louisiana, refused to [allow a new sentencing hearing]."[74] In *Montgomery v. Louisiana* (6-3), the United States Supreme Court held *Miller v. Alabama* barred mandatory life without parole sentences for youth. The Court extended this holding retroactively."[75]

This landmark decision paved the way for a remarkable occurrence. Mr. Joseph Ligon, 83, the oldest living juvenile lifer was released from prison after 68 years.[76] At that time, Pennsylvania and Louisiana were two states that refused to apply *Miller v. Alabama* retroactively. Pennsylvania's refusal created an opportunity for one of the worst miscarriages of juvenile justice by the United States. At 15, Joseph Ligon was convicted of two counts of first-degree murder after a drinking spree with three other youth ended tragically with two people dead. The court sentenced Ligon to life without parole. After *Montgomery*, the courts reset each of Mr. Ligon's sentences to thirty-five years. All sentences were to be served ***concurrently*** with an opportunity for parole. When offered, Ligon refused parole on several occasions, citing instead that he wanted to leave without governmental conditions. Ligon eventually brought suit which resulted in his release from prison without oversight.[77] However, housing Ligon for almost 7 decades has its costs. "According to an estimate by the Vera Institute of Justice, it cost the state of Pennsylvania nearly three million dollars to incarcerate Ligon for 68 years, and that's without medical costs."[78]

Furthermore, a Mississippi petite jury convicted Brett Jones of murdering his grandfather when he was 15 years old. Murder in Mississippi carried a mandatory sentence of life without parole. Jones was sentenced to life without parole. Jones' conviction pre-dated both *Miller v. Alabama* (2012) *and Montgomery v. Louisiana* (2016), but he was granted a resentencing to ensure that the penalty addressed the *Miller* and *Montgomery* challenges. Recall *Miller* held that the Eighth Amendment permits a life-without-parole sentence for a defendant who committed a homicide when he or she was under 18, but only if the sentence is not mandatory and the sentencer therefore has discretion to impose a lesser punishment."[79] Recall *Montgomery* provides this standard retroactively. In this case, Jones was resentenced to the same life without parole. Jones requested review of this outcome from the SCOTUS. The court upheld (6-3) the constitutionality of Jones' life without parole sentence. The court further noted that

71. Id.
72. *Children in adult prison*. (2021, January 13). Equal Justice Initiative. https://eji.org/issues/children-in-prison/
73. *Miller v. Alabama*, 2012.
74. Children in adult prison. (2021, January 13). Equal Justice Initiative. https://eji.org/issues/children-in-prison/
75. *Montgomery v. Louisana*, *577* US _ (2016)
76. *Commonwealth of Pennsylvania.v. Ligon*, 1845 EDA 2017 (Pa. Super. Ct. 2019).
77. *Id.*
78. CBS News. (2021, March 16). After 68 years in prison, "juvenile lifer" Joe Ligon is free and hopes for a "better future." *CBS News*. https://www.cbsnews.com/news/joe-ligon-longest-serving-juvenile-lifer/
79. *Jones v. Mississippi*, 593 U.S. _ (2021).

> "In the case of a defendant who committed homicide when he was under 18, Supreme Court precedent does require the sentencer to make a separate factual finding of permanent incorrigibility before sentencing the defendant to life without parole; a discretionary sentencing system is both constitutionally necessary and constitutionally sufficient."[80]

This examination reminds the country of the chipping away at the progress made for juvenile offenders who receive a mandatory life without parole sentence under 18 years old. These offenders should be sentenced, but must have a review which includes "a sentencer decid[ing] whether the juvenile offender before it is a child whose crimes reflect transient immaturity or is one of those rare children whose crimes reflect irreparable corruption" as noted in *Tatum v. Arizona*.[81] In her dissent, Justice Sotomayor joined by Justice Kagan and Justice Breyer, noted Jones was requesting such a determination. Therefore, Justices Kavannaugh, Roberts, Barrett, Gorusch, and Alito joining in the opinion which upheld the life without parole sentence, but claimed to leave *Miller* and *Montgomery* undisturbed. The justices attributed their opinions to the state's sovereign ability to execute justice as they see fit.[82]Thus, the majority shifted federal judicial authority found in *Miller* and *Montgomery* back to the states for final determination.

d. Prisoners' Rights

Deplorable prison conditions[83]

There are many examples where cruel and unusual punishment may apply to prisoners housed in the prisons and jails. These violations of prisoners' rights include, but are not limited to:

- protection against beatings, ***Hudson v McMillian* (1992)** where the Supreme Court held an

80. *Id.*
81. *Tatum v. Arizona*, 580 U. S. _, _ (2016) (SOTOMAYOR, J., concurring in decision to grant, vacate, and remand) (slip op., at 3) (internal quotation marks omitted).
82. *Jones v. Mississippi*, 2021.
83. *How atrocious prisons conditions make us all less safe*. (2021, August 23). Brennan Center for Justice. https://www.brennancenter.org/our-work/analysis-opinion/how-atrocious-prisons-conditions-make-us-all-less-safe

Eighth Amendment violation occurred when the guards maliciously and sadistically beat Hudson.[84]

- lack of adequate medical care, ***Estelle v. Gamble*** **(1976)** where a prison employees "deliberate indifference" to the "serious medical needs" of prisoners is an Eighth Amendment violation.[85]
- lack of care – resulting from overcrowding, ***Brown v. Plata*** **(2011)** where the Court stated prisoners would suffer and potentially die without food sustenance and proper medical care.[86]
- sexual assault by inmates or guards, ***Bearchild v. Cobban*** **(2020)** where the Court held that "sexual conduct for the staff member's own sexual gratification, or for the purpose of humiliating, degrading, or demeaning the prisoner" violates a prisoner's right against cruel and unusual punishment.[87]
- sexual assault by inmates or guards – federal code, **Civil Rights Actions – Convicted Person's Claim of Sexual Assault** which lists:

"Under the Eighth Amendment, a convicted prisoner has the right to be free from "cruel and unusual punishments." To prove the defendant deprived [name of applicable plaintiff] of this Eighth Amendment right, the plaintiff must establish the following elements by a preponderance of the evidence:

1. [Name of applicable defendant] acted under color of law;

2. [Name of applicable defendant] acted without penological justification; and

3. [Name of applicable defendant] [touched the prisoner in a sexual manner] [engaged in sexual conduct for the defendant's own sexual gratification] [acted for the purpose of humiliating, degrading, or demeaning the prisoner]."[88]

Furthermore, the Eighth Amendment provides protections for the basic human needs of prisoners, as prisoners remain humans even, and especially when, in confinement. In *Farmer v. Brennan (1994)*, prisoners were afforded "humane conditions of confinement," to "ensure that inmates receive adequate food, clothing, shelter, and medical care."[89] Still, inmates suffer severe and despicable conditions while confined.

CONSTITUTIONAL CLIP

84. *Hudson v McMillian*, 503 U.S. 1 (1992)
85. *Estelle v. Gamble*, 429 U.S. 97 (1976).
86. *Brown v. Plata*, 131 S.Ct. 1910 (2011)
87. *Bearchild v. Cobban*, 947 F.3d 1130, 1144 (9th Cir. 2020)
88. 42 U.S.C. Sec. 1983, 9.26
89. *Farmer v. Brennan*, 511 U.S. 825, 832 (1994).

In *Taylor v. Riojas* (2020), the Supreme Court of the United States, in a per curiam opinion, noted that the petitioner could sue under the Eighth Amendment for confining him in two inhumane cells over the course of six days.[90]

Taylor was housed in the first cell which contained human feces everywhere including the floor, ceiling, windows, walls, and faucet creating a fear in Taylor. These uninhabitable conditions affected Taylor's physical and mental well-being. As Taylor heightened his responses, this treatment only worsened. Taylor was placed naked in a freezing cell with an inoperable drain. Unfortunately, Taylor involuntarily relieved himself and was forced to sleep naked in his and other persons' bodily waste. The court deemed these conditions appropriate to provide a basis for a lawsuit.[91] Specifically, the court noted that the correctional officers in this situation should have known that the prisoner's cell conditions amounted to "cruel and unusual" punishment. The court stated that when the officers were "[c]onfronted with the particularly egregious facts of this case, any reasonable officer should have realized that Taylor's conditions of confinement offended the Constitution."[92] The court in Taylor set forth the legal standard of a reasonable officer, when evaluating whether an Eighth Amendment violation for prisoner's right occurs.

Finally, the Supreme Court of the United States applied cruel and unusual punishment to women in confinement during childbirth. Recall, the Eighth Amendment prevents officials in a jail or prison from acting with deliberate indifference to an inmate's serious medical needs. Obviously, the Court notes childbirth as a serious medical need. Unfortunately, both federal and state violations persist with 173,000 women and girls incarcerated as of March 2023. These women are forced to endure incomprehensible pain and restraint during childbirth. Essentially, these practices continue and impact about 5-10% of restrained women and girls who gave birth in many types of restraints.[93] These restraints include, but are not limited to: "shackles, flex cuffs, soft restraints, hard metal handcuffs, a black box, Chubb cuffs, leg irons, belly chains, a security (tether) chain, or a convex shield."[94] Because prisoners' rights are constitutionally protected under the Eighth Amendment cruel and unusual punishment clause, these claims are sometimes heavily litigated.

One such civil case filed in a federal court out in New Jersey addressed this issue for an incarcerated mom. The prisoner was incarcerated on non-violent drug charges, but later died from an unrelated illness. The case continued as the estate wanted the county to make improvements for pregnant prisoners. Her loved ones detailed the deceased, incarcerated mom's experience when they explained that the Middlesex County Jail officials "routinely shackled her wrists, ankles, and waist during prenatal visits, as she was transported to the hospital and during labor and childbirth."[95] The deceased

90. *Taylor v. Riojas*, 592 U.S. ____ (2020).

91. American Bar Association. (n.d.). *Cruel & unusual punishment – conversation starter*. Retrieved October 22, 2020, from https://www.americanbar.org/groups/public_education/programs/constitution_day/conversation-starters/cruel-and-unusual-punishment/

92. *Taylor v. Riojas* (2020).

93. Clarke, J., & Simon, R. (2013). Shackling and Separation: Motherhood in prison. *AMA Journal of Ethics, 15*(9), *779–785*. https://doi.org/10.1001/virtualmentor.2013.15.9.pfor2-1309

94. *Does shackling incarcerated women during childbirth violate the Eighth Amendment?* (n.d.). https://www.americanbar.org/groups/litigation/committees/civil-rights/articles/2020/does-shackling-incarcerated-women-during-childbirth-violate-the-eighth-amendment/

95. Joe Atmonavage, NJ Advance Media for NJ.com. (2022, September 13). N.J. county settles case for $750K after woman says she was shackled during labor. *Nj*. https://www.nj.com/news/2022/09/nj-county-settles-case-for-750k-after-woman-says-she-was-shackled-during-labor.html

inmate's estate alleged the mental and physical challenges associated with being shackled during her pregnancy and throughout labor and delivery led Middlesex County representative to settle for $750,000.[96]

In most cases, the "cruel and unusual punishment" violations stem from prisoners' serious medical needs up to and including death. Prisoners, as humans, are entitled to human dignity. What is human dignity? According to Hopwood, "If you translated [human dignity] into policy, it would mean that people in prison would be protected from physical, sexual, and emotional abuse and would be provided with adequate mental health and medical treatment."[97] The right against cruel and unusual punishment requires legislatures as well as the Supreme Court of the United States to weigh in and trace both the Framers' intention and the current evolution for a holistic solution to this important legal issue including a protection of physical, sexual, emotional, mental and physical health. Therefore, when thinking of Amendment VIII and its rights, remember to acknowledge all major parts of the amendment as opposed to the most infamous "cruel and unusual punishment" for a complete analysis.

Critical Reflections:

1. Review the bail schedule listed in this chapter as well as this ruling issued by the Illinois Supreme Court. What is the reasoning used by the court to support their constitutional finding?
2. Do people convicted of nonviolent crimes, such as drug offenses, belong in the same prison population as people convicted of violent crimes? If not, what form of punishment would meet the standards of the Eighth Amendment?
3. Review methods of execution here. What are the legal methods of executions used in the United States? Explain how a prisoner is able to challenge the method of their execution. You must state both sides of the argument.
4. Review the Marshall Project here. What states have the ability to review old sentences? When should prosecutors use their authority to review old sentences? What factors help prosecutors determine if a sentence is cruel and unusual?
5. Define the restraints such as shackles, flex cuffs, soft restraints, hard metal handcuffs, a black box, Chubb cuffs, leg irons, belly chains, a security (tether) chain, and a convex shield. Do you believe these restraints during childbirth violates a mother's Eighth Amendment right against "cruel and unusual" punishment?
6. Case law in recent years such as *Taylor v. Riojas* (2020) has highlighted inhumane treatment of prisoners. How does that inform how you will perform your career in law enforcement understanding detainees, defendants and even convicts have rights.

96. *Ibid.*
97. Brennan City for Justice, 2021.

Chapter 9 - Amendment IX and Amendment X: To Retain or To Reserve

Amendment IX & Amendment X

RICHARD J. FORST AND TAUYA R. FORST

LEARNING OBJECTIVES

After reading this chapter, you should be able to:

9.1 Define the unfamiliar terms of the Ninth and Tenth Amendments.

9.2 Explain the parts of the Ninth and Tenth Amendments.

9.3 Explain the implicit rights of the Ninth Amendment not specifically mentioned in the Constitution.

9.4 Summarize the net powers bestowed, to whom the powers are bestowed upon, as related in the Tenth Amendment.

9.5 Describe the zone of privacy set forth in the Griswold case.

9.6 Explain the Supreme Court's holdings in Roe v. Wade, Planned Parenthood of Southeastern Pennsylvania v. Casey, and Dobbs v. Jackson Women's Health Organization.

z9.7 Explain the purpose of the inclusion of the Tenth Amendment in the Bill of Rights.

KEY TERMS

Compelling State Interest
Construe
Enumerated Rights
Implied or Unenumerated Rights
McCulloch v. Maryland
Penumbra of Rights
Right to Privacy
Viability
Zone of Privacy

Amendment IX

Passed by Congress September 25, 1789. Ratified December 15, 1791. The first 10 amendments form the Bill of Rights.

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

The 9th amendment of the Bill of Rights

The 9th amendment of the Bill of Rights[1]

INTRODUCTION TO AMENDMENT IX

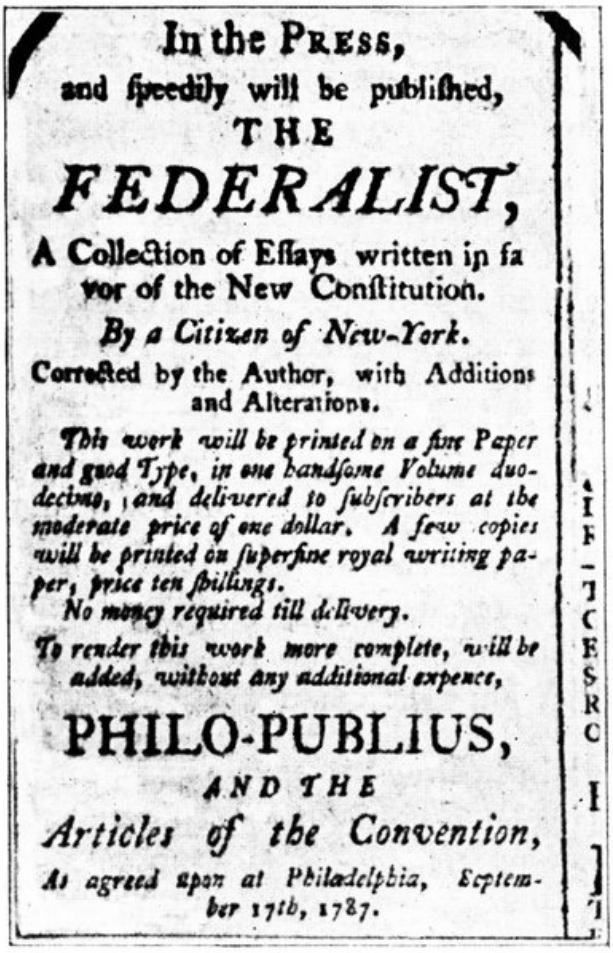
Legal analysts agree that the ambiguity in the Ninth Amendment presents interesting topics for those who chose to invoke it. In fact, Associate Justice Robert H. Jackson described his thoughts surrounding the Ninth Amendment. In "*The Supreme Court in the American System of Government*," Justice Jackson, a noted legal scholar, admits that the Ninth Amendment "remains a mystery" to him.[2] Similarly, most legal scholars and lay persons alike agree that the Ninth Amendment remains vague. The final version of the Ninth Amendment (after five attempts by James Madison) leaves much to the imagination of those who debate its inclusion of natural or lack of natural rights.[3] We find it paramount to begin a conversation of this vastness, by defining some of the terms found in its twenty-one words. The depth of its effect can not be measured by the miniscule number of words. The Ninth Amendment was meant to be a living, breathing construct for additional individual rights to be vetted and born.

ANALYSIS OF AMENDMENT IX

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

Due to this living, breathing aspect of the United States Constitution and is vagueness of Amendment Nine, we begin by reviewing key terms to help develop a framework of understanding as we introduce some new terminology. Firstly, **enumerate** or enumeration is "[t]o count off or designate one by one; to list."[4] The amendment speaks to those rights which are identified and established with a numerical counterpart in the beginning of the verbiage. Following this context is the term construed. Black's Law Dictionary defines **construe** as "[t]o analyze and explain the meaning of (a sentence or passage.)"[5] The amendment lends credence to certain numbered rights which must (the legal force of the word, shall) not be used to analyze whether those rights are explicitly missing, disregarding its existence or diminish the value of others.

1. Fermin, M., & Fermin, M. (2022). The 9th amendment of the Bill of Rights. *History*. https://www.historyonthenet.com/9th-amendment-of-the-bill-of-rights
2. Jackson, R. (1963). *The supreme court in the american system of government*. Harper & Row.
3. *Ibid.*
4. ENUMERATE (enhanced), Black's Law Dictionary (12th ed. 2024).
5. CONSTRUE, Black's Law Dictionary (12th ed. 2024).



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As agreed upon at Philadelphia, September 17th, 1787.

The Federalist Papers[6]

Scholars regard *The Federalist Papers,* originally referred to as *The Federalist,* as a compilation of 85 essays written in persuasive detail by Alexander Hamilton, John Jay, and James Madison culminating in 1788.[7] The essays were published under a pen name, leaving the original authors' names unknown. These essays appeared in several New York state newspapers. In short, the purpose of *the Federalist Papers* was to encourage support to ratify the United States Constitution. The authors took extra attention and time to provide the necessary methodical explanation for each portion of the United States Constitution. "For this reason, and because Hamilton and Madison were each members of the Constitutional Convention, the Federalist Papers are often used today to help interpret the intentions of those drafting the Constitution."[8]

6. *The Federalist Papers*. (n.d.). https://www.constitutionfacts.com/us-articles-of-confederation/the-federalist-papers/
7. Research guides: Federalist papers: Primary documents in american history: Full text of The federalist papers. (n.d.). *Federalist Papers: Primary Documents in American History*. Retrieved November 12, 2020, from https://guides.loc.gov/federalist-papers/full-text
8. *Ibid.*

CONSTITUTIONAL CLIP

The diametrically opposed positions of the Anti-Federalists and Federalists remain at the forefront of every debate regarding the United States Constitution. The Anti-Federalists advocated for individual rights to help balance the power of the federal government, while Federalists noted the controlled method of providing a limited number of individual rights would contradict the argument for additional rights and symbolize any additional rights as unconstitutional.

"Thus was born the Ninth Amendment, whose purpose was to assert the principle that the enumerated rights are not exhaustive and final and that the listing of certain rights does not deny or disparage the existence of other rights."[9] Therefore, the Ninth Amendment was written to emphasize clarity of additional individual rights, while providing ambiguity to those who limited the rights to those being enumerated within the amendments.

Although the Ninth Amendment doesn't provide explicit rights, SCOTUS has noted some implicit rights in many instances. We will explore how two such cases with very different legal issues have leveraged and highlighted the depth of the Ninth Amendment. In *United Public Workers v. Mitchell (1947)*, the court examined a violation of the §9 and §15 of the Hatch Act of 1940, which is a federal law which seeks to protect a nonpartisan federal workforce.[10] In this case, several issues came before the court.

The appellants wanted the court to address: 1. an alleged jurisdictional issue barred by a deadline, 2. a justiciable issue for all appellants, if only one appellant violated the Hatch Act, and 3. §9 and §15 of the Hatch Act of 1940 as a Constitutional provision regarding federal employees.

The court gave an elaborate analysis of each of the first two legal procedural issues, while providing interpretation for the third issue. In fact, the court states that the political restrictions as stated in the §9 and §15 of the Hatch Act of 1940 are not unconstitutional. SCOTUS relied upon a penumbra of rights to help make this determination. The penumbra of rights stems from the First Amendment, the Third Amendment, Fourth Amendment, and Fifth Amendments. "The fundamental human rights guaranteed by the First, Fifth, Ninth and Tenth Amendments are not absolute, and this Court must balance the extent of the guarantee of freedom against a congressional enactment to protect a democratic society against the supposed evil of political partisanship by employees of the Government."[11] This application of the explicit rights to a federal political issue pales in contrast to how the Ninth Amendment was eventually utilized within the Constitutional scheme of the country.

9. Smentkowski, B. (n.d.). Britannica. *Tenth Amendment*. Retrieved August 30, 2020, from https://www.britannica.com/topic/Tenth-Amendment.
10. *United Public Workers v. Mitchell*, 330 U.S. 75, 95-96 (1947).
11. *Id.*

In comparison, the Supreme Court of the United States (SCOTUS) spotlighted the penumbra of rights which included the Ninth Amendment in other ways. Whereas its original construction may be argued, it is clear by the 1960s the Ninth Amendment was morphing into an important concept within SCOTUS. Its use landed on new concepts which SCOTUS deemed significant enough to acknowledge regardless of its direct enumeration or lack of enumeration.

CONSTITUTIONAL CLIP

It is interesting that the Supreme Court of the United States has never been asked to specifically interpret the vagueness or, for that matter, the meaning of the Ninth Amendment.

To this end, the Supreme Court of the United States instead explored and implemented new judicial concepts. One such concept, the **zone of privacy**, which Justice Louis Brandeis once defined as "the right to be left alone," is not an enumerated right.[12] However, Black's Law Dictionary defines **zone of privacy** as "[a] range of fundamental privacy rights that are implied in the express guarantees of the Bill of Rights."[13] Additionally, the right to privacy, or even the word "privacy" is not mentioned in the United States Constitution. In 1965, this assumed inclusion of privacy would be addressed via landmark cases. In this way, the Supreme Court of the United States began to acknowledge inherent rights supported by the Ninth Amendment.

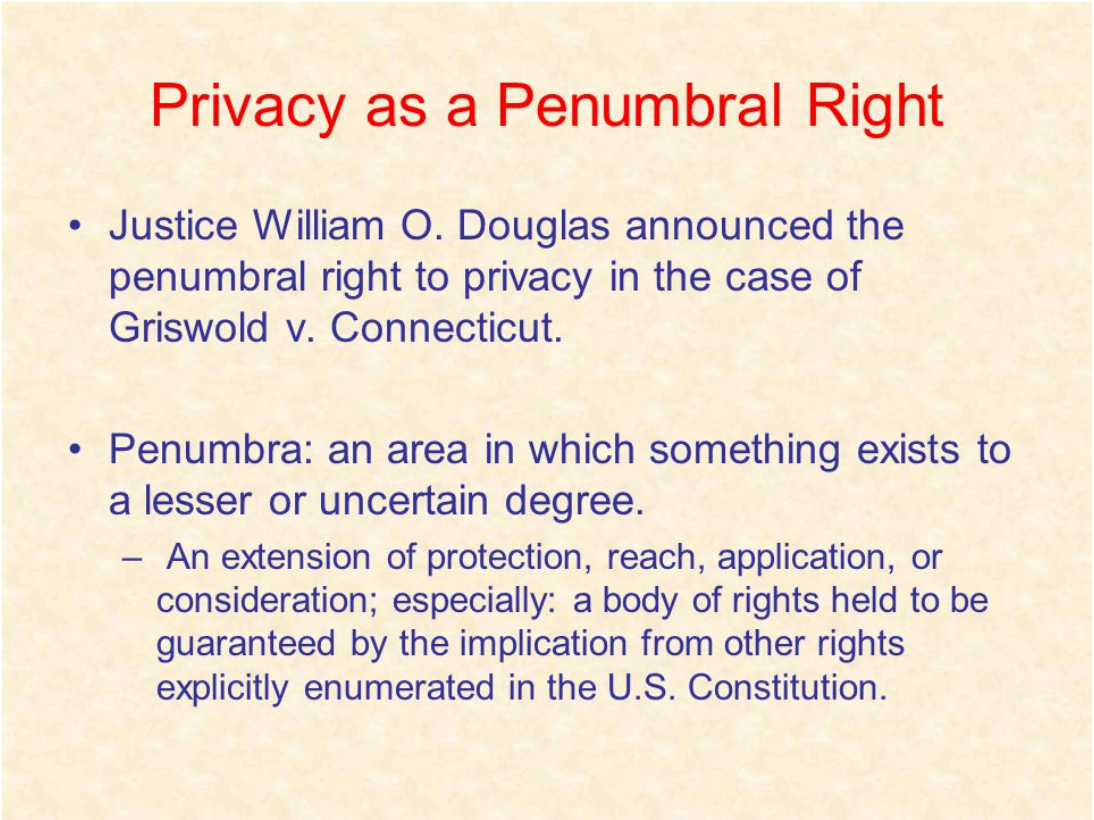
In *Griswold v. Connecticut* (1965), Griswold, the Executive Director of Planned Parenthood in Connecticut, was a named party. Griswold and her staff provided birth control services.[14] These services were a violation of the Connecticut law which read "Any person who assists, abets, counsels, causes, hires or commands another to commit any offense may be prosecuted and punished as if he were the principal offender."[15] Griswold and a member of her staff were each found to be in violation of the law. The penalty for the violation was a $100 fine.[16] Griswold and her colleague appealed the case to the SCOTUS. The Court, in a 7-2 opinion, reviewed the question of whether the aforementioned Connecticut law interferes with the zone of privacy created by "several fundamental guarantees" including those which pre-date the United States Constitution, such as marriage.[17] Thus, the Court warned, if allowed to stand, the police would be endowed to enter the sacred bedrooms of married couples to determine illegal activities barring any legal authority to do so.[18]

The Court further explores and draws legal authority from other parts of the United States

12. Skousen, 2002. The right to be left alone. Foundation for Economic Education. https://fee.org/articles/the-right-to-be-left-alone/
13. ZONE OF PRIVACY, Black's Law Dictionary (12th ed. 2024).
14. *Griswold v. Connecticut*, 381 U.S. 479 (1965).
15. *Id.*
16. *Id.*
17. *Id.*
18. *Id.*

The court identifies the First, Third, Fourth, Fifth, Ninth, and Fourteenth Amendments to provide this hedge of protection that does not explicitly state these rights of privacy, but has shown in times past a periphery approach to such rights.

Constitution as a signal of support. In short, SCOTUS admits that minus the extended interpretation of the First, Third, Fourth, Fifth and Fourteenth (by inclusion) Amendments, plus the ambiguity of the Ninth Amendment, the zone of privacy or the rights of privacy does not exist.[19] *Griswold* plainly states that the right to privacy is solely comprised of the ***penumbra* of enumerated rights.** Therefore, we are introduced to this legal concept of penumbras for one of the most pivotal rights for those on the soil of the United States of America. According to Black's Law Dictionary, a **penumbra** is defined as "[a] surrounding area or periphery of uncertain extent."[20] Thus, SCOTUS has acknowledged that specific rights and guarantees in the first ten amendments use this concept to support the implied rights – namely, the right to privacy. Notably, an **implied right** is defined as "[a] right inferred from another legal right that is expressly stated in a statute or at common law."[21] Regardless of your interpretation of the Ninth Amendment, it is of utmost importance to recognize that the Supreme Court of the United States has extended the Ninth Amendment's effect to include such implied rights as travel, right to vote, right to privacy as well as the right to one's own self-care.[22]



19. *Id.*
20. PENUMBRA, Black's Law Dictionary (12th ed. 2024).
21. RIGHT, Black's Law Dictionary (12th ed. 2024).
22. *Ibid.*

Penumbra of Rights – Right to Privacy[23]

The controversial landmark case *Roe v. Wade* (1973), firmly established the right to privacy as fundamental, and required that any governmental infringement of that right to be justified by a **compelling-state-interest test.**[footnote]*Roe v. Wade*, 410 U.S. 113 (1973)[/footnote] Black's Law Dictionary defines a **compelling-state-interest test** is defined as "[a] method for determining the constitutional validity of a law, whereby the government's interest in the law and its purpose are balanced against an individual's constitutional right that is affected by the law."[24] More importantly, laws are deemed valid when the government's interest is strong enough.[25] In fact, "[t]he compelling-state-interest test is used, [for example], in equal-protection analysis when the disputed law requires strict scrutiny."[26] In *Roe*, the Court ruled that the state's compelling interest in preventing abortion and protecting the life of the mother outweighs a mother's personal autonomy only after the viability of the fetus.[27]

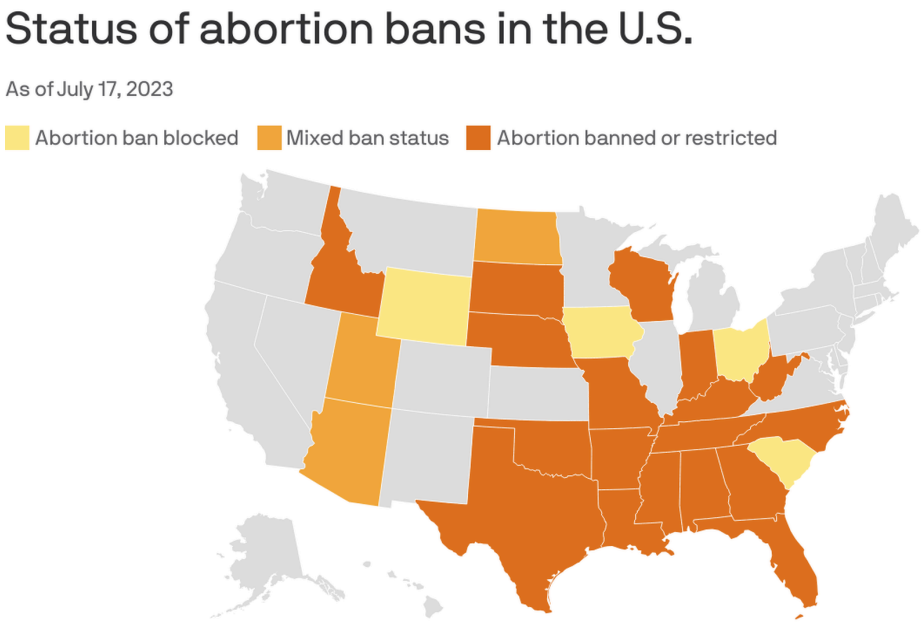
According to *Roe,* the fetus is deemed viable if it is "...potentially able to live outside the mother's womb, albeit with artificial aid."[28] Additionally, viability usually occurs "about seven months (28 weeks) but may occur earlier, even at 24 weeks."[29] Before viability, the mother's right to privacy limits state interference due to the lack of a compelling-state-interest test according to Sharp (2014).[30] First trimester, the mother's personal autonomy dictates the abortion. Second trimester, the state's compelling interest is balanced with protecting the life of the mother. Finally, third trimester, the state's important and legitimate compelling interest sets forth the basis for an abortion, if one is to be performed. Therefore, *Roe* ***previously*** set forth the right to abortion based upon the three trimesters in birth by balancing the state's compelling interest and the mother's personal autonomy.

The Supreme Court reaffirmed its holding in *Roe*, granting a right to an abortion, in *Planned Parenthood of Southeastern Pennsylvania v. Casey* (1992).[31] The Judgment of the Court was announced by Justices O'Connor, Kennedy and Souter, with Justices Blackmun and Stevens concurring (**all five of whom had been nominated by Republican Presidents–see below**), resulting in a 5-4 majority.[32] The Judgment stated, "We conclude that the basic decision in *Roe* was based on a Constitutional analysis which we cannot now repudiate....The woman's right to terminate her pregnancy before viability is the most central principle of *Roe v. Wade*. It is a rule of law and component of liberty we cannot renounce..."[33]

The right to an abortion established by *Roe* (1973) and reaffirmed by *Casey* (1992) was overturned by a 6-3 majority of the Court in *Dobbs v. Jackson Women's Health Organization* (2022).[34] The Court's

23. *Does the Constitution guarantee a right to privacy* . (n.d.). https://slideplayer.com/slide/4533648/
24. COMPELLING-STATE-INTEREST TEST, Black's Law Dictionary (12th ed. 2024).
25. *Id.*
26. *Id.*
27. *Roe v. Wade* (1973).
28. *Roe v. Wade*, 410 U.S. 113, at 161 (1973).
29. *Id.*
30. *Id.*
31. *Planned Parenthood of Southeastern Pennsylvania v. Casey,* 505 U.S. 833 (1992).
32. O'Brien, D. M., & Silverstein, G. (2020). Constitutional Law and Politics: Struggles for power and governmental accountability. p. 1285-1286.
33. *Planned Parenthood v. Casey, 1992.*
34. *Dobbs v. Jackson Women's Health Organizatio*n, 597 U.S. _ _ (2022); Hamm, A. (2023, July 20). *Dobbs v. Jackson Women's Health Organization – SCOTUSblog*. SCOTUSblog. https://www.scotusblog.com/case-files/cases/dobbs-v-jackson-womens-health-organization/.

six-person majority (nominated by Republican Presidents) held that the Constitution does not confer a right to abortion, and that the authority to regulate abortion is returned to the people and their elected representatives.[35] Justice Alito, writing for the majority, stated, "The Constitution makes no reference to abortion, and no such right is implicitly protected by any constitutional provision...any such right must be 'deeply rooted in this Nation's history and tradition' and 'implicit in the concept of ordered liberty.'"[36] Alito further wrote, "*Stare decisis*, the doctrine on which *Casey*'s controlling opinion was based, does not compel unending adherence to *Roe*'s abuse of judicial authority. *Roe* was egregiously wrong from the start. Its reasoning was exceptionally weak, and the decision has had damaging consequences."[37]



Ban on Abortion[38]

Within the first year after *Dobbs* was announced, and the decision whether or not to guarantee the right to an abortion had been turned over to the individual States, the following States banned abortion entirely: Alabama, Arkansas, Idaho, Kentucky, Louisiana, Mississippi, Missouri, North Dakota, Oklahoma, South Dakota, Tennessee, Texas, West Virginia, and Wisconsin. Other states passed Gestational Limits on abortions: Georgia, after 6 weeks, Nebraska and North Carolina after 12 weeks, Arizona and Florida after 15 weeks, and Utah, after 18 weeks.[39]

35. Hamm, A. (2023, July 20). *Dobbs v. Jackson Women's Health Organization – SCOTUSblog*. SCOTUSblog. https://www.scotusblog.com/case-files/cases/dobbs-v-jackson-womens-health-organization/.
36. *Dobbs v. Jackson*, 2022.
37. O'Brien, D. M., & Silverstein, G. (2020). Constitutional Law and Politics: Struggles for power and governmental accountability. p.1304
38. *Abortion ban*. (2023). [Dataset; Data set]. Axios. https://www.axios.com/2022/06/25/abortion-illegal-7-states-more-bans-coming
39. Times, N. Y. (2023, July 12). Abortion bans across the country: Tracking restrictions by state. *The New York Times*. https://www.nytimes.com/interactive/2022/us/abortion-laws-roe-v-wade.html

CONSTITUTIONAL CLIP

In an unusual show of solidarity, the three most liberal justices—Breyer, Sotomayor and Kagan—issued a joint opinion in bitter dissent from the *Dobbs* majority. The right recognized in *Roe* (1973) and *Casey* (1992) "does not stand alone," they wrote. "To the contrary, the Court has linked it for decades to other settled freedoms involving bodily integrity, familial relationships, and procreation. Most obviously, the right to terminate a pregnancy arose straight out of the right to purchase and use contraception. In turn, those rights led, more recently, to rights of same-sex intimacy and marriage. They are all part of the same constitutional fabric, protecting autonomous decisionmaking over the most personal of life decisions."[40]

Amendment X

Passed by Congress September 25, 1789. Ratified December 15, 1791. The first 10 amendments form the Bill of Rights.

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

INTRODUCTION TO AMENDMENT X

The Tenth Amendment follows the course of the Ninth Amendment, in that it still portrays some form of ambiguity and vagueness if taken solo. On the other hand, some critics believe the Tenth Amendment provides clarity of power regarding the reservations of said power. What becomes questionable is what the power is and how it should be interpreted when applied to case law and ordinances, codes, and statutes. Within this debate, we find a carefully crafted compromise for the positions of the Federalists and Anti-Federalists. The Federalists continued to lay hold to the concept of a strong and notable federal or central government, while the Anti-Federalists delighted in opposing said federal or central government.[41] In short, the Tenth Amendment manages to avert any strict parameters, while encouraging and supporting the states as they implement, institute, and introduce their own laws as long as it doesn't compete or contradict the federal powers. Then the question remains – what powers are being addressed in the Tenth Amendment.

40. O'Brien and Silverstein, pp. 1301-1302.
41. Levy, M. (n.d.). *Reserved powers*. LII / Legal Information Institute. Retrieved March 3, 2021, from https://www.law.cornell.edu/constitution-conan/amendment-10/reserved-powers

ANALYSIS OF AMENDMENT X

The Tenth Amendment – Rights Reserved To States or The People[42]

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

According to the language of the Tenth Amendment, the powers being addressed begins first with those powers not delegated in the United States Constitution to the federal government. The implication of the first clause is to place the emphasis on an **enumerated power** which is "[a] political power specifically delegated to a governmental branch by a constitution."[43] This implication then extends and is further developed by the next clause. This clause coupled with the initial clause further directly prohibits States' powers held by the Constitution, thus leaving the states with the remainder powers officially known as reserved powers. **Reserved powers** differ in that they are political powers "that [are] not enumerated or prohibited by a constitution, but instead is reserved by the Constitution for a specified political authority, such as a state government."[44]

Compared to other amendments, the Tenth Amendment is comprised of only twenty-eight words and one sentence. Similar to the Ninth Amendment, one should not be discouraged by the lack of words to express this very powerful sentiment of those who support the Tenth Amendment. According to the Annals of Congress, the term "expressly" was purposely absent before "delegated" from the Tenth Amendment.[45] Additionally, this did not provide support for granting the federal government powers or reservation of power to the states as evidenced in "...Madison's remarks in the course of the debate which took place while the proposed amendment was pending concerning

42. America's Future. (2022, October 6). *The Tenth Amendment – Rights Reserved To States or The People – America's Future*. https://www.americasfuture.net/newsletter/the-tenth-amendment-rights-reserved-to-states-or-the-people/
43. POWER, Black's Law Dictionary (12th ed. 2024).
44. *Ibid.*
45. GPO. (n.d.). *Tenth amendment*. Authenticated U.S. Government Information GPO. Retrieved December 11, 2020, from https://www.govinfo.gov/content/pkg/GPO-CONAN-1992/pdf/GPO-CONAN-1992-10-11.pdf.

Hamilton's plan to establish a national bank..."[46] This would later be explored in *McCulloch v. Maryland*.[47] The Tenth Amendment, like all other amendments, was placed with the verbiage used to address particular concerns within the states. It was meant to create a framework of separation of powers between the governments and all who they served in this newly formed entity. "...[T]he Tenth Amendment was inserted into the Constitution largely to relieve tension and to assuage the fears of states' rights advocates, who believed that the newly adopted Constitution would enable the federal government to run roughshod over the states and their citizens."[48]

McCulloch v. Maryland[49]

To this end, the fight between the state and federal government was real based upon its appearance in the Articles of Confederation. Most individuals recognized that the role of the states within that document was paramount and vowed to present a different view of balancing interests. The balancing of interests looks at the rights of the federal government, state governments, and the individuals. Each of these rights serves as a reminder that all interests are necessary to meet the viewpoints of all stakeholders involved in governmental decisions. In actuality, the first ten amendments, also known as the Bill of Rights, was drafted when the First Congress met and the balancing of the interested began to unfold.

46. *GPO*, (n.d.).
47. *McCulloch v. Maryland*, 17 U.S. 316 (1819).
48. *Levy*, 2020.
49. *McCulloch v. Maryland: Two centuries later – Harvard Law School*. (2022, August 10). Harvard Law School. https://hls.harvard.edu/today/mcculloch-v-maryland-two-centuries-later/

CONSTITUTIONAL CLIP

The Supreme Court models the balancing of federal and state interests in the following case. We find the beginnings of the Supreme Court of the United States' interpretation of the Tenth Amendment in *McCulloch v. Maryland* (1819), where the question before the court was two-fold. In *McCulloch v. Maryland* (1819), two central issues were before the composition of seven justices. The justices, most of which were in favor of states' rights, were taxed with determining whether the Congressional authority existed to create a national bank; additionally, whether the states maintained Constitutional authority to tax said national bank?[50]

With Chief Justice Marshall at its helm and writing the majority, unanimous decision, the court supported Congress in its authority to create the bank, but denied the states the right to tax the entity reiterating federal authority in most situations.[51] The court emphasized the vast federal authority vested in Congress, reminding the nation that any law created by Congress is rooted in Article I of the United States Constitution which is the supreme law of the land.[52] The courts would review, extend, and reduce its interpretation of the Tenth Amendment regarding federal taxing power, federal police power, as well as federal regulations affecting state activities.

The Ninth and Tenth Amendment together work to examine enumerated and unenumerated rights, as well as reserved powers while fully defining federalism and its relationship to federal, state, and individual rights. As Federal activity has increased, so too has the problem of reconciling all interests "...as they apply to the Federal powers to tax, to police, and to regulations such as wage and hour laws, disclosure of personal information in recordkeeping systems, and laws related to strip-mining."[53]

Critical Reflections:

1. Is the Right to Privacy an unenumerated right the Supreme Court should continue to protect? Why or why not?
2. What is a penumbra of rights? When was this term first introduced? Where was this term first introduced?
3. Is there a limit to the "reserved powers"? If so, what are the limits?
4. Read how *McCulloch v. Maryland* (1819)'s 200th birthday discussion remains relevant today. Read how one Constitutional expert applies current day implications here. How is Congress described in this article? Do you agree or disagree? Why?

50. *McCulloch v. Maryland* (1819).
51. *Id.*
52. *Id.*
53. Levy, M. (n.d.). *Reserved powers*. LII / Legal Information Institute. Retrieved March 3, 2021, from https://www.law.cornell.edu/constitution-conan/amendment-10/reserved-powers

Chapter 10 - Amendments XIII, XIV, XV, and XXIV: Becoming Human, Becoming a Citizen, & Becoming a Voter

Amendment XIII, Amendment XIV, Amendment XV & Amendment XXIV

RICHARD J. FORST AND TAUYA R. FORST

LEARNING OBJECTIVES

After reading this chapter, you should be able to:

10.1 Define the unfamiliar terms of the Thirteenth, Fourteenth, Fifteenth, and Twenty-Fourth Amendments.

10.2 Explain the parts of the Thirteenth, Fourteenth, Fifteenth, and Twenty-Fourth Amendments.

10.3 Define Due Process, Procedural Due Process, and Substantive Due Process.

10.4 Explain the difference between Procedural Due Process and Substantive Due Process.

10.5 Define Equal Protection.

10.6 Explain the differences between Slavery and Involuntary Servitude.

10.7 Explain the evolution of the Supreme Court position on education from *Plessy v. Ferguson* to *Brown v. Board of Education*.

10.8 Define "Poll Tax" and explain what the government is allowed to require for an individual to vote.

10.9 Explain the evolution of the Supreme Court position on the Voting Rights Act, from its passage in 1965 to the present.

KEY TERMS

Affirmative Action	Privileges or Immunities Clause
Brown v. Board of Education	Procedural Due Process
Disenfranchisement	Separate but Equal
Equal Protection	*Shelby County v. Holder*
Involuntary Servitude	Slavery
Manumission	*Students for Fair Admissions v. Harvard*
Native Americans	Substantive Due Process
Plessy v. Ferguson	Voting Rights Act of 1965

Figure 10.1 — History of Amendment XIII

Census Year	Free Colored	Slaves	American Indians* (Native Americans)	Whites	Asians*
1790	59,466	607,897	N/A	3,172,006	N/A
1800	108,395	803,041	N/A	4,302,828	N/A
1810	186,446	1,101,364	N/A	5,862,073	N/A
1820	233,521	1,538,038	N/A	7,866,797	N/A
1830	319,590	2,009,043	N/A	10,532,060	N/A
1840	386,303	2,487,455	N/A	14,189,705	N/A
1850	434,440	3,204,313	N/A	19,553,068	N/A
1860	487,970	3,953,760	339,421**	26,922,537	34,933

**American Indian and Asian data unavailable until 1860*
Taxed Native Americans/American Indians **44,021**, Not Taxed **295,400** = Total **339,421[1] [2]

Figure 10.2

An interactive H5P element has been excluded from this version of the text. You can view it online here: https://cod.pressbooks.pub/usconstitutionalive2e/?p=43#h5p-3

YELLOW = free colored; GREEN = slaves

1. Gauthier, J. H. S. (2020, December 17). Censuses of American Indians – history – U.S. Census Bureau. Censuses of American Indians. https://www.census.gov/history/www/genealogy/decennial_census_records/censuses_of_american_indians.html
2. *Gibson, C., & Jung, K. (2002, September). Historical Census Statistics on Population Totals by Race, 1790 to 1990, and by Hispanic Origin, 1970 to 1990, for the United States, Regions, Divisions, and States.* U.S. Census Bureau. https://www.census.gov/content/dam/Census/library/working-papers/2002/demo/POP-twps0056.pdf

Prior to 1900, few Indians are included in the decennial federal census. Indians are not identified in the 1790-1840 censuses. In 1860, Indians living in the general population are identified for the first time.[3]

AMENDMENT XIII

Passed by Congress January 31, 1865. Ratified December 6, 1865. The 13th Amendment changed a portion of Article IV, Section 2.

Section 1

Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

Section 2

Congress shall have power to enforce this article by appropriate legislation.

Thirteenth Amendment Documentary[4] *Combining archival footage with testimony from activists and scholars, director Ava DuVernay's examination of the U.S. prison system looks at how the country's history of racial inequality drives the high rate of incarceration in America*

INTRODUCTION TO AMENDMENT XIII

Although the Thirteenth Amendment was ratified almost 100 years after the original United States Constitution, the question remains, from which historical context can we view this ratification? Because of the concern of some states to reverse decisions of abolishing slavery, "Senators Lyman

3. United States Census. (n.d.). *Population of the United States in 1860. United States Census Dicennial 1860.* Retrieved April 10, 2021, from https://www2.census.gov/library/publications/decennial/1860/population/1860a-02.pdf
4. Netflix. (2020, April 17). *13TH | FULL FEATURE | Netflix* [Video]. YouTube. https://www.youtube.com/watch?v=krfcq5pF8u8

Trumbull of Illinois, Charles Sumner of Massachusetts, and John Henderson of Missouri, sponsored resolutions for a constitutional amendment to abolish slavery nationwide."[5]

ANALYSIS OF AMENDMENT XIII

a. Right against slavery

Neither slavery... shall exist within the United States, or any place subject to their jurisdiction.

Historically, the Thirteenth Amendment was approached in terms of what its suggested legal impact was; however, the Thirteenth Amendment provided a more fundamental opportunity for those who were directly targeted as well as those who were tangentially connected. First, and perhaps most important, the Thirteenth, Fourteenth and Fifteenth Amendments are recognized and digested together as the Reconstructionist Amendments. Each of the amendments represented and addressed a response to the then-prevalent practice of dismissing, ignoring, and otherwise disregarding basic human rights to specific groups and classes of people.

CONSTITUTIONAL CLIP

It is difficult to understand its significance without first remembering the Thirteenth Amendment's historical context.

The Thirteenth Amendment's purpose was to address what had been lying beneath the surface, since before the United States of America was formed. To properly and respectfully address this amendment, we must begin with the make-up of the geographical area which would later be deemed the Americas. Prior to 1492, the Natives or Indigenous peoples inhabited this land. This land is *their* land, and all who seek to possess and build must make acknowledgement of this fact. Christopher Columbus, who is noted to have founded this inhabited land, immediately seized six natives and used them as his servants. It is this concept which continues to plague our current society.[6] Eventually, other explorers came to the Americas and began to possess the land, while dispossessing its Native inhabitants.[7] The Native American term isn't settled. In fact, "[t]he United States' Constitution, more than 300 treaties, and over two centuries of Federal law recognize Indian tribes as domestic dependent nations with degrees of sovereignty existing within the confines of the United States."[8]

5. *U.S. senate: Landmark legislation: Thirteenth, fourteenth, & fifteenth amendments*. (2021, January 11). United States Senate. https://www.senate.gov/artandhistory/history/common/generic/CivilWarAmendments.htm
6. History.com Editors. (2021, March 16). Native american history timeline. HISTORY. https://www.history.com/topics/native-american-history/native-american-timeline
7. *Ibid.*
8. *Native American and Indigenous Peoples FAQs*. (n.d.). UCLA Equity, Diversity & Inclusion. https://equity.ucla.edu/know/resources-on-native-american-and-indigenous-affairs/native-american-and-indigenous-peoples-faqs/#:~:text=The%20U.S.%20Census%20defines%20American,definition%2C%20citizens%20of%20their%20federally.

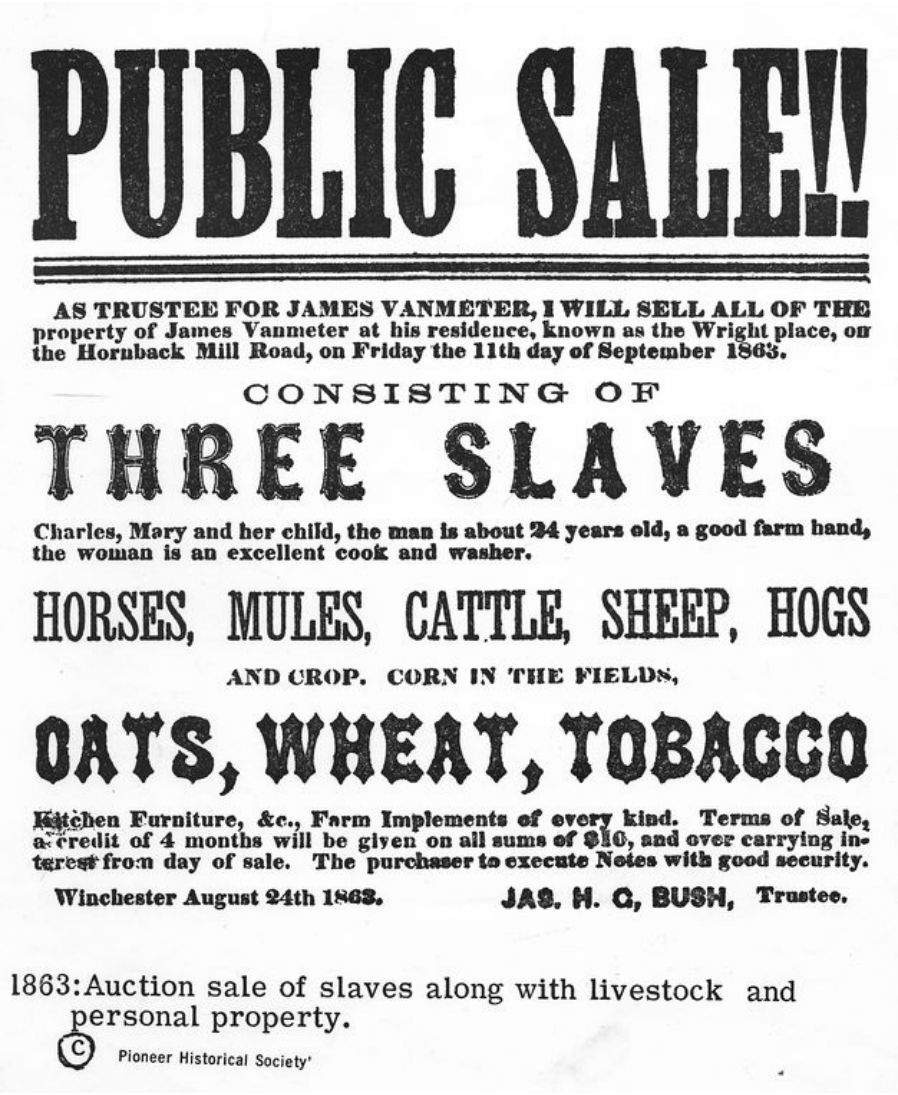
This means that many may attribute different names to Native Americans including American Indian, Indigenous Peoples, however, tribal nation affiliation is a preferred terminology.[9] It is important to note that the United States Census does maintain a formal definition for Native Americans. "The U.S. Census defines **Native American,** American Indian or Alaska Native as "A person having origins in any of the original peoples of North and South America (including Central America) and who maintains tribal affiliation or community attachment."[10] This is well documented and from this settlers' mentality of possession and colonization throughout the 16th and 17th centuries, a continuous battle of disrespect and rewriting of history begins between the settlers and the Natives spanning the gamut of "cooperation to indignation to revolt."[11] The Natives clearly recognized that dispossession and interference with their practices, beliefs, and governance was displaced and perverted to fit within this newly colonized way of living.

Similarly, Africans were noted for joining the Spanish and Portuguese in their exploration of America. One of the most notable African settlers was Esteban from the 1530s. Africans continued their appearances until 1619 when the impact of Africans took a very dire turn.[12] The concentrated emphasis of Africans within the United States began not as most believe. Historians dispute various aspects of the Africans existence; however, all agree that the early Africans were enslaved in Virginia. Africans were first bought to the English colony as servants, but their use extended beyond normal parameters of servitude. At this time the colonists began to build their wealth and status and believed that the key to maintenance of this new lifestyle was to convert the statuses of runaway servants into involuntary servants for life.[13] Furthermore, this conversion was typically given to those who were of non-African descent. Replacing the servitude and making the service permanent, Africans became slaves for life. This is an important distinction. Compared to the inhumane condition of slavery, involuntary servitude is considered the slaves' dream. The seriousness of this institution is only fully appreciated after one reads how slavery made humans into property. **Slavery** is defined as "[a] situation in which one person has absolute power over the life, fortune, and liberty of another."[14] Of note is the fact that the complete and utter totality of a person's existence is removed in slavery.

Accordingly, the legal conditioning and denial of activities of daily living which faced African slaves provides context for the absolute horror of inhumanity which was the slaves' "normal" existence. The following is a list of treatments offered as a reminder and indication of the vastness, depth, and breath of slavery.

In fact, slaves were deemed less than human, chattel, or most importantly, the property of the colonists. Therefore, slaves were not allowed to make any decisions, plans, or have any thoughts for themselves or their families.

9. *Ibid.*
10. *Ibid.*
11. *Ibid.*
12. Lynch, H. (n.d.). African americans | history, facts, & culture. Encyclopedia Britannica. Retrieved April 18, 2021, from https://www.britannica.com/topic/African-American
13. *Slavery and the Making of America. Timeline | PBS.* (2004). Slavery and the Making of America. https://www.thirteen.org/wnet/slavery/timeline/1641.html
14. SLAVERY, Black's Law Dictionary (12th ed. 2024).


PUBLIC SALE!!

AS TRUSTEE FOR JAMES VANMETER, I WILL SELL ALL OF THE property of James Vanmeter at his residence, known as the Wright place, on the Hornback Mill Road, on Friday the 11th day of September 1863.

CONSISTING OF

THREE SLAVES

Charles, Mary and her child, the man is about 24 years old, a good farm hand, the woman is an excellent cook and washer.

HORSES, MULES, CATTLE, SHEEP, HOGS

AND CROP. CORN IN THE FIELDS,

OATS, WHEAT, TOBACCO

Kitchen Furniture, &c., Farm Implements of every kind. Terms of Sale, a credit of 4 months will be given on all sums of $10, and over carrying interest from day of sale. The purchaser to execute Notes with good security.

Winchester August 24th 1863. JAS. H. C. BUSH, Trustee.

1863: Auction sale of slaves along with livestock and personal property.

© Pioneer Historical Society

Public Sale of Slaves, Livestock, and other Personal Property[15]

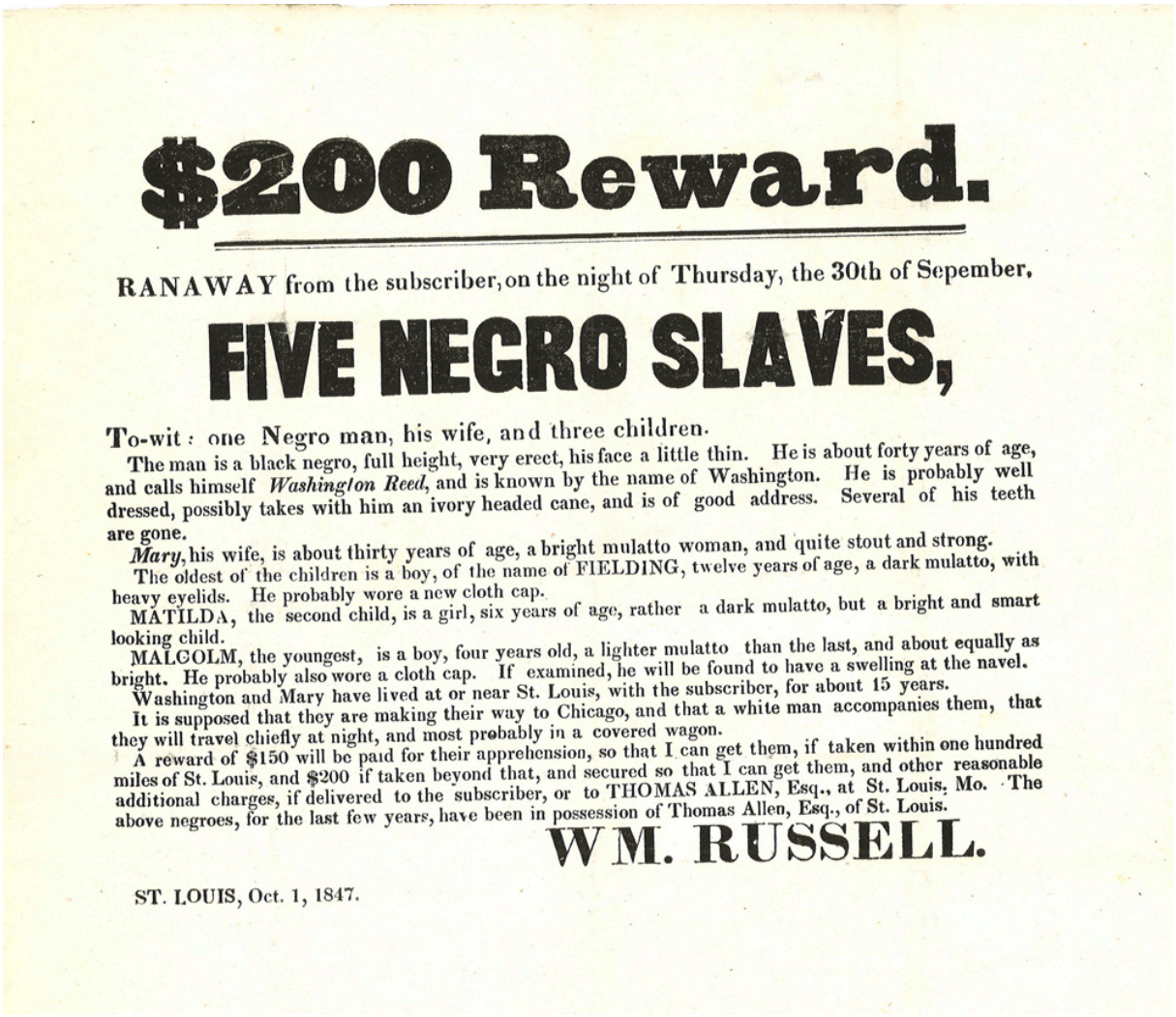
As such, each enumerated fact or condition provides context for the hatred of America's dark history and foundations towards African slaves:

(1) slaves are property, and can be sold, traded, given away, bequeathed, inherited, or exchanged for other things of value;

(2) the status of a slave is inheritable, usually through the mother;

(3) formal legal structures or informal agreements regulate the capture and return of fugitive slaves;

15. *Notice of slave sale, "Public sale!. . .consisting of three slaves. . ."* (n.d.). NYPL Digital Collections. https://digitalcollections.nypl.org/items/510d47df-a26c-a3d9-e040-e00a18064a99



$200 Reward.

RANAWAY from the subscriber, on the night of Thursday, the 30th of Sepember,

FIVE NEGRO SLAVES,

To-wit: one Negro man, his wife, and three children.

The man is a black negro, full height, very erect, his face a little thin. He is about forty years of age, and calls himself *Washington Reed*, and is known by the name of Washington. He is probably well dressed, possibly takes with him an ivory headed cane, and is of good address. Several of his teeth are gone.

Mary, his wife, is about thirty years of age, a bright mulatto woman, and quite stout and strong.

The oldest of the children is a boy, of the name of FIELDING, twelve years of age, a dark mulatto, with heavy eyelids. He probably wore a new cloth cap.

MATILDA, the second child, is a girl, six years of age, rather a dark mulatto, but a bright and smart looking child.

MALCOLM, the youngest, is a boy, four years old, a lighter mulatto than the last, and about equally as bright. He probably also wore a cloth cap. If examined, he will be found to have a swelling at the navel.

Washington and Mary have lived at or near St. Louis, with the subscriber, for about 15 years.

It is supposed that they are making their way to Chicago, and that a white man accompanies them, that they will travel chiefly at night, and most probably in a covered wagon.

A reward of $150 will be paid for their apprehension, so that I can get them, if taken within one hundred miles of St. Louis, and $200 if taken beyond that, and secured so that I can get them, and other reasonable additional charges, if delivered to the subscriber, or to THOMAS ALLEN, Esq., at St. Louis, Mo. The above negroes, for the last few years, have been in possession of Thomas Allen, Esq., of St. Louis.

WM. RUSSELL.

ST. LOUIS, Oct. 1, 1847.

"After a person escaped enslavement, many relied on northern whites to lead them safely to the northern free states and to Canada. It was very dangerous to be a formerly-enslaved person. There were rewards for their capture, and advertisements like the reward poster here described people in detail. This reward poster from 1847 described five formerly-enslaved people: a man, his wife and his three children. Whenever a northerner led a group of enslaved people to freedom, they placed themselves in great danger, too."[16]

(4) slaves have limited (or no) legal rights or protections;[17]

16. *$200 reward: Poster for the Return of Formerly-Enslaved People, October 1, 1847 | State Historical Society of Iowa*. (n.d.). https://history.iowa.gov/history/education/educator-resources/primary-source-sets/underground-railroad/200-reward-poster.
17. *Plessy v. Ferguson*, 163 U.S. 537 (1896)

CONSTITUTIONAL CLIP

Plessy v. Ferguson (1896) was a landmark Supreme Court of the United States' decision that upheld the constitutionality of racial segregation under the "separate but equal" doctrine.[18] Mr. Plessy had refused to sit in a railroad car set aside for black people, and was arrested for violating Louisiana's "Jim Crow" law. Only one Justice dissented from the majority decision, John Marshall Harlan, a former slaveholder, who argued that segregation ran counter to the constitutional principle of equality under the law. It would not be until 1954, in *Brown v. Board of Education*, that the majority of the Court would essentially concur with Harlan's dissent.[19]

(5) slaves **(regardless of age) may** be punished by slave owners (or their agents) with minimal or no legal limitations;

(6) masters may treat, or mistreat, slaves as they wish, although some societies required that masters treat slaves 'humanely' and some societies banned murder and extreme or barbaric forms of punishment and torture;

(7) masters have unlimited rights to sexual activity with their slaves;

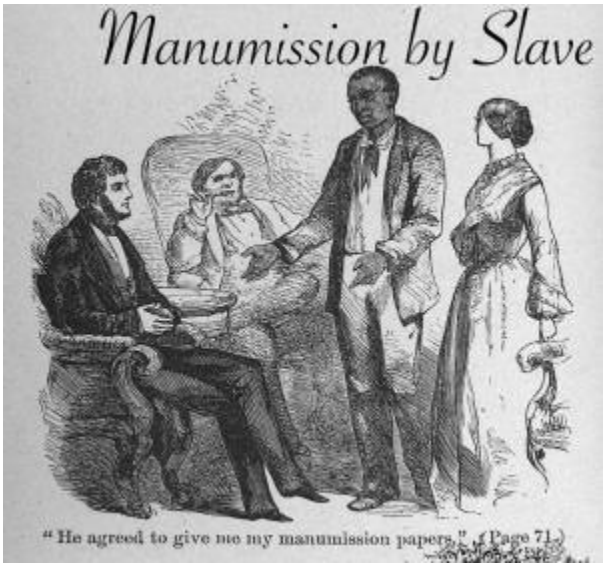
(8) slaves have very limited or no appeal to formal legal institutions;

(9) slaves are not allowed to give testimony against their masters or (usually) other free people, and in general their testimony is not given the same weight as a free person's;

(10) the mobility of slaves is limited by owners and often by the State;

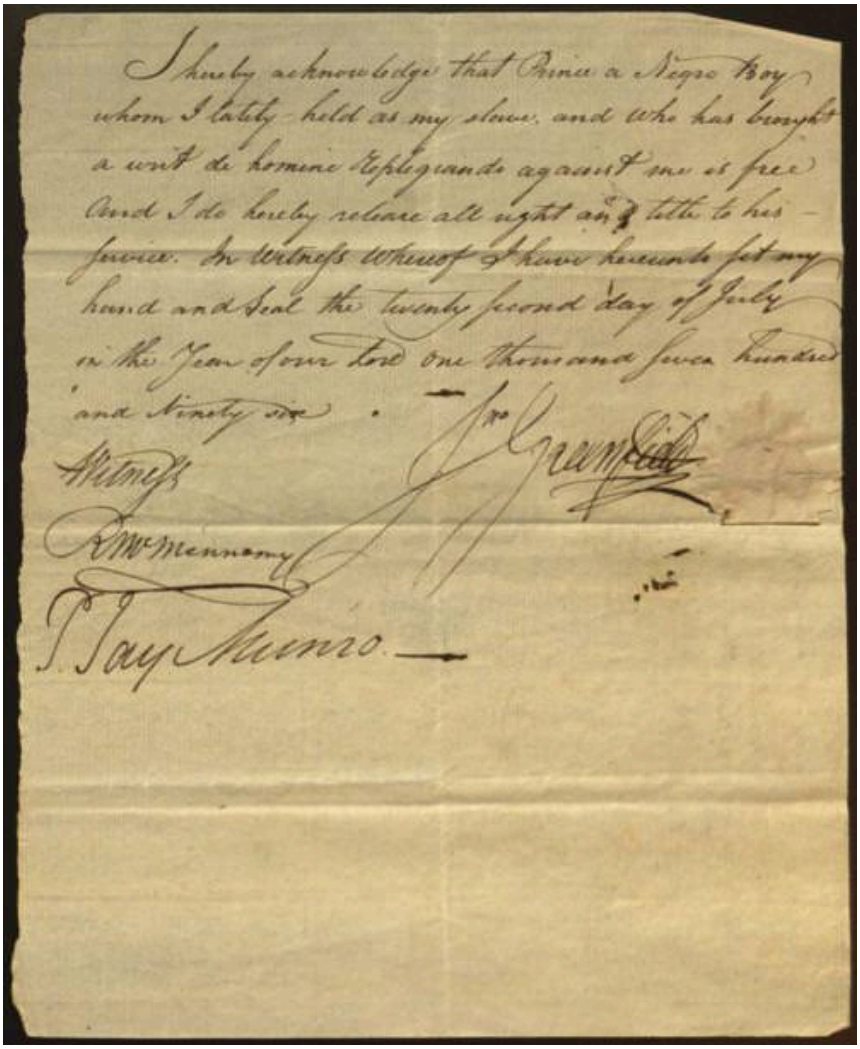
(11) owners are able to make slaves into free persons through a formal legal process (manumission), but often these freed persons are not given full legal rights *(even when you are free, you are not free indeed or equal)*; (**Manumission** is defined in Black's as "the granting of freedom to a slave."[20] But the manumission was usually unsanctioned by law and therefore the extent of the freedom granted was whatever the slaveholder allowed.[21])

18. *Id.*
19. *Brown v. Board of Education of Topeka*, 347 US 483 (1954).
20. MANUMISSION, Black's Law Dictionary (12th ed. 2024)
21. MANUMISSION, 2024.



"Prince, a man enslaved in New York, had the courage to bring a writ of Homine Replegiando, which essentially states that a person is being unlawfully held. His petition was successful, and Prince was manumitted in due course."[22]

22. *Manumission by slave*. (2017, November 16). The Gilder Lehrman Center for the Study of Slavery, Resistance, and Abolition. https://glc.yale.edu/VoicesFromTheArchive/WhatdidFreedomMean/Manumission-By-Slave.



I hereby acknowledge that Prince a Negro Boy whom I lately held as my slave, and who has brought a writ de homine Replegiando against me is free And I do hereby release all right and title to his service. In Witness Whereof I have hereunto set my hand and Seal the twenty second day of July in the Year of our Lord one thousand seven hundred and Ninety six

Witness
R. W. Mennomy
T. Jay Munro

"Transcription: I hereby acknowledge that Prince a Negro Boy whom I lately held as my slave, and who has brought a writ of homine replegiando against me is free and I do hereby release all right and title to his service. In witness whereof I have hereunto set my hand and Seal the twenty second day of July in the Year of our Lord one thousand seven hundred and Ninety six.

Tho. Greenfield
Witness
R. W. Mennomy
T. Jay Munro"[23]

(12) slave ownership is supported by laws, regulations, courts, and legislatures, including provisions for special courts and punishments for slaves, provisions for the capture and return of fugitive slaves, and provisions and rules for regulating the sale of slaves."[24]

The authors explicitly share the conditions of slavery in an effort to distinguish between slavery

23. *Prince*. (2017, November 16). The Gilder Lehrman Center for the Study of Slavery, Resistance, and Abolition. https://glc.yale.edu/VoicesFromTheArchive/WhatdidFreedomMean/Manumission-By-Slave/Prince.
24. SLAVERY (2019).

and involuntary servitude as it relates to the Thirteenth Amendment. The first clause of the United States Constitution points to both of these incredibly barbaric concepts which indicates the founders' understanding and intention to address two entirely different systems. At any rate, the founders believed that both of these institutions were unconstitutional, but its verbiage leaves a loophole for constitutionality.

This concept was deeply embedded in our foundational fabric as a nation and continues to haunt us as we make strides to address some of its institutional and systemic effects which led to systematic racism.

> "Slavery was a big problem for the Constitution makers. Those who profited by it insisted on protecting it; those who loathed it dreaded even more the prospect that to insist on abolition would mean that the Constitution would die aborning. So the Framers reached a compromise, of sorts. The words 'slave' and 'slavery' would never be mentioned, but the Constitution would safeguard the 'peculiar institution' from the abolitionists."[25]

In 1861-1865, the leaders of the United States of America began to determine and define what kind of nation the United States of America would be.

CONSTITUTIONAL CLIP

In fact, it is the Civil War fought by northerners and southerners, brothers and other relatives which proved to be influential in the country's two-part challenge: "whether the United States was to be a dissolvable confederation of sovereign states or an indivisible nation with a sovereign national government; and whether this nation, born of a declaration that all men were created with an equal right to liberty, would continue to exist as the largest slaveholding country in the world."[26]

The so-called Northern victory was anything but a victory, considering the loss of American life (often complete with blood relatives opposing one another) amounted to 625,000.[27] Additionally, this number represented the total loss of American lives from all previous wars combined. This is aside from the enormous financial cost to both sides of the conflict: $6.19 billion for the North, $2.1 billion for the South, over $8 billion combined, ***in 1865 dollars.***[28] This is particularly problematic as the post-War nation attempts to heal, connect and present a united front.

25. Lieberman, J. (1888). *Evolving constitution: How supreme court has ruled on issues from abortion to zoning*. Random House Reference.
26. McPherson, J. (2021, April 16). *A brief overview of the american civil war*. American Battlefield Trust. https://www.battlefields.org/learn/articles/brief-overview-american-civil-war.
27. McPherson, J. (2021, April 16). *A brief overview of the american civil war*. American Battlefield Trust. https://www.battlefields.org/learn/articles/brief-overview-american-civil-war
28. *Ibid.*

The proponents of the Civil War aimed to demolish inequities in the structure of government as well as in the human dignity of its inhabitants. The aftermath of the Reconstruction was a moment of liberty for the former slaves which lasted until 1876. In that presidential election year, the Northern Republicans exchanged the Reconstruction guarantee of freedom to the slaves for an agreement from Southern Democrats to elevate the Republican candidate, Rutherford B. Hayes, to the presidency.[29] This arrangement would allow Southern States to pass "Jim Crow" laws which segregated blacks from white society, enforced with lynchings and terror raids on black homes and businesses.[30]

Although the country was formed as the United States of America, predating its existence America struggled with this concept of equity and even equality. Historians note an ongoing battle over property (slaves), conditions of slaves, the acceptable amount of power and its delegation between the federal government and the states remained central to every discussion during this time.[31] Proponents of slavery outlined and supported this institution based upon the surge in the economy as well as a biblical and economic authoritative approach to retaining this power. In fact, those who were proponents of slavery and those who vehemently opposed slavery were divided in part and parcel according to their stance on slavery. Unfortunately, President Abraham Lincoln's victory in 1860 was the final precursor to states for evidence of the necessity to secede.[32] It was this point in politics that a resolution to separate become a separate entity known as the Confederate States of the United States.

The North's approach to prosperity and sustainability was housed in its ability to diversify employment opportunities, whereas the Southern states approach began and ended with slaves, cotton, and plantation living. Thus, the equality of the promise which Lincoln supported was hotly debated.

29. *Ibid.*
30. McPherson, 2021.
31. Gross, A., & Upham, D. (n.d.). *Interpretation: Article IV, Section 2: Movement of persons throughout the union | the national constitution center*. Interactive Constitution. Retrieved May 31, 2021, from https://constitutioncenter.org/interactive-constitution/interpretation/article-iv/clauses/37
32. *Ibid.*

Abraham Lincoln, 16th President of the United States, 1861 – 1865
Abraham Lincoln portrait, oil on canvas by George Healy, 1887; in the National Portrait Gallery, Smithsonian Institution, Washington, D.C.[33]

Abraham Lincoln was a complicated individual who generally opposed slavery, but found it difficult to remain steadfast to his approach of its roots within our society.

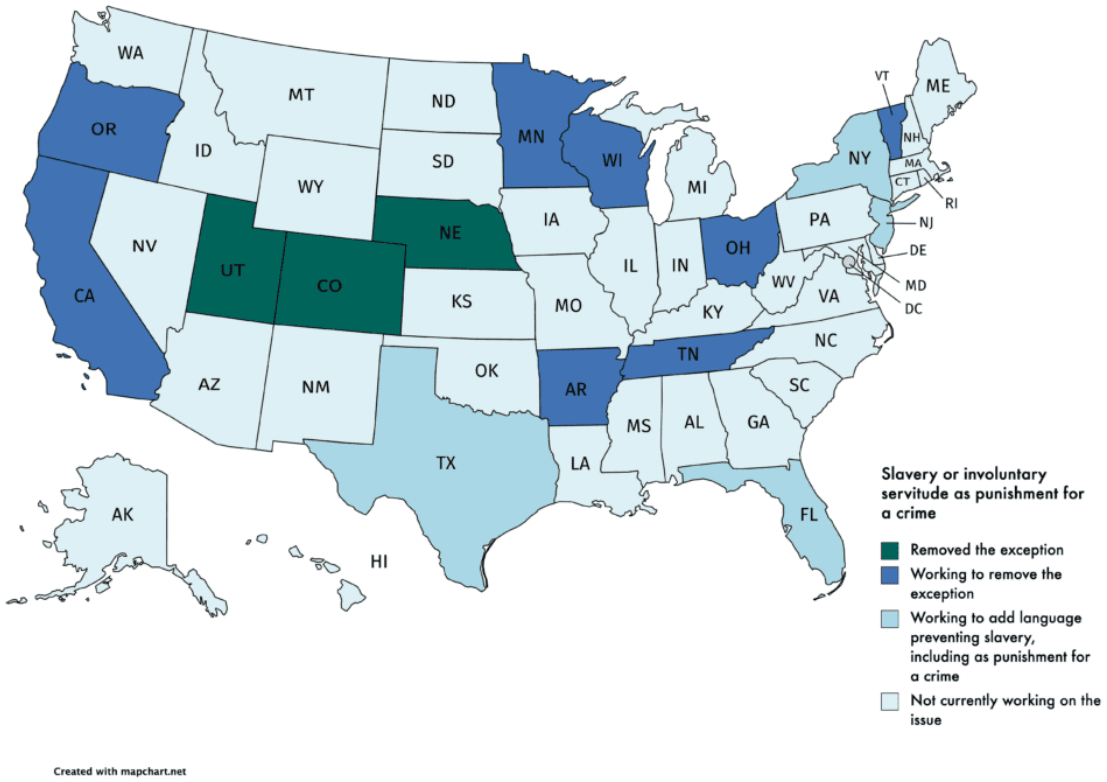
Lincoln recognized slavery as being morally incomprehensible, but lacked the wherewithal to combat its roots and tentacles. Unfortunately like many historical figures before him, he had a two-fold response to slavery. He recognized that he could help provide freedom to the slaves, while "he had become convinced that emancipating enslaved people in the South would help the Union crush the Confederate rebellion and win the Civil War."[34] As a result of this evolutionary thinking on September 22, 1862, President Lincoln signed the Emancipation Proclamation to take effect on January 1, 1863.[35] The Emancipation Proclamation was his first tangible and life-altering promise of freedom for slaves. Unfortunately, it would prove to be ceremonial at best.

33. Abraham Lincoln | Biography, Childhood, Quotes, Death, & Facts. (2023, July 14). Encyclopedia Britannica. https://www.britannica.com/biography/Abraham-Lincoln/The-road-to-presidency#/media/1/341682/52489
34. History.com Editors. (2020a, June 19). *Thirteenth amendment*. HISTORY. https://www.history.com/topics/black-history/thirteenth-amendment#section_1
35. History.com Editors. (2021a, January 25). *Emancipation proclamation*. HISTORY. https://www.history.com/topics/american-civil-war/emancipation-proclamation

This document did not free some 4 million slaves who were most impacted by slavery, instead it functioned to free those who were slaves in Confederate states which were not Union loyalists.[36] However, what the document did operationally for Lincoln is to begin to shift his thoughts regarding slavery and its impact on the Civil War. Therefore, freedom for the slaves became one of the central points of the Civil War. Unfortunately, this left all who supported freedom for slaves to recognize that this was a heavy lift and could only be accomplished with a constitutional amendment. Recall this would take the verbiage of the amendment being approved by 2/3 of Congress and ratified by 3/4 of the states. Thus, all proponents resolved themselves to an uphill battle which ultimately culminated in the abolition of slavery in 1865, almost 100 years after the original United States Constitution was ratified in 1788. Note, operationally the United States of America would continue to reckon with this now abolished concept – struggling to legitimize and legalize slaves as humans, no longer chattel or property.

b. Right against involuntary servitude

...nor involuntary servitude,...shall exist within the United States, or any place subject to their jurisdiction.



Efforts by States to Eliminate the Exception Allowing Slavery or Involuntary Servitude as Punishment for a Crime[37]

36. *Ibid.*
37. akanksha. (2021, June 17). *Efforts by states to eliminate the punishment exception – human trafficking search*. Human Trafficking Search. https://humantraffickingsearch.org/efforts-by-states-to-eliminate-the-exception-allowing-slavery-or-involuntary-servitude-as-punishment-for-a-crime/

As previously discussed, by some accounts early slaves and others were first used as involuntary servants. It was the greed, insecurity, and ethnocentric beliefs which led slaves to be further demeaned. Additionally, others such as Natives, non-landowning individuals were forced into involuntary servitude. Thus, the second part of the first clause of the Thirteenth Amendment – involuntary servitude – is more than likely referring to others (as opposed to African slaves) within the population of the United States in 1865. Black's Law Dictionary defines **involuntary servitude** within the Thirteenth Amendment as "[t]he condition of one forced to labor – for pay or not – for another by coercion or imprisonment."[38] This concept, although arguably difficult and illegal, does not begin to compare to the vastness of human rights which are abrogated by the institution which emerged as slavery. Whereas involuntary servitude is heartless, it allows those mandated to its terms to continue to exercise basic human rights such as marrying, conceiving, and securing and engaging in a family without interference.

However, we, the authors of this text, refuse to completely dismiss involuntary servitude, as it became a foundation for future applications of the Thirteenth Amendment. Thus, what conditions did involuntary servants find themselves sentenced to endure? The Thirteenth Amendment bans all types of working conditions where a person is forced to work without being paid something of value (**in most** cases). One practice was peonage. **Peonage** is defined as "[i]llegal and involuntary servitude in satisfaction of a debt."[39] The practice of peonage was said to begin in New Mexico, spreading its influence across other jurisdictions after the Civil War.

The Supreme Court of the United States weighed the facts in a case and determined this unequitable financial institution was inhumane and oppressive to those who are less fortunate. In *Bailey v. Alabama* (1911), the Court addressed the impact of the Thirteenth Amendment and the term involuntary servitude. The Court indicated that the term "involuntary servitude "[has] a larger meaning than slavery, and the Thirteenth Amendment prohibited all control by coercion of the personal service of one man for the benefit of another."[41] In short, the court reasserted its emphasis on the concern of forcibly using a human for another human's benefit. The *U.S. v. Kozminski* (1988) court further addressed and extended the concept of involuntary servitude. In *U.S. v. Kozminski* (1988), two mentally and physically challenged men who worked in deplorable working conditions daily. The working conditions isolated the men from the rest of the world with little or no wages.[42] Additionally, the men endured incidents of emotional, physical, and mental abuse culminating in the threat to recommit one of the men to an

Essentially, those who were once slaves and other socioeconomically depressed individuals were forced to work until the debt for basic human needs and expenses were satisfied.[40] Unfortunately in many cases this repayment would never occur due to inflated charges and expenses. To this end, the involuntary servant becomes the face of those who are subjected to unfair and illegal working conditions.

38. SERVITUDE, Black's Law Dictionary (12th ed. 2024).
39. PEONAGE, Black's Law Dictionary (12th ed. 2024).
40. *Interpretation: The thirteenth amendment | the national constitution center*. (n.d.). National Constitution Center. Retrieved April 17, 2021, from https://constitutioncenter.org/interactive-constitution/interpretation/amendment-xiii/interps/137#:%7E:text=Section%20Two%20of%20the%20Thirteenth%20Amendment%20empowers%20Congress%20to%20%E2%80%9Cenforce,conduct%20than%20just%20coerced%20labor
41. *Bailey v. Alabama*, 219 U.S. 219 (1911).
42. *U.S. v. Kozminski*, 487 U.S. 931 (1988).

institution.[43] The respondent faced violations found in two criminal federal codes as well as allegations of preventing the men from duly exercising their Thirteenth Amendment right against involuntary servitude. Ultimately, the court determined that the federal statutes at issue – required a specific jury instruction for the case so the "jury must be instructed that compulsion of services by the use or threatened use of physical or legal coercion is a necessary incident of a condition of involuntary servitude."[44] This ban on slavery and involuntary servitude was to persist throughout the United States and its jurisdictions, but there is an exception to this legal rule.

c. Right against involuntary servitude except as a punishment

except as a punishment for crime whereof the party shall have been duly convicted

Most scholars agree that the Thirteenth Amendment abolished slavery and involuntary servitude as it relates to all penalties after an alleged violation of a crime in which the defendant was legally convicted. These 13 words and two clauses served as a stark contrast to the current state of the Thirteenth Amendment. It reminded those who were impacted that these institutions are alive and well to those who are the least of us. It reminded the world that according to the second clause of the Thirteenth Amendment slavery and involuntary servitude are alive and well – within the prison, jail and criminal justice system.

d. Right to enforcement of Thirteenth Amendment

Congress shall have power to enforce this article by appropriate legislation.

After reading the Thirteenth Amendment, it is important to notice some distinctions within the amendment which we have not seen in any of the previous twelve amendments. First and foremost, the Thirteenth Amendment is not very long, but it has sections. This is important as the reader may ask themselves why does a small amendment require two sections. Additionally, no prior amendments have been enumerated into sections. Finally, what is the purpose of §2 of the Thirteenth Amendment as it seems repetitive in nature? This information would be true of all previous amendments, however, it was not deemed necessary as an **enumerated and separate** section. Finally, will other amendments have multiple sections, include this verbiage or return to the format of the first twelve amendments? It is important as you delve into the constitution that you review with scrutiny these slight, but quite significant changes to help you keep the context and history of the times close to your analysis and opinions. We return to the issue at hand – why do we have the Second § of the Thirteenth Amendment? This verbiage in the Constitutional amendment enabled proper enforcement power by appropriate legislation. Similar verbiage can be seen in the Fourteenth, Fifteenth, Nineteenth, Twenty-third, Twenty-fourth, and Twenty-sixth Amendments.

As relations between state and federal government began to deteriorate, the federal government recognized that some states would completely and holistically defer, denounce, and ignore the ratified Thirteenth Amendment.

43. Id.
44. *Id.*

CONSTITUTIONAL CLIP

This split in our country is reflective of what we see in today's politics where opinions are polarized, as we profess our undying support and love for one entity, while being made to feel that it decimates another entity.

This same behavior was highlighted by the Federalists and Anti-Federalists. Again, we see this heightened split from the Civil War between those who supported succession – The Confederacy and those who supported a unified country – The Unionists. This same opposition has been foundational in the United States of America. This split began with the Natives and the Europeans at the "inception" of the Americas. Furthermore, we see the divide in the history of our country between those who support Women's Suffrage as opposed to those in the country who objected to Women's Suffrage. Additionally, we are looking to those who supported Civil Rights and those who didn't. Perhaps, there is the fight between abolishing slavery and those who fought to keep slavery etched in this country's fabric. If you profess Black Lives Matter, then it must be opposed by Blue Lives Matter. Thus, our country has historically and consistently finds itself in contentious and diametrically opposed spaces which requires the law and evolution of the minds of people on American soil to progress.

With this opposition in mind, Amendment XIII, §2, Amendment XIV, §5, Amendment XV, §2, Amendment XIX, §2, Amendment XXIII, §2, Amendment XXVI, §2, and Amendment XXVII, §2 all required an explicit statement that Congress is empowered to invoke suitable legislation to implement the respective amendment's sections.

Therefore, this provision is necessary for Congress to pass and/or effectuate laws to address those who persist in violating this significant amendment. With regard to the Thirteenth Amendment, "For example, the Anti-Peonage Act of 1867 prohibits peonage, and another federal law, 18 U.S.C. §1592, makes it a crime to take somebody's passport or other official documents for the purpose of holding her as a slave."[45] This section was necessary as it was apparent that all jurisdictions would not voluntarily follow these amendments.

As of today, this power remains invested in Congress within each of the aforementioned amendments. Legal parties have sought to further expand Congress's authority in this area; variations of this language was added to six additional amendments. Although SCOTUS has never addressed the full purview of the Second § of the Thirteenth Amendment, it did indicate that its implication must rely upon the "badges and incidents of slavery," described as "refers to public or widespread private action, aimed at any racial group or population that has previously been held in slavery or servitude, that mimics the law of slavery and has significant

45. Greene, J., & McAward, J. M. (2016, December 6). *A Common Interpretation: The Thirteenth Amendment*. National Constitution Center. https://constitutioncenter.org/interactive-constitution/blog/a-common-interpretation-the-thirteenth-amendment

potential to lead to the de facto reenslavement or legal subjugation of the targeted group."[46] Subsequently, the section continues to lack clarity on its implementation. "Finally, it granted Congress the power to enforce this amendment, a provision that led to the passage of other landmark legislation in the 20th century, including the Civil Rights Act of 1964 and the Voting Rights Act of 1965."[47]

Amendment XIV

Passed by Congress June 13, 1866. Ratified July 9, 1868. The 14th Amendment changed a portion of Article I, Section 2. A portion of the 14th Amendment was changed by the 26th Amendment.

Section 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2

Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice-President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3

No person shall be a Senator or Representative in Congress, or elector of President and Vice-President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4

The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5

The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.

46. United States Senate. (2021, January 11). U.S. senate: Landmark legislation: Thirteenth, fourteenth, & fifteenth amendments. https://www.senate.gov/artandhistory/history/common/generic/CivilWarAmendments.htm
47. United States Senate. (2021, January 11).

INTRODUCTION TO AMENDMENT XIV

The Fourteenth Amendment addresses many aspects of citizenship and the rights of citizens. The most commonly used and frequently litigated phrase in the amendment is "equal protection of the laws," which figures prominently in a wide variety of landmark cases, including *Brown v. Board of Education* (racial discrimination); *Roe v. Wade* (reproductive rights); *Bush v. Gore* (election recounts); *Reed v. Reed* (gender discrimination); and *University of California v. Bakke* (racial quotas in education). Amendment XIV followed an interesting process which began on June 16, 1866 through the House Joint Resolution.[48] On July 28, 1868, the 14th amendment was declared, in a certificate of the Secretary of State, ratified by the necessary 28 of the 37 States, and became part of the supreme law of the land.[49]

ANALYSIS OF AMENDMENT XIV

Section 1

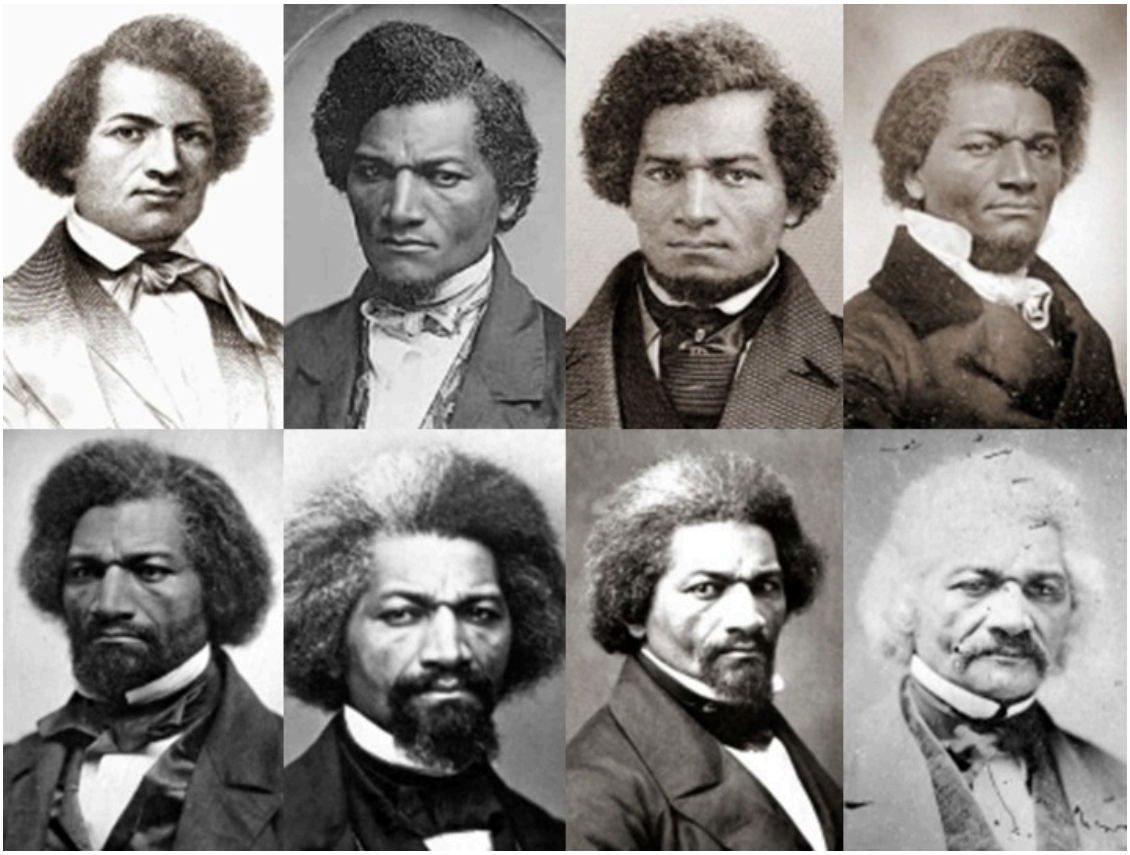
a. Right to citizenship

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside.

This section extends the impact of the Thirteenth Amendment further. The enslaved people who are now listed as human are now constitutionally allowed to be citizens of the United States.

This part of the amendment is quite important considering the original **Constitution** pointed to slaves and natives as subhuman, but should be counted towards representation. Although most case law reflected a divided country, the legislative history emerged as a commonsense approach to citizenship. The Supreme Court, in the *Dred Scott (1857)* case, with Chief Justice Roger Taney writing for the majority, restricted citizenship by designating two types of individuals as appropriate for this status.[50] In short, the Court reminded the country that citizenship was only extended to either someone (or that person's descendants) who was originally granted citizenship at the inception of the country or someone that was naturalized into the country.[51]. Taney held that men of African descent were "so far inferior that they had no rights which the white man was bound to respect…the Negro might justly and lawfully be reduced to slavery for his benefit." The iconic Black abolitionist and statesman Frederick Douglass responded, "Judge Taney can do many things, but he cannot perform impossibilities. He cannot change the essential nature of things—making evil, good, and good, evil."[52]

48. 14th Amendment to the U.S. Constitution: Civil Rights (1868). (2022, February 8). National Archives. https://www.archives.gov/milestone-documents/14th-amendment#:~:text=No%20State%20shall%20make%20or,equal%20protection%20of%20the%20laws.
49. *14th Amendment to the U.S. Constitution: Civil Rights (1868)*, 2022.
50. *Dred Scott v. Sandford*, 60 US 393 (1857).
51. *Id.*
52. Douglass, F. (2022). *Frederick Douglass: Speeches & Writings (LOA #358)*. Library of America.



The Highly Photographic Life of Frederick Douglass Through The Years[53]

This decision solidified the divide between those who were white and natives, immigrants without naturalization, slaves, and freed slaves. As a result, this clause was applied to Chinese parents (ineligible for naturalization) and the status of their Chinese child who was born in the states. The Court leveraged this clause in *United States v. Wong Kim Ark* (1898) when they determined that the child was entitled to the rights and privileges of United States citizenship according to §1, Cl. 1 of the Fourteenth Amendment.[54] Thus, the first portion of this amendment created a path to citizenship where one did not previously exist. Additionally, the amendment recognized and confirmed that this was recognized by some states already, but needed to be extended by the federal government if other states would consider, implement and ultimately embrace this clause.[55]

b. Right to privileges or immunities of citizens

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States;

It's important to note that the Fourteenth Amendment was explicit in its approach to providing a holistic cadre of rights to its newly identified citizens. The **privileges and immunities clause** is defined

53. Carlson, B. (2022, February 14). *The Highly Photographic Life Of Frederick Douglass (Cool Weird Awesome 716)*. Brady Carlson. https://www.bradycarlson.com/the-highly-photographic-life-of-frederick-douglass-cool-weird-awesome-716/

54. *United States v. Wong Kim Ark*, 169 US 649 (1898).

55. Citizenship clause: Historical background | Constitution annotated | congress.gov | library of congress. (n.d.). Amdt14.S1.1.1.1 Citizenship Clause: Historical Background. Retrieved June 3, 2021, from https://constitution.congress.gov/browse/essay/amdt14-S1-1-1-1/ALDE_00000811/

as "[t]he Constitutional provision…prohibiting a state from favoring its own citizens by discriminating against other states' citizens who come within its borders."[56] The implementation of this clause faced grave danger soon after it was ratified as evidenced in the *Slaughter-House Cases* (1873), where New Orleans' butchers offered a violation of the national citizenship and the court explained that this was an adverse meaning of the right to privileges and immunities within this context.[57] Ultimately, the court determined that the privileges and immunities were limited to those explicitly stated within the Constitution and did not regard those rights offered by the state governments.[58] In short, the *Slaughter-House Cases* essentially nullified this clause with its holding.[59]

c. Right to due process

nor shall any State deprive any person of life, liberty, or property, without due process of law;

Due Process[60]

Whereas, the previous section seemed to be reduced in its application, the current clause broadens it ability to be applied. This section is typically viewed in tandem with other mentions of due process across the Constitution such as the Fifth Amendment; although the verbiage used in both the Fifth and the Fourteenth Amendment is almost identical. There is a unique difference in the focus of the two amendments. Recall, the Fifth Amendment applies due process protections for individuals from federal government (and extended through the Incorporation Doctrine); whereas the Fourteenth Amendment applies to due process protections to individuals from local and state government.

As we identify the true essence of this clause, it is important to define **due process** of the law as "[t]he conduct of legal proceedings according to established rules and principles for the protection and enforcement of private rights, including notice and the right to a fair hearing before a tribunal with

56. PRIVILEGES AND IMMUNITIES CLAUSE, Black's Law Dictionary (12th ed. 2024).
57. *Slaughter-House Cases*, 83 US 36 (1873).
58. *Id.*
59. *Id.*
60. Desetti, M. (n.d.). *How about a two-tiered class system for teachers? House Ed Committee says no thanks. | Under The Dome KS.* https://underthedomeks.org/how-about-a-two-tiered-class-system-for-teachers-house-ed-committee-says-no-thanks/

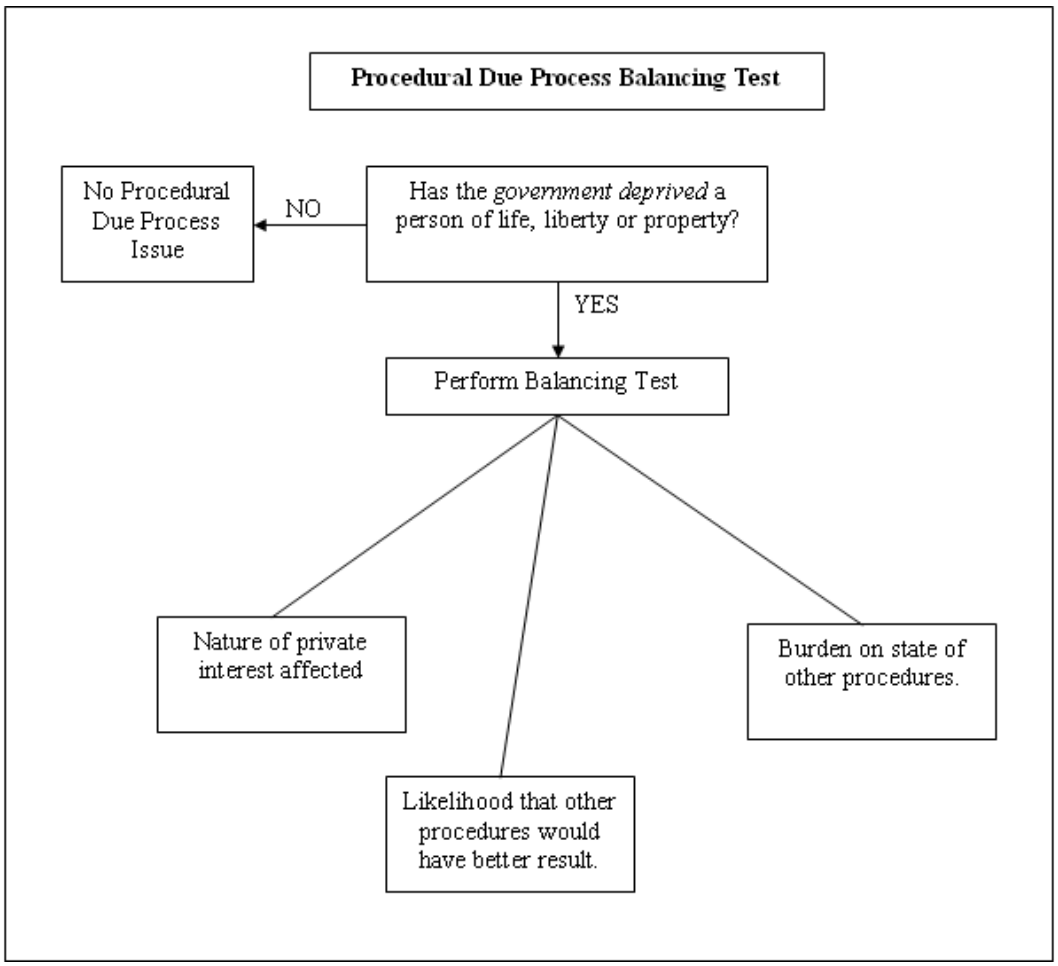
the power to decide the case."[61] This amendment explicitly includes life, liberty, or property as notable dissertations of the due process of law. Further, due process of law may be distinguished based upon possible violations. On the one hand, due process may affect how the defendant proceeds through the criminal justice system. This process would include investigation to sentencing and post-conviction proceedings. Each defendant is to be treated equally at each juncture of the process. On the other hand, due process may be violated when it fails to maintain basic freedoms such as the freedom of speech or the freedom of religion.

CONSTITUTIONAL CLIP

Thus, the due process concept doctrine includes two separate doctrines – procedural and substantive due process violations for the accused.

Procedural due process is defined as "[t]he minimal requirements of notice and a hearing guaranteed by the Due Process Clauses of the Fifth and Fourteenth Amendments, especially if the deprivation of a significant life, liberty, or property interest may occur."[62] An example of procedural law is if two accused individuals are both engaged in the ***same*** criminal activity and one ***is*** Mirandized and arraigned for the alleged crime; while the other accused ***is not*** Mirandized and confesses to the crime. In *In re Gault* (1967), procedural due process protections were extended to juveniles as well when the court determined that juveniles are entitled to privilege against self-incrimination, notice of charges, and right to confront, and subpoena witnesses.[63]

61. DUE PROCESS, Black's Law Dictionary (12th ed. 2024).
62. DUE PROCESS, 2019.
63. *In re Gault*, 387 US 1 (1967).



Procedural Due Process[64]

Whereas, **substantive due process** is defined as "[t]he doctrine that the Due Process Clauses of the Fifth and Fourteenth Amendments require legislation to be fair and reasonable in content and to further a legitimate governmental objective."[65] In short, the due process violation is unfair based upon the verbiage of the law itself. By way of example, two individuals are both charged with possession of cocaine. One of the accused has powder cocaine and the other has crack cocaine. Everyone within the criminal justice system recognizes that both accused are in possession of the same drug – cocaine (albeit a different form). Unfortunately, the statute which the accused is charged with distinguishes powder cocaine convictions as a lesser offense than a crack cocaine conviction. At sentencing the accused convicted of powder cocaine receives 10 years less than their counterpart who is convicted on crack cocaine. Sometimes compounding a substantive due process violation is the disproportionate impact it has on Black and brown communities evidenced in the language of the statute itself.

Constitutional Law on the MBE®: Topics and Sample Questions

Substantial Due Process[66]

64. *Procedural due process*. (2013, April 17). Vatterott OKC Paralegal Studies. https://vatterottokcparalegals.wordpress.com/2013/04/17/procedural-due-process/
65. DUE PROCESS, 2019.
66. UWorld Legal. (2023, June 16). *Constitutional Law on the MBE®: Topics and sample questions*. https://legal.uworld.com/bar-exam/constitutional-law-outline-and-practice-questions/

The Fourteenth Amendment guarantee of Substantive Due Process was first used to protect the right of a private business to make contracts. The Supreme Court, in *Lochner v. New York* (1905), struck down a New York State law that prohibited bakeries from from employing people for more than ten hours a day, or to require employees to work more than sixty hours in a week. The Court said that the right of a private business to make contracts was a fundamental liberty protected by the Fourteenth Amendment and its Due Process clause, and this law interfered with that liberty.[67] Substantive Due Process became the basis of many of the Court's most controversial rulings protecting individuals, not businesses, rulings that established a right to privacy, a right to interracial marriage, a right to abortion, and a right to same sex marriage. In each case, the Court ruled that a law had interfered with the exercise of a fundamental liberty.[68]

d. Right to equal protection of the law

nor deny to any person within its jurisdiction the equal protection of the laws.

Thus, because the conversation surrounding citizen's rights is fluid, it must include the current clause to be complete. Equal protection of the law was thought to be foundational in correcting so many wrongs with those who were deemed inhumane, therefore not citizens and thus stripped of all citizen's rights. Although the phrase is a familiar phrase which endured every version of its drafting, the Framers who introduced this phrase in the Fourteenth Amendment did not envision the same meaning. Similar to our current struggles with Constitutional interpretation of verbiage, proper words to convey our thoughts, and finally what definitions we attribute to the word choice presented, the Framers also dealt with these issues regarding the Fourteenth Amendment. Their thoughts which converged on the inclusion of this clause into the final draft did not necessarily have the same meaning for each Framer. Thus, for our purposes we will adopt the meaning attributed from our esteemed legal resource – Black's Law Dictionary. Black's emphasizes the Fourteenth Amendment by stating that it is "[t]he constitutional amendment, ratified in 1868, whose primary provisions effectively apply the Bill of Rights to the states by prohibiting states from denying due process and equal protection and from abridging the privileges and immunities of U.S. citizenship.[69] Furthermore, "[i]n today's Constitutional jurisprudence, **equal protection** means legislation which discriminates must have a rational basis for doing so.[70] And if the legislation affects a fundamental right (such as the right to vote) or involves a suspect classification (such as race), it is unconstitutional unless it can withstand strict scrutiny."[71]

To this end, important concepts have been raised by parties within cases to encourage the Supreme Court of the United States to weigh in on the direct effect of the Equal Protection Clause. Recall, in ***Plessy v. Ferguson*** (1896), the court confirmed the widely held belief and law of "separate, but equal" rights for White and Black facilities. In this case, the doctrine was applied to a train. The court explained that the separation of whites and blacks is Constitutional and, more importantly, did not violate the fourth part of §1 of the Fourteenth Amendment.[72] **Separate-but-equal** doctrine is defined as "[t]he now-defunct doctrine that African-Americans could be segregated if they were provided with

67. *Lochner v. New York*, 198 U.S. 45 (1905).
68. Waldman, M. (2023). *The supermajority: How the Supreme Court Divided America*. Simon and Schuster.
69. FOURTEENTH AMENDMENT, Black's Law Dictionary (12th ed. 2024).
70. EQUAL PROTECTION, Black's Law Dictionary (12th ed. 2024).
71. EQUAL PROTECTION, Black's Law Dictionary (12th ed. 2024).
72. *Plessy v. Ferguson*, 163 U.S. 537 (1896).

equal opportunities and facilities in education, public transportation, and jobs."[73] It would take more than 60 years in 1954 for a new interpretation of this section to emerge. This new mentality emerged as a result of the composition of the court as well as the increase in the civil rights protests and activities of the country. Specifically, the unexpected death of Chief Justice Fred Vinson Jr. prompted President Dwight Eisenhower to nominate then California Governor Earl Warren to replace Vinson.[74]

An interactive H5P element has been excluded from this version of the text. You can view it online here: https://cod.pressbooks.pub/usconstitutionalive2e/?p=43#h5p-4

Information for timeline[75]

This helped build the foundation for the *Brown v. Topeka Board of Education* (1954) decision. Chief Justice Warren would write the unanimous decision, which stated that segregation in public schools is "inherently unequal" and explained in non-legal language why he felt this practice produced and reinforced an inferiority complex in the Black children who were marginalized and dismissed within the public schools due to this law.[76] In fact, President Eisenhower was forced to use troops to protect those who engaged in this Constitutional action. "When Governor [Orval] Faubus ordered the Arkansas National Guard to surround Central High School to keep the nine students from entering the school, President Eisenhower ordered the 101st Airborne Division into Little Rock to insure the safety of the 'Little Rock Nine' and that the rulings of the Supreme Court were upheld."[77] In fact, this was the first time troops were deployed to protect Blacks since the Reconstruction Era. Ultimately, President Eisenhower would sign the Civil Rights Act of 1957.[78]

SCOTUS would continue emphasizing the belief that the United States Constitution is a living, breathing document which is adaptable and adoptable to expand and respond to current events. This led the Warren Court to have much progress in the areas of race, criminal justice, political procedures, as well as church and state.[79]

Additionally, this expansion was questioned as it relates to interracial marriage in *Loving v. Virginia* (1967).[80] In *Loving*, Chief Justice Warren evidenced the breadth and depth of the Equal Protection Clause and the Due Process Clause of the Fourteenth Amendment. The court explained that marriage is a fundamental right which can not be dictated by parameters based solely on race and held that "the

73. SEPARATE-BUT-EQUAL DOCTRINE, Black's Law Dictionary (12th ed. 2024).
74. *Brown v. Board of Education of Topeka*, 347 US 483 (1954).
75. The U.S. National Archives and Records Administration. (n.d.). *Brown v. Board of education timeline*. Timeline of Events Leading to the Brown v. Board of Education Decision, 1954. Retrieved May 29, 2021, from https://www.archives.gov/education/lessons/brown-v-board/timeline.html
76. *Id.*
77. *Civil rights: The little rock school integration crisis | eisenhower presidential library*. (n.d.). Dwight D. Eisenhower Presidential Library. Retrieved February 3, 2021, from https://www.eisenhowerlibrary.gov/research/online-documents/civil-rights-little-rock-school-integration-crisis#:%7E:text=When%20Governor%20Faubus%20ordered%20the,the%20Supreme%20Court%20were%20upheld.
78. *Civil Rights: The Little Rock School Integration Crisis | Eisenhower Presidential Library*. (n.d.). https://www.eisenhowerlibrary.gov/research/online-documents/civil-rights-little-rock-school-integration-crisis
79. *Ibid.*
80. *Loving v. Virginia*, 388 U.S. 1 at 20 (1967).

freedom to marry, or not marry, a person of another race resides with the individual, and cannot be infringed by the State."[81]

Another important equal protection case was decided in 2023, ***Students for Fair Admissions v. Harvard.*** The U.S. Supreme Court held, in a 6-3 vote, that race-based affirmative action programs in college admissions processes at Harvard College (a private institution) and the University of North Carolina (public) both violate Title VI of the Civil Rights Act of 1964 and the Equal Protection Clause of the Fourteenth Amendment, which bars racial discrimination by government entities.[82]

Affirmative Action is defined by Black's Law Dictionary as

"1. The practice of selecting people for jobs, college spots, and other important posts in part because some of their characteristics are consistent with those of a group that has historically been treated unfairly by reason of race, sex, etc.; specif., a preference or decision-making advantage given to members of a racial minority that has historically been subjected to systemic discrimination.

2. An action or set of actions intended to eliminate existing and continuing discrimination, to redress lingering effects of past discrimination, and to create systems and procedures to prevent future discrimination, all by taking into account individual membership in a minority group so as to achieve minority representation in a larger group."[83]

The decision severely limited, if not effectively ended, the use of affirmative action in college admissions. Chief Justice Roberts, writing for the majority, held that a student "must be treated based on his or her experiences as an individual—not on the basis of race." Justice Sotomayor, who once called herself "the perfect affirmative action baby,"[84] emphasized in her dissent that the majority's decision had rolled "back decades of precedent and momentous progress" and "cemented a superficial rule of colorblindness as a Constitutional principle in an endemically segregated society."

CONSTITUTIONAL CLIP

Brown v. Board (1954) would take two cases, *Brown I* and *Brown II*, army troops, and nine brave Black students – "The Little Rock Nine" to fight the mental precedents of governments in Arkansas. However, the holding would not result in true school integration until the 1970's, and was then met with fierce resistance. Today, nearly half of all black students attend majority black schools, with over 70% in high-poverty school districts. New York is the most segregated state: two-thirds of its black students attend schools that are less than 10% white. Schools remain segregated mostly because their neighborhoods are segregated.[85]

81. *Id.*
82. *Students for Fair Admissions v. Harvard*, 600 US _ (2023).
83. AFFIRMATIVE ACTION, Black's Law Dictionary (12th ed. 2024).
84. Howe, A., & Amy-Howe. (2023). Supreme Court strikes down affirmative action programs in college admissions. *SCOTUSblog*. https://www.scotusblog.com/2023/06/supreme-court-strikes-down-affirmative-action-programs-in-college-admissions/
85. *Brown*, 1954.

ANALYSIS OF AMENDMENT XIV

Section 2

a. Right for each individual to be treated as whole person

Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed.

Upon first glance, this portion of §2 of the Fourteenth Amendment seems to address and eradicate all discrepancies between persons who are not considered a whole person. Specifically, this section addresses a previous section of Art. I, §2, cl. 3 of the original Constitution. This section of the Fourteenth Amendment repealed this clause known as the Three-Fifths Compromise. This compromise previously counted African slaves as three-fifths of a person as opposed to a whole person. This new approach may appear to work on behalf of slaves; however, this section worked for the purpose of apportioning congressional representation.

b. Right to Vote

But when the right to vote at any election for the choice of electors for President and Vice-President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Ultimately, counting the previously enslaved as whole persons provided more representation for their states, while not necessarily providing more human rights for Blacks. Most important is that this section still excluded Natives or Indigenous people from this new representative apportionment.

Legally, this section also guaranteed that all male citizens over age 21, regardless of landownership or race, had a right to vote. Operationally, we understand that not all male citizens had the right to vote. This did not include Blacks or Native males. Therefore, this remains contentious within the states. As always this section does provide exceptions. Males who are deemed to be in "rebellion or crime" are constitutionally allowed to be disenfranchised. Further this disenfranchisement may be extended based upon those who maintain court costs and fines in some jurisdictions according to their state constitutions.[86] Disenfranchisement is important as it works to destroy true democracy. Furthermore, **disenfranchisement** is defined as "[t]he act of taking away the right to vote in public elections from a citizen or class of citizens."[87]

Operationally, the southern states continued to deny Black and Native men the right to vote using the laws known as the "Jim Crow" laws. These laws "represented a formal, codified system of racial apartheid that dominated the American South for three quarters of a century beginning in the

86. *Voting Rights and Voter Disenfranchisement in Florida*. (2020, October). U.S. Commission on Civil Rights. https://www.usccr.gov/files/2020-10-06-FL-Voting-Rights-Advisory-Memo.pdf

87. DISENFRANCHISEMENT, Black's Law Dictionary (12th ed. 2024).

1890s."[88] Unfortunately, these laws encompassed every area of life from "White Only" restrooms to heightened voter disenfranchisement. Thus, this section addressed an important concern which would be litigated for many years going forward.

ANALYSIS OF AMENDMENT XIV

Section 3

Right Against Congress

No person shall be a Senator or Representative in Congress, or elector of President and Vice-President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

This section gives Congressional authority to prevent those who are public officials who seek to take an oath in their position, from taking office if they are confirmed to be a part of an insurrection or rebellion against the Constitution. "The intent was to prevent the president from allowing former leaders of the Confederacy to regain power within the U.S. government after securing a presidential pardon."[89] Congress may overcome this issue with a two-thirds majority vote; therefore, an exception exists even for those who were actively engaged in insurrection or rebellion from holding office. This section of the Fourth Amendment leads the reader to consider the Insurrection which occurred at the Capitol on January 6, 2021. It appears that even if Congress could point to a member of Congress who engaged in this tragic event, only a vote of two-thirds of Congress is needed to overcome this disability (if it were raised). Hence, many members of Congress believe an investigation which leads to action in this case could be a waste of taxpayers' money, while undermining the taxpayers' confidence.

ANALYSIS OF AMENDMENT XIV

Section 4

Right Against Governmental Assistance with Public Debt

The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

This section points to the mounting debt incurred by those states who engaged in war against the

88. American Experience. (2011, May 16). *Jim crow laws*. American Experience | PBS. https://www.pbs.org/wgbh/americanexperience/features/freedom-riders-jim-crow-laws/

89. History.com Editors. (2021a, January 12). *14th amendment*. HISTORY. https://www.history.com/topics/black-history/fourteenth-amendment

United States of America. In fact, those states which left to form the Confederacy had a right to confirm their remaining debt from war, but lacked the ability to have the United States pay said debt. As the Confederacy lost the war, it was important for those who remained in the federal government not to allow financing for the debts which were in question, such as for *slavery.*[90]

ANALYSIS OF AMENDMENT XIV

Section 5

Right to Enforcement of Fourteenth Amendment

The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.

As previously stated earlier, the verbiage of the Fourteenth Amendment is a repeat of a similar version of §2 of the Thirteenth Amendment. Again, Congress is granted the power to ensure that the controversial Fourteenth Amendment is properly enforced using all available legislation. This verbiage in the Constitutional amendment enabled proper enforcement power by appropriate legislation. Similar verbiage can be seen in the Thirteenth, Fifteenth, Nineteenth, Twenty-third, Twenty-fourth, and Twenty-sixth Amendments.

Amendment XV

Passed by Congress February 26, 1869. Ratified February 3, 1870.

Section 1

The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.

Section 2

The Congress shall have the power to enforce this article by appropriate legislation.

INTRODUCTION TO AMENDMENT XV

Recall under the original Constitution and for much of American history, only landowning white males over 21 years old were legally allowed to vote. Although the right to vote cannot be denied based upon race, religion, sex, disability, or sexual orientation, the right still remains highly politicized and polarized when the voter is 18 years old.[91] Furthermore, disenfranchisement continues to occur with some states exhibiting tactics to reduce as opposed to increase enfranchisement. This topic is further explored in the analysis section of Amendment XV. Finally, all states require registration for voting, except North Dakota.[92] The Fifteenth Amendment is specifically dedicated to protecting the right of all citizens to vote, regardless of race.[93]

90. Ibid.
91. The White House. (2022a, July 12). *Elections and Voting | The White House*. https://www.whitehouse.gov/about-the-white-house/our-government/elections-and-voting/
92. *Elections and* Voting, 2022a.
93. *Elections and* Voting, 2022a.

ANALYSIS OF AMENDMENT XV

Section 1

a. Right to Vote for Every Male over the Age of 21

The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.

After slaves became humans (Thirteenth Amendment) and these humans became citizens (Fourteenth Amendment), the Fifteenth Amendment granted male citizens over the age of 21 Constitutional protections of voting. To support this amendment's passage, Nevada Senator William Stewart provided direction and expertise as the Fifteenth Amendment progressed through the Senate.[94] Unfortunately, this well-intentioned amendment left Confederate states the opportunity to continue to block the previously identified males with new ways to disenfranchise those who were impacted the most by the Thirteenth, Fourteenth and Fifteenth Amendments. Particularly, this provision could not prevent literacy tests, poll tax, and other inequitable means to support voter disenfranchisement. These practices would persist for almost 100 years until the Twenty-fourth Amendment and the Voters Right Act of 1965.

Section 2

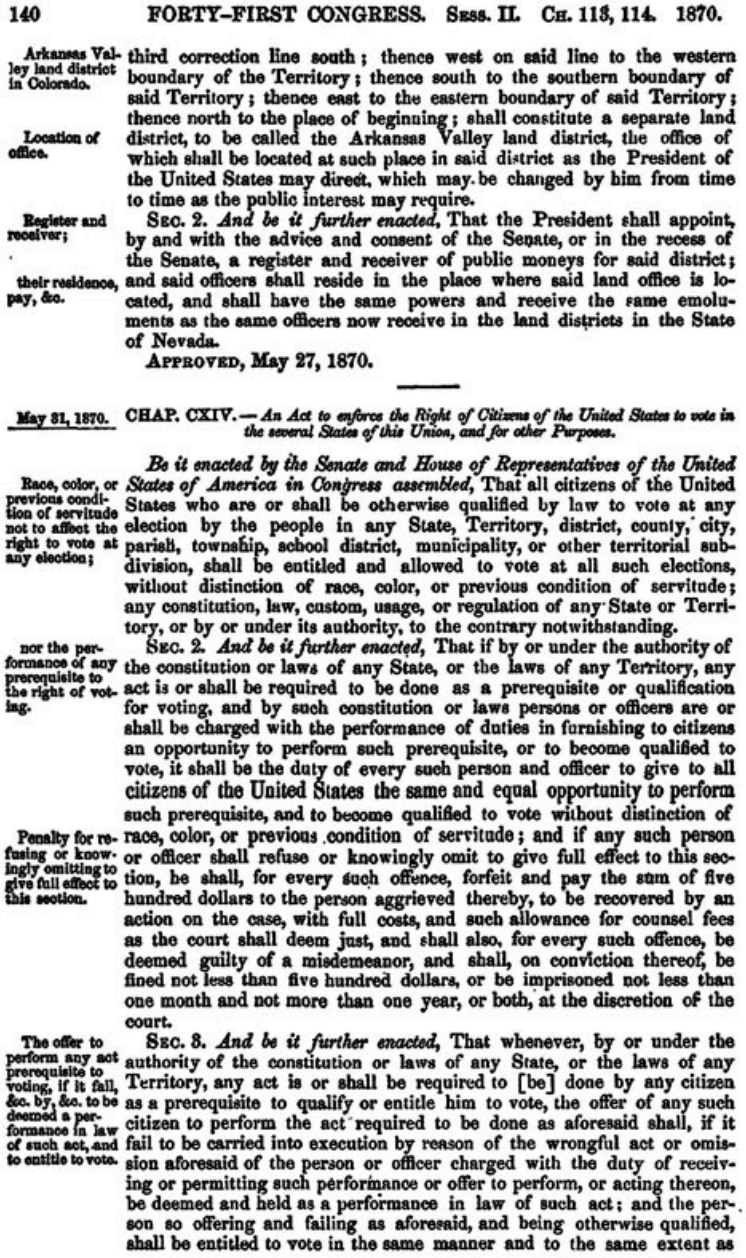
b. Right to Enforcement of the Fifteenth Amendment

The Congress shall have the power to enforce this article by appropriate legislation.

"The Enforcement Acts (also referred to as Civil Rights Acts) were three bills passed by the Federal government in 1870 and 1871 that were intended to protect African American rights to vote, hold office, be on juries, and have protection under the law."[95]

94. *LibGuides: American history: The civil war and reconstruction: Amendments, acts and codes of reconstruction*. (2020). John Jay College of Criminal Justice. https://guides.lib.jjay.cuny.edu/c.php?g=288398&p=1922458

95. *American History*, 2020.



140 FORTY-FIRST CONGRESS. SESS. II. CH. 113, 114. 1870.

Arkansas Valley land district in Colorado.

Location of office.

Register and receiver;

their residence, pay, &c.

third correction line south; thence west on said line to the western boundary of the Territory; thence south to the southern boundary of said Territory; thence east to the eastern boundary of said Territory; thence north to the place of beginning; shall constitute a separate land district, to be called the Arkansas Valley land district, the office of which shall be located at such place in said district as the President of the United States may direct, which may be changed by him from time to time as the public interest may require.

SEC. 2. *And be it further enacted*, That the President shall appoint, by and with the advice and consent of the Senate, or in the recess of the Senate, a register and receiver of public moneys for said district; and said officers shall reside in the place where said land office is located, and shall have the same powers and receive the same emoluments as the same officers now receive in the land districts in the State of Nevada.

APPROVED, May 27, 1870.

May 31, 1870.

CHAP. CXIV.—*An Act to enforce the Right of Citizens of the United States to vote in the several States of this Union, and for other Purposes.*

Race, color, or previous condition of servitude not to affect the right to vote at any election;

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That all citizens of the United States who are or shall be otherwise qualified by law to vote at any election by the people in any State, Territory, district, county, city, parish, township, school district, municipality, or other territorial subdivision, shall be entitled and allowed to vote at all such elections, without distinction of race, color, or previous condition of servitude; any constitution, law, custom, usage, or regulation of any State or Territory, or by or under its authority, to the contrary notwithstanding.

nor the performance of any prerequisite to the right of voting.

SEC. 2. *And be it further enacted*, That if by or under the authority of the constitution or laws of any State, or the laws of any Territory, any act is or shall be required to be done as a prerequisite or qualification for voting, and by such constitution or laws persons or officers are or shall be charged with the performance of duties in furnishing to citizens an opportunity to perform such prerequisite, or to become qualified to vote, it shall be the duty of every such person and officer to give to all citizens of the United States the same and equal opportunity to perform such prerequisite, and to become qualified to vote without distinction of

Penalty for refusing or knowingly omitting to give full effect to this section.

race, color, or previous condition of servitude; and if any such person or officer shall refuse or knowingly omit to give full effect to this section, he shall, for every such offence, forfeit and pay the sum of five hundred dollars to the person aggrieved thereby, to be recovered by an action on the case, with full costs, and such allowance for counsel fees as the court shall deem just, and shall also, for every such offence, be deemed guilty of a misdemeanor, and shall, on conviction thereof, be fined not less than five hundred dollars, or be imprisoned not less than one month and not more than one year, or both, at the discretion of the court.

The offer to perform any act prerequisite to voting, if it fail, &c. by, &c. to be deemed a performance in law of such act, and to entitle to vote.

SEC. 3. *And be it further enacted*, That whenever, by or under the authority of the constitution or laws of any State, or the laws of any Territory, any act is or shall be required to [be] done by any citizen as a prerequisite to qualify or entitle him to vote, the offer of any such citizen to perform the act required to be done as aforesaid shall, if it fail to be carried into execution by reason of the wrongful act or omission aforesaid of the person or officer charged with the duty of receiving or permitting such performance or offer to perform, or acting thereon, be deemed and held as a performance in law of such act; and the person so offering and failing as aforesaid, and being otherwise qualified, shall be entitled to vote in the same manner and to the same extent as

The Enforcement Act of 1870[96]

Congress believed additional enforcement would be necessary. Therefore, this Constitutional amendment enabled proper enforcement power by appropriate legislation. Similar verbiage can be seen in the Thirteenth, Fourteenth, Nineteenth, Twenty-third, Twenty-fourth, and Twenty-sixth Amendments. One manifestations of this additional legislation included the Enforcement Act of

96. *U.S. Senate: Enforcement Act of 1870*. (2023, July 17). https://www.senate.gov/artandhistory/history/common/image/EnforcementAct_1870_Page_1.htm

May 1870, Second Force Act of February 1871, and the Third Force Act of April 1871. Each of these Enforcement acts were in direct response to the enforcement verbiage of Amendment Thirteen, Amendment Fourteen, and Amendment Fifteen as well as the Civil Rights Act of 1866.[97] Collectively, these acts became known as the Ku Klux Klan (KKK) Acts. These members of the KKK continued to "terrorize black citizens for exercising their right to vote, running for public office, and serving on *juries*."[98] Congress passed the second attempt to diminish these attacks "a series of Enforcement Acts in 1870 and 1871 (also known as the Force Acts) to end such violence and empower the president to use military force to protect African Americans."[99] Although the Force Acts provided some form of relief for African-Americans, "the end of formal Reconstruction in 1877 allowed for a return of largescale disenfranchisement of African Americans."[100]

The **Voting Rights Act of 1965** (the "VRA"), passed by Congress at the height of the Civil Rights movement in the United States, outlaws any "voting qualification or prerequisite to voting, " including literacy tests, tests for educational achievement and understanding, proof of "good moral character," and vouchers for qualification as a registered voter, that deny the right to vote on account of race or color.[101] The VRA provides that States and localities where less than 50% of the persons of voting age are registered, must receive the approval of the district court of the District of Columbia or of the U.S. Attorney General ("preclearance") prior to implementing any changes in election laws.[102] The VRA also authorizes the appointment of federal voting examiners to register voters when the Attorney General deemed that was necessary to the enforcement of the Fifteenth Amendment.[103] The Supreme Court affirmed its constitutionality in *South Carolina v. Katzenbach (1966)*.[104] The VRA was extended in 1970 and again in 1975 to 1982, then extended again, this time for 25 years.[105] In 2006, Congress extended the VRA for another 25 years. The 1975 extension added an amendment, explicitly covering Hispanic, Asian-American, Native American, and Native Alaskan voters.[106]

George W. Bush, 43rd President of the United States (2001-2009), signing the 2006 extension of the Voting Rights Act, joined by Democratic and Republican members of Congress for the signing ceremony. The extension passed overwhelmingly in the House of Representatives, and 98-0 in the Senate.[107]

The effect of the Voting Rights Act was profound. Nearly as many Black people registered to vote

97. *U.S. Senate: The Enforcement Acts of 1870 and 1871*. (2020, June 5). https://www.senate.gov/artandhistory/history/common/generic/EnforcementActs.htm
98. *Ibid.*
99. *Ibid.*
100. *Ibid.*
101. *Voting Rights Act (1965)*. (2022, February 8). National Archives. https://www.archives.gov/milestone-documents/voting-rights-act#:~:text=This%20act%20was%20signed%20into,as%20a%20prerequisite%20to%20voting.
102. *Ibid.*
103. *Ibid.*
104. *South Carolina v. Katzenbach*, 383 US 301 (1966).
105. Voting Rights Act of 1965.
106. 42 U.S.C. S 1973b(b) (1976).
107. *Yahoo forma parte de la familia de marcas de Yahoo*. (n.d.). https://images.search.yahoo.com/search/images?p=george+w.+bush+signs+voting+rights+act&fr=mcafee&type=E210US714G0&imgurl=https%3A%2F%2Fwww.dailyherald.com%2Fstoryimage%2FDA%2F20121028%2Fnews%2F710289838%2FAR%2F0%2FAR-710289838.jpg%26updated%3D20121028171926MaxW%3D900%26maxH%3D900%26noborder%26Q%3D80#id=0&iurl=https%3A%2F%2Fmedia.npr.org%2Fassets%2Fimg%2F2012%2F11%2F30%2FBush_votingrights_wide-66d0a553e2844cf9cc885f223fefde005277b78b.jpg%3Fs%3D6&action=click

in southern states in its first five years as in the entire previous century combined.[108] In Mississippi, African-American registration jumped from 7% in 1964, to 59% four years later, and 71% by 1998. The law changed the South, and for the first time opened the way for a truly multiracial democracy in the United States.[109]

However, in 2013, the Supreme Court in ***Shelby County v. Holder,*** by a 5-4 majority vote, invalidated Section 4 of the VRA, which had specified a formula for singling out certain States and counties for preclearance review by the U.S.[110] Writing for the slim majority, Chief Justice Roberts held that either Congress must revise the Section 4 formula, or that the Justice Department must independently prove that a State or county attempted to dilute the voting power of minorities.[111] He declared that the continued use of a formula was "based on 40-year-old facts" and that the country had changed, because more African-Americans vote and are elected to office today than fifty years ago.[112] Therefore, he found Section 4 of the VRA to be unconstitutional. In dissent, Justice Ruth Bader Ginsburg arguing that the majority had been shortsighted in saying Section 4 was no longer needed. In fact she famously remarked, "It is like throwing away your umbrella in a rainstorm because you are not getting wet."[113] For further information on this topic, refer to Introduction to Amendment XXIV later in this chapter.

Amendment XXIV

Passed by Congress August 27, 1962. Ratified January 23, 1964.

Section 1

The right of citizens of the United States to vote in any primary or other election for President or Vice President, for electors for President or Vice President, or for Senator or Representative in Congress, shall not be denied or abridged by the United States or any State by reason of failure to pay poll tax or other tax.

Section 2

The Congress shall have power to enforce this article by appropriate legislation.

INTRODUCTION OF AMENDMENT XXIV

Unfortunately, the verbiage of Amendment XIII, Amendment XIV, and Amendment XV did not end the struggles for voting, especially women and African-Americans.

> "Because of widespread discrimination in many states, including the use of poll taxes, grandfather clauses, and literacy tests, and other more violent means, African Americans were not assured basic voting rights until President Lyndon Baines Johnson signed the Voting Rights Act in 1965."[114]

The Voting Rights Act in 1965 addressed discriminatory voting practices adopted in many southern states after the Civil War, including literacy tests, poll taxes, and grandfather clauses as a prerequisite to voting. Unfortunately, the Voting Rights Act in 1965 continues to face opposition.

108. Grofman, B. N., & Davidson, C. (2011). *Controversies in minority voting: The Voting Rights Act in Perspective*. Brookings Institution Press, p. 2.
109. Valelly, R. M. (2009). *The two reconstructions: The Struggle for Black Enfranchisement*. University of Chicago Press, p. 207.
110. *Shelby County v. Holder,* 570 U.S. 529 (2013.)
111. *Id.*
112. O'Brien, D. M., & Silverstein, G. (2020). *Constitutional Law and Politics: Struggles for power and governmental accountability.*
113. *Shelby County v. Holder,* 2013.
114. *Elections and* Voting, 2022a.

In 2023, the Supreme Court decided two cases that promise to have a far-reaching impact on the ability of African-Americans to vote. In *Allen v. Milligan* (2023), voters and pro-voting groups had filed two lawsuits, arguing that Alabama's congressional map diluted the voting strength of Black Alabamians, violating Section 2 of the VRA.[115] The Court ruled 5-4 in favor of the Plaintiffs, finding that Section 2 had been violated, and most importantly, leaving Section 2 of the VRA intact. Other States, such as Louisiana, that had aimed to limit the voting ability of Blacks have curtailed their plans, in light of the decision in *Allen v. Milligan*.[116]

The second case is *Moore v. Harper* (2023) in which the North Carolina Supreme Court had struck down the State's congressional map for violating the state constitution.[117] Republican State legislators appealed the decision to the U.S. Supreme Court, invoking a new idea, the Independent State Legislature theory (ISL). They argued that the Elections Clause of the U.S. Constitution (Article I, Section 4) grants State legislatures the sole authority to enact congressional maps, free of judicial review by the State courts.[118] The Supreme Court voted 6-3 against the legislators, rejecting the ISL theory. Chief Justice Roberts, writing for the majority, ruled that the Elections Clause "does not insulate state legislatures from the ordinary exercise of state judicial review."[119]

ANALYSIS OF AMENDMENT XXIV

Section 1

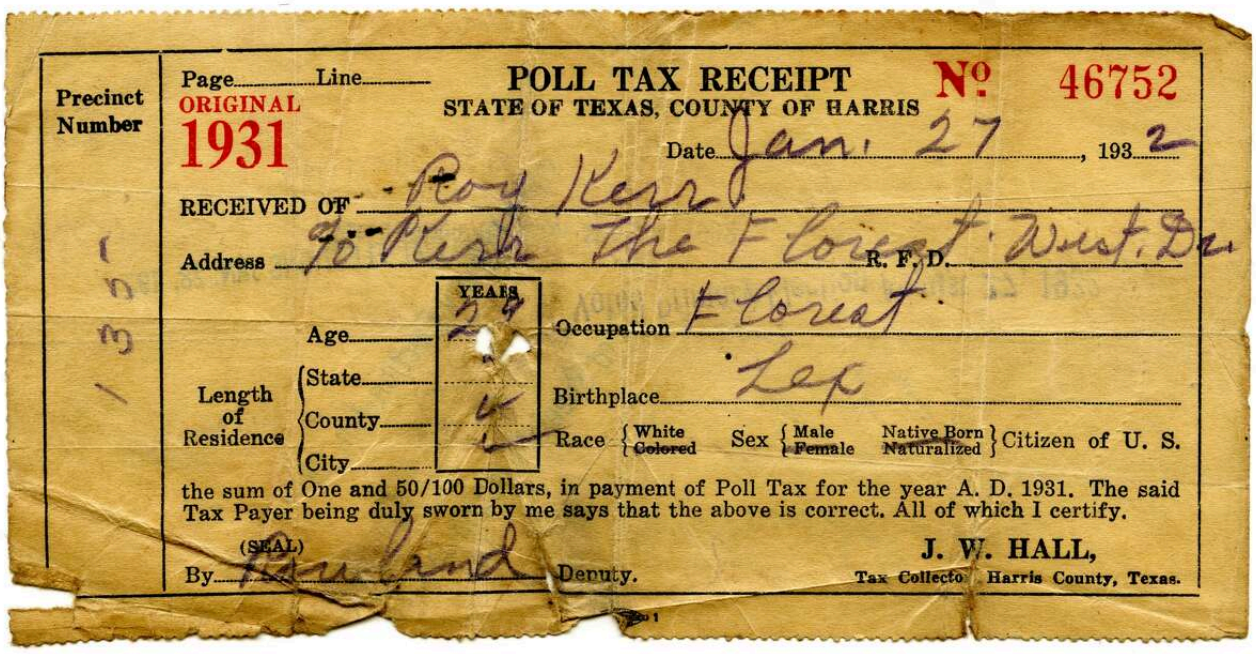
a. Right Against Poll Tax

The right of citizens of the United States to vote in any primary or other election for President or Vice President, for electors for President or Vice President, or for Senator or Representative in Congress, shall not be denied or abridged by the United States or any State by reason of failure to pay poll tax ....

115. *Allen v. Milligan*, 599 U.S. _____ (2023)
116. *Black Voters Fight To Be Seen in Three Lawsuits That Could Impact State Judicial Selection – Democracy Docket*. (2023, July 27). Democracy Docket. https://www.democracydocket.com/analysis/black-voters-fight-to-be-seen-in-three-lawsuits-that-could-impact-state-judicial-selection/
117. *Moore v. Harper*, 600 U.S. _____ (2023).
118. *Moore v. Harper*, 2023.
119. *Moore v. Harper*, 2023.

Twenty-Fourth Amendment, Pay Your Poll Tax[120]

The conversation surrounding elections, electors and the entire process was called into question with the 2020 Presidential Election with Republican Donald J. Trump and Democrat Joseph R. Biden, Jr. On every side and within every cycle, on *one* thing all political activists agreed. Competing pundits across the political spectrum each believe that democracy is being threatened but for very different reasons. Democrats believe Republicans and those who support President Trump have irrationally and unconstitutionally made claims of voter fraud in jurisdictions mostly comprised of Black and Brown people. These specific areas include counties in Pennsylvania, Florida, Michigan, Georgia and heavily populated areas of Black voters.[121]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ORIGINAL

1931

POLL TAX RECEIPT

STATE OF TEXAS, COUNTY OF HARRIS

No. 46752

Date Jan. 27, 1932

RECEIVED OF Roy Kerr

Address 20 Park The Floreat. West. Dr. R. F. D.

YEARS

Age 24 Occupation Floreat.

Length of Residence: State 4 County 1 City

Birthplace Lee

Race {White / Colored} Sex {Male / Female} {Native Born / Naturalized} Citizen of U. S.

the sum of One and 50/100 Dollars, in payment of Poll Tax for the year A. D. 1931. The said Tax Payer being duly sworn by me says that the above is correct. All of which I certify.

(SEAL)

By ..... Deputy.

J. W. HALL,

Tax Collector Harris County, Texas.

Poll tax receipts provide peek into Texas' electoral history[122]

In fact, Former President Trump continues to cast doubt on these votes, specifically in Black communities.[123] On the other hand, Republicans overwhelmingly believe that Former President Trump endured an unfair year in 2020. This unfairness stemmed from voter fraud, mail-in ballot fraud, poll watchers denied access, as well as votes being inaccurately counted.[124] More than 100 lawsuits were filed unsuccessfully contesting the 2020 election processes, vote counting and the voter certification process in multiple states and the District of Columbia, as well as two presidential recounts were conducted.[125]

This is of particular note in this section because Black men did not receive the right to vote with

120. The Cleveland Law Library. (n.d.). *Virtual Displays: Twenty-Fourth Amendment – Abolition of Poll Taxes.* https://clevelandlawlibrary.org/public/misc/virtual_display/24thamendment.html

121. *Trump push to invalidate votes in heavily black cities alarms civil rights groups.* (2020, November 24). NPR. https://www.npr.org/2020/11/24/938187233/trump-push-to-invalidate-votes-in-heavily-black-cities-alarms-civil-rights-group

122. *Poll tax receipts provide peek into Texas' electoral history.* (2016, November 3). Houston Chronicle. https://www.houstonchronicle.com/news/houston-texas/bayou-city-history/article/Poll-tax-receipts-provide-peek-into-Texas-10425904.php

123. *Ibid.*

124. *Ibid.*

125. *How and when are election results finalized?* (2020). (n.d.). Ballotpedia. Retrieved April 3, 2021, from https://ballotpedia.org/How_and_when_are_election_results_finalized%3F_(2020)

great limitations until the Fifteenth Amendment; however, the poll tax indicated in the Twenty-fourth Amendment, ratified in 1964, continues to be exploited. Therefore, the country remains in turmoil regarding racial inequity and disparities among voters who were forced to make a plan to vote, endure weather irregularities, a health pandemic as well as a racial pandemic.

b. Right Against Other Tax

... or other tax.

To date, there are now more than 300 bills and laws that have been offered which may be categorized as other taxes. This includes Georgia laws containing provisions whereby bringing water and food to those standing in voting lines was deemed illegal.[126] Additionally, the law reduced or eliminated Sunday voter drives and early voting. Finally, the laws change the structure and ability of a new appointee to overturn local voting results.[127] These efforts have worked to disenfranchise Black and Brown voters just as hurdles were placed in the way of previous efforts of disenfranchisement of Black and Brown voters.[128] These efforts have led to bills and laws for inappropriate and irrelevant actions to reduce voter turn out.

Many persons, entities as well as organizations have responded with solidarity statements, boycotts, and other intentional responses. However, several actors and other famous activists have chosen to address the matter with a dollar and cents approach. As seen to the left with Will Smith and Director Antoine Fuqua.

Opponents of the bills and laws are convinced that using their First Amendment freedoms and rights will bolster their claim of the unfair treatment of Georgia Senate Bill 202 signed into law by Governor Brian Kemp. World renowned actor, Will Smith and Director Antoine Fuqua are working on a film entitled *Emancipation*.[129] Ironically, this film is set in the 1860s and follows a man, played by Will Smith, who escaped the harsh treatment of a slave plantation to fight for his interest with the Union army. Specifically, Fuqua and Smith stated "At this moment in time, the Nation is coming to terms with its history and is attempting to eliminate vestiges of institutional racism to achieve true racial justice. We cannot in good conscience provide economic support to a government that enacts regressive voting laws that are designed to restrict voter access. The new Georgia voting laws are reminiscent of voting impediments that were passed at the end of Reconstruction to prevent many Americans from voting. Regrettably, we feel compelled to move our film production work from Georgia to another state."[130]

126. *Voting laws roundup*: March 2021. (n.d.). Brennan Center for Justice. Retrieved March 3, 2021, from https://www.brennancenter.org/our-work/research-reports/voting-laws-roundup-march-202.
127. Brennan Center for Justice (n.d.).
128. *Ibid.*
129. Tsioulcas, A. (2021, April 12). "Emancipation" Moving Production Out Of Georgia Due To New Voting Laws. NPR. https://www.npr.org/2021/04/12/986418563/emancipation-moving-production-out-of-georgia-due-to-new-voting-laws
130. *Ibid.*

Section 2

c. Right to Enforcement of Twenty-fourth Amendment

The Congress shall have power to enforce this article by appropriate legislation.

As previously stated, Congress is granted the power to ensure that the controversial Twenty-fourth Amendment is properly enforced using all available legislation. This verbiage in the Constitutional amendment enabled proper enforcement power by appropriate legislation. It mirrors the language found in the Thirteenth, Fourteenth, Nineteenth, Twenty-third, and Twenty-sixth Amendments.

Therefore, the above amendments provided more than additional rights to groups of individuals who were otherwise disregarded. Through their sections and parts, forgotten Americans received humanity, citizenship, and ultimately voting rights. Therefore, the pursuit of equity is one that has only been progressed with litigation, Constitutional amendments, and grassroots efforts.

Critical Reflections:

1. Is mass incarceration a form of slavery or involuntary servitude? Explain.
2. Might Congress validly allow disabled citizens to sue states for denial of adequate access to state facilities such as: courtrooms, voting booths, jail facilities, legislative chambers, hearing rooms, and sports arenas?
3. Is "voter ID," that is, requiring voters to obtain and present a valid government-issued identification card, allowed under the Twenty-Fourth Amendment? Why or why not?
4. Watch *13th* here which is a documentary on the Thirteenth Amendment. Which activists are pictured in the documentary? What do they discuss? Who do you see from the political realm? What is their focus? Do you agree with DuVernay's depiction?
5. Chief Justice Roger Taney, in the 1857 *Dred Scott* decision, held that men of African descent were "so far inferior that they had no rights which the white man was bound to respect…the Negro might justly and lawfully be reduced to slavery for his benefit." After viewing the photo and caption below, and reading the short Time Magazine article about it here, answer this question: In modern-day America, is true reconciliation between descendants of slaveholders and descendants of slaves an achievable goal?

Lynne Jackson (R), a descendant of Dred Scott, hugs Charles Taney III, a descendant of U.S. Supreme Court Chief Justice Roger Taney, on the 160th anniversary of the Dred Scott decision in front of the Maryland State House on March 6, 2017, in Annapolis, Md.

Chapter 11 - Amendment XVIII & Amendment XXI: Prohibition & Its Prohibition

Amendment XVIII & Amendment XXI

RICHARD J. FORST AND TAUYA R. FORST

LEARNING OBJECTIVES

After reading this chapter, you should be able to:

11.1 Identify the unfamiliar terms of the Eighteenth Amendment.
11.2 Understand the groups instrumental in the Temperance Movement.
11.3 Explain how groups effectuated the ratification of the Eighteenth Amendment.
11.4 Identify the unfamiliar terms of the Twenty-First Amendment.
11.5 Define Prohibition and explain the reasons for its enactment.
11.6 Summarize the effects of Prohibition on societal norms of conduct.
11.7 Explain the reasons for repeal of Prohibition.

KEY TERMS

Exportation
Importation
Intoxicating Liquor
Inoperative
Prohibition
Prohibition Party
Repeal
Temperance Movement
Volstead Act

INTRODUCTION TO AMENDMENT XVIII

CONSTITUTIONAL CLIP

"By 1830, the average American over 15 years old consumed nearly seven gallons of pure alcohol a year – three times as much as we drink today..."[1]

This path ultimately led to the implementation of the 18th Amendment began the century before. In the 19th century, the country was facing unchecked alcohol consumption and drunkenness. This phenomenon was both in men and women; yet it seemed to overwhelmingly affect men at a rate three times our current average consumption.[2] Significant problems within the country are typically met with a process including one of two choices either:

1. Regulate one's own behavior and actions or
2. Regulate behavior and actions with legislation.

This particular issue was no exception. It appeared that those who lived during this important period became increasingly concerned of the affairs of the individuals and the country for that matter. In fact, women and children suffered greatly as they were completely and utterly reliant upon men for finances. Alcohol abuse was taking its toll on the proper functioning of the home.[3] To resolve mounting difficulties, blatant disrespect and to prevent disassociation, women adamantly advocated for temperance in alcohol consumption which led to the Temperance Movement. The **Temperance Movement** was "rooted in America's Protestant churches, first urged moderation, then encouraged drinkers to help each other to resist temptation, and ultimately demanded that local, state, and national governments prohibit alcohol outright."[4]

The Temperance Movement began in the early part of the 19th century in response to the increased drunkenness and lack of control of drunken bouts. The Temperance Movement worked to reduce alcohol consumption in two ways: complete abstinence or moderation of consumption. Both the United States and Great Britain recognized that these behaviors would carry a lasting effect upon their countries if left unchecked.[5] Within the United States, this effort was spearheaded by women in religious and secular organizations as some places required abstinence pledges, while others formed

1. Burns, K. & Novick, L. (2011). Roots of prohibition. *PBS*. Retrieved from http://www.pbs.org/kenburns/prohibition/roots-of-prohibition/.
2. *Ibid.*
3. *Ibid.*
4. Pbs. (2022, August 28). *Roots of prohibition*. Prohibition | Ken Burns | PBS. https://www.pbs.org/kenburns/prohibition/roots-of-prohibition#:~:text=The%20temperance%20movement%2C%20rooted%20in,national%20governments%20prohibit%20alcohol%20outright.
5. Britannica, T. Editors of Encyclopaedia (2020, April 28). Temperance movement. Encyclopedia Britannica. https://www.britannica.com/topic/temperance-movement

temperance societies engaging in important advocacy efforts to combat the evil woes of the destruction that drunkenness can cause on families and the society.[6]

The Women's Christian Temperance Union[7]

In 1874, the Women's Christian Temperance Union (WCTU) was created in Ohio to address the atrocities of drunkenness.[8] Recall, women did not possess legal rights such as the right to vote, however women were able to address this problem from a grassroots approach. Because of its breadth and depth of influence, the WCTU would become the largest woman's organization in the United States.[9]

The symbolic white ribbon was selected to indicate purity, and the WCTU's platform included its clarion call to action: "Agitate — Educate — Legislate."[10]

WCTU and other temperance societies were typically religious groups that sponsored lectures and marches, sang songs, and published tracts that warned about the destructive consequences of alcohol. Eventually these temperance societies began to promote the virtues of abstinence or "teetotalism." By the 1830s and the 1840s many societies in the United States began asking people to sign "pledges" promising to abstain from all intoxicating beverages. However, just as most movements needed in the past, this movement needed help from partners to catapult it ahead. One such partner was the Prohibition Party.

The Prohibition Party[11]

The **Prohibition Party** is defined as the "oldest minor United States political party still in existence.

6. *Ibid.*
7. *Christian Action | Woman's Christian Temperance Union.* (n.d.). WCTU. https://www.wctu.org/
8. Campbell, A. (2017). *The Temperance Movement*. Social Welfare History Project. Retrieved from http://socialwelfare.library.vcu.edu/religious/the-temperance-movement/temperance-movement/4/29.
9. *Woman's Christian Temperance Union.* (n.d.). History. WCTU. Retrieved from https://www.wctu.org/history.html
10. *Woman's Christian Temperance Union.* (n.d.).
11. *Home | Prohibition Party.* (n.d.). Prohibition Party. https://www.prohibitionparty.org/

It was founded in 1869 to campaign for legislation to prohibit the manufacture and sale of intoxicating liquors, and from time to time has nominated candidates for state and local office in nearly every state of the Union."[12] This foundation would ultimately be included in the verbiage of the 18th Amendment itself.[13] Notably, the Prohibition Party was the first movement of its scale to accept women as members.[14] This monumental occurrence appeared to create a bedrock foundation for women's advocacy that made direct connections to women's suffrage efforts later.[15]

CONSTITUTIONAL CLIP

In February 1933 Congress adopted a resolution proposing the Twenty-First Amendment to the Constitution to repeal the Eighteenth Amendment. On December 5, 1933, Utah was the 36th state to ratify the Eighteenth. This ratification completed the repeal. "After repeal a few states continued statewide prohibition, but by 1966 all had abandoned it. In general, liquor control in the United States came to be determined more and more at local levels.[16] The Prohibition Party still exists today as a real minor political party.[17]

This connection is explored under the Nineteenth Amendment in Chapter 14. Unfortunately, women did not carry the political power that men enjoyed due to their positions of status, authority, and standing in religious organizations. In 1898, an all-men's organization took the reins in the fight against prohibition nationwide. The Anti-Saloon League (ASL), employed "by any means necessary" tactics to further their efforts to pass national legislation surrounding prohibition. ASL introduced a new technique of "'pressure politics,' a strategy that uses media, publications, and behind-the-scenes influence to persuade politicians that the public demands an action."[18] This became the predecessor of many campaigns including President Barack Obama's strategic use of social media to elevate his campaign. "Three-quarters (74%) of internet users went online during the 2008 election to take part in, or get news and information about the 2008 campaign."[19] The ASL was able to provide this type of pressure as it owned its own publishing house: The American Issue Publishing Company.[20] At the

12. Cunningham, J. M. (2022, October 26). *United States presidential election of 1880. Encyclopedia Britannica.* https://www.britannica.com/event/United-States-presidential-election-of-1880
13. Campbell, 2017.
14. *Ibid.*
15. *Ibid.*
16. Britannica, T. Editors of Encyclopaedia (2018, February 13). *Prohibition Party. Encyclopedia Britannica.* https://www.britannica.com/topic/Prohibition-Party
17. Prohibition Party. (n.d.). *Prohibition Party.* Retrieved February 8, 2021, from https://www.prohibitionparty.org/
18. *Campbell*, 2017.
19. Smith, A. (2020, August 28). *The Internet's Role in Campaign 2008 | Pew Research Center. Pew Research Center*: Internet, Science & Tech. https://www.pewresearch.org/internet/2009/04/15/the-internets-role-in-campaign-2008/
20. *Ohio History Central.* (n.d.). Anti-Saloon League of America. Ohio History Central. Retrieved from http://www.ohiohistorycentral.org/w/Anti-Saloon_League_of_America

height of the League's popularity, it published more than forty tons of prohibition publications every month.[21]

As with most grassroots efforts, many Americans were impressed to take notice and join the fight. As previously stated, the issue of drunkenness touched the country as a whole and caused confusion, division, and general unproductiveness. On October 28, 1919, Congress passed the National Prohibition Act, also known as The **Volstead Act**, to combat the issues that it knew it would face enforcing the Eighteenth Amendment.[22] The ratification of the 18th Amendment created a different nation. Although the Eighteenth Amendment did not take effect until one year, it still seemed to catch the country by surprise, as illustrated below.

"...Americans would only be able to own whatever alcoholic beverages [that] had been in their homes the day before. In fact, Americans had had several decades' warning, decades during which a popular movement like none the nation had ever seen—a mighty alliance of moralists and progressives, suffragists and xenophobes—had legally seized the Constitution, bending it to a new purpose."[23]

Freedom is **not absolute.** The Eighteenth Amendment, and all of the legislation to support its enforcement, reminded the country of this fact. In fact, those who broke with a country with parameters may later follow the same process to reinstate the parameters.

Amendment XVIII

Passed by Congress December 18, 1917. Ratified January 16, 1919. Repealed by the 21st Amendment, December 5, 1933.

Section 1

After one year from the ratification of this article the manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof for beverage purposes is hereby prohibited.

Section 2

The Congress and the several states shall have concurrent power to enforce this article by appropriate legislation.

Section 3

This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of the several states, as provided in the Constitution, within seven years from the date of the submission hereof to the states by the Congress.

21. *Ibid.*
22. *Research guides: 18th amendment to the U.S. constitution: Primary documents in american history: Introduction*. (n.d.). Library of Congress. Retrieved April 30, 2021, from https://guides.loc.gov/18th-amendment
23. Okrent, D. Last Call: The Rise and Fall of Prohibition, Scribner; 1st edition (2011), p. 1.

Amendment XVIII[24]

ANALYSIS OF AMENDMENT XVIII

Section 1

a. After one year from the ratification of this article

This part of §1 serves as a reminder to the reader that the amendment needs additional steps for effectiveness according to its verbiage. The one year stay or postponement of the amendment notes to the reader that there was a need for additional concern even after its creation and ratification. The creation date of December 18, 1917 to the date of ratification with the requisite number of states would be more than one year on January 16, 1919. This section requires ratification similar to all others, but included specific language after the ratification or "[a]doption or enactment, especially where the act is the last in a series of necessary steps or consents."[25] Of particular note is that the amendment itself has explicit implication issues as it provides an extended amount of time to become effective. This newly include section was necessary for adoption of the amendment. This interference added more than 128 years earlier to the Bill of Rights. To help ease the effect of Prohibition, those on American soil were given one year to become acclimated, dry, or otherwise determine other ways to deal with its ratification. In short, the country was in an alcohol crisis, but the framers understood that the crisis would not be resolved overnight.

b. *the manufacture [or transportation of intoxicating liquors within],*
sale [or transportation of intoxicating liquors within],
or transportation of intoxicating liquors within,
the importation thereof into,

24. *Part V: Lesson 50: 18th Amendment & 21st Amendment – CWP: Government 2016-2017*. (n.d.). https://sites.google.com/a/oroville.wednet.edu/cwp-government-2016-2017/part-v-lesson-50-18th-amendment
25. RATIFICATION, Black's Law Dictionary (12th ed. 2024).

or the exportation thereof from the United States and all territory subject to the jurisdiction thereof for beverage purposes is hereby prohibited.

This part of the amendment included two terms which must be defined by Black's Law Dictionary to provide appropriate legal context for the analysis. First, **exportation** is defined as "the act of sending or carrying goods and merchandise from one country to another."[26] Whereas, **importation** is defined as "the bringing of goods into a country from a foreign country."[27] Additionally, The Volstead Act defined **intoxicating liquor** as "any beverage over 0.5% alcohol."[28] The Volstead Act became the official law on Prohibition. Additionally, the act did not prohibit the purchase or consumption of intoxicating liquors. "For example, those who had stockpiled alcoholic beverages could legally drink them."[29]

This provides the appropriate framework as we determine every aspect of what was termed "intoxicating liquors" according to the Constitution. It is interesting that this part of §1 is so explicit in covering all aspects of the "intoxicating liquors," but fails to provide any context of what "intoxicating liquors" refers to. Those who advocated for this amendment knew possible meanings could include:

1. making, building or creating intoxicating liquors;
2. the agreement to exchange intoxicating liquors for money or something of value;
3. the movement of the intoxicating liquors; the bringing of intoxicating liquors into a country from a foreign country;
4. as well as the action of sending or carrying intoxicating liquors from one country to another was ongoing and intricately apart of the American fabric.

Thus, the question remained, what did Congress mean by "intoxicating liquors?" When originally presented and through the campaigns of the 18th Amendment, supporters erroneously assumed that the amendment's reach would only include whiskeys and hard liquor.[30] This interpretation would later be tested with the passage of the Volstead Act in 1919. Thus, the concerted efforts of those who wanted reduction or abstinence against "intoxicating liquors" began to erode.[31]

Section 2

The Congress and the several States shall have concurrent power to enforce this article by appropriate legislation.

Section 2 of the Eighteenth Amendment empowers others to work with Congress to face the mounting opposition of §1 of the Eighteenth Amendment. One important piece of legislation that would help settle the previous question of what the term "intoxicating liquors" means through its enactment is the Volstead Act. This Act directly named beer, wine, and extended its meaning to "spirits" as well. Recall the definition for intoxicating liquors according to the Volstead Act. The verbiage of §2, identifies a new support for the amendments. Readers witness the simultaneous approach of the federal legislative body which yields its authority from Article I and consistently serves as a checks and balances on the other branches of government.

Interestingly, the verbiage of "and the several states" was included to acknowledge this as a joint

26. EXPORTATION, Black's Law Dictionary (12th ed. 2024).
27. IMPORTATION, Black's Law Dictionary (12th ed. 2024).
28. Hansondj, & Hansondj. (2023). Volstead Act (National Prohibition Act of 1919). *Alcohol Problems and Solutions*. https://www.alcoholproblemsandsolutions.org/volstead-act-national-prohibition-act-of-1919/
29. *Ibid.*
30. Eighteenth & twenty-first amendments (1919 & 1933) – (2018, October 9). Annenberg Classroom. https://www.annenbergclassroom.org/resource/our-constitution/constitution-amendments-18-21/
31. *The 18th Amendment*. (2019, November 12). Constitutional Law Reporter. http://constitutionallawreporter.com/amendment-18/

effort. What significance does this hold? Well it appears that the passage of the Eighteenth Amendment would require additional assistance. Congress yielded to this concern and passed the Volstead Act as previously stated. To the surprise of Prohibitionists, the act included an extensive provision which increased issues with enforcing Prohibition. Initially, the 18th amendment appeared to respond to the issues connected to alcoholism as an advantage, some disadvantages manifested as well. One such disadvantage – a criminal syndication regarding the black market for manufacture, sale, transportation, exportation and importation of "intoxicating liquors" emerged and organized in response to the Eighteenth Amendment. This newfound blatant disregard for the law and authority provided a grassroots approach to set the stage for repealing the Eighteenth Amendment.[32]

Section 3

This article shall be inoperative
unless it shall have been ratified as an amendment to the Constitution
by the legislatures of
the several States, as provided in the Constitution,
within seven years from the date of the submission hereof to the States by the Congress.

This part of §3 reminds the reader of the previously explained history with the Eighteenth Amendment. According to Black's Law Dictionary, **inoperative** is defined as "[h]aving no force or effect; not operative.[33] This reminds the reader of the typical method of creating and adopting the language by the framers, then proceeding to ratification. The framers provide a look into just how concerned they were about this amendment taking full effect when it adds all parameters of State legislatures as well as a time limit of seven years (uncommon language for the Constitution).

It is important to note that the Eighteenth Amendment and the Nineteenth Amendment were inextricably connected. This connection provided the catalyst for supporting the right to vote of countless women. In fact no one could ever determine how far the ratification of the Eighteenth Amendment's reach would affect the landscape of America's evolution.

CONSTITUTIONAL CLIP

Other than the right to Woman's Suffrage, the 18th Amendment impacted "international trade, speedboat design, tourism practices, soft-drink marketing, and the English language itself? [Additionally, the 18th Amendment] would provoke the establishment of the first nationwide criminal syndicate, the idea of home dinner parties, the deep engagement of women in political issues other than suffrage, and the creation of Las Vegas. As interpreted by the Supreme Court and as understood by Congress, Prohibition would also lead indirectly to the eventual guarantee of the American woman's

32. Eighteenth & twenty-first amendments (1919 & 1933) –. (2018, October 9). Annenberg Classroom. https://www.annenbergclassroom.org/resource/our-constitution/constitution-amendments-18-21/
33. INOPERATIVE, Black's Law Dictionary (12th ed. 2024).

right to abortion and simultaneously dash that same woman's hope for an Equal Rights Amendment to the Constitution."[34]

As one may notice, the Eighteenth Amendment was not just about drunkenness but carried the larger conversation of rights, freedoms, limits, Congress, the power of the Supreme Court of the United States, and how it would all balance for those on American soil.

Amendment XXI

Passed by Congress February 20, 1933. Ratified December 5, 1933. The 21st Amendment repealed the 18th Amendment.

Section 1

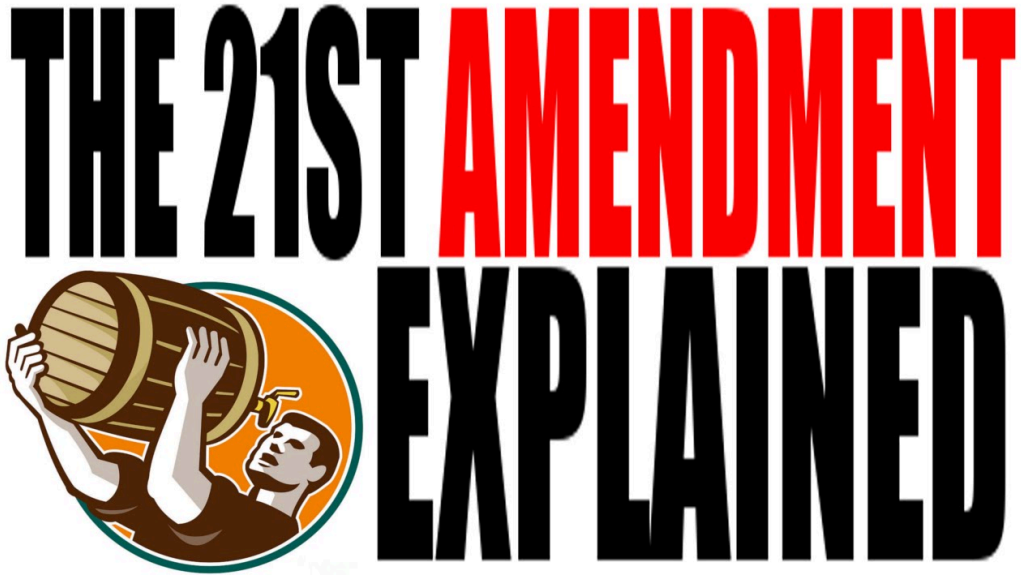
The eighteenth article of amendment to the Constitution of the United States is hereby repealed.

Section 2

The transportation or importation into any State, Territory, or Possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.

Section 3

This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by conventions in the several States, as provided in the Constitution, within seven years from the date of the submission hereof to the States by the Congress.



Amendment XXI[35]

34. Excerpt from Okrent, D. Last Call: The Rise and Fall of Prohibition, Scribner; 1st edition (2011), p. 4.
35. *Unit II: Lesson 38: 21st Amendment – AMERICAN GOVENRMENT*. (n.d.). https://sites.google.com/a/oroville.wednet.edu/american-govenrment/unit-ii-lesson-38-21st-amendment

INTRODUCTION TO AMENDMENT XXI

How did we get to this point in history?

The Presidential election of 1928 between Republican Herbert Hoover and Democrat Alfred E. Smith highlighted and centered the much debated political topic of Prohibition. Hoover hailed a "law and order" approach, where he vowed to uphold the law and prosecute those who dare to challenge Prohibition maintaining order. On the other hand, Smith highlighted the effects of Prohibition, including the advent of organized crime and blatant disregard for the law.[36] Apparently, the country agreed with Hoover because he won the election by substantial numbers. Despite this agreement, the 1932 Presidential election campaign indicated a great shift in the country's position.

The country believed the missing revenue from the sale of liquor could provide an answer to the major economic depression which the country faced, but Hoover refused to change his position. Unfortunately for Hoover, the country now supported repealing the Eighteenth Amendment, and his opponent, Franklin D. Roosevelt, campaigned for this position. Simultaneously, ..."eleven states held referendums on Prohibition, and repeal won in every state by wide margins. This convinced Congress to move quickly in voting for the Twenty-first Amendment. As a consequence of the Prohibition experience, Congress became more wary of employing constitutional solutions for social and moral problems."[37]

Thus the Twenty-first Amendment effectively repealed a national stance on Prohibition, but left implementation of a similar action to states as they worked to create their own parameters and restrictions on the "intoxicating liquors."

ANALYSIS OF AMENDMENT XXI

Section 1

The eighteenth article of amendment to the Constitution of the United States is hereby repealed.

Section 1 of the Twenty-first Amendment refers directly to the Eighteenth Amendment. the reader is notified that all three sections of the Eighteenth Amendment are repealed. According to Black's Law Dictionary, the term **repeal** means "[a]brogation of an existing law by express legislative act; revocation, rescission, or annulment."[38] Essentially, the Twenty-first Amendment indicates that the amendment rescinds the Eighteenth Amendment. Additionally, it allows for what should occur with all three sections as previously identified in the Eighteenth Amendment.

Section 2

The transportation or importation into any State, Territory, or Possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.

Section 2 continues to prohibit transportation or importation of intoxicating liquors, however.

36. *Eighteenth & twenty-first amendments (1919 & 1933) –*. (2018, October 9). Annenberg Classroom. https://www.annenbergclassroom.org/resource/our-constitution/constitution-amendments-18-21/
37. *Ibid.*
38. REPEAL, Black's Law Dictionary (12th ed. 2024).

Section 3

This article shall be inoperative
unless it shall have been ratified as an amendment to the Constitution
by conventions in
the several States, as provided in the Constitution,
within seven years from the date of the submission hereof to the States by the Congress.

This section provided the process with regard to ratification. The Twenty-first amendment is the only amendment which was ratified, not by the legislatures of the states, but by state ratifying conventions, as called for by the Amendment's third section. Click the citation for the timeline of the actions leading to, during and after the Eighteenth and Twenty-first timeline to help visualize its evolution and information.[39]

Ultimately, the Twenty-first Amendment was precipitated and supported for a reason which may be less constitutional and more economic. With the income tax implemented and void of constitutional questions within the 16th Amendment, supporters of repealing the Eighteenth Amendment remind the opposition that the manufacture, sale, importation, transportation and exportation has great economic potential and benefit. As the country faced another economic challenge, the promise of additional taxation carried a newfound acceptance of the ills of alcohol and the effects on society.

Critical Reflections:

1. How did the perceived ills of society provide the impetus for the eventual passage of Prohibition?
2. Does the government have the right to legislate our personal behavior as was done with the Eighteenth Amendment? Why or why not?
3. How does the Nineteenth Amendment and its ratification date connect to the Eighteenth Amendment and the efforts of the Prohibition movement?
4. How did the experience of ratifying and later rescinding Prohibition alter the country's norms of personal conduct?

39. *Eighteenth & twenty-first amendments (1919 & 1933) –* (2018, October 9). Annenberg Classroom. https://www.annenbergclassroom.org/resource/our-constitution/constitution-amendments-18-21/

Chapter 12 - Amendments III, VII, XI & XVI: Regulating the Government

Amendment III, Amendment VII, Amendment XI, & Amendment XVI

RICHARD J. FORST AND TAUYA R. FORST

LEARNING OBJECTIVES

After reading this chapter, you should be able to:

12.1 Identify the unfamiliar terms of the Third Amendment.
12.2 Define quartering, troops, and house according to the Third Amendment.
12.3 Identify the unfamiliar terms of the Seventh Amendment.
12.4 Define value in controversy, suits, and common law according to the Seventh Amendment.
12.5 Identify the unfamiliar terms of the Eleventh Amendment.
12.6 Define judicial power, law or equity, and Foreign state according to the Eleventh Amendment.
12.7 Identify the unfamiliar terms of the Sixteenth Amendment.
12.8 Define lay, collect, and census according to the Sixteenth Amendment.
12.9 Explain the parts of the Sixteenth Amendment.
12.10 Describe governmental and sovereign immunity.
12.11 Summarize the taxing power of the federal government.
12.12 Explain how Congress exerts their power according to the Sixteenth Amendment.

KEY TERMS

Apportionment
Census
Petit Jury
Prescribe

Constitutional Prohibition	Prohibition
Direct Income Tax	Quartering of Soldiers
Governmental Immunity	Sovereign Immunity
Income	Taxation Power
Judicial Power	Trial

Amendment III

Passed by Congress September 25, 1789. Ratified December 15, 1791. The first 10 amendments form the Bill of Rights.

No Soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law.

Amendment III[1]

INTRODUCTION TO AMENDMENT III

Amendment III is the least likely amendment to be referenced in judicial opinions. Not only is it rarely mentioned, but SCOTUS has never relied on its content as a sole basis for a Supreme Court decision. Thus, the question becomes what was the significance of this amendment that it became part and parcel of the Bill of Rights (the first 10 amendments ratified after the original constitution), but is rarely

1. Timetoast. (1791, December 15). *Bill of Rights timeline.* Timetoast Timelines. https://www.timetoast.com/timelines/bill-of-rights-480f2aad-933e-4d6f-859e-2aaf9bce1ec3

referenced? The question lies in the troubled history and foundation for the Third Amendment. In all actuality, the Third Amendment answered a problem exhibited in English law.

As previously mentioned, most of the constitutional provisions and amendments were centered in English law. English law contained several sources which included common law, legislation, as well as legal standards with their roots in Parliament, the Crown and the courts. These sources were the foundation for almost all of the United States' laws, particularly in the earlier formation of the country. As a result, these important concepts were included in the Constitution based upon the Quartering Acts of 1765 and 1774 which provided British troops to take cover in colonial homes with the military regulation.[2]

CONSTITUTIONAL CLIP

This military posture continued as the British troops forced the owners of the private residences to house them during the American Revolution. This forced quartering of soldiers became intolerable and was evidenced in the pushback of the Declaration of Independence, where increased numbers of troops and standing armies were supported without any additional support from legislation.[3]

According to Black's Law Dictionary, **quartering of soldiers** is defined as

> "[t]he furnishing of shelter or lodging to one or more people, esp. to soldiers. In the United States, a homeowner's consent is required before soldiers may be quartered in a private home during peacetime. During wartime, soldiers may be quartered in private homes only as prescribed by law. The Third Amendment generally protects U.S. citizens from being forced to use their homes to quarter soldiers."[4]

Unfortunately, the English perspective did not include an alternative to the private residents **quartering soldiers** (as defined above). The distrust of quartering soldiers in private homes translated to an alignment against quartering troops in barracks as a standing army as well.[5] This mentality provided the catalyst for colonies to develop and enact similar laws. Delaware, Maryland, Massachusetts and New Hampshire, all held the belief that the quartering of soldiers would become problematic if left unchecked. Thus, they provided a similar version of the Third Amendment within their colonies' Bill of Rights or Declaration of Rights.[6]

However, the fruition of such fears was never realized and the Third Amendment was rarely invoked by SCOTUS. Oddly, when SCOTUS engaged the Third Amendment it did not include soldiers or

2. *Ibid.*
3. *English law*, n.d.
4. QUARTERING, Black's Law Dictionary (12th ed. 2024)
5. Wood, G. (n.d.). *Interpretation: The third amendment | the national constitution center*. National Constitution Center. Retrieved February 13, 2021, from https://constitutioncenter.org/interactive-constitution/interpretation/amendment-iii/interps/123
6. *Ibid.*

quartering at all. Instead SCOTUS has expanded the reach of the Third Amendment with the angle of private citizens having legally defined and protected rights such as the right against quartering troops. Additionally, when certain parties have invoked the Third Amendment in lower federal courts, its usage was flatly rejected as a reliable posture.[7] This rejection did not completely preclude the use of the Third Amendment. SCOTUS noted in *Griswold v. Connecticut* (1965), a 7-2 decision authored by Justice Douglas, the Court held that there is a constitutional basis to protect the right of marital privacy against state restrictions on contraception. Although this right to privacy was not explicitly stated, the court identified the First, Third, Fourth, and Ninth Amendments as references for constitutional authority. Specifically, the "[t]hird Amendment, in its prohibition against the quartering of soldiers "in any house" in time of peace without the consent of the owner, is another facet of that privacy."[8]

SCOTUS has never decided a case based solely on the Amendment III.

A **prohibition** and more importantly a **constitutional prohibition** is defined as "[a] proscription contained in a constitution, esp. one on the making of a particular type of statute (e.g., an ex post facto law) or on the performance of a specified type of act."[9] Additionally, SCOTUS has never decided a case based solely on the Third Amendment. However, the most notable case in reference to the Third Amendment is *Engblom v. Carey (S.D.N.Y. 1983)* from the U.S. Court of Appeals for the Second Circuit.[10] This is the closest case which includes a direct reference to quartering soldiers. The question before the court was whether the state violated the Third Amendment when the governor activated the National Guard and quartered them in two correctional officer's dorm rooms located on the state penitentiary complex. This case is fascinating and held that the renting correctional officers were "owners" of their quarters as well as the National Guard were deemed "soldiers" for the purposes of the Third Amendment.[11] Finally, no additional analysis has occurred since 1983.

ANALYSIS OF AMENDMENT III

Part 1

No Soldier shall,
in time of peace be quartered in any house,
without the consent of the Owner,

Upon a literal analysis of this verbiage, a soldier would include any persons enlisted in the American military branches – Air Force, Army, Coast Guard, Marine Corps, Navy, and Space Force. However, the court in *Engblom v. Carey* (S.D.N.Y. 1983) extended this analysis to include the National Guard as well.[12] Further, the amendment explains soldiers may be housed in any [private] quarters. The language precludes **quartering soldiers** which is defined by Black's Law Dictionary as "[t]he assigning of military

7. *English law*, n.d.
8. *Griswold v. Connecticut*, 381 U.S. 479, 484 (1965).
9. PROHIBITION, Black's Law Dictionary (12th ed. 2024).
10. *Engblom v. Carey*, 572 F. Supp. 44 (S.D.N.Y. 1983).
11. *Id.*
12. *Id.*

personnel to a place for food and lodging, usu. in a barracks."[13] This prohibition may not occur in time of peace. This phrase is quite important and appears to refer to times without war and/or rumors of war. Some interpretations lend itself to a period of peace which may occur during a time of war. At any rate, a soldier may not be quartered during a true time of peace or a period of peace without the consent of the owner of the private quarters. This includes rental quarters as evidenced in *Engblom v. Carey (S.D.N.Y. 1983).*[14]

Part 2

nor in time of war,

but in a manner to be prescribed by law.

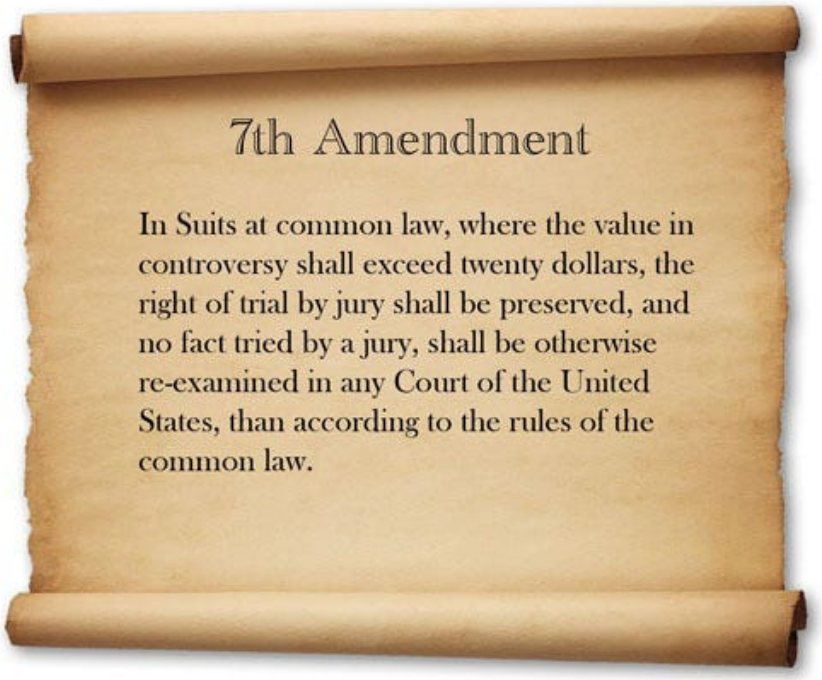
The amendment allows homeowners to retain their ownership and autonomy over their property, except when the soldiers' housing is a military necessity. According to Black's Law Dictionary, **prescribe** is defined as "[t]o dictate, ordain, or direct; to establish authoritatively (as a rule or guideline)."[15] Thus, a soldier is not limited to military designated housing during time of war, but it must meet the established authority or legal approval of the law. Further, a soldier is not prohibited from being quartered in a time of war either. This time of war may be armed or unarmed, domestic or foreign, and public or private. The authority for the war power is located in U.S. Const. Art. I, §8, Cl. 11-14 and coincides with the law.

Amendment VII

Passed by Congress September 25, 1789. Ratified December 15, 1791. The first 10 amendments form the Bill of Rights.

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

13. QUARTERING SOLDIERS, Black's Law Dictionary (12th ed. 2024).
14. *Id.*
15. PRESCRIBE, Black's Law Dictionary (12th ed. 2024).



Amendment VII[16]

INTRODUCTION TO AMENDMENT VII

As the Bill of Rights was drafted, many of the earlier amendments referred to criminal proceedings. However, the Seventh Amendment refers to civil proceedings as there was no direct amendment which addressed these proceedings prior to this amendment. The federal convention revealed the intention to include such an amendment in the Bill of Rights. "On September 12, 1787, as the Convention was in its final stages, Mr. Williamson of North Carolina 'observed to the House that no provision was yet made for juries in Civil cases and suggested the necessity of it.'"[17] In fact, the convention entertained a motion to add a clause to Art. III, §2 which would include language regarding federal jury trials. A trial is defined as "[a] formal judicial examination of evidence and determination of legal claims in an adversary proceeding."[18] This effort failed. Thus, the Seventh Amendment was included as one of the original changes to the original United States Constitution. As a result of its inclusion in the Bill of Rights, the purpose of the Seventh Amendment began to emerge. "The Amendment has, for its primary purpose, the preservation of 'the common law distinction between the province of the court and that of the jury, whereby, in the absence of express or implied consent to the contrary, issues of law are resolved by the court and issues of fact are to be determined by the jury under appropriate instructions by the court.'"[19]

16. Ccpc. (2018, May 31). A brief guide to the 7th Amendment — and how it may end. *Medium*. https://medium.com/@CCPCoalition/a-brief-guide-to-the-7th-amendment-and-how-it-may-end-915377bf0f53
17. GPO. (n.d.). *Seventh amendment*. Authenticated U.S. Government Information GPO. Retrieved November 10, 2020, from https://www.govinfo.gov/content/pkg/GPO-CONAN-1992/pdf/GPO-CONAN-1992-10-8.pdf
18. TRIAL, Black's Law Dictionary (12th ed. 2024).
19. *Ibid*.

ANALYSIS Of AMENDMENT VII

In Suits at common law,
where the value in controversy shall exceed twenty dollars,
the right of trial by jury shall be preserved,
and no fact tried by a jury,
shall be otherwise re-examined in any Court of the United States,
than according to the rules of the common law.

In the Seventh Amendment, the verbiage of suits refers to lawsuits at common law as described in Chapter 2. The amendment specifically refers to those actions or lawsuits which request more than $20 in damages yielding a right to a jury. A **jury** is defined as "[a] group of persons selected according to law and given the power to decide questions of fact and return a verdict in the case submitted to them."[20] This section allows a right of trial by jury to be maintained providing an opportunity for parties to invoke the right when they deem it appropriate. The right of trial by jury is also known as jury trial or petit jury. **Petit jury** is defined as "[a] jury ([usually] consisting of 6 or 12 persons) summoned and empaneled in the trial of a specific case."[21] The purpose of the petit jury in a ***civil***, or common law, case is for its members to determine whether the plaintiff proves the elements of the statute with the legal standard of preponderance of the evidence (more than 50%). The elements of the violation are found in the ordinance, statute, or codes depending upon the jurisdiction. After the petit jury deliberates in a civil case, the civil petit jury finds for the plaintiff or the defendant and addresses the amount of damages.

Additionally, the Seventh Amendment identifies trial by jury in common law. The term common law emphasized the distinction of trial by jury in equity and common law. The distinction began with the difference of the definition of the word as used in the United States and referred to in the English legal systems. While equity courts barred a right to a trial by jury, some cases within the jurisdiction of the courts provided justice through a jury as evidenced in Black's Law dictionary.[22]

The execution of justice within the federal courts allowed single courts to use procedures unique to equity and common law in one courtroom. This effort was codified under the adoption of the Federal Rules of Civil Procedure in 1938 where both law and equity shared jurisdiction and the uniform rules of procedure.[23]

As a result several cases provided explanation for the manner in which justice should be determined when both common law and equity claims are involved. Specifically, in *Dairy Queen v. Wood* (1962), the plaintiff pursued both equity and common law relief.[24] The relief included an injunction and monetary damages which led the court to hold that the Seventh Amendment required that the legal relief sought be heard by a trial jury due to the legal character of the primary rights. Therefore, the court reiterated that legal actions proceed prior to equitable actions, if litigants requests a jury trial.[25]

20. JURY, Black's Law Dictionary (12th ed. 2024).
21. PETITE JURY, Black's Law Dictionary (12th ed. 2024).
22. *Ibid.*
23. *Ibid.*
24. *Dairy Queen v. Wood*, 369 U.S. 469 (1962).
25. *Lytle v. Household Manufacturing, Inc.*, 494 U.S. 545 (1990).

Amendment XI

Passed by Congress March 4, 1794. Ratified February 7, 1795. The 11th Amendment changed a portion of Article III, Section 2.

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

Amendment XI[26]

INTRODUCTION TO AMENDMENT XI

The Eleventh Amendment, similar to the other amendments in the Constitution, has its roots in the battle for the American Revolution (also known as the Revolutionary War or the United States War of Independence). During this war, many debts were incurred. As a result, the plaintiff, Chisholm, the executor of the estate of Robert Farquhar, sued the state of Georgia for the debts incurred and the money owed to him for goods Farquhar provided during the Revolutionary War.[27] Georgia never acknowledged the debt and did not defend its claims. Georgia invoked the British concept of sovereign immunity. **Sovereign immunity** is defined as "[a] government's immunity from being sued in its own courts without its consent."[28] Georgia claimed that as a state and a sovereign power, no citizen could sue the state unless Georgia acquiesced to the court's jurisdiction of the lawsuit. The concept of

26. Tavish Whiting. (2020, October 18). *Eleventh Amendment – quick review* [Video]. YouTube. https://www.youtube.com/watch?v=CHLtoeFp6qU
27. Clark, B., & Jackson, V. (n.d.). *Interpretation: The eleventh amendment | the national constitution center*. The National Constitution Center. Retrieved December 8, 2020, from https://constitutioncenter.org/interactive-constitution/interpretation/amendment-xi/interps/133
28. IMMUNITY, Black's Law Dictionary (12th ed. 2024).

sovereign immunity was based upon the deference to the crown as the law. Because of the deference to monarchs, this immunity protection has long existed. Thus, Georgia posited that it is immune to citizens' lawsuits in federal court unless and until Georgia provides consent to the litigation.[29]

The Supreme Court of the United States addressed this concept of sovereign immunity in an attempt to provide clarity for this approach. In *Chisholm v.* Georgia (1793), SCOTUS rejected the claim of sovereign or state governmental immunity.[30] To the contrary, the court held that Article III, the foundation of the federal courts, precluded state governmental immunity. Therefore, the court in *Chisholm* explained that its holding was based upon the action of the states' ratification of the United States Constitution which SCOTUS noted was the states' action of relinquishing their governmental immunity.[31]

ANALYSIS OF AMENDMENT XI

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

The Eleventh Amendment included the judicial power of the United States contained in Art. III, §2. The **judicial power** referenced in this amendment is defined as "[t]he authority vested in courts and judges to hear and decide cases and to make binding judgments on them; the power to construe and apply the law when controversies arise over what has been done or not done under it."[32] According to federal law, the Supreme Court of the United States is vested with judicial power. Whereas, Congress establishes inferior courts under its purview. The Eleventh Amendment protects states within the federal court if the state's citizens from State A chooses to sue the state's citizens from State B or another country is known as government immunity, governmental immunity, or sovereign immunity.[33] Governmental immunity is defined as "[a] government's immunity from being sued in its own courts without its consent. Congress has waived most of the federal government's sovereign immunity." Sovereign immunity is a rarity for SCOTUS review. However, this concept was explored in *PennEast Pipeline Co. v. New Jersey* (2021).[34] Under Art. I, §8 and the interstate commerce clause, Congress passed the Natural Gas Act (NGA) of 1938 to regulate the transportation and sale of natural gas.[35] As much needed background, in order for a company to build an interstate pipeline, a company must secure a Federal Energy Regulatory Commission (FERC) certificate reflecting that such construction "is or will be required by the present or future public convenience and necessity" according to 15 U. S. C. §717f(e).[36] As originally enacted, the NGA did not provide a way for certificate holders to secure property rights in New Jersey. Certificate holders were unable to secure property rights to accomplish building pipelines; therefore, FERC granted petitioner PennEast Pipeline Co. a certificate of public convenience.

PennEast filed suit and sought to exercise the federal eminent domain power under §717f(h) to

29. Clark & Jackson, n.d.
30. *Chisholm v. Georgia*, 2 U.S. 419 (1793)
31. *Id.*
32. JUDICIAL POWER, Black's Law Dictionary (12th ed. 2024).
33. *Ibid.*
34. *PennEast Pipeline Co. v. New Jersey*, 594 US _ (2021).
35. *PennEast Pipeline Co. v. New Jersey*, 2021.
36. *Id.*

obtain rights-of-way along the pipeline route approved by FERC. PennEast sought to condemn New Jersey or the New Jersey Conservation Foundation asserted property interests. New Jersey moved to dismiss PennEast's complaints on sovereign immunity grounds. The District Court denied New Jersey's motion to dismiss PennEast's complaints on the basis of sovereign immunity grounds. The Third Circuit vacated the District Court's order insofar as it awarded PennEast relief with respect to New Jersey's property interests and concluded §717f(h) did not clearly delegate to certificate holders the Federal Government's ability to sue nonconsenting States such as New Jersey. As a result, the Supreme Court held that §717f(h) authorizes FERC certificate holders to condemn all necessary rights-of-way, whether owned by private parties or States. As a result, the states waived their sovereign immunity as to the federal eminent domain power.[37]

Compare the above holding to the holding in *Torres v. Texas Department of Public Safety* (2022).[38] According to Art. I, §8, Congress has the authority to raise and support armies. LeRoy Torres enlisted in Army Reserves in 1989 and was called to active duty in Iraq, 2007. While deployed, Torres was exposed to toxic burn pits receiving an honorable discharge due to the diagnosis of constructive bronchitis.[39] Upon his discharge, Torres requested his former employer, Texas Department of Public Safety ("hereinafter Texas"), to accommodate his constructive bronchitis. Texas refused to accommodate Torres' request. As a result, Torres filed suit under Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA). This act gives returning servicemembers the right to reclaim their prior jobs with state employers and authorizes suit if those employers refuse to accommodate veterans' service-related disabilities.[40] Texas filed a motion and raised the defense of sovereign immunity according to the 11th Amendment to get the claim dismissed. The trial court denied this motion and allowed Torres' suit to proceed. An intermediate appellate court reversed the trial court, reasoning that Congress could not authorize private suits against nonconsenting States (Texas) pursuant to *PennEast Pipeline Co. v. New Jersey*.[41] Subsequently, SCOTUS granted certiorari to determine whether, in light of that intermediate court's intervening ruling, USERRA's damages remedy against state employers is constitutional.[42] Writing for the Court in a 5-4 opinion, Justice Breyer noted "Text, history, and precedent show that the States, in coming together to form a Union, agreed to sacrifice their sovereign immunity for the good of the common defense."[43] Finally, this holding reversed and remanded the case to the Texas Court of Appeals according to SCOTUS' opinion.

Amendment XVI

Passed by Congress July 2, 1909. Ratified February 3, 1913. The 16th Amendment changed a portion of Article I, Section 9.

The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration.

37. *Id.*
38. *Torres v. Texas Department of Public Safety*, 597 U.S. _ (2022).
39. *Id.*
40. *Id.*
41. *Id.*
42. *Id.*
43. *Id.* at 16.

Amendment XVI – Uncle Sam is requesting your payment[44]

INTRODUCTION TO AMENDMENT XVI

According to the Constitution Annotated, the Sixteenth Amendment was directly related to previous Congressional powers and Supreme Court cases.[45]

CONSTITUTIONAL CLIP

Specifically, the Sixteenth Amendment's roots were firmly planted in a case where the definition of income was explained and applied to taxation.

44. *Federal income tax – oh joy! – historic america*. (n.d.). Historic America. Retrieved August 3, 2023, from https://images.squarespace-cdn.com/content/v1/50b67298e4b05c3cd8b81744/1555423193092-79FDRDCCFAW9MP0MORKU/Uncle+Sam+Handout.jpg?format=1000w

45. Sixteenth amendment: *Historical background | constitution annotated | Congress.gov | library of congress*. (n.d.). Library of Congress. Retrieved May 8, 2021, from https://constitution.congress.gov/browse/essay/amdt16-1/ALDE_00000999/

In *Pollock v. Farmers' Loan & Trust Company* (1895), the plaintiff sought to preclude the company where he held shares from complying with the intended taxation of his 10 shares.[46] Farmers' Loan & Trust Company expressed to its shareholders its desire to comply with the provisions in the Wilson-Gorman Tariff Act of 1894 by paying the tax as well as identifying those who were subject to the tax.[47] Ultimately, the lower level courts ruled for the investment company, but the Supreme Court of the United States accepted the case for review.

The question before the court was "whether the income tax now before it does or does not belong to the class of direct taxes."[48] The court agreed with the plaintiff and held that clauses of the act were void. According to the population and the requirement of apportionment of direct taxes in the states, a **direct income tax** breached Art. I, §9. Taxes are either direct or indirect. A **direct tax** is "[a] tax [that] is levied on individuals and organizations and cannot be shifted to another payer. Often with a direct tax, such as the personal income tax, tax rates increase as the taxpayer's ability to pay increases, resulting in what's called a progressive tax."[49] Ultimately, this change affected two sections of Article I.[/footnote]

Unfortunately, *Pollock* was an unpopular holding. Soon after, the Democrats capitalized on its lack of popularity during the 1896 platform and reminded the voters that the court usurped its authority in *Pollock*.[51] On the other hand, working class individuals saw this as the wealthy people and corporations avoiding their fair share of taxes. This fight continues today, as President Joe Biden supported a bill introduced in the House which provides an increased share in taxes for the wealthy and corporations.

> "By specifically affixing the language, 'from whatever source derived,' it removes the 'direct tax dilemma' related to Art. I, §8, and authorizes Congress to lay and collect income tax without regard to the rules of Art. I, §9, regarding census and enumeration."[50]

Therefore, the Sixteenth Amendment did not provide any additional power of taxation, but worked to prohibit Congress' previous exhaustive and plenary power of income taxation.[52]

ANALYSIS OF AMENDMENT XVI

The Congress shall have power to lay and collect taxes on incomes,
from whatever source derived,
without apportionment among the several States,
and without regard to any census or enumeration.

46. *Pollock v. Farmers' Loan & Trust Company*, 158 U.S. 601 (1895).
47. *Id.*
48. *Id.* at 602.
49. Tax Foundation. (2023, July 26). *Direct Tax | Examples of a direct tax | Tax Foundation's TaxEDU*. https://taxfoundation.org/taxedu/glossary/direct-tax/
50. Smentkowski, B. P. (2019, October 14). *Sixteenth Amendment. Encyclopedia Britannica*. https://www.britannica.com/topic/Sixteenth-Amendment
51. *Pollock v. Farmers' Loan & Trust Company, 1895.*
52. See *Stanton v. Baltic Mining Co.*, 240 U.S. 103 (1916) for a full explanation.

Amendment XVI[53]

Congress first exercised the federal government's power to tax in 1861, long before ratification of the Sixteenth Amendment, to finance the Civil War.[54] The first Internal Revenue Act taxed imports, provided for a direct land tax, and imposed a tax of 3% on individual incomes over $800.00.[55] The Act was overhauled in new legislation signed by President Lincoln in 1862. This act created the Internal Revenue Service which levied the first progressive income tax and heavily taxed alcohol and tobacco products.

This section identified and outlined how the Framers granted Congress authority to address taxes. The power referred to within this amendment is a taxing or **taxation power** defined as "[t]he power granted to a governmental body to levy a tax; especially, the congressional power to levy and collect taxes as a means of effectuating Congress's delegated powers."[56] Although the phrase originally appeared in Art. I, §8, it did not include the language "on incomes." Thus, the question becomes what is income? Black's defines **income** as "[t]he money or other form of payment that one receives, [usually] periodically, from employment, business, investments, royalties, gifts, and the like."[57] As stated above, in *Pollock* and Black's Law Dictionary, income tax includes the entirety of a person or entity's net income.

53. Roback, J. (2021, September 28). What is The 16th Amendment?. . . *The US Sun*. https://www.the-sun.com/news/3268867/what-is-the-16th-amendment/
54. Fishkin, J. R., Forbath, W. E., & Jensen, E. (n.d.). *Interpretation: The sixteenth amendment | the national constitution center. The National Constitution Center*. Retrieved October 23, 2020, from https://constitutioncenter.org/interactive-constitution/interpretation/amendment-xvi/interps/139
55. *Ibid.*
56. POWER, Black's Law Dictionary (12th ed. 2024).
57. INCOME, Black's Law Dictionary (12th ed. 2024).

CONSTITUTIONAL CLIP

The guide for all things federal income tax is governed by the Internal Revenue Code (hereinafter the IRC) which provides the perimeters for collection and appropriation. The IRC "is the domestic portion of federal statutory tax law in the United States, and is under Title 26 of the United States Code (USC). The IRC has 11 subtitles, including income taxes, employment taxes, coal industry health benefits, and group health plan requirements, and group health plan requirements. The implementing agency of IRC is the Internal Revenue Service (IRS)."[58]

Furthermore, this code is located at Title 26 of the United States Code. Finally, the IRC's power does not require apportionment or "...allocating or attributing moneys...in a given way..." amongst the states, nor does the IRC tax based upon the census or "[a]n official count of people made for the purpose of compiling social and economic data for the political subdivision to which the people belong."[59]

The Supreme Court of the United States agreed to hear one case which invokes the Sixteenth Amendment. The appearance of the Sixteenth Amendment is a rarity, but takes front stage when SCOTUS granted certiorari to hear whether the 2017 Tax Cuts and Jobs Act provision is constitutional which requires "U.S. taxpayers who owned shares in foreign corporations to pay a one-time tax on their share of the corporation's earnings, even if those earnings were reinvested in the corporation and the taxpayers did not receive them."[60] Although, Article I of the Constitution requires Congress to apportion any "direct taxes" among the states, the 16th Amendment's exception allows Congress to tax "incomes, from whatever source derived," without apportioning that tax among the states.[61] Charles and Kathleen Moore challenged the tax because they reinvested their earnings as opposed to distributing the dividends. SCOTUS granted review of "whether the 16th Amendment authorizes Congress to tax unrealized sums without apportionment among the states?"[62] Finally, this appeal would mean an additional $15,000 in taxes for the Moores if affirmed.[63]

Critical Reflections:

58. *Internal Revenue Code (IRC)*. (n.d.). LII / Legal Information Institute. https://www.law.cornell.edu/wex/internal_revenue_code_(irc)#:~:text=The%20Internal%20Revenue%20Code%20(IRC,and%20group%20health%20plan%20requirements.
59. APPORTIONMENT, Black's Law Dictionary (12th ed. 2024); CENSUS, Black's Law Dictionary (12th ed. 2024).
60. Howe, A., & Amy-Howe. (2023). Justices take up cases on veterans' education benefits and 16th Amendment. *SCOTUSblog*. https://www.scotusblog.com/2023/06/justices-take-up-cases-on-veterans-education-benefits-and-16th-amendment/
61. *Id.*
62. *Id.*
63. *Id.*

1. Does Congress have the power to tax for a purely regulatory, non-revenue generating goal? Could Congress require all prostitutes to register and pay taxes?
2. If a foreign country attacks America, can you envision any circumstances in which the armed forces would be able to quarter soldiers in the homes of private citizens?
3. Do you agree that the Eleventh Amendment does not allow states to use their state's immunity to avoid providing compensation and retribution to its citizens? Explain why or why not?

Chapter 13 - Amendments XII, XX, XXII, & XXV: Electoral College, President, & Vice-President

Amendment XII, Amendment XX, Amendment XXII, & Amendment XXV

RICHARD J. FORST AND TAUYA R. FORST

LEARNING OBJECTIVES

After reading this chapter, you should be able to:

13.1 Identify the unfamiliar terms of the Twelfth Amendment.

13.2 Describe how the Electoral College and the popular vote affect election of President and Vice-President.

13.3 Identify the unfamiliar terms of the Twentieth Amendment.

13.4 Describe the lame duck session.

13.5 Identify the unfamiliar terms of the Twenty-Second Amendment.

13.6 Describe historical and present-day Presidential term limits.

13.7 Identify the unfamiliar terms of the Twenty-Fifth Amendment.

13.8 Summarize how the Twenty-Fifth Amendment provides for the permanent, complete succession plan of a President in the event of death, removal, resignation, or incapacity.

13.9 Summarize how the Twenty-Fifth Amendment provides for the permanent, complete succession plan of a Vice-President in the event of death, removal, resignation, or incapacity.

KEY TERMS

Elector
Electoral College
Nominate
Presidential Succession Act of 1948

Inoperative	Succession
Lame Duck	

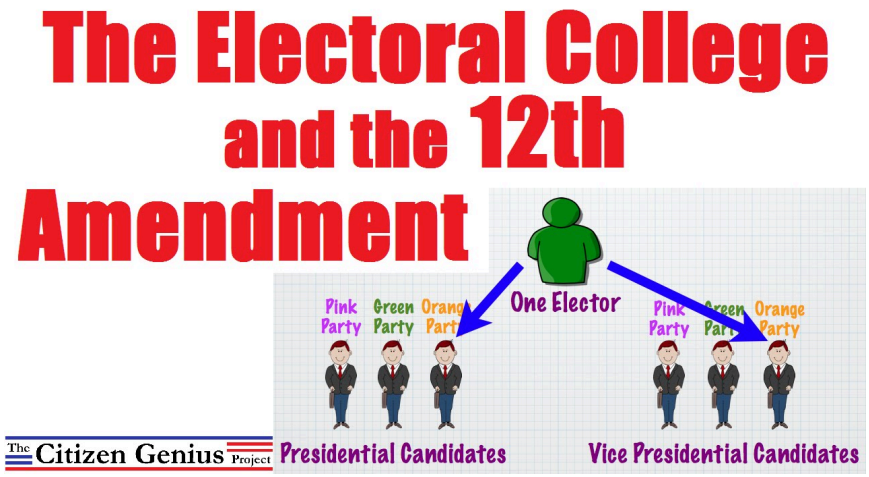


Illustration of The Electoral College and the 12th Amendment[1]

Amendment XII

Passed by Congress December 9, 1803. Ratified June 15, 1804. The 12th Amendment changed a portion of Article II, Section 1. A portion of the 12th Amendment was changed by the 20th Amendment, Section 3.

The Electors shall meet in their respective states and vote by ballot for President and Vice-President, one of whom, at least, shall not be an inhabitant of the same state with themselves; they shall name in their ballots the person voted for as President, and in distinct ballots the person voted for as Vice-President, and they shall make distinct lists of all persons voted for as President, and of all persons voted for as Vice-President, and of the number of votes for each, which lists they shall sign and certify, and transmit sealed to the seat of the government of the United States, directed to the President of the Senate;–the President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates and the votes shall then be counted;–The person having the greatest number of votes for President, shall be the President, if such number be a majority of the whole number of Electors appointed; and if no person have such majority, then from the persons having the highest numbers not exceeding three on the list of those voted for as President, the House of Representatives shall choose immediately, by ballot, the President. But in choosing the President, the votes shall be taken by states, the representation from each state having one vote; a quorum for this purpose shall consist of a member or members from two-thirds of the states, and a majority of all the states shall be necessary to a choice. And if the House of Representatives shall not choose a President whenever the right of choice shall devolve upon them, before the fourth day of March next following, then the Vice-President shall act as President, as in case of the death or other constitutional disability of the President.–The person having the greatest number of votes as Vice-President, shall be the Vice-President, if such number be a majority of the whole number of Electors appointed, and if no person have a majority, then from the two highest numbers on the list, the Senate shall choose the Vice-President; a quorum for the purpose shall consist of two-thirds of the whole number of Senators, and a majority of the whole

1. W. F. (n.d.). The electoral college and the 12th amendment [Illustration]. The United States Constitution Resource Page. https://franw.com/2019/03/30/bill-of-rights-amendment-12/

number shall be necessary to a choice. But no person constitutionally ineligible to the office of President shall be eligible to that of Vice-President of the United States.

INTRODUCTION TO AMENDMENT XII

Although the term is not mentioned specifically in the amendment, the Twelfth Amendment refers to the Electoral College. Black's Law Dictionary defines **electoral college** as "[t]he body of electors chosen from each state to formally elect the U.S. President and Vice President by casting votes based on the popular vote."[2] This concept appears to be common sense as we observe and understand elections today; however, the electoral process was not always this simple. As previously mentioned, the electoral college was established in Art. II, §1. The verbiage in this article worked well for the United States until the elections of 1796 and 1800.[3] In order for us to understand how the electoral college evolved, we must first understand how it was established in Art. II, §1.

This electoral process consisted of four significant features:

(1) Electors would vote for the two most qualified individuals (one outside of the elector's home state).

(2) Electors did not determine whether the two individuals would be President or Vice President. The individual who secures the most votes (if a majority) becomes President, with the runner-up becoming Vice President.

(3) The House of Representatives would decide if no majority or a tie occurs from the elections – with the House's state delegate having one vote.

(4) Finally, the House of Representatives' determinations would be made by a fair amount of lame ducks – who may have been defeated in the previous election. Therefore, the final decision would not occur with the new representatives as they were not seated until one year later per the Constitution.

This structure supported the notion that the forefathers wanted the most qualified individual as opposed to the concept of the best political party.

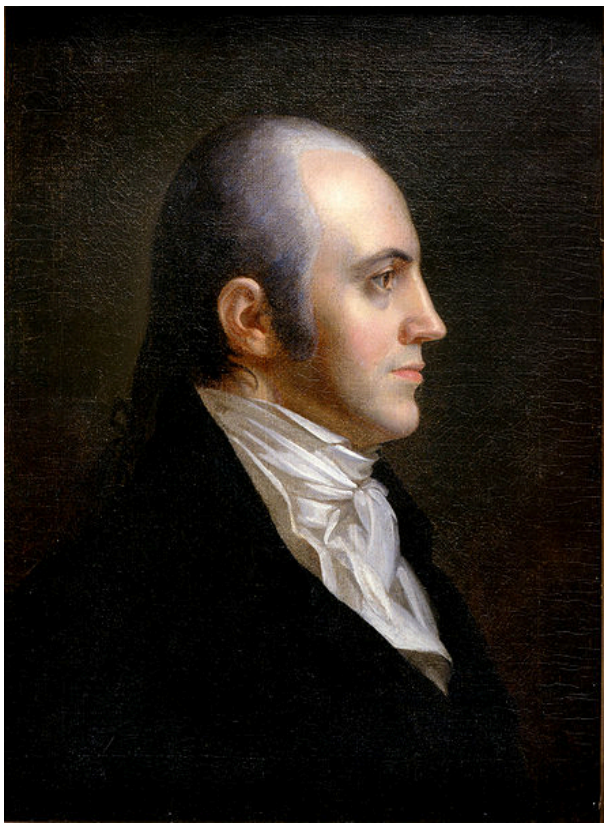
CONSTITUTIONAL CLIP

The Twelfth Amendment is the fastest ratified amendment in the United States Constitution. The amendment was ratified less than 6 months after its proposal.

Any sense that this concept would be defended was dissipated with the election of 1796. The election emerged with the incumbent John Adams, who was Washington's Vice President for two terms and

2. ELECTORAL COLLEGE, Black's Law Dictionary (12th ed. 2024).
3. *Ibid.*

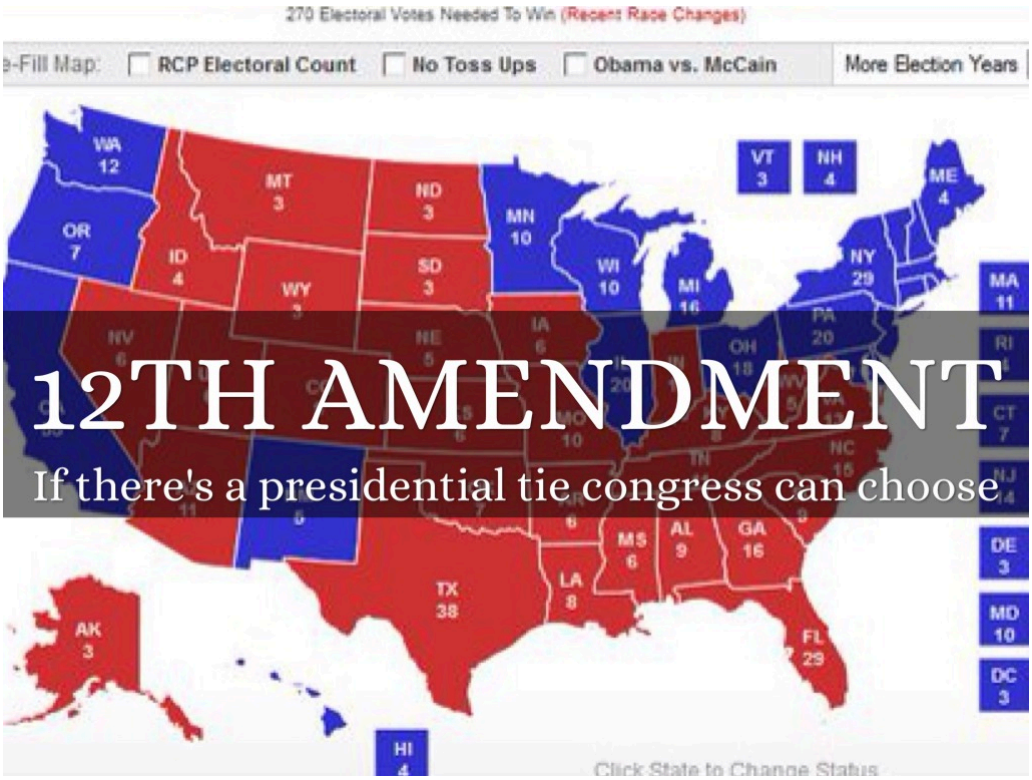
was then elected President in 1796.[4] At this time, the electors chose Thomas Jefferson as the Vice President. This would prove to be frustrating in 1800 when this process included political party association as well as running mates.[5] As the 1800 election unfolded, President Adams (Charles Cotesworth Pickney) of the Federalist Party and Vice President Jefferson (Aaron Burr) of the Democratic-Republican Party were candidates for the highest office again, only with running mates.[6]



Aaron Burr – Lieutenant Colonel, Attorney General, and Senator[7]

The Federalists began to analyze what would occur if they cast ballots on the most qualified system and determined that they would not provide all of their votes with Adams and Pickney as this would not be a majority. Thus, the Federalists were determined to avoid a tie and a decision from the House of Representatives (keeping the deciding vote within their grasp). On the other hand, the Democratic-Republicans did not consider all possible outcomes and voted for their party running mates. This led to a tie and the House decided between Jefferson and Burr. This tie launched deep rooted issues within the original electoral process which ultimately led directly to the ratification of the Twelfth Amendment. Jefferson was chosen, inaugurated, and the precedent for peaceful transfer of power began – regardless of one's political affiliation. However, the cracks in the electoral college were exposed as necessary for repair.[8]

4. Levinson, S. (n.d.). *Interpretation: The twelfth amendment | the national constitution center*. The National Constitution Center. Retrieved April 13, 2021, from https://constitutioncenter.org/interactive-constitution/interpretation/amendment-xii/interps/171
5. *Ibid.*
6. *Ibid.*
7. Vanderlyn, J. (1802). Portrait of aaron burr [Oil on canvas]. In *USHistory.org*. https://www.ushistory.org/valleyforge/served/burr.html
8. *Ibid.*



Amendment XII – Resolving Presidential Ties[9]

"While states varied in how they selected presidential electors through the 19th century, electors today are uniformly popularly elected (rather than appointed) and pledged to support a given candidate."[10] It is worth noting that the Presidential election issue surfaced again in 1824 in the House of Representatives when Andrew Jackson (99) did not win a majority of votes, John Quincy Adams (85), Treasury Secretary William Crawford (41) and Speaker of the House Henry Clay (37), but Jackson had widespread influence in the House and was expected to leverage it to win the election.[11] Now ratified, the Twelfth Amendment required the House of Representatives to only consider those with the top votes; instead, the House chose Adams over Jackson. Not surprisingly, Adams chose Clay as his Secretary of State, due to Clay's agreement with Adams on the key issues. Jackson was devastated and publicly identified what he believed to be corruption. Jackson stated in response to the 1825 election, "[T]he Judas of the West has closed the contract and will receive the thirty pieces of silver . . . Was there ever witnessed such a bare faced corruption in any country before?"[12]

In recent years, this amendment has proven to be quite important. It should be noted that several

9. *12th amendment*. (n.d.). Clip Art. https://clipart-library.com/clipart/1722845.htm
10. *Electoral college & indecisive elections | US house of representatives: History, art & archives*. (n.d.). US House of Representatives: History, Art, & Archives. Retrieved October 18, 2020, from https://history.house.gov/Institution/Origins-Development/Electoral-College/#:%7E:text=After%20the%20experiences%20of%20the,the%20other%20for%20Vice%20President.&text=After%20the%20experiences%20of%20the,the%20other%20for%20Vice%20President.
11. *Ibid.*
12. *Ibid.*

portions of the Constitution were changed as a result of the Twelfth Amendment. Art. II, §1 changed the dates of the Congressional sessions and when Presidential sessions began. It is noteworthy that this section clearly established the need for a single individual to be the President. The process was safeguarded through the agency of the electoral college. Each elector votes using an instrument in paper or electronic form to name the chief of state, as well as a different ballot if the chief dies and/or resigns (otherwise unable to complete the duties of President). This process seeks to impart transparency as it limits one's votes to those who reside outside of the same state as the elector. Furthermore, these electors will create running lists for both President and Vice-President. The lists will be forwarded to the Federal capital where the President of the Senate (that is, the Vice-President of the United States) will count all votes in front of the Senate and the House of Representatives. There are two ways that the candidate is chosen. If a majority vote occurs, then the candidate with the majority vote becomes President and Vice-President, respectively. If there is no majority, then the candidate who held the majority of at least three other candidates will be determined by ballot by the House of Representatives. This smaller voting process will require a majority of the House's members to be present (at least two-thirds) and will decide the President/Vice-President with the majority vote of the House's members.

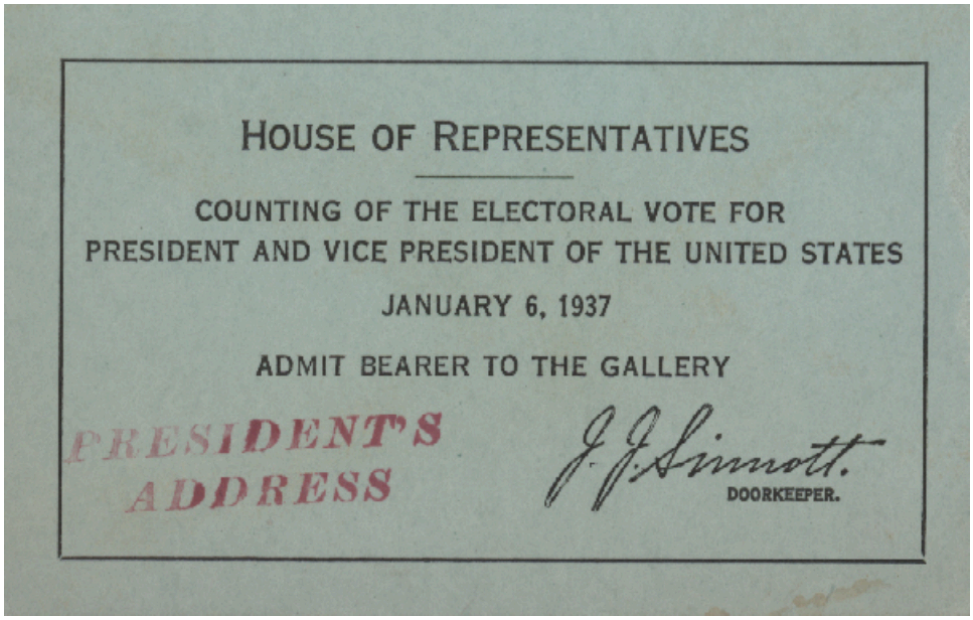
After acknowledging an inconclusive electoral college result, John Quincy Adams became the only President to be elected by the House of Representatives in 1824.

ANALYSIS OF AMENDMENT XII

Part 1 — Electoral College

a. The Electors shall meet in their respective states and vote by ballot for President and Vice-President, one of whom, at least, shall not be an inhabitant of the same state with themselves; they shall name in their ballots the person voted for as President, and in distinct ballots the person voted for as Vice-President, and they shall make distinct lists of all persons voted for as President, and of all persons voted for as Vice-President, and of the number of votes for each, which lists they shall sign and certify, and transmit sealed to the seat of the government of the United States, directed to the President of the Senate; —

b. The President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates and the votes shall then be counted;



This pass for the Electoral College's 1937 vote count was used again the same day for the President's annual message.[13]

This section of the Twelfth Amendment heavily examines electors and how they function in the President and Vice-Presidential election. However, the verbiage itself doesn't provide context for one of the most important terms in the amendment – electors. What is an elector? According to Black's Law Dictionary, an **elector** is "[a] member of the electoral college chosen to elect the U.S. President and Vice President.[14] An elector has a specific method for choosing both the United States President and Vice-President. The electors are required to gather in their states and cast two votes, but one vote must be for a non-native inhabitant of the state.

The difference between Art. II, §1 and the Twelfth Amendment is that the elector must identify the name for President and a separate name for Vice-President.

Electors will maintain a list of all Presidential votes as well as all Vice-Presidential votes keeping a tally of the votes for each candidate with certification and seal to the Vice-President who is the President of the Senate. In *Chiafalo v. Washington* (2020), in a 9-0 decision, Justice Kagan wrote an opinion for the majority based upon the Twelfth Amendment, while Justice Thomas wrote a concurring opinion based upon the Tenth Amendment.[15] In *Chiafalo*, a few "faithless" electors sought to change the outcome of the 2016 presidential election by voting for their parties' choice as opposed to the candidate who carried the popular vote in their state.[16] The court introduced an additional mode of Constitutional interpretation called Constitutional liquidation to reach its reasoning. Justice Kagan reminded the parties that James Madison "wrote that the Constitution's meaning could be 'liquidated' and settled by practice. But the term 'liquidation' is not

13. *Electoral College Fast Facts | US House of Representatives: History, Art & Archives*. (n.d.). https://history.house.gov/Institution/Electoral-College/Electoral-College/
14. ELECTOR, Black's Law Dictionary (12th ed. 2024).
15. *Chiafalo v. Washington*, 140 S.Ct. 2316 (2020).
16. *Id.*

widely known, and its precise meaning is not understood."[17] Justice Kagan invoked the concept of constitutional liquidation, which relies upon three key elements:

1. textual indeterminancy,
2. course of deliberate practice, and
3. the course of practice had to result in a constitutional settlement.[18]

Further, she relied upon constitutional liquidation to express the court's opinion which ultimately combined "[t]he Constitution's text and the Nation's history [to] both support allowing a State to enforce an elector's pledge to support his party's nominee — and the state voters' choice — for President."[19] Finally to complete the electoral college process, the Vice-President **must** open all of the sealed certifications to be counted. Following Chiafalo, the Supreme Court of the United States addressed *Colorado Department of State v. Baca* (2020). Baca cast a vote for John Kasich as opposed to the person who won the popular vote, Hillary Clinton. After becoming a "faithless elector," Baca was removed from his office as an elector.

> "Electors pledge to vote for the candidate from their party if that candidate wins the most votes in the state (or district in the case of Maine and Nebraska). 'Faithless electors' are electors who ultimately vote for someone other than for whom they pledged."[20]

Faithless Electors[21]

Subsequently Baca sued. The court reversed the decision in *Colorado Department of State v. Baca* in a per curiam decision upon the reasoning in *Chiafalo*.

Now that we understand what electors should do, it is important to provide additional information to delve into the particulars as we rarely discuss electors, but they are quite powerful. What are the qualifications for an elector; when are electors chosen; and why do we need to vote if we have electors to vote for President and Vice-President?[22]

a. What are the Qualifications for an Elector?

As previously stated, the U.S. Constitution contains very little information regarding the qualifications of an elector. Art. II, §1, Cl. 2 states "...no Senator or Representative, or Person holding an Office of Trust or Profit under the United States, shall be appointed an elector." This information along with the language of the Fourteenth Amendment, §3 indicates some terms for disqualification of an elector where it states

> **"No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any state, who, having previously taken an**

17. Baude, W., & Review, S. L. (2019). Constitutional liquidation. *Stanford Law Review*. https://www.stanfordlawreview.org/print/article/constitutional-liquidation/
18. *Ibid*.
19. *Chiafalo*, 2020.
20. *What is the law on faithless electors? – Ask a Librarian*. (n.d.). https://ask.loc.gov/law/faq/
21. 331082#:~:text=Electors%20pledge%20to%20vote%20for,than%20for%20whom%20they%20pledged.
22. *About the electors*. (2021, May 11). National Archives. https://www.archives.gov/electoral-college/electors#:%7E:text=What%20are%20the%20qualifications%20to,shall%20be%20appointed%20an%20elector.

oath, as a member of Congress, or as an officer of the United States, or as a member of any state legislature, or as an executive or judicial officer of any state, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof."

Finally, the certification presented by the appointed electors, "Each State's Certificates of Ascertainment," confirms the names of its appointed electors. A State's certification of its electors is generally sufficient to establish the qualifications of electors.

b. When are Electors Chosen?

Although state law on elector appointments vary, most States follow this procedure on Election Day. The state political parties nominate slates of electors at their State conventions or other meetings. Finally, the citizens vote on the appointment of the electors in the state's general election.

c. Where do the Electors Meet?

Electors are required to meet in December on the first Monday after the second Wednesday in their own states. The State legislature will determine where in the state, said meetings will occur. At this meeting, the electors cast their votes for President and Vice President.[23]

d. Why Do We Need to Vote if We Have Electors to Vote for President?

The general election identifies for the State's electors for whom they should cast their ballot for President and Vice-President. When those who vote (popular vote) for a Presidential candidate, you are indicating to the electors which candidate you want your State to vote for at the meeting of electors. The winning Presidential candidate's state political party selects the electors.

Part 2 — House of Representatives

a. The person having the greatest number of votes for President, shall be the President, if such number be a majority of the whole number of Electors appointed; and if no person have such majority, then from the persons having the highest numbers not exceeding three on the list of those voted for as President, the House of Representatives shall choose immediately, by ballot, the President. But in choosing the President, the votes shall be taken by states, the representation from each state having one vote; a quorum for this purpose shall consist of a member or members from two-thirds of the states, and a majority of all the states shall be necessary to a choice. And if the House of Representatives shall not choose a President whenever the right of choice shall devolve upon them, before the fourth day of March next following, then the Vice-President shall act as President, as in case of the death or other constitutional disability of the President.–

The Electoral College is effective as long as the individual with the greatest votes for President has a majority of the electoral votes, but the process becomes more involved if this is not the case. Just as explained previously in Art. II, § I, the top three vote getters must be chosen from this list by the House of Representatives. The vote will be held by the states, wherein each state = one vote. The choice must be made prior to March 4 of the next year or the Vice-President must act as interim President.

b. The person having the greatest number of votes as Vice-President, shall be the Vice-President, if such number

23. *Ibid.*

be a majority of the whole number of Electors appointed, and if no person have a majority, then from the two highest numbers on the list, the Senate shall choose the Vice-President; a quorum for the purpose shall consist of two-thirds of the whole number of Senators, and a majority of the whole number shall be necessary to a choice. But no person constitutionally ineligible to the office of President shall be eligible to that of Vice-President of the United States.

As to the Vice-President, the Electoral College is effective as long as the individual with the greatest votes for Vice-President has a majority of the electoral votes. The process becomes more involved if this is not the case. In this case, the top two vote getters must be chosen from this list by the Senate. However, individuals chosen for Vice-President must be eligible for President as well, lest he or she encounters circumstances which requires them to become President.

Amendment XX

Passed by Congress March 2, 1932. Ratified January 23, 1933. The 20th Amendment changed a portion of Article I, Section 4, and a portion of the 12th Amendment (changed the dates of the Congressional sessions and Presidential sessions began).

Section 1

The terms of the President and the Vice President shall end at noon on the 20th day of January, and the terms of Senators and Representatives at noon on the 3d day of January, of the years in which such terms would have ended if this article had not been ratified; and the terms of their successors shall then begin.

Section 2

The Congress shall assemble at least once in every year, and such meeting shall begin at noon on the 3d day of January, unless they shall by law appoint a different day.

Section 3

If, at the time fixed for the beginning of the term of the President, the President elect shall have died, the Vice President elect shall become President. If a President shall not have been chosen before the time fixed for the beginning of his term, or if the President elect shall have failed to qualify, then the Vice President elect shall act as President until a President shall have qualified; and the Congress may by law provide for the case wherein neither a President elect nor a Vice President shall have qualified, declaring who shall then act as President, or the manner in which one who is to act shall be selected, and such person shall act accordingly until a President or Vice President shall have qualified.

Section 4

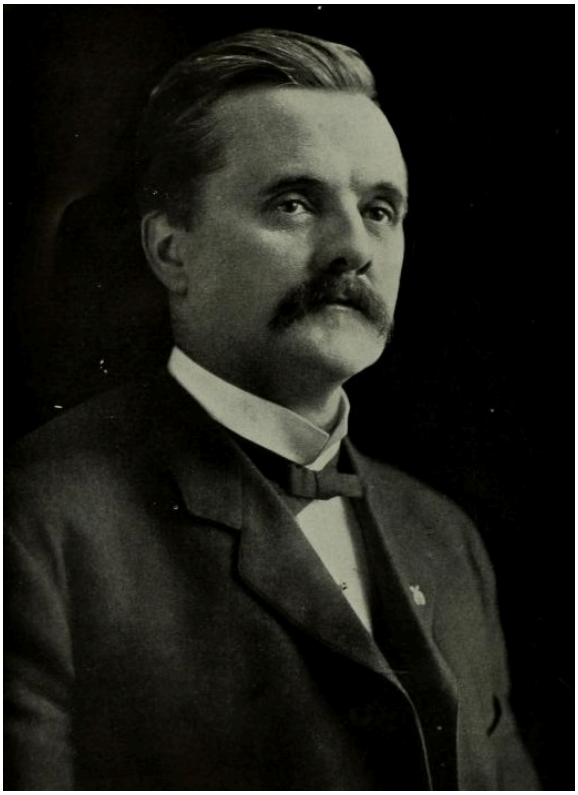
The Congress may by law provide for the case of the death of any of the persons from whom the House of Representatives may choose a President whenever the right of choice shall have devolved upon them, and for the case of the death of any of the persons from whom the Senate may choose a Vice President whenever the right of choice shall have devolved upon them.

Section 5

Sections 1 and 2 shall take effect on the 15th day of October following the ratification of this article.

Section 6

This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of three-fourths of the several States within seven years from the date of its submission.



Portrait of Senator George Norris, the author of the first resolution that ultimately created the Twentieth Amendment, c. 1910. (Public Domain)[24]

INTRODUCTION TO AMENDMENT XX

According to History, Arts, and Archives, the 74th Congress (1935-1937) of the United States of America represented the first Congress to adhere to the Twentieth Amendment where "...an old Congress dies and a new one is born on the 3d day of January."[25] The new method of representation as transportation improved and those who were considered lame ducks could be removed before they could cause an unbalanced or unchecked change on the government. A **lame duck** is defined as "[a]n official, esp. an elected one, whose term of office will soon end and who therefore has limited power or influence; esp., an elected official serving out a term after a successor has been elected."[26] Thus, the lame duck elected official is simply sitting in the place of the newly elected "during which a number of members sat who had not been reelected to office."[27] Similarly, the time which elapsed between the election of the new Congress and the President and Vice-President's inaugural ceremony is greatly abridged to accommodate these individuals who were not reelected. Therefore, this "...post-election legislative

24. US National Archives. (2022, October 3). "*Constitutional Amendments" Series – Amendment XX – "Date Changes for Presidency, Congress, and Succession*." The Reagan Library Education Blog. https://reagan.blogs.archives.gov/2022/10/03/constitutional-amendments-series-amendment-xx-date-changes-for-presidency-congress-and-succession/
25. The 20th amendment | US house of representatives: History, art & archives. (n.d.). *US House of Representatives: History, Art & Archives*. Retrieved March 23, 2021, from https://history.house.gov/Historical-Highlights/1901-1950/The-20th-Amendment/.
26. LAME DUCK, Black's Law Dictionary (12th ed. 2024).
27. *Ibid.*

session in which some of the participants are voting during their last days as elected officials" may prove to be quite destructive to a party's new legislative and new presidential agenda.[28]

Nebraska Senator George Norris understood this uncomfortable political position and worked diligently to pass an answer to this dilemma. Senator Norris was unrelenting in his efforts proposing the Twentieth Amendment to five successive Congressional – with a ratified version in 1923. This remarkable effort spanned the course of almost ten years before Congress finally and quickly ratified it. Although this amendment's rise to ratification was not without incident, it became a well-received and ratified amendment. After reviewing the process for ratification, we note that most amendments only receive three-fourths support from the states.

In this case, by the end of the state legislative sessions, all states showed support for this change by ratifying the Twentieth Amendment.

This unanimous support of an amendment is unique, but also it was the most expediently ratified amendment as well.

Additionally, the Twentieth Amendment has never been the sole subject of a Supreme Court case. In fact, lower courts rarely identify or rely on the amendment in their analysis; however, it is an amendment which functions without incident. Thus, it is important to fully examine the language in the amendment for comprehension. Therefore, this snippet from the Constitution Annotated provides a picture of why the Senate Committee on the Judiciary wanted these changes made as it relates to the lame duck session:

> **"If it should happen that in the general election in November in presidential years no candidate for President had received a majority of all the electoral votes, the election of a President would then be thrown into the House of Representatives and the membership of the House of Representatives called upon to elect a President would be the old Congress and not the new one just elected by the people. It might easily happen that the Members of the House of Representatives, upon whom devolved the solemn duty of electing a Chief Magistrate for 4 years, had themselves been repudiated at the election that had just occurred, and the country would be confronted with the fact that a repudiated House, defeated by the people themselves at the general election, would still have the power to elect a President who would be in control of the country for the next 4 years. It is quite apparent that such a power ought not to exist, and that the people having expressed themselves at the ballot box should through the Representatives then selected, be able to select the President for the ensuing term. . . ."**[29]

ANALYSIS OF AMENDMENT XX

Section 1

The terms of the President and the Vice President shall end at noon on the 20th day of January, and the terms of Senators and Representatives at noon on the 3d day of January, of the years in which such terms would have ended if this article had not been ratified; and the terms of their successors shall then begin.

Originally, Art. II, § 1, Cl. 1 set the four-year term for the President and Vice President. Section 1 reduced the timeframe from March 4th – January 20th beginning with the election of 1932. In the same

28. *Ibid.*
29. *Twentieth amendment: Doctrine and practice | constitution annotated | Congress.gov | library of congress.* (n.d.). Library of Congress. Retrieved January 28, 2021, from https://constitution.congress.gov/browse/essay/amdt20-2/ALDE_00001006/5/13./

way, Congress reduced the timeframe from March 4th – January 3rd which affected the newly ratified Seventeenth Amendment's six-year senator term. Ironically, this verbiage shortened Representatives' terms in the Seventy-third Congress to two years while reducing their time to sit from March 4, 1935 – January 3, 1937.

CONSTITUTIONAL CLIP

If January 3rd occurs on a Sunday, then a different day is chosen for commencing the Senate term.

The section is clear to remind the readers that ratification must occur for the changes to apply. Once ratification occurs then the successors' terms must begin at the indicated dates to remain compliant with the United States Constitution.

ANALYSIS OF AMENDMENT XX

Section 2

The Congress shall assemble at least once in every year, and such meeting shall begin at noon on the 3d day of January, unless they shall by law appoint a different day.

This section answers the question of timing for the first mandatory session of Congress.[30] This section replaces Art. I, § 4, Cl. 2. The need for a specific meeting time was enacted in 1867, while it was repealed in 1871. This difference continued to support the thought that Congress needed additional support.[31]

ANALYSIS OF AMENDMENT XX

Section 3

If, at the time fixed for the beginning of the term of the President, the President elect shall have died, the Vice President elect shall become President. If a President shall not have been chosen before the time fixed for the beginning of his term, or if the President elect shall have failed to qualify, then the Vice President elect shall act as President until a President shall have qualified; and the Congress may by law provide for the case wherein neither a President elect nor a Vice President shall have qualified, declaring who shall then act as President, or the

30. *Twentieth amendment: Doctrine and practice | constitution annotated | Congress.gov | library of congress.* (n.d.-b). Library of Congress. Retrieved November 30, 2020, from https://constitution.congress.gov/browse/essay/amdt20-2/ALDE_00001006/

31. *Ibid.*

manner in which one who is to act shall be selected, and such person shall act accordingly until a President or Vice President shall have qualified.

ANALYSIS OF AMENDMENT XX

Section 4

The Congress may by law provide for the case of the death of any of the persons from whom the House of Representatives may choose a President whenever the right of choice shall have devolved upon them, and for the case of the death of any of the persons from whom the Senate may choose a Vice President whenever the right of choice shall have devolved upon them.

This section speaks to the succession of the Presidency. If the President-elect dies after the November election but prior to the January 20th inauguration, the Vice President-elect must become President. Further this section identifies an interim issue of choosing the President or failing to meet the qualifications of President prior to January 20, then the Vice President must temporarily act as President until a President shows appropriate qualifications. It is of note that the issue of qualification may arise from death, disability, succession or other disqualifying factors. Finally, this section authorizes Congress to enact a law which addresses a situation where neither a President nor Vice President-elect qualifies as President. In response to this unprecedented event, Congress enacted the Presidential Succession Act of 1948, but was amended and codified as 3 U.S.C, §19 where Congress is given authority to choose the President if the Electoral College fails to do so. Please note this discussion of Presidential succession continues under the Twenty-fifth Amendment later in this chapter.[32]

ANALYSIS OF AMENDMENT XX

Section 5

Sections 1 and 2 shall take effect on the 15th day of October following the ratification of this article.

This section is self-explanatory but sets a specific date and time to allow for additional compliance by the government.

ANALYSIS of Amendment XX

Section 6

This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of three-fourths of the several States within seven years from the date of its submission.

This section provides an alternate end to the amendment if ratification does not occur.

Amendment XXII

Passed by Congress March 21, 1947. Ratified February 27, 1951.

32. *Ibid.*

Section 1

No person shall be elected to the office of the President more than twice, and no person who has held the office of President, or acted as President, for more than two years of a term to which some other person was elected President shall be elected to the office of President more than once. But this Article shall not apply to any person holding the office of President when this Article was proposed by Congress, and shall not prevent any person who may be holding the office of President, or acting as President, during the term within which this Article becomes operative from holding the office of President or acting as President during the remainder of such term.

Amendment XXII – Uncle Sam states time is up for extending presidential terms[33]

Section 2

This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of three-fourths of the several States within seven years from the date of its submission to the States by the Congress.

INTRODUCTION TO AMENDMENT XXII

If you are not familiar with Amendment XXII, then you might miss it. It is a quiet amendment, considering its colorful history. Amendment XXII continues to deliver its purpose which is to create a term limit for President. It is of important note that the balance of power among the federal, state, and individual rights always informed the Constitution and its formation. Consider the no-term limit for a Senator; while accepting the term limit for a President. Perhaps this single fact continued to drive the debate surrounding the Twenty-second amendment. Specifically, the amendment was never identified in a Supreme Court case. Although this topic was thoroughly debated by the delegates in

33. *Amendment XXII*. (n.d.). http://constitutiondynamics.blogspot.com/2015/11/amendment-xxii.html

the 1787 Constitutional Convention, their thoughts seemed to be geared toward one term varying from three to seven years.[34] Additionally, some delegates floated the idea of a life-time presidency and this perspective received much support; however, both George Washington and Thomas Jefferson declined a third term of Presidency.[35]

According to the National Constitution Center,

> **"These doubts about unlimited presidential terms of office did not fade away after President Washington set the unofficial two-term precedent in 1796. Scholar Stephen W. Stathis [explained] that Congress considered early versions of presidential term limit amendments in 1803 and 1808, and the Senate approved term-limit resolutions in 1824 and 1826, only to be rejected by the House."**[36]

The process of balancing federal, state and individual power was emphasized in congressional activity. Taken together, the Congressional debate over the presidential terms amounted to almost 150 years and 125 iterations of the presidential term limit amendments.[37] Finally, the National Archive explored this contention when Ulysses S. Grant was elected to two terms in 1876 and 1880. At the end of his second term, he tried to obtain his party's nomination for a third term. Unfortunately, the party did not obtain the nomination for a third term. In 1876, the National Constitution Center reported that a resolution was submitted indicating "the precedent established by Washington and other Presidents of the United States, in retiring from the Presidential office after their second term, has become by universal concurrence a part of our republican system of government."[38] This resolution did not comfort those who believed the presidential term must be addressed in a more formal manner. Therefore, the passage of the Twenty-second amendment would prove to be a must.

The President was not always limited to two terms. George Washington, the first President of the United States of America created a precedent of two terms. Ironically, national and global concerns led the 32nd President Franklin D. Roosevelt to secure four terms (the Elections of 1932, 1936, 1940, and 1944). Unfortunately, his fourth term would terminate with his death in 1945.[39]

ANALYSIS OF AMENDMENT XXII

Section 1

No person shall be elected to the office of the President more than twice, and no person who has held the office of President, or acted as President, for more than two years of a term to which some other person was elected President shall be elected to the office of President more than once. But this Article shall not apply to any person holding the office of President when this Article was proposed by Congress, and shall not prevent any person who may be holding the office of President, or acting as President, during the term within which this Article becomes operative from holding the office of President or acting as President during the remainder of such term.

34. Interpretation: *Twenty-Second amendment | the national constitution center*. (n.d.). The National Constitution Center. Retrieved March 17, 2021, from https://constitutioncenter.org/interactive-constitution/interpretation/amendment-xxii/interps/149
35. *Ibid.*
36. *Interpretation: Twenty-Second amendment | the national constitution center*. (n.d.). The National Constitution Center. Retrieved March 17, 2021, from https://constitutioncenter.org/interactive-constitution/interpretation/amendment-xxii/interps/149
37. *Ibid.*
38. *Ibid.*
39. *Ibid.*

This section limits the terms of the President. The verbiage indicates three possibilities. First, the President may be elected to up to two four- year terms, if he or she has not been previously elected. Next, a person who has acted as the President temporarily, for less than two years, may be elected to up to two four-year terms. Finally, a person who has acted as the President temporarily, for more than two years, may only be elected to one additional four-year term.

ANALYSIS OF AMENDMENT XXII

Section 2

This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of three-fourths of the several States within seven years from the date of its submission to the States by the Congress.

Black's Law Dictionary defines **inoperative** as "[h]aving no force or effect; not operative."[40] This section outlines the terms for ratification of the Twenty-second amendment to become effective within a specified timeframe. In this instance, the amendment was to be ratified by three-fourths of the States but it must be completed within seven years from the original date of submission unlike other amendments without this limitation.

Amendment XXV

Passed by Congress July 6, 1965. Ratified February 10, 1967. The 25th Amendment changed a portion of Article II, Section 1.

Section 1

In case of the removal of the President from office or of his death or resignation, the Vice President shall become President.

Section 2

Whenever there is a vacancy in the office of the Vice President, the President shall nominate a Vice President who shall take office upon confirmation by a majority vote of both Houses of Congress.

Section 3

Whenever the President transmits to the President pro tempore of the Senate and the Speaker of the House of Representatives his written declaration that he is unable to discharge the powers and duties of his office, and until he transmits to them a written declaration to the contrary, such powers and duties shall be discharged by the Vice President as Acting President.

Section 4

Whenever the Vice President and a majority of either the principal officers of the executive departments or of such other body as Congress may by law provide, transmit to the President pro tempore of the Senate and the Speaker of the House of Representatives their written declaration that the President is unable to discharge the powers and duties of his office, the Vice President shall immediately assume the powers and duties of the office as Acting President.

Thereafter, when the President transmits to the President pro tempore of the Senate and the Speaker of the House of Representatives his written declaration that no inability exists, he shall resume the powers and duties of his office unless the Vice President and a majority of either the principal officers of the executive department or of such other

40. INOPERATIVE, Black's Law Dictionary (12th ed. 2024)

body as Congress may by law provide, transmit within four days to the President pro tempore of the Senate and the Speaker of the House of Representatives their written declaration that the President is unable to discharge the powers and duties of his office. Thereupon Congress shall decide the issue, assembling within forty-eight hours for that purpose if not in session. If the Congress, within twenty-one days after receipt of the latter written declaration, or, if Congress is not in session, within twenty-one days after Congress is required to assemble, determines by two-thirds vote of both Houses that the President is unable to discharge the powers and duties of his office, the Vice President shall continue to discharge the same as Acting President; otherwise, the President shall resume the powers and duties of his office.

Presidential Line of Succession[41]

INTRODUCTION of AMENDMENT XXV

As we examine Amendment XXV, we must begin with some contextual facts which informed Congressional responses as evidenced by Britannica.

CONSTITUTIONAL CLIP

Prior to the passage [of Amendment XXV], nine presidents – William Henry Harrison, Zachary Taylor, Abraham Lincoln, James Garfield, William McKinley, Woodrow Wilson, Warren G. Harding, Franklin D. Roosevelt, and Dwight D.

41. *Presidential Succession Clinic Report | Fordham School of Law*. (n.d.). https://www.fordham.edu/school-of-law/experiential-education/clinics/news/presidential-succession-clinic-report/

Eisenhower – all experienced health crises that left them temporarily incapacitated. According to the Bill of Rights Institute, death resulted in six of the cases – Harrison, Taylor, Lincoln, Garfield, McKinley, and Harding.[42]

As Congress and the states acted to close the loop for succession in cases of disability, Dr. Felix Yerace of the Bill of Rights Institute, sought to show how President Lyndon Baines Johnson viewed this monumental action.[43] President Johnson explained that Amendment XXV provided a long-awaited response to concerns most Americans held for almost two centuries. The Presidential disability conversation is a continuous debate which began with the constitutional convention and the founding fathers. John Dickinson of Delaware asked this question: "What is the extent of the term 'disability' and who is to be the judge of it?" No one replied."[44] Thus, Amendment XXV was born out of pure necessity. Since the beginning of the country, Congressional leaders grappled with how the country would function if its Commander-In-Chief died or was otherwise unavailable due to a variety of circumstances.

Accordingly, Dr. Yerace identified three concerns which supported the ratification of Amendment XXV.[45] First, the President maintained escalating authority and duties after the ratification of the original constitution. Second, presidential duties in national security and execution at any moment; and finally, the realization that Presidents become injured or ill, but too disabled to continue their responsibilities as President. As a result, there is a vagueness in the language of the constitution as to succession which may end in debilitating illness or injury for a President, but without the end of death.

Remember, the Art. II, § 1, Cl. 6, the predecessor to Amendment XXV states

> **"In Case of the Removal of the President from Office, or of his Death, Resignation, or Inability to discharge the Powers and Duties of the said Office, the Same shall devolve on the Vice President, and the Congress may by Law provide for the Case of Removal, Death, Resignation or Inability, both of the President and Vice President, declaring what Officer shall then act as President, and such Officer shall act accordingly, until the Disability be removed, or a President shall be elected."**

Congressional pressure to address all three concerns met with some rejection, but eventually the third concern and another presidential assassination of President John F. Kennedy led to real change. As a

42. Smentkowski, B. (n.d.). Britannica. *Twenty-Fifth Amendment*. Retrieved September 20, 2020, from https://www.britannica.com/topic/Twenty-fifth-Amendment

43. *The Twenty-Fifth amendment*. (2018). Bill of Rights Institute. https://billofrightsinstitute.org/e-lessons/the-twenty-fifth-amendment

44. *Ibid.*

45. *Ibid.*

The National Constitution Center distinguished the temporary, piecemeal presidential succession plans in Art. II, §1, Cl. 6, the 1947 Presidential Succession Act, and finally President Dwight Eisenhower's promise to the country and Vice President Nixon to serve as Acting President in the event of his inability due to illness.[46]

result, Black's Law Dictionary acknowledges how the passage of Amendment XXV sets forth the permanent, complete succession plan for "...presidency and vice presidency in the event of death, resignation, or incapacity."[47]

ANALYSIS OF AMENDMENT XXV

Section 1

In case of the removal of the President from office or of his death or resignation, the Vice President shall become President.

This section addresses the protocol for the voluntary or involuntary removal of a President. Moreover, this section addresses the protocol upon a Presidential resignation being offered. In both instances, the Vice President becomes the Interim or Acting President upon either event occurring. This protocol is known as the presidential succession plan. Black's Law dictionary defines **succession** as "[t]he act or right of legally or officially taking over a predecessor's office, rank, or duties."[48] In essence this section addresses all ambiguities which previously existed if the President were incapacitated, but still retained the title of President. This provides continuity in leadership for the United States of America in case any unknown presidential disability occurs.

The "acting President" provision of the Twenty-fifth Amendment was first invoked on July 13, 1985, when President Ronald Reagan underwent cancer surgery.[49] He signed a letter transferring power to Vice President George H.W. Bush and sent another letter to the Speaker of the House and president pro tempore of the Senate, as the amendment required. Following his surgery, Reagan notified both that he was fit to resume his Presidential duties. In 2002, President George W. Bush signed similar letters to transfer power temporarily to Vice President Dick Cheney, while Bush was sedated briefly during a colonoscopy medical procedure.[50]

ANALYSIS ROF AMENDMENT XXV

Section 2

Whenever there is a vacancy in the office of the Vice President, the President shall nominate a Vice President who shall take office upon confirmation by a majority vote of both Houses of Congress.

46. Cait, C., & Pozen, D. (n.d.). Interpretation: *The Twenty-Fifth amendment | the national constitution center.* The National Constitution Center. Retrieved November 18, 2020, from https://constitutioncenter.org/interactive-constitution/interpretation/amendment-xxv/interps/159
47. TWENTY-FIFTH AMENDMENT, Black's Law Dictionary (12th ed. 2024).
48. SUCCESSION, Black's Law Dictionary (12th ed. 2024).
49. *Ibid.*
50. *Ibid.*

Vice-Presidents Vacancies[51]

Further, this section addresses gaps in succession for the vice presidency. If a Vice Presidential vacancy occurs, then this section empowers the President to fill the vacancy of the Vice President. Recall the vacancy discussion which occurred earlier in this chapter. Note the vacancy remains under the jurisdiction of the president without Congressional involvement, popular vote, or even the electoral college. This section balances this great increase in power by checks and balances with Congress. The President must **nominate** or "...propose (a person) for election or appointment" according to Black's Law Dictionary.[52] A valid nomination must be confirmed by a majority vote of the House of Representatives and the Senate. Thus, this protocol seemed to address the increased concerns over presidential authority.

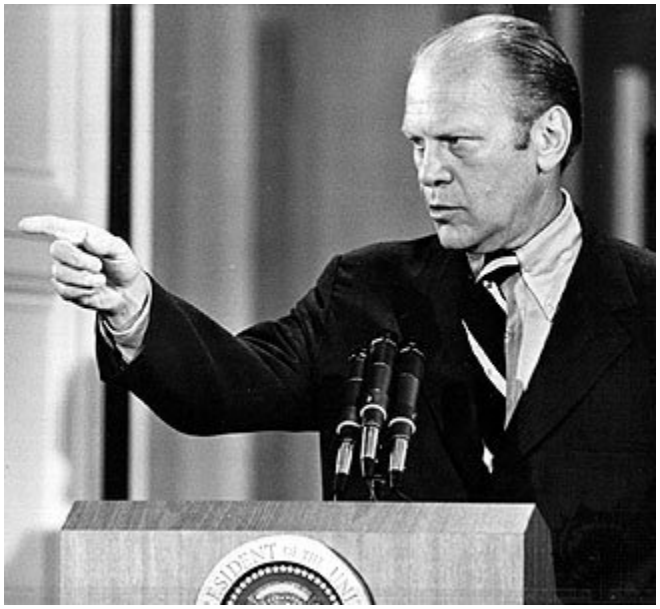
CONSTITUTIONAL CLIP

According to Constitution Annotated, the Amendment XXV "...resulted for the first time in our history in the accession to the Presidency and Vice-Presidency of two men who had not faced the voters in a national election."[53]

To date, this section of the Amendment XXV has been invoked twice. In 1973, President Richard Nixon nominated then Congressman Gerald Ford for Vice-President after Spiro Agnew's untimely resignation.[54] In 1974, the unlikely use of Amendment XXV would occur again, when then President

51. *Presidential Succession Clinic Report | Fordham School of Law*. (n.d.). https://www.fordham.edu/school-of-law/experiential-education/clinics/news/presidential-succession-clinic-report/
52. NOMINATE, Black's Law Dictionary (12th ed. 2024).
53. *Twenty-Fifth amendment: Doctrine and practice | constitution annotated | Congress.gov | library of congress*. (n.d.). Library of Congress. Retrieved January 13, 2021, from https://constitution.congress.gov/browse/essay/amdt25-2/ALDE_00001014/
54. *Ibid.*

Nixon resigned and Vice President Ford matriculated to the office and became President Ford.[55] These movements created a vacancy and President Ford nominated Nelson Rockefeller, who was confirmed. According to the Gerald R. Ford Presidential Library and Museum, this unique set of circumstances highlighted a new issue regarding succession where voters were not contemplated in choosing President and Vice-President. Therefore, Amendment XXV would not address every issue surrounding presidential disability and vice presidential vacancy, but it did provide answers using such concepts as separation of powers and checks and balances to settle questions which perplexed the framers. Feerick outlined this remarkable feat and identified how it was accomplished, while providing continuity and security to future successions.[56]



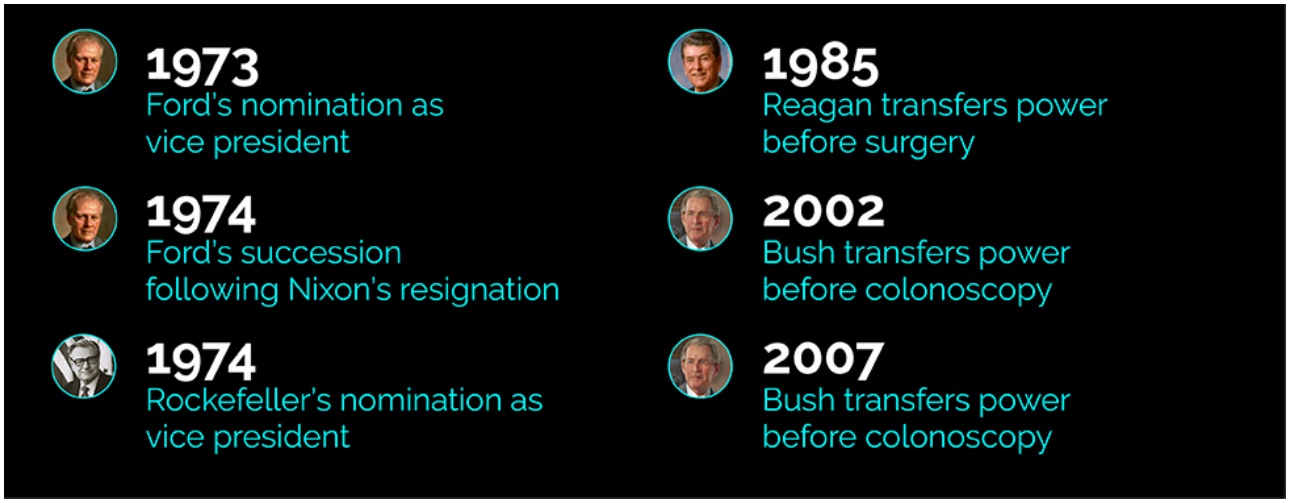
Gerald R. Ford, 38th President of the United States (1974-1977), U.S. Pres. Gerald Ford defending the pardon of Richard Nixon at a White House press conference, September 16, 1974.[57]

ANALYSIS OF AMENDMENT XXV

Section 3

Whenever the President transmits to the President pro tempore of the Senate and the Speaker of the House of Representatives his written declaration that he is unable to discharge the powers and duties of his office, and until he transmits to them a written declaration to the contrary, such powers and duties shall be discharged by the Vice President as Acting President.

55. *Ibid.*
56. Feerick, J. (1995). *The Twenty-Fifth amendment: An explanation and defense. Wake Forest Law Review, 30*, 481–503. https://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=1382&context=faculty_scholarship
57. The Editors of Encyclopaedia Britannica. (2023b, July 10). *Gerald Ford | Biography, presidency, accomplishments, foreign policy, & Facts*. Encyclopedia Britannica. https://www.britannica.com/biography/Gerald-Ford#/media/1/213206/10739



Presidential Succession and Transfer of Power[58]

Interestingly this section allows the President to voluntarily and temporarily discharge the powers and duties of his or her office. Scholars agree that this notice assumes that if § 3 is not invoked by the President, then he or she is able to discharge their powers and duties for their office. However, when this section is invoked the President must be of sound mind to do so (which removes incapacitation of thought and/or activity of limbs). Also, this section allows for the President to provide notice when he or she believes they are able to resume powers and duties. According to the Congressional Research Service, this ability includes anticipated and unanticipated disabilities for our President. In fact, this clause has been activated twice, but with two different Presidents.

> Amendment XXV, §3 was activated under President Ronald Reagan when he "...underwent general anesthesia for medical treatment. It was informally implemented by President Ronald Reagan in 1985 and was formally implemented twice by President George W. Bush [for colonoscopies], in 2002 and 2007, under similar circumstances."[59]

According to Annenberg Classroom (providing constitutional history), President Ronald Reagan invoked § 3 on July 13, 1985 prior to cancer treatment.[60] He memorialized his intention to temporarily stop his duties and powers by granting Vice President George H.W. Bush the power.[61] Additionally, he sent his written intention to the Speaker of the House and president pro tempore of the Senate anticipating the requirement of §3. Furthermore, President Reagan informed all of his intention to return to his Presidential duties after the treatment. Similarly, Vice-President Kamala Harris became the first woman to possess presidential power. In November 2021, President Joe Biden underwent his first annual physical since becoming president.[62] To accomplish the goal of transferring power under Amendment XXV, §3, "Biden sent a letter to House Speaker Nancy Pelosi and Democratic Sen. Patrick Leahy of

58. *Presidential Succession Clinic Report | Fordham School of Law*. (n.d.). https://www.fordham.edu/school-of-law/experiential-education/clinics/news/presidential-succession-clinic-report/
59. *Twenty-fifth amendment (1965) –. (2019, January 15)*. Annenberg Classroom. https://www.annenbergclassroom.org/resource/our-constitution/constitution-amendment-25/
60. *Ibid*.
61. *Ibid*.
62. Sullivan, K. (2021, November 19). *For 85 minutes, Kamala Harris became the first woman with Presidential Power | CNN politics*. CNN. https://www.cnn.com/2021/11/19/politics/kamala-harris-presidential-power/index.html

Vermont, the president pro tempore of the Senate, at 10:10 a.m. ET before going under anesthesia."[63] After the procedure, President Biden transferred the power back by sending a letter evidencing this intention.[64] Thus, when used appropriately by our Commander-in-Chief, §3 supports a smooth transfer of power between the President and Vice-President.

ANALYSIS OF AMENDMENT XXV

Section 4

Whenever the Vice President and a majority of either the principal officers of the executive departments or of such other body as Congress may by law provide, transmit to the President pro tempore of the Senate and the Speaker of the House of Representatives their written declaration that the President is unable to discharge the powers and duties of his office, the Vice President shall immediately assume the powers and duties of the office as Acting President.

Thereafter, when the President transmits to the President pro tempore of the Senate and the Speaker of the House of Representatives his written declaration that no inability exists, he shall resume the powers and duties of his office unless the Vice President and a majority of either the principal officers of the executive department or of such other body as Congress may by law provide, transmit within four days to the President pro tempore of the Senate and the Speaker of the House of Representatives their written declaration that the President is unable to discharge the powers and duties of his office. Thereupon Congress shall decide the issue, assembling within forty-eight hours for that purpose if not in session. If the Congress, within twenty-one days after receipt of the latter written declaration, or, if Congress is not in session, within twenty-one days after Congress is required to assemble, determines by two-thirds vote of both Houses that the President is unable to discharge the powers and duties of his office, the Vice President shall continue to discharge the same as Acting President; otherwise, the President shall resume the powers and duties of his office.

Sections 3 and 4 address different aspects of how the President is regarded when determining succession and disability. The first clause of § 4 points to the specific time when the Vice-President should engage in temporary representation or as Acting President. Specifically, the Congressional Research Service outlines the options as it relates to this shift in power. Firstly, "§4 can be implemented only by the Vice President and either (1) a majority of the Cabinet, or (2) a majority of "such other body as Congress may by law provide."[65] Secondly, §4 supposes that the President may be of the mindset that he or she is either unfit or reluctant to state the apparent issue of disability. Additionally, the President will not or cannot submit to temporarily removing themselves while this disability exists. Furthermore, this section categorically sets forth four distinct approaches to the presidential disability based upon the Congressional Research Service.

Finally, § 4 was most recently discussed, reviewed and otherwise anticipated after a domestic terrorist attack by individuals who sought to interrupt democracy as well as bring harm to members of our government on January 6, 2021 at the Capitol (the seat of the government) of the United States of America. In response, political leaders, commentators and civilians engaged in a renewed conversation of Amendment XXV. In response, National Public Radio announced the House of Representatives symbolic response to a day of terror which left many capitol police injured and two capital police

63. *Ibid.* at 6th para.

64. *Ibid.*

65. Congressional Resource Service. (2021, February 5). *The Twenty-Fifth Amendment: Sections 3 and 4—Presidential Disability.* https://fas.org/sgp/crs/misc/IF11756.pdf

dead.[67] Occurring within one week after the insurrection, this resolution was the House of Representatives' push for action as America increased security at the capitol and neared the inauguration of the next president, then President-elect Joseph R. Biden. Therefore, the history of Amendment XXV exposes unresolved issues, while addressing the smooth transfer of power and duties for voluntary or involuntary presidential disability.

The House approved a resolution which symbolized their stance of support for those directly and indirectly impacted by the January 6, 2021 insurrection. The resolution strongly suggested that Vice President Mike Pence invoke Amendment XXV without the agreement of President Donald Trump.[66]

CONSTITUTIONAL CLIP

According to the Congressional Research Service, §4 authorizes four potential procedures:

(1) a joint declaration of presidential disability by the Vice President and a majority of the Cabinet or such other body (i.e., DRB) as Congress has established by law. When they transmit a written message to this effect to the President pro tempore and the Speaker, the Vice President immediately assumes the powers and duties of the office as Acting President;

(2) a declaration by the President that the disability invoked under the provisions set out above no longer exists. If the President's declaration is not contested by the Vice President and the Cabinet or DRB within four days, then the President resumes the powers and duties of the office;

(3) the Vice President and a majority of the Cabinet or DRB, acting jointly, may, however, contest this finding by a written declaration to the contrary to the aforementioned officers. As noted previously, this declaration must be issued within four days of the President's declaration; otherwise, the President resumes the powers and duties of the office;

(4) if this declaration is transmitted within four days, then Congress decides the issue.

If Congress is in session it has 21 days to consider the question. If a two thirds vote of Members present and voting in both chambers taken within this period disputes the President, the Vice President continues as Acting President. If less than two-thirds of Members in both houses vote to confirm the President's disability, the President resumes the powers and duties of the office. Alternative actions—a decision by Congress not to vote on the question, a decision to vote to sustain the President's declaration,

66. *Ibid.*

67. *House approves 25th amendment resolution against trump, pence says he won't invoke*. (2021, January 12). House Approves 25th Amendment Resolution Against Trump, Pence Says He Won't Invoke. https://www.npr.org/sections/trump-impeachment-effort-live-updates/2021/01/12/955750169/house-to-vote-on-25th-amendment-resolution-against-trump

or passage of the 21-day deadline without a congressional vote—would also result in the President's resumption of the office's powers and duties."[68]

Finally, some critics believe Amendment XXV doesn't go far enough. Specifically, for our country to run seamlessly, we must address two concerns with presidents and vice-presidents. In fact, Fordham Law noted some important aspects of Amendment XXV as their graduate, John D. Feerick helped draft the amendment.[69] In fact, they note that there is a possibility of a "dual inability" where both president and vice president may be unavailable. This may lead to a lack of coverage in the presidential succession. Specifically, "Without an able vice president, the 25th Amendment cannot be invoked to declare the president unable. In a dual inability scenario, there is no formal way to initiate succession to the next person in the line of succession." Therefore, there appears to be gaps in the line of succession which may require additional amendments or congressional acts to secure the federal executive governments.

Critical Reflections:

1. The Twelfth Amendment has the potential to provide major answers if our country becomes a multi-political party system as it was in 1948, 1968 and possibly in 2024. What would occur if we had a multi-political system? How will the electoral college function? Is this problematic for other branches within our country?
2. Should Presidential terms be limited? Why or why not?
3. Is the Electoral College a fair way to elect a President? If yes, why and how would you change the way we elect a President?

68. Congressional Resource Service. (2021, February 5). *The Twenty-Fifth Amendment: Sections 3 and 4—Presidential Disability*. https://fas.org/sgp/crs/misc/IF11756.pdf

69. *Presidential Succession Clinic Report | Fordham School of Law*. (n.d.). https://www.fordham.edu/school-of-law/experiential-education/clinics/news/presidential-succession-clinic-report/

Chapter 14 - Amendments XVII, XIX, XXIII, XXVI, and XXVII: Voting, Elections, & Representation

Amendment XVII, Amendment XIX, Amendment XXIII, Amendment XXVI, & Amendment XXVII

RICHARD J. FORST AND TAUYA R. FORST

LEARNING OBJECTIVES

After reading this chapter, you should be able to:

14.1 Identify the unfamiliar terms of the Seventeenth Amendment.
14.2 Compare the legislative election of Senators from the election of Senators by popular vote.
14.3 Identify the unfamiliar terms of the Nineteenth Amendment.
14.4 Describe the concerns and obstacles women overcame during the march to ratification of the Nineteenth Amendment.
14.5 Identify the unfamiliar terms of the Twenty-third Amendment.
14.6 Define seat of government and its powers according to the Twenty-third Amendment.
14.7 Identify the unfamiliar terms of the Twenty-sixth Amendment.
14.8 Explain the reasoning for the voting age change per the Twenty-sixth Amendment.
14.9 Identify the unfamiliar terms of the Twenty-seventh Amendment.
14.10 Describe how Congress compensated itself prior to the Twenty-seventh amendment.

KEY TERMS

Disenfranchisement
Suffrage

Minor v. Happersatt	Vacancy Clause
Senator	Voting
Statehood	

Counting the Electoral Vote – David Dudley Field Objects to the Vote of Florida.[1]

Amendment XVII

Passed by Congress May 13, 1912. Ratified April 8, 1913. The 17th Amendment changed a portion of Article I, Section 3.

The Senate of the United States shall be composed of two Senators from each State, elected by the people thereof, for six years; and each Senator shall have one vote. The electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislatures.

When vacancies happen in the representation of any State in the Senate, the executive authority of such State shall issue writs of election to fill such vacancies: Provided, That the legislature of any State may empower the executive thereof to make temporary appointments until the people fill the vacancies by election as the legislature may direct.

This amendment shall not be so construed as to affect the election or term of any Senator chosen before it becomes valid as part of the Constitution.

1. *History, Art & Archives, U.S. House of Representatives*. "Counting the Electoral Vote – David Dudley Field Objects to the Vote of Florida," https://history.house.gov/Collection/Listing/2005/2005-106-000/ (June 08, 2021)

INTRODUCTION

Previously, the authors discussed the consistent theme within the evolution of the United States Constitution as it continues to balance state and federal governments and how that equilibrium impacts the individual's rights. The Seventeenth Amendment is parallel to this balance as well. Known for its ability to make a significant change to the original United States Constitution, the Seventeenth Amendment has provided the most notable difference in its impact to the composition and process of the legislature. Prior to 1913 and the ratification of Amendment XVII, Art. I, § 3 empowered state legislatures to select United States Senators. Although the original United States Constitution was ratified in 1788, the selection of United States Senators by direct vote of the State's electorate did not occur for 125 years. Ultimately, the change which occurred in 1913 was rooted in a much earlier version of the Seventeenth Amendment. In 1826, a plan existed to amend the original constitution to include a process which would address some contentious and corrupt elections held in Indiana and New Jersey.[2] This corruption included powerful political machines and pecuniary interests which worked to underline the integrity of the senatorial races. Interestingly, Congress passed a law in 1826 which directed the process and time of the senatorial choices, but refused to change the structure of how state legislatures chose the senators.[3]

Furthermore, the House of Representatives began a proposal campaign in which it offered several iterations of an amendment for direct election of United States senators.[4] Unfortunately, these efforts were unsuccessful with the Senate refusing to proceed forward to a full vote. It was not until 1911, nearly 100 years after the first attempt to amend how we elect Senators, that the House of Representatives passed a joint resolution which allowed for direct election of Senators. The resolution required a change in the "race rider" included in the resolution. Once removed, the amendment was adopted, finally, and ratified in 1913.[5]

CONSTITUTIONAL CLIP

Specifically, the Seventeenth Amendment drastically changed the process by which a senator is chosen by amending Art. I, § 3 of the United States Constitution from "chosen by the Legislature thereof" to "elected by the people thereof."[6] This significant change impacted government.

Furthermore, this slight change in verbiage of the Seventeenth Amendment allows a change in curing

2. *U.S. Senate: Landmark Legislation: The Seventeenth Amendment to the Constitution*. (2019, October 16). Senate.Gov. https://www.senate.gov/artandhistory/history/common/generic/SeventeenthAmendment.htm
3. *Ibid.*
4. 17th Amendment to the U.S. Constitution: Direct Election of U.S. (2019, July 18). National Archives. https://www.archives.gov/legislative/features/17th-amendment
5. *Ibid.*
6. U.S. Senate (2019, October 16).

the vacancy of a senator as well. With the authorization of the state's legislature, the governor may temporarily appoint a senator. When a vacancy arises, this power occurs and remains until a general election occurs. "Thirty-seven states fill Senate vacancies at their next regularly scheduled general election. The remaining 13 require that a special election be called."[7] Since the Seventeenth Amendment was adopted in 1913, there have been 244 vacancies in the U.S. Senate with more than 40 appointments directly disregarding the Seventeenth Amendments' popular vote election requirement.[8] Over and above this affront, other states have delayed election integrity, erroneously delivering 200 years of elected representation. Surprisingly, these practices have gone virtually unnoticed and/or unchecked for state compliance.

It is imperative that the text profiles the famous Illinois example of the Seventeenth Amendment corruption. In 2008, Senator Barack Obama resigned his senate seat to become the President of the United States, the Seventeenth Amendment's **Vacancy Clause** emerged front and center. The Vacancy Clause states, "**When vacancies happen in the representation of any State in the Senate, the executive authority of such State shall issue writs of election to fill such vacancies: Provided, That the legislature of any State may empower the executive thereof to make temporary appointments until the people fill the vacancies by election as the legislature may direct.**" Then Illinois Governor Rod Blagojevich recognized his authority to appoint a senator to fill this vacancy. Typically, the appointment is a non-event as it occurs quite frequently within the United States. However, this vacancy became a test case for how abuse of power may cloud one's judgment when executing gubernatorial senate appointments. Blagojevich saw an opportunity to raise his political and financial capital as he shopped the senatorial appointment opportunity around the state. Unfortunately for Blagojevich, federal agents recorded the conversations in which he engaged in these discussions.[9] Interestingly enough, the temporary appointment of Roland Burris (then Illinois attorney general) was deemed as accepted, although Blagojevich was arrested, tried twice and convicted of attempting to sell the political appointment for the Illinois senate vacancy. In an ironic twist in 2020, Republican President Donald Trump granted clemency to past Democratic Governor Rod Blagojevich. Perhaps, in time the country will determine the rationale behind this unlikely research.

It is with this history that we began our examination of the parts of the Seventeenth Amendment.

CONSTITUTIONAL CLIP

7. *Vacancies in the United States Senate*. (2023, July 10). https://www.ncsl.org/elections-and-campaigns/vacancies-in-the-united-states-senate
8. Zachary Clopton & Steven E. Art, "The Meaning of the Seventeenth Amendment and a Century of State Defiance," 107 Northwestern University Law Review 1181 (2013).
9. *Ibid*.

On July 15, 1913, Senator Augustus Bacon of Georgia was the first directly elected Senator. The following year marked the first time that all senatorial elections were held by popular vote.[10]

ANALYSIS OF AMENDMENT XVII

Part I

The Senate of the United States shall be composed of two Senators from each State, elected by the people thereof, for six years; and each Senator shall have one vote. The electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislatures.

Each state, regardless of size, will have representation of two Senators. What is a **Senator**? According to Black's, a senator is "[a] member of a senate."[11] As Senators are members of the legislative branch, their authority can be found under Article I of the U.S. Constitution as previously stated. This section creates a new way of obtaining Senators. Formerly, Senators were chosen by the state legislatures, but from 1913 forward Senators were directly elected by the voters of their respective states. Further, the term of the elected Senator was set at six years, unless otherwise extended or removed due to other incidents. Finally and quite important, is the concept of one senator = one vote. Although the first section of the Seventeenth Amendment is straightforward, the second section is anything but straightforward. Nevertheless, Clopton and Art note "...the first two paragraphs of the Seventeenth Amendment work in tandem to guarantee that the people will have the right in all circumstances to elect their representatives in the U.S. Senate."[12]

Part II

When vacancies happen in the representation of any State in the Senate, the executive authority of such State shall issue writs of election to fill such vacancies: Provided, That the legislature of any State may empower the executive thereof to make temporary appointments until the people fill the vacancies by election as the legislature may direct.

The second portion of the amendment has pressed the interpretation issue as it presents several perspectives to consider regarding senate vacancies. A vacancy is defined as "[a]n unoccupied office, post, or piece of property; an empty place."[13] The text of the amendment identifies the vacancy of the representation of the office of a United States Senator, the governor must issue a court's order directing the election commission to hold an election to fill the vacant senate seat. A colon follows the clause to indicate that there is a separation of two independent clauses within this portion of the amendment. These two independent clauses are interconnected, in that the second clause will demonstrate or provide an explanation for the first clause. The second clause explains that the vacancies must be filled if and only if the state legislature allow the governor, through the state constitution or other laws, to fill the vacancies for the time being. The legislature would only provide this power until an election for the vacancy may be held. According to Clopton and Art, "[t]he Seventeenth Amendment's second paragraph promotes the same democratic reform in situations where Senate seats are left vacant

10. U.S. Senate (2019, October 16).
11. SENATOR, Black's Law Dictionary (12th ed. 2024).
12. Zachary (2013).
13. VACANCY, Black's Law Dictionary (12th ed. 2024).

midterm, while at the same time helping preserve the states' equal representation in the Senate through temporary appointments."[14] Therefore, Clopton and Art's data collection supports the blatant state noncompliance of direct election of Senators pertaining how the vacancy occurred; how the vacancy was filled (temporary appointment, election or both); how much time the seat remained vacant; and how much time the people of the state were without an elected senator.

Part III

This amendment shall not be so construed as to affect the election or term of any Senator chosen before it becomes valid as part of the Constitution.

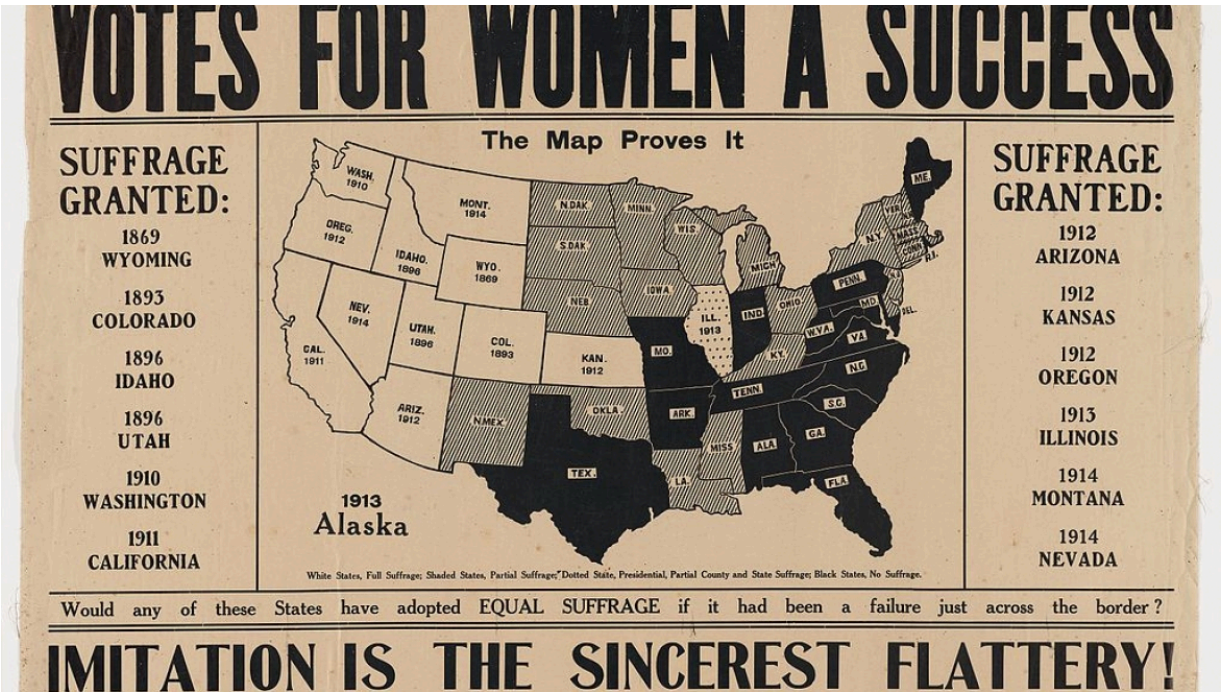
This part of the amendment reminds the reader that any Senator's term currently in office at the time of ratification in 1913 will not be affected by the Amendment; however, going forward all Senators will be subject to vacancy and direct election.

Amendment XIX

Passed by Congress June 4, 1919. Ratified August 18, 1920

The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex.

Congress shall have power to enforce this article by appropriate legislation.



100 Years and Counted: Women's Movement Still Moving After 19th Amendment[15]

14. Zachary (2013).
15. *100 years and counted: Women's movement still moving after 19th Amendment*. (2020, August 18). ASU News. https://news.asu.edu/20200814-global-engagement-100-years-and-counted-women%E2%80%99s-movement-still-moving-after-19th-amendment

INTRODUCTION

CONSTITUTIONAL CLIP

The United States Women's Suffrage fight was built upon the Abolitionist movement where women exhibited great political influence, in spite of their inability to obtain the right to vote.

The original constitution called for freeholders or white men who were landowning citizens. Individuals who were void of property were considered to have no stake in the community according to the National Constitution Center. What becomes less clear within the women's suffrage movement is that women were regarded as voters in the 1776 New Jersey Constitution and 1790 New Jersey election law. When taking the facts as a whole, the white males and their landowning characteristics this interpretation pointed to the interpretation that women were allowed to vote.[16] This particular moment led to what would be known as the women's suffrage movement. Black's defines women's **suffrage** as "[t]he right of women to vote. In the United States, the right is guaranteed by the 19th Amendment to the Constitution."[17] This limited women's right to vote was halted in response to allegations of men dressing as women and thus, the formal disenfranchisement of women continued until 1920 when the Nineteenth Amendment was ratified. What is **disenfranchisement**? Black's Law defines disenfranchisement as "[t]he act of taking away the right to vote in public elections from a citizen or class of citizens."[18] Furthermore, Stanford Historian and Professor Freedman carefully identifies the intersectionality of the women's suffrage movement, race, and class noting that the true advocacy for voting is rooted in the women who were advocates of the abolition of slavery.[19] Black and white women alike were engaged in the fight for human, civil, and political rights from the 1830s to the 1850s. Freedman explains that "[w]hile Black women sought freedom for their own race, some white women steeped in religious or moral training came to believe that slavery defied their ideals of womanhood and of justice."[20] Because of this shared belief, white abolitionist women unapologetically spotlighted the rape and kidnapping of enslaved and free Black women leading to additional advocacy.

However, the ratification of the Fifteenth Amendment served as a catalyst for advocates such as Susan B. Anthony to argue that the Fourteenth Amendment's Privileges or Immunities Clause gave all women the right to vote. Anthony believed that women's citizenship made it clear that no citizen

16. 17th Amendment to the U.S. Constitution: Direct Election of U.S. (2019, July 18). National Archives. https://www.archives.gov/legislative/features/17th-amendment
17. SUFFRAGE, Black's Law Dictionary (12th ed. 2024).
18. DISENFRANCHISEMENT, Black's Law Dictionary (12th ed. 2024).
19. Stanford University. (2020, August 12). *19th Amendment is a milestone, not endpoint*. Stanford News. https://news.stanford.edu/2020/08/12/19th-amendment-milestone-not-endpoint-womens-rights-america/
20. *Ibid.*

should be denied the privileges and immunities of citizenship, including the right to vote.[21] To test her theory, Anthony tried to vote and was allowed to do so. Unfortunately, her vote was deemed illegal. Soon after she voted, she was arrested and convicted of illegally voting. Simultaneously in another state, voter Virginia Minor attempted the voting process as well, but was denied registration.[22] Ms. Minor's actions led her to the courts using the Fourteenth Amendment's justification. In ***Minor v. Happersett*** (1875), the Supreme Court of the United States held that women's citizenship did not support the right to vote.[23] Thus, women began to look to other avenues to expand the women's suffrage.

CONSTITUTIONAL CLIP

Since the inception of the United States of America, the clarion call of voter fraud has led the charge of the rationale for widespread, illogical, and constitutional disenfranchisement.

Similar to other marginalized groups, the right to vote for women did not occur easily and/or overnight. To receive the right to vote, women wrote, fought, protested, marched, lobbied, paraded, and practiced civil disobedience. They were misused, physically abused, taunted, and imprisoned. They silently demonstrated and even engaged in hunger strikes to highlight and showcase the barriers that women faced to gain their full citizenship rights. As previously noted in Chapter 11, women's advocacy prior, during and after the Eighteenth Amendment, was key to the grass roots and organizational approach to Prohibition. In addition, women's involvement at a national level for a victorious effort provided the necessary confidence for the advocacy, engagement and ultimately diligence to pursue their right to vote; however, it is equally important to remember that women's right to vote did not apply to every woman.[24]

This is of special import, in that numerous women who would never benefit from this fight, still refused to allow the movement to proceed without their support. Namely, Ida B. Wells was cited with starting the first Women's Suffrage Organization for Black women in 1913 – Chicago's Alpha Suffrage Club.[25] Additionally, Sojourner Truth began appearing and speaking at suffrage gatherings from 1850 until her death in 1883. Meanwhile, Frances E. W. Harper organized and served as the Vice-President of the National Association of Colored Women.[26] It is essential to note for women, the right to vote was interconnected with equally important issues such as child care, equal pay, abolition of slavery, and prohibition. Most activists and champions recognized that these human and civil rights were intersectional and required attention if they were to be properly addressed.

21. *Ibid.*
22. *Minor v. Happersett*, 88 U.S. 162 (1875).
23. *Id.*
24. The 19th Amendment. (2020, May 14). National Archives. https://www.archives.gov/exhibits/featured-documents/amendment-19
25. *Ibid.*
26. *Ibid.*

As women began to center their efforts on suffrage, advocates believed the best path forward for their goals included a constitutional amendment. According to the National Archives, "[b]etween 1878, when the amendment was first introduced in Congress, and 1920, when it was ratified, champions of voting rights for women worked tirelessly, but their strategies varied."

As a result, New York adopted suffrage, President Woodrow Wilson pledged his commitment to the unanimous effort for the constitutional amendment and the country supported this stance.

ANALYSIS OF AMENDMENT XIX

Part I

The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex.

Interestingly, the final verbiage of the Nineteenth Amendment included the concept of citizenry raised by Susan B. Anthony above. This portion of the amendment states all citizens without bar, reduction or diminution shall enjoy the rights afforded in the Fourteenth and Nineteenth Amendments. This citizenship and ultimately the vote can not be restricted based upon a citizen's sex. Consequently, this portion of the amendment's ratification provided the right to vote for white women.

Part II

Congress shall have power to enforce this article by appropriate legislation.

The verbiage in this constitutional amendment was employed to enable proper enforcement power by appropriate legislation. It reflects the language found in the 13th, 14th, 15th, 19th, 23rd, 24th, and 26th Amendments.

Amendment XXIII

Passed by Congress June 16, 1960. Ratified March 29, 1961.

Section 1

The District constituting the seat of Government of the United States shall appoint in such manner as Congress may direct:

A number of electors of President and Vice President equal to the whole number of Senators and Representatives in Congress to which the District would be entitled if it were a State, but in no event more than the least populous State; they shall be in addition to those appointed by the States, but they shall be considered, for the purposes of the election of President and Vice President, to be electors appointed by a State; and they shall meet in the District and perform such duties as provided by the twelfth article of amendment.

DC Representation Taxation[27]

Section 2

The Congress shall have power to enforce this article by appropriate legislation.

INTRODUCTION

Prior to the passing of the Twenty-third Amendment, residents of the District of Columbia (the seat of the government) were unable to cast a ballot. This ironic fact rang true until 1960, with the exception of the resident who maintained valid election registration in a state. Since the inception of the District of Columbia (DC), Congress has grappled with its treatment for purposes of representation.

CONSTITUTIONAL CLIP

The Twenty-third Amendment is the second fastest ratified amendment.

History reveals an uncertainty from the 1787 establishment of DC as the official seat of the government. According to the White House Historical Society, Congress directed and maintained exclusive control over the seat of the government via Art. 1, § 8, noting the Constitution states that Congress shall have the power "to exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States."[28] To this end, DC was meant to be the framers' compromise balancing the unpaid debt of the Revolution addressed in the Amendment XIV,

27. AFRO-American News. (2016, July 13). *DC Representation taxation | AFRO American Newspapers*. AFRO American Newspapers. https://afro.com/taxation-without-representation-d-c-council-passes-statehood-referendum-bill/dc-representation-taxation/

28. *Clause XVII*. (n.d.). LII / Legal Information Institute. Retrieved November 18, 2020, from https://www.law.cornell.edu/constitution-conan/article-1/section-8/clause-17

§ 4 and the location of the seat of the government. The framers wanted to ensure that the seat of government would exude nonpartisan, unbiased approach to politics excluding state influence and emphasizing federal control. However, National Constitution Center identified that as the years progressed beyond 1787, DC notes increased freedom from federal control with residents participating in statehood actions of levying and collecting federal and local taxes, armed forces service, election of a Mayor as well as a Council.[29]

Black's Law Dictionary defines **Statehood** as "The condition of being a state, esp. one of the states in the United States."[30] Proponents of statehood continue to rely on these activities as it emphasizes DC's restrictions on Congressional representation due to the Twenty-third Amendment, but the issue remains that this representation is for a nonvoting delegate. Proponents of DC's statehood suffered a slight setback when Congress adopted "The District of Columbia Voting Rights Amendment," outlining political treatment of DC as a state, but failing with just 42% of the necessary States needed before the common clause of ratification occurred prior to the seven-year period similar to *Amendments Eighteen, Twenty, Twenty-One and Twenty-Two.*[31]

As it relates to the present day events, proponents for furtherance of representation in DC are involved in a continued push for statehood. Proponents note original arguments and evidence in support of efforts for the Twenty-third Amendment. Notably, the House of Representatives hearings in the 86th Congressional body of 1960 explains the initial purpose for the consistent campaign for those who reside in DC to have appropriate representation:

> "ENFRANCHISEMENT OF RESIDENTS OF DISTRICT OF COLUMBIA
>
> The purpose of this. . . constitutional amendment is to provide the citizens of the District of Columbia with appropriate rights of voting in national elections for President and Vice President of the United States. It would permit District citizens to elect Presidential electors who would be in addition to the electors from the States and who would participate in electing the President and Vice President.
>
> The District of Columbia, with more than 800,000 people, has a greater number of persons than the population of each of 13 of our States. District citizens have all the obligations of citizenship, including the payment of Federal taxes, of local taxes, and service in our Armed Forces. They have fought and died in every U.S. war since the District was founded. Yet, they cannot now vote in national elections because the Constitution has restricted that privilege to citizens who reside in States. The resultant constitutional anomaly of imposing all the obligations of citizenship without the most fundamental of its privileges will be removed by the proposed constitutional amendment. . .
>
> [This] . . . amendment would change the Constitution only to the minimum extent necessary to give the District appropriate participation in national elections. It would not make the District of Columbia a State. It would not give the District of Columbia any other attributes of a State or change the constitutional powers of the Congress to legislate with respect to the District of Columbia and to prescribe its form of government. . . . It would, however, perpetuate recognition of the unique status of the District as the seat of Federal Government under the exclusive legislative control of Congress."

Although DC's population was high in 1960, it increased significantly from the 2010 census until the

29. Interpretation: *The Twenty-Third Amendment | The National Constitution Center*. (n.d.). Constitutioncenter.org. Retrieved May 8, 2021, from https://constitutioncenter.org/interactive-constitution/interpretation/amendment-xxiii/interps/155
30. STATEHOOD, Black's Law Dictionary (12th ed. 2024).
31. Interpretation: The Twenty-Third Amendment (n.d.).

2020 census.[32] In fact, the number grew by almost 100,000 in the last decade. According to the U.S. Census Bureau, this massive increase represents the seventh highest growth in the United States, which thus supporting and suggesting the need for DC to have separate statehood.[33]

On the other hand, critics of DC statehood are in agreement with proponents indicating that DC residents possess special privileges for DC residents only. As a result, critics posit that DC can not be admitted until and unless Amendment XXIII is repealed. The constitutional interpretation of Amendment XXIII being repealed for DC statehood has support for and against on both sides. Finally, critics point to the original Congressional authority in directing DC as unbiased and independent nature of state's influence for it to work optimally. Perhaps, this subject may benefit from judicial interpretation as a Congressional chamber passed the second amendment for DC statehood. This occurred on April 22, 2021, with the Washington, D.C. Admission Act (H.R. 51) providing for the State of Washington, D.C. The country looks forward to seeing how this important and controversial amendment proceeds.

ANALYSIS OF AMENDMENT XXIII

Section 1

The District constituting the seat of Government of the United States shall appoint in such manner as Congress may direct:

A number of electors of President and Vice President equal to the whole number of Senators and Representatives in Congress to which the District would be entitled if it were a State, but in no event more than the least populous State; they shall be in addition to those appointed by the States, but they shall be considered, for the purposes of the election of President and Vice President, to be electors appointed by a State; and they shall meet in the District and perform such duties as provided by the twelfth article of amendment.

32. *2020 Census Data Shows DC's Population Growth Nearly Tripled Compared to Previous Decade*. (2021, April 26). [Press release]. https://dc.gov/release/2020-census-data-shows-dcs-population-growth-nearly-tripled-compared-previous-decade#:%7E:text=The%202020%20Census%20reports%20DC's,growth%20rate%20in%20the%20nation

33. *Ibid*.

Washington, D.C. at night – National Mall pictured above[34]

This section reminds the reader of the original appointment of DC as the seat of Government in Art. 1, §8 and its authority to govern DC as it sees fit. The seat of government is defined as "[t]he country's capital, a state capital, a county seat, or other location where the principal offices of the national, state, and local governments are located." Recall, the earlier elector discussion as mentioned in Chapter 13, Amendment XII regarding the President and Vice President. This section introduces an equivalency to what a state would receive in non-voting delegates for President and Vice President of the United States. Further, it provides the delegate numbers for a non-state which equal to the least populous state. These delegates are extra delegates from the states within the United States, but considered electors for Presidential elections. Rounding out the benefits and perks of these delegates is the process outlined in Chapter 13, Amendment XII.

Section 2

The Congress shall have power to enforce this article by appropriate legislation.

As aforementioned, the language in this section was included to provide the necessary enforcement power because this amendment was controversial. The words in the constitutional amendment enabled commensurate enforcement power by appropriate legislation. It mirrors the language found in the 13th, 14th, 15th, 19th, 23rd, 24th, and 26th Amendments. Thus the National Constitutional Convention reports that Congress enacted Public Law No. 87-389 in September 1961 providing the process for District of Columbia's presidential elections.[35]

34. *Washington DC Moonlit Tour of the National Mall & Stops at 10 Sites – Signature Tours of DC*. (2023, March 24). Signature Tours of DC. https://signaturetoursdc.com/dc-under-the-stars/

35. *Cait & Pozen*, n.d.

Amendment XXVI

Passed by Congress March 23, 1971. Ratified July 1, 1971. The 26th Amendment changed a portion of the 14th Amendment.

Section 1

The right of citizens of the United States, who are eighteen years of age or older, to vote shall not be denied or abridged by the United States or by any State on account of age.

Section 2

The Congress shall have power to enforce this article by appropriate legislation.

INTRODUCTION

Amendment Twenty-Six was included as the last amendment in a collection and series of amendments which worked to expand significant change in voting rights in the United States Constitution. Prior to Amendment Twenty-six, persons who met the voting requirements over the age of 21 maintained the right to vote. Many of the previous amendments and legislation such as the Fourteenth, Fifteen, Nineteenth, and Twenty-fourth Amendments as well as the Civil Rights Act, Voting Rights Act and Women's Suffrage movements helped the country gain the necessary support to provide voting rights for all women over 21 years old regardless of gender, race, and any additional barriers which voters may face.[36] Specifically, upon ratifying the original constitution in 1788, voting was mostly available for white, male, landowning citizens over 21 years old. More than eighty years later, former and freed slaves would gain the right to vote (but this gain was short-lived returning a century later). Moreover, more than 132 years later, white women would join the ranks of voters. Finally, 183 years later all remaining, young adults 18-20 would complete the eligible voters.[37]

Beginning in 1942, an uneven response to the rally for lowering the voting age emerged. Black's Law Dictionary defines **Voting** as "[t]he casting of votes for the purpose of deciding an issue."[38] Some states lowered the voting age from 21 to 18, while others refused to do so – creating some confusion and contention. In response, proponents for lowering the voting age pointed to another controversial topic – young people drafted for war. According to the Smithsonian National Museum of American History, cries for help began with World War II in 1941.[39] Proponents of lowering the age, began to analogize a young adult's ability to be drafted in war with the young adults' ability to vote. In 1942, Representative Jennings Randolph introduced legislation and explained that young adults (18-20) were capable of identifying governmental and political concerns relating to both war and voting.[40] Therefore, the young adults wanted to participate in both.

Proponents of lowering the voting age adopted a specific slogan "old enough to fight, old enough to vote."[41] This popular slogan rang true during another war – The Vietnam War, when voting rights

36. Interpretation: *The Twenty-Sixth Amendment | the national constitution center*. (n.d.). Constitutioncenter.org. Retrieved March 2, 2021, from https://constitutioncenter.org/interactive-constitution/interpretation/amendment-xxvi/interps/161
37. *Ibid.*
38. VOTING, Black's Law Dictionary (12th ed. 2024).
39. The 26th Amendment. (2018, May 3). National Museum of American History. https://americanhistory.si.edu/democracy-exhibition/vote-voice/getting-vote/sometimes-it-takes-amendment/twenty
40. Claire, M. (2020, November 11). How Young Activists Got 18-Year-Olds the Right to Vote in Record Time. Smithsonian Magazine. https://www.smithsonianmag.com/history/how-young-activists-got-18-year-olds-right-vote-record-time-180976261/
41. *Ibid.*

were revisited again. Due to the controversy surrounding the Vietnam War as well as the extension of the Voting Rights Act of 1965, Congress inserted a clause which lowered the voting age from 21 to 18 for all elections – federal, state and local. Remember, voting rights are typically in the purview of the State election boards per our earlier discussions.[42] In this instance, the states' adversarial approach to lowering the voting age culminated in several court cases. The United States government filed a lawsuit against Idaho and Arizona attempting to force compliance with the act; while, Texas and Ohio filed claims that the government overstepped its legal authority to lower ages in elections.[43]

Therefore, the Supreme Court of the United States combined these cases in *Oregon v. Mitchell* (1970), addressing many issues including whether Congress can lower the voting age from 21 to 18 in federal, state and local elections.[44] Justice Hugo L. Black wrote the opinion in a 5-4 decision. Justice Black confirmed Congress' ability to lower the voting age from 18-21 years old in federal elections for U.S. Congress, President and Vice-President.[45] Proponents of lowering the voting age, then turn their attentions to repudiating *Oregon v. Mitchell* (1970), by supporting a Congressional proposal for a constitutional amendment, Amendment XXVI, to settle the issue – lowering the voting age in all elections.

CONSTITUTIONAL CLIP

The ratification of Amendment XXVI added 11 million new eligible voters.[46]

In 2021, the country celebrated 50 years of this amendment. According to Tufts University's Center for Information and Research on Civic Learning and Engagement (CIRCLE), this celebration came on the heels of the 25-point margin where voters 18-29 participated heavily in a monumental moment.[47] Then Senator Kamala Harris joined then Past Vice-President Joe Biden's ticket and was elected as the first woman Vice-President as well as the first African-American and South Asian American to hold this office.[48] CIRCLE emphasizes the assistance young voters provided in all of the important battleground states to secure the White House for the Biden-Harris campaign.

Of equal note is what *Oregon v. Mitchell* (1970) stated regarding state and local elections. Congress lacks the power to force states to lower the voting age from 21 to 18 years old in state and local

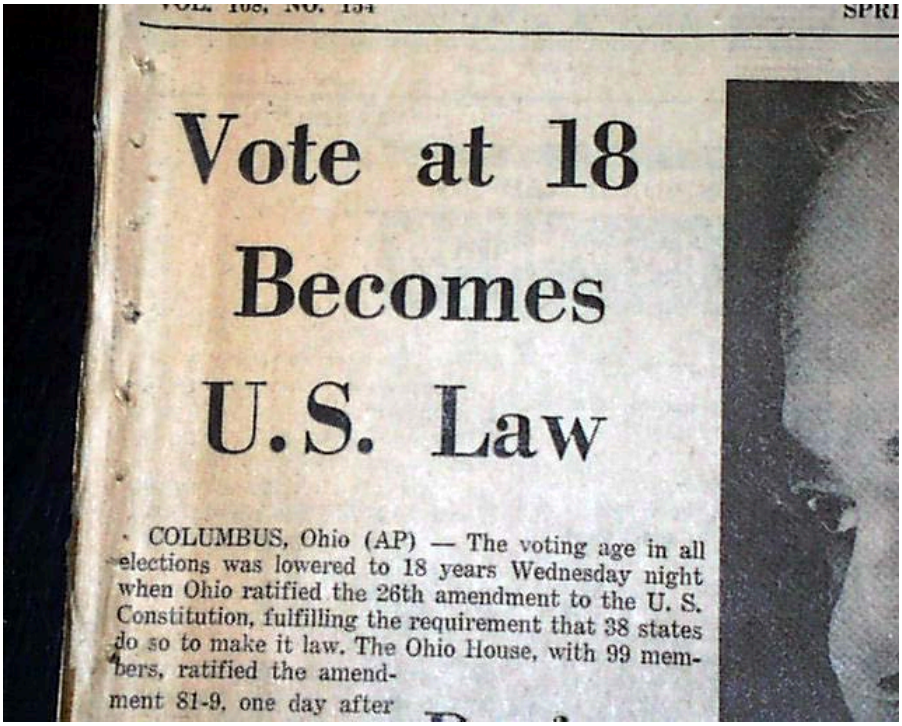
42. *Ibid.*
43. *Ibid.*
44. *Oregon v. Mitchell*, 400 U.S. 112 (1970).
45. *Id.*
46. Williams, J. (2016, July 1). "*Old enough to fight, old enough to vote*": *The 26th amendment's mixed legacy*. U.S. News. https://www.usnews.com/news/articles/2016-07-01/old-enough-to-fight-old-enough-to-vote-the-26th-amendments-mixed-legacy
47. *Trump push to invalidate votes in heavily black cities alarms civil rights groups*. (2020, November 24). NPR. https://www.npr.org/2020/11/24/938187233/trump-push-to-invalidate-votes-in-heavily-black-cities-alarms-civil-rights-group
48. *Ibid.*

elections.[49] Thus, the legal, federal voting age is 18, state and local officials are anything but consistent on the voting age topic. For example, "...a third of the states allow those who are 17, but will be 18 by the general election, to vote in primaries." Additionally, "...18 states and Washington, D.C., allow those who are 17, but will be 18 by the general election, to vote in primaries."[50] Illinois allows voters to vote in the primaries prior to 18 years old. Furthermore, voters may be allowed to preregister for voting, if they are younger than 18 years old. According to the National Conference of State Legislatures, "[p]reregistration is an election procedure that allows individuals younger than 18 years of age to register to vote, so they are eligible to cast a ballot when they reach 18..."[51] Pre-registrants must follow the state's rules for application, but will receive a pending or preregistration status. When the pre-registrant turns 18, the individual is automatically added to the voter registration list and able to cast a ballot.[52] Again, this decision is left to the states for direction, so some states "16-year-olds to preregister, and others allow 17-year-olds to preregister. The remaining preregistration states do not establish a specific preregistration age limit but require the voter to be 18 the next general election.[53]

ANALYSIS OF AMENDMENT XXVI

Section 1

The right of citizens of the United States, who are eighteen years of age or older, to vote shall not be denied or abridged by the United States or by any State on account of age.



Vote at 18 Becomes U.S. Law

COLUMBUS, Ohio (AP) — The voting age in all elections was lowered to 18 years Wednesday night when Ohio ratified the 26th amendment to the U. S. Constitution, fulfilling the requirement that 38 states do so to make it law. The Ohio House, with 99 members, ratified the amendment 81-9, one day after

49. *Ibid.*
50. *Voting age for primary elections*. (2023, July 10). https://www.ncsl.org/elections-and-campaigns/voting-age-for-primary-elections
51. Ibid.
52. Ibid.
53. Ibid.

Twenty-Sixth Amendment identified in rare newspaper[54]

The language in §1 greatly reflects the language used in Amendment XV. Compare the discussion in Amendment XV which points to deny or abridge as reduction or minimization of voting rights based upon race. In Amendment XXVI, the reduction or minimization refers to age as opposed to age. Critics of Amendment XXVI most similarly align with Amendment XV. In comparison, this section of Amendment XXVI as well as Amendment XIV, §1 regarding voting rights residency raises issues for college students and what is their established domicile for voting purposes.[55] Additionally, the National Constitution Center acknowledges that this section serves to protect young adults 18-20 against special voting parameters unique only to their age group.[56] Therefore, some critics posit that the similarities of expansion enjoyed in Amendment XV are missing in Amendment XXVI.

Section 2

The Congress shall have power to enforce this article by appropriate legislation.

As a point of clarification, this section reflects the words which provided a suitable response to diverging opinions surrounding this amendment. It is recognized that proper laws, codes, and/or statutes are needed to support the implementation of this amendment. It reflects similar verbiage found in the 13th, 14th, 15th, 19th, 23rd, and 24th Amendments.

Amendment XXVII

Originally proposed September 25, 1789. Ratified May 7, 1992.

No law, varying the compensation for the services of the Senators and Representatives, shall take effect, until an election of representatives shall have intervened.

INTRODUCTION

CONSTITUTIONAL CLIP

Although Amendment XXVII was ratified in 1992, it was proposed with the Bill of Rights amendments in 1789. The ratification of this amendment took almost 200 years. It was the slowest amendment to be ratified in the United States Constitution.

Ironically Amendment XXVII, originally proposed by James Madison as the second amendment to

54. *26th Amendment adopted. . . voting age of 18. . .. – RareNewspapers.com*. (n.d.). https://www.rarenewspapers.com/view/617289
55. *Interpretation: The Twenty-Sixth amendment | the national constitution center*. (n.d.).
56. *Ibid.*

the United States Constitution, became the last ratified amendment in 1992.[57] It is apparent that the forefathers considered the amendment and its impact, but it would not come to fruition for more than two centuries later.

Although this effort began*in 1789, yes 1789 not 1989*, only nine states had ratified Amendment XXVII until the power of a college student's advocacy occurs.[58] National Public Radio explained that the bulk of the movement regarding this amendment did not occur until 1982. Then 19 year-old undergraduate student, Gregory Watson submitted a paper in his government class on Amendment XXVII.[59] Surprisingly, he received a C. This C was not your normal grade, because Watson decided he would lobby state legislatures until the amendment was ratified. At this juncture, Watson needed 29 states to ratify. He wrote letters and most of the responses did not agree with Watson's position until ... Senator William Cohen of Maine. Cohen was the first to secure his home state, Ohio's ratification in 1983. Ohio's ratification occurred more than 100 years later. Amendment XXVII became part of the Constitution when Michigan finally ratified in 1992.[60]

Finally, Bernstein examines an in-depth analysis as to how Amendment XXVII survived death, while other amendments failed greatly in the more than 200 years which it took to ratify it. The legacy, history and evolution of Amendment XXVII was due to three reasons why Amendment XXVII was uniquely positioned to discuss "amendment politics."[61] Therefore, this amazing law review article combines the best and worst of the work, sweat, tears, and goodwill which surrounds the amendment process providing note-worthy insight into our constitution.

ANALYSIS OF AMENDMENT XXVII

No law, varying the compensation for the services of the Senators and Representatives, shall take effect, until an election of representatives shall have intervened.

57. Calabresi, S., & Teachout, Z. (n.d.). *Interpretation: The Twenty-Seventh amendment | the national constitution center*. The National Constitution Center. Retrieved April 24, 2021, from https://constitutioncenter.org/interactive-constitution/interpretation/amendment-xxvii/interps/165
58. *Ibid.*
59. *The bad grade that changed the U.S. constitution*. (2017, May 5). NPR. https://www.npr.org/2017/05/05/526900818/the-bad-grade-that-changed-the-u-s-constitution
60. *Ibid.*
61. Bernstein, R. (1992). *The sleeper wakes: The history and legacy of the Twenty-Seventh amendment*. *Fordham Law Review*, 61, 497–557. https://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=3017&context=flr

Twenty-Seventh Amendment – comparative salary petition from 2013[62]

This amendment speaks directly and frankly regarding how Congress is prevented from increasing the wages and/or salaries of its members until the subsequent election occurs. According to Strickland, the amendment passed after voters were introduced in 1989 to an almost $50,000 increase in the annual salaries of legislators.[63]

Strickland grapples with and determines that Amendment XXVII with its more than 200 years of ratification is constitutionally sound and established. Finally, this amendment was quietly accepted except for one sole case. In a Court of Appeals ruling, *Boehner v. Anderson* (1994), Congressman John Boehner vaguely addressed a violation of Amendment XXVII, when the court held "that the 1993 legislation eliminating the 1994 Cost-of-Living Adjustment (COLA) for Congress violates the twenty-seventh amendment" as it occurred after its ratification.[64] Thus, it appears the amendment process may be messy, elongated, strange, but well-established if it applies by the language of its proposal.

In closing, the authors remind you that the term amendment means change. In fact, the constitutional process has entertained approximately 11,848 amendments to the United States Constitution from 1798 to 2019 according to the United States Senate Legislative Records.[65] As a note to students, your voice can make a difference just as Gregory Watson's did for Amendment XVII. In fact, our text consistently examined how the United States Constitution balanced federal, state and individual rights. As a result, Gregory Watson operationalized his individual rights and powers to change not one, but two amendments.

Fresh off his victory of Amendment XXVII, in 1995 Watson realized a peculiar fact about Mississippi and Amendment XIII. Watson researched and determined Mississippi never ratified Amendment XIII.[66] He lobbied and convinced the Mississippi Legislature to ratify the Amendment. Interestingly, a recording mishap would preclude Mississippi's ratification until 2013.[67] Although this ratification

62. *Sign the petition*. (n.d.). Change.org. https://www.change.org/p/congress-amend-the-27th-amendment
63. *Ibid.*
64. *Boehner v. Anderson*, 30 F.3d 156, 163 (D.C. Cir. 1994).
65. *U.S. Senate: Measures proposed to amend the constitution*. (2021, March 12). United States Senate. https://www.senate.gov/legislative/MeasuresProposedToAmendTheConstitution.htm
66. *The bad grade*, 2017
67. *Ibid.*

was simply symbolic, I believe the 1.12 million African-American residents of Mississippi in 2013 would greatly appreciate this student's symbolic push to ratify Amendment XIII.

Now that you have examined the history, story, legacy and process of the United States Constitution, how will you use your voice to help balance the federal, state, and individual rights to better our country?

Critical Reflections:

1. To date, the longest Senatorial term was 51 years. Should Senatorial terms be limited? Why or why not?
2. Should the District of Columbia be admitted to the union as the 51st State? Why or why not?
3. Should individuals convicted of felonies be allowed to vote? Why or why not?

Appendix - The Constitution of the United States of America

Original United States Constitution, Order of States' Ratification and Their Vote

The states and the dates of ratification are listed here, in order of ratification:

An interactive H5P element has been excluded from this version of the text. You can view it online here: https://cod.pressbooks.pub/usconstitutionalive2e/?p=54#h5p-5

Ashbrook Center. (2006–2021). *Dates of Ratification of the Constitution*. Teaching American History. https://teachingamericanhistory.org/library/document/dates-of-ratification-of-the-constitution/

Preamble*

Highlighted sections indicate changes identified in other parts of the Constitution of the United States.

Signed in convention September 17, 1787. Ratified June 21, 1788

We the People of the United States, **in Order to form a more perfect Union,** establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.

Article I — Legislative Branch

Signed in convention September 17, 1787. Ratified June 21, 1788. A portion of Article I, Section 2, was changed by the 14th Amendment; a portion of Section 9 was changed by the 16th Amendment; a portion of Section 3 was changed by the 17th Amendment; and a portion of Section 4 was changed by the 20th Amendment.

Section 1: Congress

All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

Section 2: The House of Representatives

The House of Representatives shall be composed of Members chosen every second Year by the People of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature.

No Person shall be a Representative who shall not have attained to the Age of twenty five Years, and been seven Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State in which he shall be chosen.

Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons. The actual Enumeration shall be made within three Years after the first Meeting of the Congress of the United States, and within every subsequent Term of ten Years, in such Manner as they shall by Law direct. The number of Representatives shall not exceed one for every thirty Thousand, but each State shall have at Least one Representative; and until such enumeration shall be made, the State of New Hampshire shall be entitled to chuse three, Massachusetts eight, Rhode-Island and Providence Plantations one, Connecticut five, New-York six, New Jersey four, Pennsylvania eight, Delaware one, Maryland six, Virginia ten, North Carolina five, South Carolina five, and Georgia three.

When vacancies happen in the Representation from any State, the Executive Authority thereof shall issue Writs of Election to fill such Vacancies.

The House of Representatives shall chuse their Speaker and other Officers; and shall have the sole Power of Impeachment.

Section 3: The Senate

The Senate of the United States shall be composed of two Senators from each State, chosen by the Legislature thereof, for six Years; and each Senator shall have one Vote.

Immediately after they shall be assembled in Consequence of the first Election, they shall be divided as equally as may be into three Classes. The Seats of the Senators of the first Class shall be vacated at the Expiration of the second Year, of the second Class at the Expiration of the fourth Year, and of the third Class at the Expiration of the sixth Year, so that one third may be chosen every second Year; and if Vacancies happen by Resignation, or otherwise, during the Recess of the Legislature of any State, the Executive thereof may make temporary Appointments until the next Meeting of the Legislature, which shall then fill such Vacancies.

No Person shall be a Senator who shall not have attained to the Age of thirty Years, and been nine Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State for which he shall be chosen.

The Vice President of the United States shall be President of the Senate, but shall have no Vote, unless they be equally divided.

The Senate shall chuse their other Officers, and also a President pro tempore, in the Absence of the Vice President, or when he shall exercise the Office of President of the United States.

The Senate shall have the sole Power to try all Impeachments. When sitting for that Purpose, they shall be on Oath or Affirmation. When the President of the United States is tried, the Chief Justice shall preside: And no Person shall be convicted without the Concurrence of two thirds of the Members present.

Judgment in Cases of Impeachment shall not extend further than to removal from Office, and disqualification to hold and enjoy any Office of honor, Trust or Profit under the United States: but the Party convicted shall nevertheless be liable and subject to Indictment, Trial, Judgment and Punishment, according to Law.

Section 4: Elections

The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators.

The Congress shall assemble at least once in every Year, and such Meeting shall be on the first Monday in December, unless they shall by Law appoint a different Day.

Section 5: Powers and Duties of Congress

Each House shall be the Judge of the Elections, Returns and Qualifications of its own Members,and a Majority of each shall constitute a Quorum to do Business; but a smaller Number may adjourn from day to day, and may be authorized to compel the Attendance of absent Members, in such Manner, and under such Penalties as each House may provide.

Each House may determine the Rules of its Proceedings, punish its Members for disorderly Behaviour, and, with the Concurrence of two thirds, expel a Member.

Each House shall keep a Journal of its Proceedings, and from time to time publish the same, excepting such Parts as may in their Judgment require Secrecy; and the Yeas and Nays of the Members of either House on any question shall, at the Desire of one fifth of those Present, be entered on the Journal.

Neither House, during the Session of Congress, shall, without the Consent of the other, adjourn for more than three days, nor to any other Place than that in which the two Houses shall be sitting.

Section 6: Rights and Disabilities of Members

The Senators and Representatives shall receive a Compensation for their Services, to be ascertained by Law, and paid out of the Treasury of the United States.They shall in all Cases, except Treason, Felony and Breach of the Peace, be privileged from Arrest during their Attendance at the Session of their respective Houses, and in going to and returning from the same; and for any Speech or Debate in either House, they shall not be questioned in any other Place.

No Senator or Representative shall, during the Time for which he was elected, be appointed to any civil Office under the Authority of the United States, which shall have been created, or the Emoluments whereof shall have been encreased during such time; and no Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office.

Section 7: Legislative Process

All Bills for raising Revenue shall originate in the House of Representatives; but the Senate may propose or concur with Amendments as on other Bills.

Every Bill which shall have passed the House of Representatives and the Senate, shall, before it become a Law, be presented to the President of the United States; If he approve he shall sign it, but if not he shall return it, with his Objections to that House in which it shall have originated, who shall enter the Objections at large on their Journal, and proceed to reconsider it. If after such Reconsideration two thirds of that House shall agree to pass the Bill, it shall be sent, together with the Objections, to the other House, by which it shall likewise be reconsidered, and if approved by two thirds of that House, it shall become a Law. But in all such Cases the Votes of both Houses shall be determined by Yeas and Nays, and the Names of the Persons voting for and against the Bill shall be entered on the Journal of each House respectively. If any Bill shall not be returned by the President within ten Days (Sundays excepted) after it shall have been presented to him, the Same shall be a Law, in like Manner as if he had signed it, unless the Congress by their Adjournment prevent its Return, in which Case it shall not be a Law.

Every Order, Resolution, or Vote to which the Concurrence of the Senate and House of Representatives may be necessary (except on a question of Adjournment) shall be presented to the President of the United States; and before the Same shall take Effect, shall be approved by him, or being disapproved by him, shall be repassed by two thirds of the Senate and House of Representatives, according to the Rules and Limitations prescribed in the Case of a Bill.

Section 8: Powers of Congress

The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States;

To borrow Money on the credit of the United States;

To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;

To establish a uniform Rule of Naturalization, and uniform Laws on the subject of Bankruptcies throughout the United States;

To coin Money, regulate the Value thereof, and of foreign Coin, and fix the Standard of Weights and Measures;

To provide for the Punishment of counterfeiting the Securities and current Coin of the United States;

To establish Post Offices and post Roads;

To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries;

To constitute Tribunals inferior to the supreme Court;

To define and punish Piracies and Felonies committed on the high Seas, and Offenses against the Law of Nations;

To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water;

To raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years;

To provide and maintain a Navy;

To make Rules for the Government and Regulation of the land and naval Forces;

To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions;

To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress;

To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards and other needful Buildings;-And

To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

Section 9: Powers Denied Congress

The Migration or Importation of such Persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the Year one thousand eight hundred and eight, but a Tax or duty may be imposed on such Importation, not exceeding ten dollars for each Person.

The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.

No Bill of Attainder or ex post facto Law shall be passed.

No Capitation, or other direct, Tax shall be laid, unless in Proportion to the Census or Enumeration herein before directed to be taken.

No Tax or Duty shall be laid on Articles exported from any State.

No Preference shall be given by any Regulation of Commerce or Revenue to the Ports of one State over those of another: nor shall Vessels bound to, or from, one State, be obliged to enter, clear, or pay Duties in another.

No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law; and a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time.

No Title of Nobility shall be granted by the United States: And no Person holding any Office of Profit or Trust under them, shall, without the Consent of the Congress, accept of any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince, or foreign State.

Section 10: Powers Denied to the States

No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility.

No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing it's inspection Laws: and the net Produce of all Duties and Imposts, laid by any State on Imports or Exports, shall be for the Use of the Treasury of the United States; and all such Laws shall be subject to the Revision and Controul of the Congress.

No State shall, without the Consent of Congress, lay any Duty of Tonnage, keep Troops, or Ships of War in time of Peace, enter into any Agreement or Compact with another State, or with a foreign Power, or engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay.

Article II Executive Branch

Signed in convention September 17, 1787. Ratified June 21, 1788. Portions of Article II, Section 1, were changed by the 12th Amendment and the 25th Amendment

Section 1

The executive Power shall be vested in a President of the United States of America.

He shall hold his Office during the Term of four Years, and, together with the Vice President, chosen for the same Term, be elected, as follows:

Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress: but no Senator or Representative, or Person holding an Office of Trust or Profit under the United States, shall be appointed an Elector.

The Electors shall meet in their respective States, and vote by Ballot for two Persons, of whom one at least shall not be an Inhabitant of the same State with themselves. And they shall make a List of all the Persons voted for, and of the Number of Votes for each; which List they shall sign and certify, and transmit sealed to the Seat of the Government of the United States, directed to the President of the Senate. The President of the Senate shall, in the Presence of the Senate and House of Representatives, open all the Certificates, and the Votes shall then be counted. The Person having the greatest Number of Votes shall be the President, if such Number be a Majority of the whole Number of Electors appointed; and if there be more than one who have such Majority, and have an equal Number of Votes, then the House of Representatives shall immediately chuse by Ballot one of them for President; and if no Person have a Majority, then from the five highest on the List the said House shall in like Manner chuse the President. But in chusing the President, the Votes shall be taken by States, the Representation from each State having one Vote; A quorum for this Purpose shall consist of a Member or Members from two thirds of the States, and a Majority of all the States shall be necessary to a Choice.

In every Case, after the Choice of the President, the Person having the greatest Number of Votes of the Electors shall be the Vice President. But if there should remain two or more who have equal Votes, the Senate shall chuse from them by Ballot the Vice President.

The Congress may determine the Time of chusing the Electors, and the Day on which they shall give their Votes; which Day shall be the same throughout the United States.

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; neither shall any person be eligible to that Office who shall not have attained to the Age of thirty five Years, and been fourteen Years a Resident within the United States.

In Case of the Removal of the President from Office, or of his Death, Resignation, or Inability to discharge the Powers and Duties of the said Office, the Same shall devolve on the Vice President, and the Congress may by Law provide for the Case of Removal, Death, Resignation or Inability, both of the President and Vice President, declaring what Officer shall then act as President, and such Officer shall act accordingly, until the Disability be removed, or a President shall be elected.

The President shall, at stated Times, receive for his Services, a Compensation, which shall neither be increased nor diminished during the Period for which he shall have been elected, and he shall not receive within that Period any other Emolument from the United States, or any of them.

Before he enter on the Execution of his Office, he shall take the following Oath or Affirmation:—"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."

Section 2

The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States; he may require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices, and he shall have Power to grant Reprieves and Pardons for Offenses against the United States, except in Cases of Impeachment.

He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

The President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session.

Section 3

He shall from time to time give to the Congress Information of the State of the Union, and recommend to their Consideration such Measures as he shall judge necessary and expedient; he may, on extraordinary Occasions, convene both Houses, or either of them, and in Case of Disagreement

between them, with Respect to the Time of Adjournment, he may adjourn them to such Time as he shall think proper; he shall receive Ambassadors and other public Ministers; he shall take Care that the Laws be faithfully executed, and shall Commission all the Officers of the United States.

Section 4

The President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors.

Article III — Judicial Branch

Signed in convention September 17, 1787. Ratified June 21, 1788. A portion of Article III, Section 2, was changed by the 11th Amendment.

Section 1

The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

Section 2

The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;–to all Cases affecting Ambassadors, other public Ministers and Consuls;–to all Cases of admiralty and maritime Jurisdiction;–to Controversies to which the United States shall be a Party;–to Controversies between two or more States;–between a State and Citizens of another State;–between Citizens of different States;–between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

The Trial of all Crimes, except in Cases of Impeachment; shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

Section 3

Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort. No Person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court.

The Congress shall have Power to declare the Punishment of Treason, but no Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person attainted.

Article IV — States, Citizenship, New States

Signed in convention September 17, 1787. Ratified June 21, 1788. A portion of Article IV, Section 2, was changed by the 13th Amendment.

Section 1

Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.

Section 2

The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.

A Person charged in any State with Treason, Felony, or other Crime, who shall flee from Justice, and be found in another State, shall on Demand of the executive Authority of the State from which he fled, be delivered up, to be removed to the State having Jurisdiction of the Crime.

No Person held to Service or Labour in one State, under the Laws thereof, escaping into another, shall, in Consequence of any Law or Regulation therein, be discharged from such Service or Labour, but shall be delivered up on Claim of the Party to whom such Service or Labour may be due.

Section 3

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.

The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State.

Section 4

The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence.

Article V — Amendment Process

Signed in convention September 17, 1787. Ratified June 21, 1788

The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress; Provided that no Amendment which may be made prior to the Year One thousand eight hundred and eight shall in any Manner affect the first and fourth Clauses in the Ninth Section of the first Article; and that no State, without its Consent, shall be deprived of its equal Suffrage in the Senate.

Article VI — Debts, Supremacy, Oaths, Religious Tests

Signed in convention September 17, 1787. Ratified June 21, 1788

All Debts contracted and Engagements entered into, before the Adoption of this Constitution, shall be as valid against the United States under this Constitution, as under the Confederation.

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.

The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution; but no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States.

Article VII — Ratification

Signed in convention September 17, 1787. Ratified June 21, 1788

The Ratification of the Conventions of nine States, shall be sufficient for the Establishment of this Constitution between the States so ratifying the Same.

Amendment I

Passed by Congress September 25, 1789. Ratified December 15, 1791. The first 10 amendments form the Bill of Rights.

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Amendment II

Passed by Congress September 25, 1789. Ratified December 15, 1791. The first 10 amendments form the Bill of Rights.

A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.

Amendment III

Passed by Congress September 25, 1789. Ratified December 15, 1791. The first 10 amendments form the Bill of Rights.

No Soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law.

Amendment IV

Passed by Congress September 25, 1789. Ratified December 15, 1791. The first 10 amendments form the Bill of Rights.

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Amendment V

Passed by Congress September 25, 1789. Ratified December 15, 1791. The first 10 amendments form the Bill of Rights.

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.

Amendment VI

Passed by Congress September 25, 1789. Ratified December 15, 1791. The first 10 amendments form the Bill of Rights.

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.

Amendment VII

Passed by Congress September 25, 1789. Ratified December 15, 1791. The first 10 amendments form the Bill of Rights.

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

Amendment VIII

Passed by Congress September 25, 1789. Ratified December 15, 1791. The first 10 amendments form the Bill of Rights.

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Amendment IX

Passed by Congress September 25, 1789. Ratified December 15, 1791. The first 10 amendments form the Bill of Rights.

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

Amendment X

Passed by Congress September 25, 1789. Ratified December 15, 1791. The first 10 amendments form the Bill of Rights.

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

Amendment XI

Passed by Congress March 4, 1794. Ratified February 7, 1795. The 11th Amendment changed a portion of Article III, Section 2.

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

Amendment XII

Passed by Congress December 9, 1803. Ratified June 15, 1804. The 12th Amendment changed a portion of Article II, Section 1. A portion of the 12th Amendment was changed by the 20th Amendment, Section 3.

The Electors shall meet in their respective states and vote by ballot for President and Vice-President, one of whom, at least, shall not be an inhabitant of the same state with themselves; they shall name in their ballots the person voted for as President, and in distinct ballots the person voted for as Vice-President, and they shall make distinct lists of all persons voted for as President, and of all persons voted for as Vice-President, and of the number of votes for each, which lists they shall sign and certify, and transmit sealed to the seat of the government of the United States, directed to the President of the Senate;–the President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates and the votes shall then be counted;–The person having the greatest number of votes for President, shall be the President, if such number be a majority of the whole number of Electors appointed; and if no person have such majority, then from the persons having the highest numbers not exceeding three on the list of those voted for as President, the House of Representatives shall choose immediately, by ballot, the President. But in choosing the President, the votes shall be taken by states, the representation from each state having one vote; a quorum for this purpose shall consist of a member or members from two-thirds of the states, and a majority of all the states shall be necessary to a choice. And if the House of Representatives shall not choose a President whenever the right of choice shall devolve upon them, before the fourth day of March next following, then the Vice-President shall act as President, as in case of the death or other constitutional disability of the President.–The person having the greatest number of votes as Vice-President, shall be the Vice-President, if such number be a majority of the whole number of Electors appointed, and if no person have a majority, then from the two highest numbers on the list, the Senate shall choose the Vice-President; a quorum for the purpose shall consist of two-thirds of the whole number of Senators, and a majority of the whole number shall be necessary to a choice. But no person constitutionally ineligible to the office of President shall be eligible to that of Vice-President of the United States.

Amendment XIII

Passed by Congress January 31, 1865. Ratified December 6, 1865. The 13th Amendment changed a portion of Article IV, Section 2.

Section 1

Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

Section 2

Congress shall have power to enforce this article by appropriate legislation.

Amendment XIV

Passed by Congress June 13, 1866. Ratified July 9, 1868. The 14th Amendment changed a portion of Article I, Section 2. A portion of the 14th Amendment was changed by the 26th Amendment.

Section 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2

Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice-President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3

No person shall be a Senator or Representative in Congress, or elector of President and Vice-President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4

The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5

The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.

Amendment XV

Passed by Congress February 26, 1869. Ratified February 3, 1870.

Section 1

The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.

Section 2

The Congress shall have the power to enforce this article by appropriate legislation.

Amendment XVI

Passed by Congress July 2, 1909. Ratified February 3, 1913. The 16th Amendment changed a portion of Article I, Section 9.

The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration.

Amendment XVII

Passed by Congress May 13, 1912. Ratified April 8, 1913. The 17th Amendment changed a portion of Article I, Section 3.

The Senate of the United States shall be composed of two Senators from each State, elected by the people thereof, for six years; and each Senator shall have one vote. The electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislatures.

When vacancies happen in the representation of any State in the Senate, the executive authority of such State shall issue writs of election to fill such vacancies: Provided, That the legislature of any State may empower the executive thereof to make temporary appointments until the people fill the vacancies by election as the legislature may direct.

This amendment shall not be so construed as to affect the election or term of any Senator chosen before it becomes valid as part of the Constitution.

Amendment XVIII

Passed by Congress December 18, 1917. Ratified January 16, 1919. Repealed by the 21st Amendment, December 5, 1933.

Section 1.

After one year from the ratification of this article the manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof for beverage purposes is hereby prohibited.

Section 2.

The Congress and the several states shall have concurrent power to enforce this article by appropriate legislation.

Section 3.

This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of the several states, as provided in the Constitution, within seven years from the date of the submission hereof to the states by the Congress.

Amendment XIX

Passed by Congress June 4, 1919. Ratified August 18, 1920

The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex.

Congress shall have power to enforce this article by appropriate legislation.

Amendment XX

Passed by Congress March 2, 1932. Ratified January 23, 1933. The 20th Amendment changed a portion of Article I, Section 4, and a portion of the 12th Amendment (changed the dates of the Congressional sessions and Presidential sessions began).

Section 1

The terms of the President and the Vice President shall end at noon on the 20th day of January, and the terms of Senators and Representatives at noon on the 3d day of January, of the years in which such terms would have ended if this article had not been ratified; and the terms of their successors shall then begin.

Section 2

The Congress shall assemble at least once in every year, and such meeting shall begin at noon on the 3d day of January, unless they shall by law appoint a different day.

Section 3

If, at the time fixed for the beginning of the term of the President, the President elect shall have died, the Vice President elect shall become President. If a President shall not have been chosen before the time fixed for the beginning of his term, or if the President elect shall have failed to qualify, then the Vice President elect shall act as President until a President shall have qualified; and the Congress may by law provide for the case wherein neither a President elect nor a Vice President shall have qualified, declaring who shall then act as President, or the manner in which one who is to act shall be selected, and such person shall act accordingly until a President or Vice President shall have qualified.

Section 4

The Congress may by law provide for the case of the death of any of the persons from whom the House of Representatives may choose a President whenever the right of choice shall have devolved upon them, and for the case of the death of any of the persons from whom the Senate may choose a Vice President whenever the right of choice shall have devolved upon them.

Section 5

Sections 1 and 2 shall take effect on the 15th day of October following the ratification of this article.

Section 6

This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of three-fourths of the several States within seven years from the date of its submission.

Amendment XXI

Passed by Congress February 20, 1933. Ratified December 5, 1933. The 21st Amendment repealed the 18th Amendment.

Section 1

The eighteenth article of amendment to the Constitution of the United States is hereby repealed.

Section 2

The transportation or importation into any State, Territory, or Possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.

Section 3

This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by conventions in the several States, as provided in the Constitution, within seven years from the date of the submission hereof to the States by the Congress.

Amendment XXII

Passed by Congress March 21, 1947. Ratified February 27, 1951.

Section 1

No person shall be elected to the office of the President more than twice, and no person who has held the office of President, or acted as President, for more than two years of a term to which some other person was elected President shall be elected to the office of President more than once. But this Article shall not apply to any person holding the office of President when this Article was proposed by Congress, and shall not prevent any person who may be holding the office of President, or acting as President, during the term within which this Article becomes operative from holding the office of President or acting as President during the remainder of such term.

Section 2

This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of three-fourths of the several States within seven years from the date of its submission to the States by the Congress.

Amendment XXIII

Passed by Congress June 16, 1960. Ratified March 29, 1961.

Section 1

The District constituting the seat of Government of the United States shall appoint in such manner as Congress may direct:

A number of electors of President and Vice President equal to the whole number of Senators and Representatives in Congress to which the District would be entitled if it were a State, but in no event more than the least populous State; they shall be in addition to those appointed by the States, but they shall be considered, for the purposes of the election of President and Vice President, to be electors appointed by a State; and they shall meet in the District and perform such duties as provided by the twelfth article of amendment.

Section 2

The Congress shall have power to enforce this article by appropriate legislation.

Amendment XXIV

Passed by Congress August 27, 1962. Ratified January 23, 1964.

Section 1

The right of citizens of the United States to vote in any primary or other election for President or Vice President, for electors for President or Vice President, or for Senator or Representative in

Congress, shall not be denied or abridged by the United States or any State by reason of failure to pay poll tax or other tax.

Section 2

The Congress shall have power to enforce this article by appropriate legislation.

Amendment XXV

Passed by Congress July 6, 1965. Ratified February 10, 1967. The 25th Amendment changed a portion of Article II, Section 1.

Section 1

In case of the removal of the President from office or of his death or resignation, the Vice President shall become President.

Section 2

Whenever there is a vacancy in the office of the Vice President, the President shall nominate a Vice President who shall take office upon confirmation by a majority vote of both Houses of Congress.

Section 3

Whenever the President transmits to the President pro tempore of the Senate and the Speaker of the House of Representatives his written declaration that he is unable to discharge the powers and duties of his office, and until he transmits to them a written declaration to the contrary, such powers and duties shall be discharged by the Vice President as Acting President.

Section 4

Whenever the Vice President and a majority of either the principal officers of the executive departments or of such other body as Congress may by law provide, transmit to the President pro tempore of the Senate and the Speaker of the House of Representatives their written declaration that the President is unable to discharge the powers and duties of his office, the Vice President shall immediately assume the powers and duties of the office as Acting President.

Thereafter, when the President transmits to the President pro tempore of the Senate and the Speaker of the House of Representatives his written declaration that no inability exists, he shall resume the powers and duties of his office unless the Vice President and a majority of either the principal officers of the executive department or of such other body as Congress may by law provide, transmit within four days to the President pro tempore of the Senate and the Speaker of the House of Representatives their written declaration that the President is unable to discharge the powers and duties of his office. Thereupon Congress shall decide the issue, assembling within forty-eight hours for that purpose if not in session. If the Congress, within twenty-one days after receipt of the latter written declaration, or, if Congress is not in session, within twenty-one days after Congress is required to assemble, determines by two-thirds vote of both Houses that the President is unable to discharge the powers and duties of his office, the Vice President shall continue to discharge the same as Acting President; otherwise, the President shall resume the powers and duties of his office.

Amendment XXVI

Passed by Congress March 23, 1971. Ratified July 1, 1971. The 26th Amendment changed a portion of the 14th Amendment.

Section 1

The right of citizens of the United States, who are eighteen years of age or older, to vote shall not be denied or abridged by the United States or by any State on account of age.

Section 2

The Congress shall have power to enforce this article by appropriate legislation.

Amendment XXVII

Originally proposed September 25, 1789. Ratified May 7, 1992.

No law, varying the compensation for the services of the Senators and Representatives, shall take effect, until an election of representatives shall have intervened.

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Epilogue

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FINAL CRITICAL REFLECTIONS

It has been 230 years since the original 13 states ratified the Constitution and the Bill of Rights. This would be a good time to conduct a rigorous self-analysis. So, how has the United States of America fared with the six goals set forth in the Preamble? As a reminder, here are the goals:

1. Form a More Perfect Union
2. Establish Justice
3. Ensure Domestic Tranquility
4. Provide for the Common Defense
5. Promote the General Welfare
6. Secure the Blessings of Liberty

1. Form a More Perfect Union

Do we have a "more perfect" union now than we did in 1791? It can be argued that in many ways, the answer is "yes." We have abolished slavery, the right to vote has been extended to men and women of all races, we have survived a civil war and preserved the union of the original states, while adding many more. In what ways would you argue that our union may be less perfect than it was over two centuries ago?

2. Establish Justice

What steps have we taken to "establish justice?" One may cite equal opportunity for all, regardless of race, gender or ethnic background, as a given in our current culture. One may also point to the 13th, 14th and 15th Amendments, and the Voting Rights Act of 1965, as well as marriage equality. But in what areas have we fallen short of this goal?

3. Ensure Domestic Tranquility

How has America "ensured domestic tranquility?" Perhaps we would point to the establishment of a Federal Bureau of Investigation, the U.S. Marshal's service, as well as police forces in States, cities and

counties across the country, all dedicated to preserving the peace. Meanwhile, we have witnessed mass protests against social injustice and police violence, especially in the year prior to the publication of this book. How much more do we have to do to accomplish true tranquility? What solutions would you propose, keeping in mind that any solution must be constitutional?

4. Provide for the Common Defense

Have we provided for the common defense? This would seem to be easily answered by citing the budget for the American defense department, which was in excess of $700 billion in fiscal year 2020.[cite] But in light of challenges posed by international terrorism, cyberwarfare from hackers using ransomware, and threats against democracy from governments such as those in China, Russia, and North Korea, are we safe? Have we adequately provided for the common defense? If not, what can we do to accomplish this goal?

5. Promote the General Welfare

Has America efficiently "promoted the general welfare?" Perhaps the key word in that goal is "general." It wouldn't be hard to argue that many Americans' welfare is being actively promoted, but what about the "general" welfare? What can we do to further promote it?

6. Secure the Blessings of Liberty

The final goal explicitly notes that the freedoms we often take for granted, are actually blessings to be thankful for. Are we doing enough to secure those blessings? Where have we fallen short? In which areas can we improve, while at the same time preserving our economic prosperity and way of life?