



A 90 Day Study of the Amendments to the United  
States Constitution

February 20 – June 22, 2012

Featuring Essays by  
Guest Constitutional Scholars



## **Analyzing the Amendments in 90 Days**

### **Guest Constitutional Scholar Essayists**

**W. B. Allen,**

Dean Emeritus, James Madison College; Emeritus Professor of  
Political Science, Michigan State University

**Dr. Larry P. Arnn,**

President of Hillsdale College

**Dr. John S. Baker Jr.,**

Distinguished Scholar in Residence, Catholic University School of  
Law; Professor Emeritus, Louisiana State University Law Center

**James D. Best,**

Author of *Tempest at Dawn*

**David J. Bobb, Ph.D.,**

Director of the Hillsdale College Allan P. Kirby Jr. Center

**The Honorable John Boehner,**

53rd Speaker of the U.S. House of Representatives

**Janice Brenman,**

Attorney

**Richard Broohiser,**

Author, *James Madison*

**Horace Cooper,**

Senior Fellow with the Heartland Institute

**Cynthia Dunbar,**  
Assistant Professor of Law at Liberty University

**James C. Duff,**  
CEO of the Newseum and the Diversity Institute

**William C. Duncan,**  
Director of the Marriage Law Foundation

**Justin Dyer, Ph.D.,**  
Author and Professor of Political Science, University of Missouri

**Andrew Dykstal,**  
Student, Hillsdale College Class of 2013

**David Eastman,**  
2011 Claremont Institute Abraham Lincoln Fellow

**Hans Eicholz,**  
Historian and Senior Fellow with Liberty Fund, Inc.

**Robert P. George,**  
McCormic Professor of Jurisprudence, Director of the James Madison Program in American Ideals and Institutions, Princeton University

**Michaela Goertzen,**  
Speechwriter, Office of Alaska Lt. Governor Mead Treadwell

**Michelle Griffes,**  
Manager of Programs and Curriculum Development at the Bill of Rights Institute

**Kevin R.C. Gutzman, M.P.Aff, J.D., Ph.D.,**  
Associate Professor at Connecticut State University

**Colin Hanna,**  
President, Let Freedom Ring

**Allison R. Hayward,**  
Vice President of Policy at the Center for Competitive Politics

**Gordon S. Jones,**  
Utah Valley University

**Prof. Joerg Knipprath,**  
Professor of Law at Southwestern Law School

**Marc Lampkin,**  
Shareholder at Brownstein Hyatt Farber Schreck

**George Landrith,**  
President of Frontiers of Freedom

**Andrew Langer,**  
President of the Institute for Liberty

**Gordon Lloyd, Ph.D.,**  
Professor of Public Policy at Pepperdine University

**Dr. John Lott,**  
Author of *More Guns, Less Crime*

**Brion McClanahan, Ph.D.,**  
Author of *The Founding Fathers guide to the Constitution*

**Matthew Mehan,**  
Publius Fellow and U.S. History Teacher

**Prof. William Morrissey,**  
William and Patricia LaMothe Chair in the United States Constitution  
at Hillsdale College

**Eric Rassenbach,**  
Deputy General Counsel at The Becket Fund for Religious Liberty

**Dr. Charles K. Rowley,**  
General Director of the Locke Institute

**Charles E. Rice,**  
Professor Emeritus of Law at the University of Notre Dame

**Tara Ross,**  
Author, *Enlightened Democracy: The Case for the Electoral College*

**Ralph A. Rossum, Ph.D.,**

The Salvatori Professor of American Constitutionalism at Claremont  
McKenna College

**Frank M. Reilly, Esq.,**

Partner at Potts and Reilly, L.L.P.

**Timothy Sandefur,**

Author and Principal Attorney at the Pacific Legal Foundation

**Prof. Kyle Scott,**

Professor of American Politics and Constitutional Law, Duke  
University

**Julia Shaw,**

Research Associate and Program Manager in the B. Kenneth Simon  
Center for Principles and Politics at the Heritage Foundation

**Lawrence J. Spinak,**

President of the Phoenix Center for Advanced Legal and Economic Public  
Policy Studies

**Nathaniel Stewart,**

Attorney

**J. Eric Wise,**

Partner at Gibson, Dunn & Crutcher L.L.P. Law Firm

**February 20, 2012 – Essay #1 – The Amendment Process – Guest Essayist: Dr. Larry P. Arnn, president of Hillsdale College, and author of The Founders’ Key: The Divine and Natural Connection Between the Declaration and the Constitution and What We Risk by Losing It**

Sunday, February 19th, 2012

Only with a large effort can the Constitution of the United States be formally amended. This was not an accident, but the intention of its framers.

If the Constitution is changed too often and for the wrong reasons, the people of America, the Founders held, will lose reverence for its principles, and respect for its rule. With reverence lost, they might cease to be a self-governing people. Tyranny itself could topple liberty.

The Constitution is difficult to amend not because the Founders distrusted the people. In fact, they trusted the American people more than any other constitution-makers had ever before trusted a people. They took pride in the fact that no separate or special class of persons would hold any authority under the Constitution. They created no aristocracy or favored group, and their design did not pit one group of citizens against another.

Instead, they rested all power in the hands of the people. Then they divided that power so as to encourage fairness and deliberation in their judgments. It is the “reason alone of the people that must be placed in control of the government,” writes James Madison in Federalist 49. “Their passions must be controlled by the government.”

Our American regime is the first in which sovereignty lies outside the government—in the people. The Constitution’s structure in its original form was designed to bring power and restraint together. The people must come to respect the restraint of the government so that its properly-limited power might be upheld. The Constitution provides for limited government so that the natural rights of citizens can best be secured.

In this sense, Alexander Hamilton noted that the Constitution itself, even before it was amended, was “a bill of rights.” Adding the first ten amendments, which the First Congress did in 1791, marked a reaffirmation and an explicit statement of rights held by the people and the states, but all of these are affirmed in the original structure of the Constitution—with its separation of powers, representative form, and limited grant of power to the government. All of these essential features of good government were stated with unmistakable clarity in the Declaration of Independence.

Today, the Bill of Rights is often confused as the *source* of American liberties. In fact, as both Madison and Hamilton knew, it is the Constitution’s structure that provides the surest bulwark of our liberties. Destroy the structure, and liberty will be lost. Alter the structure significantly (see the Seventeenth Amendment), and liberty is endangered.

Without reverence for it, the Constitution, like the Bill of Rights that is now part of it, will be but a “parchment barrier.”

Out of the more than 5,000 amendments to the Constitution proposed in Congress since 1789, only 27 have been adopted. There are two possible ways to amend the Constitution, both of them specified in Article V. All of the current amendments to the Constitution have been adopted following the first path, wherein votes are required by two thirds of both houses of Congress, followed by a vote of three-fourths of state legislatures.

The other path, to date not used successfully, is the convention method, in which two-thirds of the state legislatures can call a constitutional convention, after which three-fourths of the state legislatures or state conventions must then ratify the proposed amendment or amendments to the Constitution. Conventions have been avoided probably for good reason, since it is not clear to anyone whether a convention would be bound to changing only one item in the Constitution. We Americans have been pleased to have only one Constitutional Convention.

The *New York Times* recently noted that outside of the defunct Yugoslavian constitution, there is no other constitution in the world so hard to amend as ours. By coupling our Constitution with a failed state, the article seemed to imply that if we don’t get with the times, we will be left behind. Our country, they quote a justice of Australia’s high court as saying, is becoming a “legal backwater.”

For over a hundred years the Constitution has been assailed as undemocratic, and in need of an overhaul.

Long is the list of books written recently suggesting ways—formal and informal—to make our Constitution better. When formal amendment efforts fail, informal methods are advanced. Efforts to informally amend the Constitution—to bring it into better congruity with fashionable legal and political norms of today—can be successful only if citizen reverence for the Constitution is lost.

*—Dr. Larry P. Arnn is president of Hillsdale College, and author of **The Founders’ Key: The Divine and Natural Connection Between the Declaration and the Constitution and What We Risk by Losing It.** Hillsdale’s **[“Constitution 101,”](#)** an online course which features lectures by Dr. Arnn and others, starts today. For more information on Constitution 101, go to: **<http://constitution.hillsdale.edu>***

Tags: [Amendment Process](#), [Constituting America](#), [Founders Key](#), [Hillsdale College](#), [Janine Turner](#), [Larry Arnn](#)

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## **February 21, 2012 – Essay #2 – The Bill of Rights, Purpose and Benefits – Guest Essayist: Richard Brookhiser, Author, James Madison**

Tuesday, February 21st, 2012

The Philadelphia Convention finished the Constitution and sent it on to Congress and to the states in September 1787. There was no Bill of Rights. George Mason, delegate from Virginia, had suggested adding one at the last minute, but his fellow delegates, who had been in session for three and a half months, wanted to get done and get home. They believed they had designed a structure of government that would prevent despots or overbearing majorities from seizing power; a list of rights struck them as mere ornament. “Whatever fine declarations may be inserted in any constitution,” argued New York delegate Alexander Hamilton, in the *Federalist Papers* (#84), “the only solid basis of all our rights” was “the general spirit of the people and of the government.”

In the year-long national debate over whether to ratify the Constitution, it became clear, however, that the American people wanted solid protections written into the new fundamental law. Religious minorities, in particular, were alarmed that the Constitution made no specific mention of their right to worship as they wished. James Madison of Virginia, like most of the delegates to the Philadelphia Convention, originally saw no need for a Bill of Rights; it would be, he feared, a “parchment barrier,” adding nothing of substance to the structural safeguards already built into the new system. But under pressure from Baptists in his home state—a minority sect long bullied by their Anglican neighbors—and from his best friend, Thomas Jefferson, who was then serving as a diplomat in Paris, Madison came around. “A bill of rights,” Jefferson wrote him, “is what the people are entitled to against every government on earth.” Madison came to see that rights written down in black and white would become “fundamental maxims of good government.” They would “rouse the attention” of Americans, who would rally to defend them.

So in June 1789, in the First Congress, Madison, who had been elected as a representative from Virginia, took the lead in drafting a set of amendments. He originally wanted to shoehorn his new additions into the body of the Constitution, but most of his colleagues favored adding them at the end. Congress submitted twelve amendments to the states for ratification in September 1789. The first, which regulated the size of congressional districts, fell by the wayside. The second, which concerned congressional pay, was not ratified until 1992, when it became the 27<sup>th</sup> Amendment. But by December 1791, the remaining ten amendments had been ratified—the Bill of Rights of today. Their distinct position, and the magic number ten—like another famous set of laws—ensured that they would “rouse the attention” of Americans, as Madison put it.

There had been bills of rights in English and American law for centuries, and the men who drafted the American Bill of Rights drew on these precedents. The right to petition (1<sup>st</sup> Amendment) and to trial by jury (6<sup>th</sup> Amendment) went back to Magna Carta (1215). The right to bear arms (2<sup>nd</sup> Amendment) and the prohibition of excessive bail and fines and of cruel and unusual punishments (8<sup>th</sup> Amendment) appear in the English Bill of Rights (1689). The Virginia Declaration of Rights (1776) enshrined freedom of the press and free exercise of religion (1<sup>st</sup>



Amendment), and forbade arbitrary search warrants (6<sup>th</sup> Amendment) and compelling anyone to testify against himself (5<sup>th</sup> Amendment).

But the Bill of Rights added two brand-new provisions. The 9<sup>th</sup> amendment protects all “other” rights not specifically mentioned in the Constitution, while the 10<sup>th</sup> amendment “reserves” powers not assigned to the federal government to the states and to the people. These fortify the structural balance of the Constitution itself. They are a warning to the future: just because we haven’t thought of everything doesn’t mean you can grab for power.

Jefferson, as he often did, found just the right words to describe the impact of the Bill of Rights, which in this case came from his experience as an amateur architect: “a brace the more will often keep up the building which would have fallen” without it.

The Bill of Rights is a worthy addition to the great work that was done in Philadelphia in 1787.

*Distinguished author and historian Richard Brookhiser is the author of James Madison; America’s First Dynasty about John Adam’s family; Gentleman Revolutionary, about Gouverneur Morris; and Alexander Hamilton, American.*

Tags: [Bill of Rights](#), [Constituting America](#), [Janine Turner](#), [Richard Brookhiser](#)  
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### **February 22, 2012 – Essay #3 – \*The Bill of Rights: America’s Bulwark of Liberty – Guest Essayist: Horace Cooper, Senior Fellow with the Heartland Institute**

Wednesday, February 22nd, 2012

The First Ten Amendments to the United States Constitution make up what is called “The Bill of Rights.” This remarkable collection of limitations on the power of the national government was written by James Madison and heavily influenced by George Mason. Today it operates as a barrier to oppressive government at all levels and protects citizen liberty.

While most Americans at the time of the writing of the US Constitution agreed that the Articles of Confederation had failed to provide the former colonies with the powers needed to insure the experiment in self-government would succeed, there was another contingent who argued that any new and expanded powers given to the central government must be overlaid with specific limits in order to ensure that the citizens rights wouldn’t be trampled. They argued that rather than limiting principles, there should be specific prohibitions on what government is allowed to do, especially in the context of its treatment of its citizens.

The two camps generally called themselves Federalists and Anti-Federalists. While the design and makeup of the original Constitution is a triumph of the Federalists, the Bill of Rights represents the success of the Anti-Federalists.

Timeless in their rigor and value, the Bill of Rights has proven to be a brilliant tool to limit government excesses and insure that the individual has the kinds of freedoms that many of us take for granted. While the writers of the Constitution created a system of checks and balances that cause the three branches of government to be limited in their ability to achieve hegemony vis-à-vis the other, it is the Bill of Rights that has done more to protect individual liberty — doing so by specifically placing limits on government power.

While the Federalists won the day with the original draft of the Constitution, it soon became clear that the American people wouldn't accept the Constitution unless a Bill of Rights was agreed to. Shortly after meeting, the first Congress began that process. Originally 17 Amendments or changes to the Constitution were presented and passed by the House of Representatives. Of those 12 were passed by the United States Senate and sent to the states for approval in August of 1789. 10 of these were approved (or, ratified) with George Mason's state of Virginia becoming the last to ratify the amendments on December 15, 1791.

Indubitably, liberties that we take for granted as Americans find their origin in the Bill of Rights. One key aspect of the Bill of Rights is that instead of expanding or authorizing the powers of the central government, the Bill of Rights squarely and directly treats government power as a potential threat to citizen liberty and places clear and unequivocal barriers to government action. More a list of what government cannot do, the Bill of Rights provides a zone of liberty that makes our American system of citizenship the envy of the world.

The supporters of the concept of the Bill of Rights understood that government's tendency was to expand and over-run the individual. And the beauty of the Bill of Rights, its simplicity is, it limits government power and by doing keeps Americans free.

## 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.*

- ☒ The government cannot make you believe in a religion.
- ☒ The government cannot keep you from practicing any religion you choose.
- ☒ The government cannot keep you from saying what you wish.
- ☒ The government cannot keep you from writing what you want.
- ☒ The government cannot stop you from publishing what you wish.

☒ The government cannot keep you from joining together peacefully with others to express your views.

☒ The government cannot prevent you from complaining about what the government or others are doing to you.

The framers understood that freedom of faith, thought, political belief and other forms of expression were central to citizen liberty and they specifically barred government action in this arena. Rather than leave to the majority whether Catholics, Protestants, Jews or even people of no faith would receive preference by the national government, the First Amendment insures that no religious group would be preferred nor would any be penalized. It also prevents the government from using coercive powers to reward certain political thoughts or writings as well as punishing the same. Finally it further insures that citizens have the right to complain specifically about the activities of the government and to engage in demonstrations as well as formally taking measures to get the government itself to change policies.

#### *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.*

☒ The government cannot take away your right to own and keep guns.

Rather than leave fire arm access to the government, our Bill of Rights explicitly insures that the right to bear and own firearms is a fundamental right – not a privilege – that resides with every citizen.

#### *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.*

☒ The government cannot make you let soldiers to live in your house unless the country comes under attack and Congress specifically authorizes it.

Even though war-making activity is the quintessential government duty and activity, this power is not unlimited. While it might be cost-effective or even efficient, government has to respect that our homes are our property and may not be overtaken by the military during peace-time and during war only in a legal manner determined by Congress.

#### *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.*

☒ The government cannot come into your home unless it has legal permission from a judge.

Perhaps one of the greatest threats that the citizen faces is the potential that the central government will use force to enter our property whether under pretext of solving crimes or ferreting out critics of the government residing therein. The founders recognized that the principle that the individual citizen was the “king” of his own “castle” especially when the government sought unlawful entry was a powerful limit on government excesses. Juxtaposing judges and other magistrates before the government can take, enter or search property protected liberty in the 18<sup>th</sup> century and the 21<sup>st</sup> as well.

#### *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 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.*

☒ The government cannot hold you in jail for a major crime without the knowledge and approval of your fellow citizens.

☒ The government cannot try a person twice for the same crime.

☒ The government cannot make incriminate yourself.

☒ The government cannot take away your life, liberty, or property without following the law.

☒ The government cannot take your private property from you for public use unless it pays to you what your property is worth.

King George and his predecessors in England had the ability to falsely accuse and even imprison or execute his opponents without even a pretext of any real violation of the law. Our system rejects this idea. The Bill of Rights requires that your fellow citizens be presented with the charges against you and that those charges not be presented to you more than once or that you or your property be taken from you without having legal recourse to challenge it. Americans can't be forced to give incriminating testimony against themselves and their assets can't be confiscated by the government without being justly compensated.

## *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.*

☒ The government cannot hold you in jail for a long time without a trial if you are accused of having broken the law.

☒ The government cannot deny to you a speedy trial with a jury of your fellow citizens.

☒ The government cannot keep secret from you those who will speak against you.

☒ The government cannot prevent you from having your personal attorney.

☒ The government cannot keep you from having other people help you defend yourself in a courtroom.

Instead of the use of secret trials and star chambers, our system specifically requires that when people are accused the trials must not be unnecessarily lengthened and must be held in public. The individuals who decide guilt or innocent – jurors – must be impartial and residents of the area where the accused crime was to have occurred. Instead of announcing new charges mid-trial, the government must announce the charges with specificity and must present witnesses against him and must allow him to bring in his own witnesses to testify on his behalf and may not prevent him from having legal assistance if he chooses.

## *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.*

☒ The government cannot keep you from having a trial decided by your fellow citizens in civil disputes and the fact-finding by the jury in those trials cannot be overturned by other courts.

Civil cases, like criminal cases provide potential opportunity for liberties to be risked. Our founders guaranteed that civil disputes will be subject to jury trials instead of the whims of government magistrates and also that the findings of jurors can't be second guessed by judges. The government can't pick sides or use its judicial appointees to try to influence the outcomes of civil disputes.

## *Amendment VIII*

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

☒ The government cannot make people pay an unfairly high amount of money for bail while they wait for a judge or jury to hear their case.

☒ The government cannot punish you for a crime in a cruel and unusual way.

The government is not allowed to skip the trial phase by holding citizens in jail with high bails having nothing to do with the severity of their crime or any flight risks they pose. Even when citizens are found guilty, the federal government may not assess fines that aren't connected with the severity of their crime nor may they issue punishments that are depraved and unduly harsh.

#### *Amendment IX*

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

☒ The government cannot limit your rights to just those listed in the Bill of Rights.

Reaffirming the anti-federalists view that government tends to expand whenever and however it can and ultimately crowding out the rights and privileges of its citizens, our founders have made it clear that the Constitution and even the Bill of Rights do not attempt to outline every existing natural or inalienable right of citizens.

#### *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.*

☒ The government cannot claim to possess more power and authority than what the Constitution permits, and all other powers not listed in the Constitution belong to the states or individuals.

Since the Constitution is a charter of specific and enumerated powers, there are rights that exist above and beyond those addressed in it. Those powers and rights that are not specifically addressed in the Constitution and those powers that are not banned by states through the Constitution are real and duly allowed to be exercised by the states and the people.

*Horace Cooper is a senior fellow with [The Heartland Institute](#)*

Tags: [Bill of Rights](#), [Constituting America](#), [Heartland Institute](#), [Horace Cooper](#), [Janine Turner](#)  
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**February 23, 2012 – Essay #4 – The First Amendment: The Establishment Clause – Guest Essayist: David J. Bobb, Ph.D., director of the Hillsdale College Allan P. Kirby, Jr. Center for Constitutional Studies and Citizenship, in Washington, D.C.**

Wednesday, February 22nd, 2012

The First Amendment: The Establishment Clause

The Establishment Clause of the First Amendment might be less well known today than “the wall of separation between church and state” metaphor used by President Thomas Jefferson in an 1802 letter. This misinterpreted metaphor has come to define the modern debate over church and state, leading many Americans to believe that the Constitution calls for the strict separation of religion and politics.

In fact, what the Establishment Clause actually accomplished is nearly opposite what the Supreme Court in the twentieth century said it means. In barring Congress from establishing a national church, the Establishment Clause marked an important commitment of the Founders to civil and religious liberty. Unlike England, America would not have an official church. This is good for government, and good for religion. Congress was prohibited from imposing a one-size-fits-all religious straitjacket on the nation, leaving state governments wide latitude of operation in matters of church and state.

In the 1947 Supreme Court decision in *Everson v. Board of Education*, the First Amendment policy of federalism was supplanted by the doctrine of incorporation. Ruling that the First Amendment’s Establishment Clause is applied not just against Congress but also against the states (through the Due Process Clause of the Fourteenth Amendment), the Court put itself on a quick path to becoming the national arbiter of all disputes over religious matters pertaining to public entities. As Justice Hugo Black wrote, “The First Amendment has erected a wall between church and state. That wall must be kept high and impregnable. We could not approve the slightest breach . . . .”

Under this new standard, the Supreme Court found breaches in the wall nearly everywhere it looked, as it ruled unconstitutional many longstanding practices, including prayer and Bible reading in public schools. Assuming the mantle of a “national school board,” as one scholar put it, the Court put forward various “tests” by which it sought to determine the religious or secular purpose of public assistance to religion.

The modern legal understanding of the Establishment Clause has led to a confusing array of contradictory decisions. For instance, whether a municipal crèche display is an unconstitutional violation of the Establishment Clause hinges in part on what other symbols—religious or secular—are included in front of city hall. State laws allowing government funding of secular textbooks

for private schools have been deemed by the Court constitutional, but government funding of field trips in private schools has been held unconstitutional.

For the Founders, public support of religion, whether by the federal or state government, was never tantamount to the unconstitutional establishment of religion. In fact, nearly all of the Founders held that the public promotion of religion and virtue was vital to the maintenance of republican institutions. Religion was affirmed as a public good, not an evil to be kept private. Prudence dictated, many early Americans believed, that state established churches did not make for good policy, but none argued that when a dispute arose in a state about its established church, or public support of religion, that the national government should step in and impose a solution. That was a matter for the states to decide, and increasingly they would do so informed by constitutions and laws that upheld the full natural rights of all citizens.

Protection of religious liberty was of paramount importance to the Founders, but the means by which citizens were protected in their liberty came not mainly in the adoption of the Establishment Clause, but in the constitutional architecture as a whole. “The Constitution is a bill of rights,” Alexander Hamilton said, emphasizing the fact that the locus of liberty is not any list, but rather the equipoise of limited government, federalism, and separation of powers that should be maintained in the Constitution’s structure.

Finally, it is worth noting that the First Amendment was not even first on the list of twelve that James Madison originally proposed in the First Congress in June 1789. Nor was it first in the list the Congress sent to the states in September of that same year. When the two amendments preceding what is now the First Amendment were not ratified immediately (one was about representative ratios, while the other, which was adopted as the 27<sup>th</sup> Amendment, was about congressional compensation), the Establishment Clause was thrust into its starring role as the first clause in the First Amendment.

The Establishment Clause of the First Amendment is a clear statement of the fact that the United States of America has no official church. In endorsing the federalism of the Constitution, and explicitly barring Congress from arrogating unto itself power it does not have, the Establishment Clause reaffirms the powerful commitment of the Constitution to the promotion of civil and religious liberty.

*David J. Bobb, Ph.D., is director of the Hillsdale College [Allan P. Kirby, Jr. Center for Constitutional Studies and Citizenship](#), in Washington, D.C. Hillsdale’s free online course, “[Constitution 101](#),” starts this week. [The U.S. Constitution: A Reader](#), around which the course is based, includes 113 documents, including a complete section on religious liberty.*

Tags: [Constituting America](#), [David J Bobb](#), [Hillsdale College](#), [Janine Turner](#), [The Establishment Clause](#), [The First Amendment](#)

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**February 24, 2012 – Essay #5 – The First Amendment: The Free Exercise Clause – Guest Essayist: Eric Rassbach, Deputy General Counsel at The Becket Fund for Religious Liberty**

Thursday, February 23rd, 2012

“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . .”

The Free Exercise Clause is perhaps the least commonly understood part of the First Amendment. The mythical “average American” presumably understands what freedom of speech means – we protect the right of almost anyone to say almost anything – and the Establishment Clause has been given the catchy, if mostly inaccurate, shorthand of “separation of church and state.” But were one to ask this hypothetical average American what protecting free exercise of religion means, she might respond with a blank stare.

So why is the Free Exercise Clause so unknown, and what does it really mean today? Some blame for the Clause’s obscurity must lie with its checkered history. That history can be divided into roughly five stages. The first stage lasted 87 years, from 1791 to 1878, and was characterized by judicial silence. Although the Clause was ratified as part of the Bill of Rights in 1791, the Supreme Court had no occasion to address it, other than to say briefly, in 1842, that it applied only to the federal government, not states and cities. This silence does not mean that the Clause had no public meaning; indeed, it was cited time and again in debates over religion in the public square. But it did not appear in court, and its meaning remained rhetorical and political, not legal.

That first phase came to an end in 1878, with the *Reynolds* case. In that case, the Supreme Court held that the Free Exercise Clause did not protect the practice of religious polygamy. Thus began an unsettled period for the Court’s Free Exercise jurisprudence. Two separate strands of caselaw emerged—one rooted in *Reynolds* and limitations on religious exercise, and another rooted in the ability of churches, synagogues, and other religious institutions to manage their own internal structures and their property.

The tensions in Free Exercise jurisprudence became apparent in a series of cases involving Jehovah’s Witnesses during the 1940s. These cases at first resulted in at first narrow readings of the Clause and then increasingly broader readings that provided protections to the Jehovah’s Witness plaintiffs.

This second and turbulent stage ended, and the third began, with *Sherbert v. Verner*, decided in 1963. In that case, the Court took a very strong stand in favor of individual religious liberty, holding that a Seventh-day Adventist could not be denied unemployment benefits because she was fired from her job for observing the Sabbath. The Court said that any government-imposed “substantial burden” on religious activity would be very difficult for the government to justify.

This standard, extremely protective of religious liberty, represented a high-water mark in the history of the protection of Free Exercise.

The Clause's course took a sharp turn in a less religion-friendly direction 28 years after *Sherbert* was decided. In *Employment Division v. Smith*, decided in 1990, the Court held that Native Americans who had been convicted for smoking peyote in accordance with their religious beliefs did not have a right to state unemployment benefits. Because the Oregon anti-narcotic law at issue was a "neutral rule of general applicability" the Free Exercise Clause would provide no protection to the religious plaintiffs.

This was true even though, like the *Sherbert* regulation, the rule imposed a "substantial burden" on their religious activity. The *Smith* ruling represented a dramatic shift in the law of Free Exercise, making it much more difficult for religious people to protect themselves against religion-restrictive laws. For a time, it seemed that the only way to evade *Smith's* rule would be by convincing Congress and state legislatures to provide relief in the form of civil rights statutes protecting religion.

But in 2012, the Court announced a fifth and entirely new stage of the Clause's existence in *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*. In *Hosanna-Tabor*, the Court held, in a 9-0 decision, that federal and state employment discrimination laws do not apply to "ministerial" positions. The Court thus made clear that *Smith's* rule did not apply in the same way to religious institutions as it did to religious individuals. Indeed, religious activities related to "internal church decisions" would fall outside the *Smith* rule entirely, a result that shocked many long-time observers of the Court's religion decisions.

The next steps for the law of Free Exercise are not clear, but they are much more hopeful for religious people and institutions than they were before *Hosanna-Tabor* was decided. One could argue that this up-and-down history shows a kind of national, or at least judicial, schizophrenia when it comes to the place of religious people in public life. But that schizophrenia may simply mirror Americans' uncertainty about the role of religion in public life, especially given the increasing religious diversity of our nation. The law could move in the direction of France or other Western European countries that have in effect attempted to drive religion out of public life, or to control it directly. But the law might also move in the direction of increasing religious freedom for every American, and decreasing government interference with religious people.

So what *should* the Free Exercise Clause mean, at its most fundamental level? There is a case to be made that the Clause stands for the idea that every person, and every religious group, gets to decide for themselves what they believe about the good and the true, and to act on those beliefs in public. In that sense, the Clause carves out a kind of sacred space in the American body politic—a place where Americans can work out their relationship with God free from government interference, indeed, a place where the government must fear to tread. By its nature, religious freedom cannot be without limits. But by the same token government cannot be without limits, and some areas must remain completely free from government influence.

But this sacred space is under siege in today's ever-growing regulatory state. As they expand their influence over more and more areas of American life, governments at the federal, state, and local levels increasingly run roughshod over the claims of conscience. Prominent recent

examples include the federal government's attempt in the *Hosanna-Tabor* case to take over some ministerial and hiring and firing decisions, as well as the recently-issued healthcare mandates that would force Catholic, Protestant, and other religious groups to violate their consciences by paying for drugs and devices they believe cause abortion. State governments have made similar attempts to limit the conscience rights of religious institutions like churches and homeless shelters, as well as the conscience rights of individuals like pharmacists and doctors who object to participating in certain medical procedures.

These conflicts will only grow in size and number as government expands and becomes more aggressively secular. Therefore it will be important for religious Americans in coming years to fight for the sacred space staked out by the Free Exercise Clause, because government will not stay out on its own.

*Eric Rassbach is Deputy General Counsel at The Becket Fund for Religious Liberty, a non-profit law firm based in Washington, D.C. that defends the free expression of all religious traditions. He led the Becket Fund team that litigated the Hosanna-Tabor case.*

Tags: [Constituting America](#), [Eric Rassbach](#), [Janine Turner](#), [The Becket Fund for Religious Liberty](#), [The First Amendment](#), [The Free Exercise Clause](#)

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## **February 27, 2012 – Essay #6 – The First Amendment: Congress Shall make no law....abridging the freedom of speech – Guest Essayist: Andrew Langer, President of the Institute for Liberty**

Sunday, February 26th, 2012

*Congress shall make no law...abridging the freedom of speech.*

In our free republic, fewer rights are more cherished, or more important, than those enumerated in the First Amendment. It is the hallmark of a free society that the people can speak their minds without fear of retribution from the government or other citizens. Fundamentally, there are always two questions that accompany any dissection of free speech rights: what is their seminal role in our society (ie, why do we have them?), and what are the limits to free speech?

People say things with which we might vehemently disagree. They may make us angry, they may make us outraged. And the feeling might very well be mutual. Yet both their speech, and your own, are equally protected under the US Constitution. For the United States, this creates a

true marketplace of ideas. A marketplace that has the benefit of allowing ideas that are reasoned, thoughtful, and valid to take hold, while ideas that simply *aren't* (reasoned, thoughtful, *or* valid) to wither and die.

It is the latter that is perhaps free speech's greatest asset in our society. Justice Louis Brandeis wrote that, "sunshine is the best disinfectant," and this is especially true when it comes to speech that, were it outlawed, would fester or become cancerous when kept behind closed doors. In fact, when you look at societies within which free speech was outlawed, when those societies ultimately moved towards freedom, the forces of hate simply exploded on the scene, because for so long there had been no open debate or airing of the stilted beliefs of extremists groups.

In the US, we want people with the most hateful, horrible ideas to be able to say them, loudly and publicly. That way, we can not only challenge them directly (if we want), but we know which people to avoid, if we want. It's as though they've put on the brightest, most-garish sign around their neck, saying, "AVOID ME," and we'd be wise to heed their warnings.

Just as important, however, are the limits to those free speech rights. It is one of the most basic hallmarks of our society that the exercise of rights is only justly limited by their direct and harmful impact on others. In other words, I may have the right to swing my hands around wildly, but that right ends at the point where my hands meet someone else's nose.

Though the adage still prevails that "sticks and stones may break my bones, but names can never hurt me," the truth is that words *can* and *do* hurt—and the law has made several important carve-outs for speech that is *not* protected by the 1<sup>st</sup> Amendment.

One of the most basic carve-outs is for speech that is considered defamatory—which, in laymen's terms, is essentially knowingly spreading falsehoods about a person for the purposes of harming that person's reputation—destroying a person's personal life or ability to make a living. Other restrictions are placed on speech that works to incite violence, or immediate wanton lawlessness—the concept that someone can neither work to provoke people to an immediate riot, or, likewise to yell "fire" in a crowded theater. Commercial speech, and speech over the public airwaves, can also be regulated—generally under the concept that people cannot make false claims about the goods that they sell, and that because the government assigns space on the public airwaves, the government can prohibit certain kinds of content from being broadcast if it can be deemed offensive.

But by that same token, one of the most controversial debates over free speech today is found in the realm of whether or not corporate interests have free speech rights in the same manner that individuals do. The Supreme Court ruled in their well-known *Citizens' United* decision that, in point of fact, corporations *do* have these rights—a decision that many progressives have decried, and are attempting to undo.

Should they succeed, it would create a very dangerous situation—not only because these corporations are taxed and regulated very similarly to individuals (and, in some cases, more stringently), and therefore ought to be able, as affected entities within a society, to speak out on their own behalf, but many corporate institutions serve valuable purposes within our civil society.

If we fail to extend free speech protections to corporations, what is there to prevent an angered government, upset with a news company's coverage of their actions, from shutting down that news organization's business? While some might argue that the government would be prevented from silencing the individual journalists within that organization, should the government succeed in closing down the corporation's tools, the journalists will have been silenced.

Dissent is the hallmark of any free society—and whether that dissent comes from individuals or corporations, it is an essential element in civil discourse. As a people we require free speech to allow good ideas to prevail, and bad ideas to be defeated.

*Andrew Langer is President of the [Institute for Liberty](#), and host of *The Broadside*, a weekly internet radio show, which can be heard on the [Institute for Liberty](#) website.*

Tags: [Andrew Langer](#), [Constituting America](#), [Freedom of Speech](#), [Janine Turner](#), [The First Amendment](#)

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## **February 28, 2012 – Essay #7 – The First Amendment: Freedom of the Press – Guest Essayist: James C. Duff, CEO of the Newseum and the Diversity Institute, and President and CEO of the Freedom Forum**

Monday, February 27th, 2012

“Congress shall make no law ... abridging the freedom of ... the press ...” Those words, along with all others in the First Amendment to the Constitution of the United States, are engraved in the 74 foot high marble wall on the front of the Newseum on Pennsylvania Avenue in Washington, D.C. The words are simple. Enforcing those words – though not always easy or successful – is crucial to our democracy.

I recently saw a friend touring the Newseum who told me of a Russian visitor's observation about our freedoms. The visitor said, “We have freedom of the press in Russia too. The difference in America is you remain free after you publish.” His comment is both humorous and profound.

Many countries have a Bill of Rights. Very few have mechanisms to enforce and preserve those rights. What distinguishes our system of government from most others in the world? What breathes life into our Constitutional freedoms? We are indebted to our founders for the brilliant system of checks and balances of power built into our Constitution. One of the most important checks on power is an independent and free press, “designed to serve as a powerful antidote to

any abuses of power by governmental officials” as the Supreme Court noted in Mills v. Alabama (1966).

How do the mechanics and the design of the “powerful antidote” work? Suppose Congress does make a law that abridges the freedom of the press. In the United States, the press is free to challenge the law not only in print and other media, but also in court. Once in court, an independent Judiciary is free to declare such a law unconstitutional and preserve the press’ freedom. If Congress attempts to undercut the power of the Judiciary by, for example, requiring judges to explain their decisions to a Congressional committee or face impeachment for an unpopular decision, the press can expose the attempt and bring public pressure to bear on Congress. Such critical analysis, coupled with an engaged and educated public can prevent the evisceration of an independent Judiciary (in this example) or other intrusions by one branch on another’s responsibilities. The mechanics are circular and the gears work – most of the time.

Our history is certainly full of examples of a free and independent press exposing abuses of power by governmental officials. Unfortunately, there are also examples in our history in which we have failed to enforce the freedom of press embodied in the First Amendment.

Only seven years after the ratification of the First Amendment, a Federalist-dominated Congress passed the Sedition Act of 1798, a tool used to suppress the contrary views of Democratic – Republican newspaper editors. For example, Matthew Lyon, a member of the U.S. House of Representatives from Vermont and newspaper owner, was put in jail for referring to President John Adams’ “unbounded thirst for ridiculous pomp, foolish adulation, and selfish avarice.” It became abundantly clear that the Act was unconstitutional, and a new Congress allowed the Act to expire in 1801 but not before several egregious suppressions of a free press had occurred.

There are several other examples of suppression of the press in our history, notably during periods of war. Abolitionist newspapers were torched in the 1830’s. During the Civil War, the Lincoln Administration ordered the closure of several newspapers and the arrests of several newspaper editors who opposed the Union efforts. During World War I, Congress passed the Espionage Act of 1917, President Woodrow Wilson invoked it aggressively to suppress publications opposing to the draft, and in 1919 the Supreme Court unanimously upheld the convictions of Charles Schenck and Elizabeth Baer who had been convicted of violating the act when they printed leaflets urging draftees to resist the draft. Similarly, the mailing privileges of the *Milwaukee Leader* were revoked by the Postmaster General during World War I because he concluded that their articles were interfering with the military’s efforts. The Supreme Court upheld the Postmaster General’s actions.

In retrospect, it might appear that many of these historic suppressions of a free press could not occur in the United States today and that we have made significant progress and learned from those experiences. During times of conflict, however, our country has compromised on freedom of the press. Whether these particular examples could be repeated or not, they demonstrate that even with the protections clearly provided in our Constitution, and even with the best form of government ever devised to ensure those protections, ultimately the best defense of our Constitutional freedoms depends on an attentive, educated and engaged citizenry.

That is why the civic education efforts of Constituting America and the Freedom Forum are so vitally important to our future.

*James C. Duff is the President and chief executive officer of the [Freedom Forum](#) and CEO of the [Newseum](#) and the [Diversity Institute](#). Mr. Duff is the former Director of the Administrative Office of the U.S. Courts, former Counselor to Chief Justice William H. Rehnquist, and former Chairman of the U.S. Supreme Court Fellows Commission.*

Tags: [Constituting America](#), [Freedom of the Press](#), [James Duff](#), [Janine Turner](#), [Newseum](#), [The First Amendment](#)

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**[February 29, 2012 – Essay #8 – The First Amendment: Congress Shall Make No Laws....Abridging the Right of the People to Peacefully Assemble – Guest Essayist: Professor William Morrissey, William and Patricia LaMothe Chair in the United States Constitution at Hillsdale College](#)**

Wednesday, February 29th, 2012

The Right to Effective Citizenship

Free worship; free speech; freedom to publish; and the rights of the people to assemble peaceably and to petition their government: we cherish our First Amendment freedoms but we may not see how intimately they support one another, how much they need each other.

Free worship means that I may listen to the most important things, the first principles that govern my life, without fear of persecution. These principles will anchor my conduct, providing me the standards by which I may judge my own actions and those of others. Free speech and freedom to publish mean that I may safely tell people what I think, having worshipped—that is (among other things) having thought.

But what good would my worship, my speaking, and my writing be—beyond those who happen to worship with me, or hear me speak, or read my writings (small numbers all!)—if I and my fellow citizens had no right to get ourselves organized, to get the attention of our elected representatives, to *do* things that have real effects in our *public* life?

The right to assemble in public did not prevail in most places, in most times. Public assemblies endanger rulers. They can endanger the peace. During the virulent civil wars of England, fought

over intractable issues of religious conviction, what sensible king would not view such gatherings with fear and suspicion? In his *Letter Concerning Toleration* the great English political philosopher John Locke acknowledged that assemblies of men had often been “nurseries of faction and sedition.”

But Locke went on to write that this was so only because “the unhappy circumstances of the oppressed or ill-settled liberty” *make* such men violent. In an atmosphere of genuine religious toleration—of *well*-settled liberty—this need not be so. After all, he argued, do men not meet peaceably every day in local markets? Do they not circulate freely on the streets of cities? Why then do rulers fear religious assemblies? “Let us deal plainly,” Locke writes. “The magistrate is afraid of other churches, but not of his own; because he is kind and favourable to the one, but severe and cruel to the other.” But “let him let those dissenters enjoy but the same privileges in civil as in other subjects, and he will quickly find that these religious meetings will no longer be dangerous.... Just and moderate governments are everywhere quiet, everywhere, safe; but oppression raises ferments and makes men struggle to cast off an uneasy and tyrannical yoke.”

Thomas Jefferson knew his Locke. In the summer of 1774 he addressed his fellow citizens on General Gage’s proclamation in Massachusetts, “declaring a Treason for the Inhabitants of that Province to assemble themselves to consider of their Grievances and form Associations for their common Conduct on the Occasion.” Gage was Commander in Chief of his Majesty’s army in America; his “odious and illegal proclamation must be considered as a plain and full Declaration that this despotick Viceroy will be bound by no Law, nor regard the constitutional Rights of his Majesty’s Subjects, whenever they interfere with the Plan he has formed for oppressing the good People of the Massachusetts Bay.” When Jefferson and his colleagues in the Continental Congress met two years later to issue their own proclamation—for independence and against tyranny—they never forgot that the right to assemble peaceably gives a people the way to carry their thoughts and speeches into civic action.

Fifteen years almost to the day on which Jefferson spoke, the House of Representatives debated the first ten amendments to the newly-ratified federal constitution. The floor manager for the amendments was none other than Jefferson’s closest political ally, James Madison. In the course of the debates the Congressmen showed that they understood matters exactly as Jefferson had done. “If people converse together, they must assemble together,” one Member quite sensibly remarked. But more, “the great end of meeting”—its purpose—“is to consult for the common good; but can the common good be discerned” unless “the object is reflected and shown in every light.” That is, I may revolve a topic in my own mind a thousand times, but when when I share my thoughts with others I will begin to see things I had overlooked. This is the advantage of *deliberation* in common over mulling things over by oneself. Still further, as another Member observed, “under a democracy, whose great end is to form a code of laws congenial to the public sentiment, the popular opinion ought to be collected and attended to.” We not only need to think; once our thoughts have been refined and augmented by the thoughts of others, we then need to get the attention of those who can do something about the things upon which we have resolved. The Congressmen knew that writing a letter to one’s Congressman will likely have far less effect than a petition signed by dozens—the product of a public assembly of citizens. Therefore, the same Member concluded, “the people have the right to consult for the common good.”



When the French political philosopher and parliamentarian Alexis de Tocqueville arrived in America a half a century later, he remarked on the importance of civil associations to American self-government. Under the old states of Europe, the class of people who stood between the central state powers and the people had been the aristocrats—the same class that forced the Magna Charta on the King of England. But in the modern world, Tocqueville saw (he being an aristocrat), aristocracy was declining. Absent such a class, who or what would stand in the way of an oppressive central government tyrannizing the people. Would democracy collapse upon itself, with the people first setting up a government and then watching helplessly as it moved ponderously to crush the very rights governments are designed to secure?

Not so in America, Tocqueville saw. There, the citizens have learned to organize themselves not ‘vertically’ under an aristocratic class but ‘horizontally’ with civil associations: political parties, churches, clubs, societies—all of them with sufficient strength to push back against unwarranted governmental encroachments. Tocqueville reported that Americans had perfected “the art of association” to the highest degree of any people, employing this art peacefully to defend their liberties against their own governments, when necessary. To this day, Americans dissatisfied with their local school board, their state legislature, or the federal government itself, respond by getting together with like-minded citizens and—as we like to say—taking control of their own lives.’ In so doing, they act exactly as John Locke, the American founders, and Tocqueville wanted and expected human beings to do. Even more, by exercising the art of association Americans to a large and impressive degree govern themselves—that is, they get things done, so that governments will need to do less. Governments that need to do less can be smaller and likely less oppressive than governments that think they need to *do it all*. And those fewer things they do need to do will likely be done better.

***Will Morrissey holds the William and Patricia LaMothe Chair in the United States Constitution at Hillsdale College, Hillsdale, Michigan, where he has taught since 2000.***

Tags: [Constituting America](#), [Hillsdale College](#), [Janine Turner](#), [Peaceful Assembly](#), [The First Amendment](#), [William Morrissey](#)

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**March 1, 2012 – Essay #9 – The First Amendment: Right to petition the Government for a redress of grievances – Guest Essayist: William C. Duncan, Director of the Marriage Law Foundation**

Thursday, March 1st, 2012

It is a commonplace to trace the origins of the right to petition the government for a redress of grievances to Magna Carta in 1215. There, Barons displeased with King John's pretension to absolute, forced him to agree to specific limitations on his authority in deference to that of the nobility. Chapter 61 of the Great Charter (<http://www.constitution.org/eng/magnacar.htm>) provides:

*Since, moreover, for God and the amendment of our kingdom and for the better allaying of the quarrel that has arisen between us and our barons, we have granted all these concessions, desirous that they should enjoy them in complete and firm endurance forever, we give and grant to them the underwritten security, namely, that the barons choose five and twenty barons of the kingdom, whomsoever they will, who shall be bound with all their might, to observe and hold, and cause to be observed, the peace and liberties we have granted and confirmed to them by this our present Charter, so that if we, or our justiciar, or our bailiffs or any one of our officers, shall in anything be at fault towards anyone, or shall have broken any one of the articles of this peace or of this security, and the offense be notified to four barons of the foresaid five and twenty, the said four barons shall repair to us (or our justiciar, if we are out of the realm) and, laying the transgression before us, petition to have that transgression redressed without delay. [Emphasis added]*

Philip Kurland and Ralph Lerner's invaluable *The Founders' Constitution* contains in its section on the First Amendment the report ([http://press-pubs.uchicago.edu/founders/documents/amendI\\_assemblys6.html](http://press-pubs.uchicago.edu/founders/documents/amendI_assemblys6.html)) of the 1688 "Trial of the Seven Bishops for Publishing a Libel." The bishops were accused of libel when they attempted to petition King James II in protest of his declaration of limited religious freedom for Catholics and other dissenters from the Church of England. They were found not guilty after a trial in the Court of King's Bench in which Justice Holloway told the jury:

*Gentlemen, the end and intention of every action is to be considered; and likewise, in this case, we are to consider the nature of the offence that these noble persons are charged with; it is for delivering a petition, which, according as they have made their defence, was with all the humility and decency that could be: so that if there was no ill intent, and they were not (as it is not, nor can be pretended they were) men of evil lives, or the like, to deliver a petition cannot be a fault, it being the right of every subject to petition. If you are satisfied there was an ill intention of sedition, or the like, you ought to find them guilty: but if there be nothing in the case that you find, but only that they did deliver a petition to save themselves harmless, and to free themselves from blame, by shewing the reason of their disobedience to the king's command, which they apprehended to be a grievance to them, and which they could not in conscience give obedience to, I cannot think it is a libel: it is left to you, gentlemen, but that is my opinion.*

The 1689 Bill of Rights (<http://www.fordham.edu/halsall/mod/1689billofrights.asp>) explicitly protected “the right of the subjects to petition the king” and said “all commitments and prosecutions for such petitioning are illegal.”

By the time the first amendments to the new United States Constitution were being considered in 1789, the right to petition was well established in U.S. practice. The colonies had widely recognized and employed the right of citizens to petition their government. The Declaration of Independence ([http://www.archives.gov/exhibits/charters/declaration\\_transcript.html](http://www.archives.gov/exhibits/charters/declaration_transcript.html)) singled out the Crown’s treatment of colonists’ petitions for redress (“Our repeated Petitions have been answered only by repeated injury.”) in its list of grievances. The debate over the initial proposal of the First Amendment recognition “that these rights belonged to the people” and the drafters “conceived them to be inherent; and all that they meant to provide was against their being infringed by the government.” The First Amendment’s explicit protection of the right from Congressional interference was not a novel development.

After John Quincy Adams left the presidency in 1829, he became embroiled in the most significant right of petition controversy in U.S. history. He had been elected to Congress and began presenting petitions in behalf of citizens calling for the abolition of slavery in the District of Columbia. In the 1830s, a swelling number of petitions from abolitionists were being presented to Congress and the practice at that time of considering all petitions made the growing number seem unmanageable to some. Additionally, defenders of slavery preferred to silence the clamor over the terrible practice. In 1836, Congress adopted (117-68) a resolution: “That all petitions, memorials, resolutions, propositions, or papers, relating in any way or to any extent whatever, to the subject of slavery, or to the abolition of slavery, shall, without being printed or referred, be laid upon the table, and that no further action whatever shall be had thereon.” Adams called this new “gag rule” “a direct violation of the constitution of the United States, the rules of this House, and the rights of my constituents” and worked for eight years to see it repealed. In 1844, Representative Adams moved a resolution to revoke the rule (which had become a standing rule in 1840) that was adopted 108-80. This marked the high water mark of petitioning and in the aftermath, the right was “little exercised in the aftermath of the gag rule.” David C. Frederick, “John Quincy Adams, Slavery, and the Right of Petition” 9 *Law & History Review* 113 (Spring 1991).

These stories trace in broad outlines the “rise and fall” of the petition right; more accurately, the slow development, acceptance and constitutionalization, and relatively swift descent into disuse of this valuable right. Since the antebellum period, the right of petition has been largely neglected, though it is occasionally the subject of litigation and the U.S. Supreme Court decided a petition clause case, *Borough of Duryea v. Guarnieri*, in 2011 (<http://www.supremecourt.gov/opinions/10pdf/09-1476.pdf>).

Joseph Story describes the petition right as resulting “from the very nature of [the] structure and institutions” of “a republican government.” (Joseph Story, *Commentaries on the Constitution*, vol. 3, §1887 at [http://www.constitution.org/js/js\\_344.htm](http://www.constitution.org/js/js_344.htm)) This comment may provide a clue to the relative disuse of the right since the Civil War. With the extension of the franchise to more and more Americans, the ability to directly communicate desires and disapproval to elected representatives by voting and through political parties, has probably eclipsed the importance of

petitioning. Coupled with the enhanced status of the right of free speech and advances in communications technology, which fill many of the practical roles (such as providing information to legislatures and allowing citizens to express their opinions) that formal petitions served, the practice of petitioning Congress is not likely to make a resurgence.

This is not to say that the principles it protected are not still vital. The tendency of courts and the executive branch to make decisions previously understood to be only the province of the legislature, threaten the principles of representative government and can serve to exclude all but the most well-connected from influencing government. A proper understanding of what the right to petition was meant to protect could be a helpful spur to citizens to insist that its spirit—the ability of citizens to affect the legislative process—be respected and re-enthroned as a foundation of constitutional government.

*William C. Duncan is director of the [Marriage Law Foundation](#). He formerly served as acting director of the Marriage Law Project at the Catholic University of America's Columbus School of Law and as executive director of the Marriage and Family Law Research Grant at J. Reuben Clark Law School, Brigham Young University, where he was also a visiting professor.*

Tags: [Constituting America](#), [Janine Turner](#), [Marriage Law Foundation](#), [Right to Petition the Government](#), [The First Amendment](#), [William C. Duncan](#)  
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## **Friday, March 2, 2012 – Essay #10 – The First Amendment: Guest Essayist: Justin Dyer, Ph.D., Author and Professor of Political Science, University of Missouri**

Friday, March 2nd, 2012

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.*

In the American political tradition, we often refer to the freedoms of religion, speech, press, and assembly as our “first freedoms”; first not only because they are protected by the First Amendment to our Constitution but also because the freedom to speak, write, worship, and assemble peacefully is central to any conception of liberty worthy of the name. As Justice Benjamin Cardozo noted in an important Supreme Court case in 1937, the “freedom of thought and speech” is the “matrix, the indispensable condition of nearly every other form of freedom.”

But simply declaring, as the First Amendment does, that “Congress shall make no law respecting an establishment of religion” or “abridging the freedom of speech, or of the press or the right of people peaceably to assemble” does not immediately settle our current debates about the shape this freedom should take in political life. For the government will, as it always has, make some speech—libel, fraud, perjury, etc.—subject to criminal sanctions. The question we are constantly wrestling with is where the line between protected and unprotected speech is to be drawn. Just last week, for example, the Supreme Court heard oral arguments in [United States v. Alvarez](#), a case challenging a congressional act that made it a crime to claim falsely to have won a military honor.

Xavier Alvarez, an elected member of a local government board in eastern Los Angeles County, told a group of people in 2007 that he was a retired marine of 25 years and that he had been awarded a Congressional Medal of Honor for his heroic military service. Although he and his lawyers admit there was no truth to these claims, Alvarez nonetheless insists he had a constitutional right to make them. Whatever the Supreme Court decides, the outcome will depend on answers to some weighty questions—What is the purpose of the freedom of speech? Why do we have it? And are some types of speech beyond the pale of what is legitimately protected by the Constitution? The same may be said about the limits of religion and assembly, for we are always debating these anew. Is the Obama Administration’s [mandate](#) that religious organizations cover contraception, abortifacient drugs, and sterilization in their health insurance policies an affront to religious liberty? Should religious employers be [subject](#) to federal anti-discrimination laws? Is there a [right](#) to picket at the funerals of military servicemen? Can people simply [campout](#) in public spaces without appropriate permits?

To begin to answer these questions, it seems we must think through and understand our entire scheme of constitutional government. In a regime that seeks to protect the rights of individuals and create space for the vital institutions of civil society, we must balance the legitimate need for law and order against principled limits on government power. As the Founders were well [aware](#), a legislature, made of ambitious and imperfect men, will, if left unchecked, draw “all power into its impetuous vortex.” The freedoms in the First Amendment stand as a bulwark against this type of concentration of power, first by protecting the liberty of conscience and the rights of religious and civic organizations and, second, by reminding successive generations about the rights that are indispensable to a free society. The power and force of the First Amendment is muted, however, if citizens are not educated and engaged. As the principal author of the First Amendment, James Madison, acknowledged, the “only guardian of true liberty” in a republican regime is, at the end of the day, the widespread “advancement and diffusion of knowledge.”

***Justin Dyer, Ph.D. teaches political science at the University of Missouri, and he is the author of [Natural Law and the Antislavery Constitutional Tradition](#) (Cambridge University Press).***

Tags: [Constituting America](#), [First Amendment](#), [Janine Turner](#), [Justin Dyer](#)  
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**March 5, 2012 – Essay #11 – Amendment II: Well Regulated Militia Being Necessary to the Security of a Free State – Guest Essayist: Professor Joerg Knipprath, Professor of Law at Southwestern Law School**

Sunday, March 4th, 2012

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 II: A Well Regulated Militia Being Necessary to the Security of a Free State

When Paul Revere and his companions alerted the Massachusetts countryside of the movement of British troops, he warned his fellow-British subjects, “The Regulars are coming out.” In contrast to those troops, with their standard drill, formations, equipment, and armament, the Patriot combatants at Lexington and Concord (as well as Revere himself) were “Minutemen,” a lightly-armed, organized rapid-response component of the colonial militia. As all such militias at the time, they were “irregulars,” though the quality of the Minutemen’s equipment and training was superior to that of the militia as a whole. The distinction between such organized parts and the general militia was continued by the states, and, beginning in 1792, in the second federal Militia Act. It is a distinction that, despite changes in the nature of the militia concept, is preserved in current law.

Militia service in the colonies/states extended to all men able to bear arms, subject to some variations as to age and race. Universal service was both a practical necessity—the need to deal with insurrections and with Indian raids—and a reflection of the ancient republican idea that military service was a necessary, though not sufficient, qualification for participation in the community’s governance. Laws also typically required that individuals keep arms sufficient to serve in the militia. In fact, the armament of individual militiamen varied widely, from military-style smooth-bore muskets (e.g. the “Brown Bess”), to—more rarely—longer-range but slower-to-reload rifles, to fowling pieces and other less useful weaponry. Due to these and other limitations, militia units were found ineffective and unsuitable for pitched battle. In the field, they were used mainly for irregular, partisan-style warfare and, as adjuncts to regular units, for sniping and for harassment from the flanks of the line of battle.

There were frequent complaints about the militia’s performance. In a letter to the Continental Congress, General George Washington acidly passed judgment:

To place any dependence on the Militia, is, assuredly, resting upon a broken staff. Men just dragged from the tender Scenes of domestic life; unaccustomed to the din of Arms; totally unacquainted with every kind of military skill, which being followed by a want of confidence in

themselves, when opposed to Troops regularly trained, disciplined, and appointed, superior in knowledge and superior in Arms, makes them timid, and ready to fly from their own shadows....

Alexander Hamilton, who made the jump from a New York militia artillery unit to the Continental Army, was more conciliatory, magnanimously softening his criticism with praise in Federalist 25:

The American militia, in the course of the late war, have, by their valour on numerous occasions, erected eternal monuments to their fame; but the bravest of them know and feel, that the liberty of their country could not have been established by their efforts alone, however great and valuable they were. War, like most other things, is a science to be acquired and perfected by diligence, by perseverance, by time, and by practice.

Hamilton supported a standing army. But, as Elbridge Gerry and other anti-federalists argued, the militia was a necessary bulwark against the dangers from a national standing army. Still, the war-time experience described above could not be ignored. To be effective, such a militia had to be “well-regulated.” To “regulate” was to standardize, to conform to a norm, here, standard weaponry, equipment, and drill. The word did not have today’s principal connotation, to “control”; the early American word for the latter was the government’s power to “police.”

The Constitution’s critics were alarmed that Congress was given the power under the Constitution to “provide for organizing, arming, and disciplining the Militia....” In the minds of suspicious republicans, this afforded Congress the means to establish only a “select militia” under national control, in effect creating a national standing army by another name and laying the states prostrate at the feet of the national Leviathan. Moreover, like the 17-th century Stuart kings, Congress could complete the tyranny by passing laws to disarm individual Americans.

To lessen that potentiality, the Second Amendment was adopted for what has been described today as, figuratively speaking, a “nuclear option.” To the extent that Congress does not regulate the militia, the states are free to do so under general principles of federalism, as the Supreme Court recognized in 1820 in *Houston v. Moore*. The Second Amendment is not needed for that possibility. But if the Congress seeks to disarm the citizenry that composes the militia, recourse has to exist to first causes, here, the ultimate right of the people to defend their liberties, their “unalienable rights” with which they are “endowed by their Creator.” As the Minutemen did in opposition to King George, the people have the right to organize themselves into militias if the states are impotent to oppose a national tyrant. That right belongs to each individual, though it would be exercised collectively, just as the First Amendment’s right to assemble to petition the government for a redress of grievances would be. It is crucial to an understanding of the Second Amendment to keep this point in focus.

Then why did the Framers not just write that there is a personal right to own guns? Describing the Second Amendment, Supreme Court Justice Joseph Story wrote in his influential 1833 treatise on the Constitution, “The militia is the natural defence of a free country....” He then famously continued, “The right of the citizens to keep and bear arms has justly been considered, as the palladium of the liberties of a republic; since it offers a strong moral check against the usurpation and arbitrary power of rulers....”



Notice the division and simultaneous relation between the reason for the policy and the definition of the right itself. It mirrors the division in the Second Amendment, both in the original draft version presented by James Madison to the First Congress and in the restyled final version. The pattern for the Second Amendment, as for much of the rest of the Bill of Rights, was the English Bill of Rights of 1689, which, too, set up a similar textual division between concerns over the threat from standing armies and the right of the people to have arms. With some internal variations, early state constitutions maintained that distinction. Within the states, the danger from standing armies would come from their own governments, which would also be the ones to organize their militias. If the right to keep and bear arms in those constitutions applied only within the state-organized militia, rather than as an individual right, it would hardly present an obstacle to a potentially tyrannical state government. Continuing the trend, petitions for a bill of rights submitted by the state conventions ratifying the Constitution again contained this familiar distinction.

Nor is the existence of a prefatory clause in the Second Amendment unusual. While the structure is different from that of the other amendments, the Second Amendment's style was quite ordinary at the time, as a quick review of the English Bill of Rights, colonial charters, the Northwest Ordinance of 1787, state constitutions, state convention petitions, and other foundational documents amply shows. During the early Republic, such bills of rights were often viewed, as Hamilton dismissively argued in Federalist 84, as mere "aphorisms...which would sound much better in a treatise of ethics, than in a constitution of government." Such explanatory clauses allowed for ringing philosophical declarations. Today, such clauses have no legal effect but can shed light on the ratifiers' motivation for mentioning the provision and can help clarify ambiguities. Still, as Justice Antonin Scalia wrote in his extensive analysis in the 2008 gun rights case, *D.C. v. Heller*, a prefatory clause cannot limit a well-understood right.

If it is said that a vigorous First Amendment makes possible a healthy republic, a vigorous Second Amendment is needed to ensure it.

*An expert on constitutional law, Prof. Joerg W. Knipprath has been interviewed by print and broadcast media on a number of related topics ranging from recent U.S. Supreme Court decisions to presidential succession. He has written opinion pieces and articles on business and securities law as well as constitutional issues, and has focused his more recent research on the effect of judicial review on the evolution of constitutional law. He has also spoken on business law and contemporary constitutional issues before professional and community forums. Read more from Professor Knipprath at: <http://www.tokenconservative.com/>.*

Tags: [Constituting America](#), [Janine Turner](#), [Joerg Knipprath](#), [Second Amendment](#), [Southwestern Law School](#)

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**March 6, 2012 – Essay #12 – Amendment II: The Right of the People to Keep & Bear Arms, Shall Not Be Infringed – Guest Essayist: Dr. John Lott, author of More Guns, Less Crime (University of Chicago Press, third edition, 2010).**

Monday, March 5th, 2012

**The right of the people to keep and bear Arms, shall not be infringed**

To an [overwhelming percentage of Americans](#), the constitutional question over DC's and Chicago's gun bans seemed simple enough. The plain meaning of the amendment was clear, and the Supreme Court agreed. In 2008 and 2010, Supreme Court decisions struck down gun bans and gunlock laws and decided that Americans have a right to self-defense. These were contested decisions, both being decided by close 5 to 4 votes. The four dissenting liberals claimed that there exists no individual right to "self-defense," and even if such a right existed, it could be overridden by the public interest of reducing gun crimes and suicides.

In his 2008 dissent, [Justice Stephen Breyer claimed](#) that the "thought of self-defense primarily in terms of outbreaks of fighting with Indian tribes, rebellions such as Shays' Rebellion, marauders, and crime-related dangers to travelers . . . ." is unrelated to the fears that Americans face today from crime in urban areas. He claims that the proposition that "householders' possession of loaded handguns help to frighten away intruders" as "a question without a directly provable answer." And that "none of the studies can show that [handgun bans are] not worthwhile."

But a simple word count shows how Breyer's fear over letting law-abiding Americans own guns fills his dissent. Just the words "crime," "criminal," "criminologist," "death," "homicide," "murder," "life-threatening," "injury," "rape," "robbery," "assault," "safety," and "victim" were used a total of 163 times in 44 pages. The terms "accidents" and "suicide" by themselves were mentioned an additional 13 times each. While other words could be included, these words alone averaged 4.3 per page of his dissent.

Many others shared Breyer's concerns that murder and violent crime rates would soar after the Supreme Court struck down the Washington, D.C. and Chicago gun control laws. Politicians predicted disaster. "[More handguns in the District of Columbia will only lead to more handgun violence](#)," Washington's Mayor Adrian Fenty warned the day the court made its decision. Chicago's Mayor Daley predicted that we would "[go back to the Old West, you have a gun and I have a gun and we'll settle it in the streets . . .](#)" The New York Times even editorialized this month about "[the Supreme Court's "unwise" decision that there is a right for people "to keep guns in the home."](#)

Yet, Armageddon never happened. Indeed, in the year after the 2008 Heller decision, the murder rate fell two-and-a-half times faster in DC than in the rest of the country. It also fell more than three as fast as in other cities that are close to DC's size.

And murders in DC have continued to fall. If you [compare the first six months of this year to the first six months of 2008](#), the same time immediately preceding the Supreme Court's late June Heller decision, murders have now fallen by 34%.

To top it off, gun crimes fell more than non-gun crimes. Robberies with guns fell by 25%, while robberies without guns have fallen by 8%. Assaults with guns fell by 37%, while assaults without guns fell by 12%. Just as with right-to-carry laws, when law-abiding citizens have guns some criminals stop carrying theirs.

Similarly, the experience with [crime data for Chicago](#) shows that, as in DC, murder and gun crime rates didn't rise after the bans were eliminated — they plummeted. They have fallen much more than the national crime rate. On this topic, the national media has remained completely silent.

In the first six months of last year, there were 14% fewer murders in Chicago compared to the first six months of last year — back when owning handguns was illegal. It was the largest drop in Chicago's murder rate since the handgun ban went into effect in 1982. Meanwhile, the other four most populous cities experienced a total drop at the same time of only 6 percent.

The benefit could have been even greater. Getting a handgun permit in DC and Chicago is an expensive and difficult process, meaning only the relatively wealthy go through it. Only a few thousand people had handguns registered in Chicago by the middle of last year. That limits the benefits from the Supreme Court decisions since it is the poor who are the most likely victims of crime and who benefit the most from being able to protect themselves.

For DC, the biggest change was the Supreme Court striking down the law making it illegal to possess a loaded gun. Over 70,000 people have permits for long guns that they can now legally use to protect themselves.

Lower crime rates in Chicago and DC by themselves don't prove that gun control increases murders, even when combined with the quite familiar story of how their murder rates soared and stayed high after the gun bans were imposed.

But these aren't isolated examples. Around the world, whenever guns are banned, murder rates rise. Gun control advocates explained the huge increases in murder and violent crime rates in Chicago and DC by saying that those bans weren't fair tests unless the entire country adopted a ban. [Even island nations, such as Ireland and the UK — with no neighbors to blame — have seen increases in murder rates](#). The same horror stories about blood in the streets have surrounded the debate over concealed handguns. Some said it was necessary to ban guns in public places. The horror stories never came true and the data is now so obvious that as of November, only one state, Illinois, will still completely ban law-abiding citizens from carrying concealed handguns. Forty-one states will have either permissive right-to-carry laws or no longer even require a permit.

The regulations that still exist in Chicago and DC primarily disarm the most likely victims of crime. Hopefully, even the poor in these areas will soon also have more of an opportunity to defend themselves also.

***Dr. John Lott is the co-author with Grover Norquist of the just released book: Debacle: Obama's War on Jobs and Growth and What We Can Do Now to Regain Our Future. He has held research positions at academic institutions including the University of Chicago, Yale***

*University, the Wharton School at the University of Pennsylvania, Stanford, Rice, and the University of Maryland, College Park and at the American Enterprise Institute. Lott was the chief economist at the United States Sentencing Commission during 1988 and 1989. He has published over 100 articles in peer-reviewed academic journals related to his research areas, and has authored seven books, including “More Guns, Less Crime”, “The Bias Against Guns” and “Freedomnomics.” He is a contributor and columnist for Fox News. Lott earned his Ph.D. in economics from UCLA in 1984.*

Tags: [Constituting America](#), [Janine Turner](#), [John Lott](#), [More Guns Less Crime](#), [Right to Bear Arms](#), [Second Amendment](#)

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### **March 7, 2012 – Essay #13 – Amendment III: Freedom From Quartering Soldiers in Peacetime – Guest Essayist: William Morrissey, William and Patricia LaMothe Chair in the United States Constitution at Hillsdale College**

Tuesday, March 6th, 2012

#### Amendment III

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

Supreme Court Justice Joseph Story, author of perhaps the best commentary on the Constitution, wasted little time with the Third Amendment: “This provision speaks for itself.” So it does, but a few words of background can explain why the United States Congress and the people they represented thought it worth adding.

During the French and Indian War the British found themselves harried by what we would now call guerrilla strikes. They had some regular army bases—some of the best of them along the border with Quebec. But given the character of the war they were fighting they needed to move forces quickly into undefended areas to counter French and Indian raiders. And so they would occupy an unsecured and threatened area—protecting the lives and property of the local citizens in exchange for the commandeered use of the locals’ property for that purpose.

After the war, this practice (as our saying now goes) got old in a hurry. By 1765, Benjamin Franklin complained that “there are no want of barracks in Quebec, or any part of American; but if an increase of them is necessary, at whose expense should that be?” Surely not that of private citizens. To Franklin’s complaint about property rights, Samuel Adams added a political one: “where military power is introduced, military maxims are propagated and adopted, which are

inconsistent with and must soon eradicate every idea of civil government.” By occupying the property of private landowners, the British Army acted as if a law unto itself.

Colonists’ outrage heightened in Adams’s own Boston, where the early stirrings of armed resistance to British occupation provoked the Parliament to pass the Intolerable Acts (as the colonists called them), making any public gathering an act of treason and formally providing for quartering troops in private homes. Upon founding the Union in 1774, Americans saw their representatives in the Continental Congress pass a law in favor of “the better providing suitable quarters for officers and soldiers in his majesty’s service, in North America.” Once resolved upon independence, the colonists listed the British practice among the grievances proving the tyrannical character of George III’s rule.

The lack of such a provision numbered among the several complaints lodged against the 1787 Constitution by the Anti-Federalists during the ratification fight. After the Constitution passed—barely, in several states—James Madison and the first United States Congress took up the matter of amendments. One of the strongest advocates of what would become the Third Amendment was Thomas Sumter of South Carolina; the Carolina Gamecock had won his nickname by inducing Lord Cornwallis to get out of the deep south, moving on toward his unlucky fate at the hands of Washington and the French Navy at Yorktown, Virginia. Beyond property rights and politics, Sumter went to the intimate heart of the matter: property occupied by soldiers “would lie at the mercy of men irritated by a refusal”—men expecting obedience to the orders they issue —“and well disposed to destroy the peace of the family.” With that gentlemanly description of ungentlemanly conduct ringing in their ears, the Congressmen gladly passed the amendment.

Notice the important caveat. Times of extreme emergency may require the risk and burden of quartering troops in private homes. Accordingly, Congress provided that the practice might be renewed by legislative act. The lives, liberties, and property of American citizens, even the sanctity of the family, might under certain conditions be more at risk from an enemy force than from the forces charged to defend them. Then and only then would a Congress or a state legislature dare to enact such a measure.

Although one shouldn’t read much into the order of the first ten amendments (famously, the First Amendment is first only by accident), the placement of the Third Amendment does make good sense. It follows the Second Amendment stipulation of the right to bear arms; an American household usually can defend itself if family members are rightly armed and trained. It precedes the Fourth Amendment’s stipulation of security against unreasonable searches and seizures. The right to be free of military occupation in one’s own home from one’s own citizen-army sits well between the rights of self-defense and of the orderly rule of law.

***Will Morrissey holds the William and Patricia LaMothe Chair in the United States Constitution at Hillsdale College, Hillsdale, Michigan, where he has taught since 2000.***

Tags: [Constituting America](#), [Janine Turner](#), [Third Amendment](#), [William Morrissey](#)  
Posted in [Analyzing the Amendments in 90 Days 2012 Project](#), [Constitution Amendment III](#), [William Morrissey, Ph.D.](#) | [2 Comments](#) »

**March 8, 2012 – Essay #14 – Amendment III: Situation in Time of War – Guest Essayist: Andrew Dykstal, a Junior at Hillsdale College**

Wednesday, March 7th, 2012

*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.”*

The Third Amendment seldom enjoys press or study; one high school-level text dismisses it with a single sentence to the effect of “This amendment has been unimportant since its adoption.” Nevertheless, the Third Amendment offers valuable insight into the Constitution’s intended restraints on standing armies and the relationship between civil and military authorities. The Third Amendment directly protects the property and freedom of individual citizens, but it also imposes an additional limit on the power of the executive to maintain military power without the consent of the legislature.

The surface-level meaning of the Third Amendment is quite straightforward: In peacetime, the federal government cannot use any residence to house soldiers without the consent of the owner. Only in wartime—a condition that only Congress can declare—can soldiers be housed in private residences. Even in this case, Congress must provide for this mediation of property rights by an act of law distinct from a declaration of war. In the only significant court case (*Engblom v. Carey*, 1982) involving the Third Amendment, the Second Circuit Court of Appeals held that the concept of “soldier” can be broadly construed to include National Guardsmen. More significantly, the court held that “house” includes dwellings not owned by the inhabitant, such as apartments and rented rooms. The Third Amendment therefore constitutes a broad protection of the citizenry against legislative power in peacetime and the executive at any time.

In contemporary times, this protection may seem unnecessary or redundant with, say, the Fourth Amendment. But when the Bill of Rights was drafted, memories of royal abuse were still fresh in American minds, and the question of abusive military was a subject of intense debate between the Federalists—the people who supported the ratification of the Constitution—and the Antifederalists—the people who opposed it. The Third Amendment addresses one of the Antifederalists’ historically-grounded concerns. The Declaration of Independence reads, in part, “He has kept among us, in times of peace, Standing Armies without the Consent of our legislatures. He has affected to render the Military independent of and superior to the Civil power....For Quartering large bodies of armed troops among us...” This indictment of King George III bridges two separate but equally significant issues. First was the traditional, specific aversion to the quartering of troops in private homes. Parliament passed a series of Quartering Acts beginning in 1765, directly contravening the 1689 English Bill of Rights. These acts called into question the Americans’ rights as Englishmen and subjected them to treatment

unconscionable for citizens of the Empire. More pragmatically, the conduct of British troops, stationed far from home in what was often considered a colonial backwater, was often reprehensible, and crimes against colonists increased in frequency and severity as political tension grew. The colonists experienced a direct, vivid reminder of why the quartering of soldiers in homes had been explicitly forbidden under British law for decades.

The second issue at the heart of this indictment of King George III (and at the heart of the Third Amendment) is substantially more interesting from a contemporary perspective. The very existence of a standing army in the colonies was generally taken as offensive, and this sentiment influenced the development of the Constitution. The Third Amendment renders significantly more difficult the maintenance of “in times of peace, Standing Armies without the Consent of our Legislatures.” Specifically, the Third Amendment checks executive and military power by increasing the cost of maintaining a standing army. In Federalist 26, Alexander Hamilton describes the way in which regular funding renewal forces the legislature to continuously revisit the question of a standing army. Under Article One, Section 8, the executive is reliant on legislative approval to fund the military, and the Third Amendment helps to prevent an end run around these measures; the federal government must make appropriations via Congress to support the military. The military cannot support itself directly from the people unwilling hospitality. With the memory of the threat a standing army can pose to liberty in mind, the Constitution’s framers put in place both primary and incidental restrictions on the nature of executive and military power.

The specific protection afforded by the Third Amendment has not, thankfully, seen as much use as those afforded elsewhere in the Bill of Rights, but the ideas and intent behind this amendment can still educate us about our nation’s history and inform our current policies. The Third Amendment speaks to the grave responsibility in the hands of the legislature as long as the United States maintains a powerful military in war and peacetime alike, and it speaks to the care necessary in the exercise even of necessary power.

Tags: [Andrew Dykstal](#), [Constituting America](#), [Janine Turner](#), [Third Amendment](#)

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**March 9, 2012 – Essay #15 – Amendment IV: Protection Against Unreasonable Searches – Guest Essayist: Dr. Charles K. Rowley, General Director of The Locke Institute and Duncan Black Professor Emeritus of Economics at George Mason University**

Thursday, March 8th, 2012

*March 9, 2012 – 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. – Guest Essayist: Dr. Charles K. Rowley, General Director of The Locke Institute and Duncan Black Professor Emeritus of Economics at George Mason University*

Although my assignment is to discuss the first clause of the Fourth Amendment, I cannot do so effectively without referring also to the second clause. Therefore, my Essay embraces both clauses, while focusing primary attention on the first.

Like many other areas of American law, the Fourth Amendment is rooted in English legal doctrine. Sir Edward Coke, in *Semayne's case* (1604) stated: 'The house of every one is to him as his castle and fortress, as well for his defence against injury and violence as for his repose.' In this judgment, the Court determined that the King was not endowed with unlimited authority to intrude upon his subjects' dwellings, while recognizing that the King's agents were permitted to conduct searches and seizures under specified conditions, when their purpose was lawful, and when a warrant had been secured.

The 1760s witnessed a significant growth in the rate of litigation against government agents using general warrants to locate and seize materials relating to John Wilkes. Wilkes' publications attacked vehemently not only government policies, but the King himself. The most famous of these cases was *Entick v. Carrington* (1765) in which Charles Pratt, 1<sup>st</sup> Earl Camden, ruled that the forcible entry by the King's Messenger into the home of John Entick, and the search for and seizure of pamphlets and other materials under a general warrant was unlawful. This case established the English precedent that the executive is limited by common law in intruding upon private property.

Unlike other provisions in the 'Bill of Rights', however, the Fourth Amendment was grounded mainly in American colonial experience, rather than in English history. In order to stem rampant smuggling by tariff-evading colonialists, the British parliament had conferred vast powers of

search on British customs officials. *The Writ of Assistance* was a general search warrant granting such officials virtually unlimited discretion to search, and was valid throughout the lifetime of a sovereign. Casting its net widely, such a writ required neither ‘probable cause’, nor any description of persons or premises, nor even a magistrate’s authorization of a particular search. The arbitrary nature and capricious application of this writ enraged many colonialists and drove post-revolutionary arguments in favor of the Fourth Amendment (Jacob Landynski, ‘Fourth Amendment’, *The Oxford Companion To The Supreme Court Of The United States*. Edited by Kermit L. Hall, Oxford University Press, 1992).

Despite its apparent comprehensiveness, the Fourth Amendment actually provides very little guidance concerning how to deal with potential search situations. Its historical justification teaches us a preference, wherever feasible, for a search under warrant over a judicially unsupervised police action. Its text requires a standard of ‘probable cause’, and a description of the persons and premises involved. However, the text does not define ‘probable cause’, nor does it even define a ‘search’. In such circumstances, the United States Supreme Court has played a significant role, both in construing the text, and in determining how closely to hew to the history of the amendment.

Early on, the Court construed the text strictly and interpreted history narrowly. In a changing environment, such construction allowed many avenues for government agents to evade the reach of the Amendment. For example, for some time, the Court determined that electronic eavesdropping did not fall within the reach of the Amendment. Similarly, administrative inspections were exempt because they were viewed as invading ‘only’ the privacy interest of the individual rather than his security interest. Only after the Court moved away from strict construction, was it willing to hold that these new forms of search fell within the scope of the Amendment.

The great dilemma of interpretation concerns the relationship between the Amendment’s two clauses. The first clause bans unreasonable searches while the second clause defines the conditions for issuance of a warrant. Three possible interpretations emerge, each of which has been sanctioned by the Court at one time or another.

The most obvious interpretation is to consider the warrant clause as explanatory of the reasonableness clause. This interpretation has been followed in most of the Court’s cases. In the judgment of Justice Potter, ‘searches conducted outside the judicial process are *per se* unreasonable under the Fourth Amendment – subject only to a few specifically established and well-delineated exceptions.’ (*Katz v. United States*, 1967)



A second interpretation reinforces the first, by inferring that some searches are sufficiently offensive to civilized standards of behavior as to be unreasonable even under warrant. In this interpretation, the Court in 1886 proscribed the search and seizure of private papers even though such search was authorized by judicial process. In 1921, the Court limited a search to contraband and the fruits of crime, banning the seizure of mere evidence. These restrictions, however, no longer apply.

The third interpretation treats the two clauses as separable, as was implied in the nature of my commission for this Essay. The reasonableness of a search, in this interpretation, is not dependent on the existence of a warrant, but on what Justice Minton called, ‘the facts and circumstances – the total atmosphere of the case’ (*United States v. Rabinowitz*, 1950). Between 1950 and 1969, this interpretation ruled and the Court sanctioned extensive warrantless searches of premises where arrests were made.

Either of the first two interpretations is faithful to the purpose of the Amendment. The third interpretation, however, is not. Once a standard of reasonableness is segmented from the warrant requirement, it provides no standard whatsoever. A determination of probable cause, even in *non-exigency* situations is then simply made by the police, and citizen protection is completely denied. Unfortunately, at the present time, the Court is leaning once again in favor of the third interpretation – under a Hobbesian pressure from a terrorist-infested environment – even while it continues to pay lip-service to the first.

The Amendment covers arrest as well as search, albeit with an important difference between the two. An outdoor felon arrest is always viewed as an exigency, not requiring a warrant. An entry into a person’s house, in order to make an arrest, requires a warrant, unless an exigency can be demonstrated.

Perhaps the most controversial feature of the Court’s Fourth Amendment jurisprudence is the rule requiring exclusion of evidence seized in violation of constitutional standards. Suppressing evidence merely because of the wrongful manner in which it was acquired is unique to American law. This exclusionary rule first appeared in *Boyd v. United States* (1886). It was made explicit for the federal courts in *Weeks v. United States* (1914). It was extended to state prosecutions in *Mapp v. Ohio* (1961). The exclusionary rule was rigorously enforced until 1984, when the Court retreated somewhat in *United States v. Leon*. The justices ruled that ‘good faith’ reliance by police on a defective warrant does not require exclusion.

This back-track coincides with a more general retreat by the Court into the feel-good fuzziness of a living constitution. Eventually, such a retreat may leave the Court sanctioning warrantless searches under non-exigent circumstances. At such time, an unconstitutional Supreme Court, to all intents and purposes, will have arbitrarily repealed the Fourth Amendment to the Constitution of the United States.

***Charles K. Rowley, Ph.D. is President and General Director of The Locke Institute in Fairfax, Virginia and Duncan Black Professor Emeritus of Economics at George Mason University. For further details see [www.thelockeinstitute.org](http://www.thelockeinstitute.org) and [www.charlesrowley.com](http://www.charlesrowley.com)***

Tags: [Charles K. Rowley](#), [Constituting America](#), [Fourth Amendment](#), [Janine Turner](#)  
Posted in [Analyzing the Amendments in 90 Days 2012 Project](#), [Charles K. Rowley, Ph.D.](#),  
[Constitution Amendment IV](#) | [7 Comments »](#)

## **March 12, 2012 – Essay #16 – Amendment IV: Warrants to Have Probable Cause – Guest Essayist: Horace Cooper, Senior Fellow with the Heartland Institute**

Saturday, March 10th, 2012

*“.....no Warrants shall issue, but upon probable cause, supported by Oath or affirmation...”*

Americans today take great pride in the accomplishments and brilliance of the drafters of the Constitution and the Bill of Rights. One of the things that this essay will demonstrate is that quite often the protections that we take for granted came about as a result of the prudence and wisdom of the founders and in particular their specific response to the challenges they were exposed to or aware of. Many Americans may not appreciate that this provision isn't just pivotal, it is in some sense central to America's claim to independence.

The 2<sup>nd</sup> clause of the 4<sup>th</sup> Amendment makes clear, magistrates and others allowed to issue warrants must not issue “general” warrants, but instead when court orders are issued, they must be precise and detailed. Warrants must specify descriptions of items demanded to be seized and judges must be convinced that there is probable cause to believe a crime has been committed.

As is the case with much of America's legal system, British history is a good starting point to understand this provision.

Let's start with the “Star Chamber” or camera stellata as it was called in Latin. It was sort of a super-appeals Court that held its meetings in the “Starred Chamber” of the Royal Court (a place initially created for meetings of the King's Council in England.) Reports of its existence suggest it operated early as the 13<sup>th</sup> Century and sat at the royal Palace of Westminster until 1641.

Made up of royal advisors and judges, the so called “Star Chamber's” primary responsibility was to address civil and criminal matters involving elites to ensure that the kingdom's laws were enforced against the powerful and the prominent. Its sessions were held in secret. It made no pretense of operating under traditional court rules involving criminal or civil procedure. There was also no right of appeal, no juries and even no right to confront accusers or even for witnesses to testify. However perhaps more offensive than these predations was its authority to issue “general warrants.” These warrants were given to the sheriff or other local law enforcement officer and empowered them to retrieve items necessary to support the Star Chambers pre-ordained conclusions.

In other words, instead of saying that based on a signed statement by a witness, J. Smith was believed to hold in his home, item X, an illegal product, “general warrants” allowed the Sheriff to search all of J. Smith’s properties and seize any and all of his personal items without identifying any particular item. The seized items would be subsequently examined by the staff of the Star Chamber to see which if any could be used as evidence against J. Smith. The items typically weren’t returned and even when they were, they were often damaged or destroyed.

Over time the British recognized the inherent abuses associated with the operations of the Star Chamber. Finally, in 1640, the British Parliament adopted the Habeas Corpus Act and abolished the Star Chamber in 1641.

Unfortunately when making the decision to shut down the Star Chamber, the British Parliament hadn’t acted to eliminate the use of general warrants. Abuses involving general warrants would continue over another 100 years before British society generally would recognize the ills of its use in particular.

One of the most prominent cases of abuse of general warrants that the founders would have been familiar with was the fall out from the British government’s attempt to use general warrants against Englishman John Wilkes, publisher and political activist and critic of the Crown, in 1763.

Wilkes, a member of parliament, during Prime Minister George Grenville’s government, published “The North Briton” which mocked and criticized King George III and the Grenville administration. Using general warrants King George had Wilkes and nearly 50 of his associates arrested and charged with seditious libel. Not only were he and his associates arrested, their personal property, papers, and effects were seized. The abuses that occurred were obvious for all to see. As a Member of Parliament, Wilkes had immunity from these charges and while he was able to convince the Chief Justice to dismiss the case his troubles wouldn’t end. Within the next 5 years he’d be charged again and again. Notwithstanding these charges and subsequent expulsion from Parliament he would be re-elected 3 times.

Wilkes fled to France but eventually returned to England. Wilkes would subsequently be elected Mayor of London and get recognition for his efforts to support the rights of English citizens and his efforts contributed to the fall of the Grenville government. Wilkes’ ongoing arguments for Freedom of the Press, broader suffrage rights and religious toleration would ultimately find broad political support in England before his death.

But perhaps the greatest influence for the framers was the use of “general warrants” to enforce the infamous Townshend Acts of 1767. Passed by the British Parliament, the Townshend Acts was adopted purportedly to provide for the salaries of colonial appointees, but many colonialists suspected its primary if not total rationale was to establish the precedent that the British Parliament had the right to tax the colonies.

As part of its efforts to enforce this revenue act, the British Parliament created the American Board of Customs Commissioners and the commission leapt at the opportunity to use “general warrants” to deter smuggling and tax evasion. These warrants issued under the authority of the crown were particularly troublesome. They violated the colonial charters’ rules that warrants were legal only when they provide a reason and a basis for searches. Whereas Colonial warrants

were limited in scope and time, the Commissioner's general warrants had no time limits other than the life of the King and were transferable allowing one person holding the warrant to transfer his rights over to the other. Additionally, the warrant holder could search any person or property at any time. Writ holders essentially were laws unto themselves.

Massachusetts Assembly James Otis whose catchphrase is "Taxation without Representation is Tyranny" called the general warrants "the worst instrument of arbitrary power, the most destructive of English liberty, and the fundamental principles of law, that ever was found in an English law book."

The new taxes proved to be quite unpopular and colonial appointees using the general warrants even more so. Ultimately those responsible for collections requested military assistance. The British sent the fifty-gun warship HMS Romney to Boston Harbor in May 1768 to enforce the law. Rather than quelling the situation, this dramatic escalation made matters worse. Starting with the Boston Massacre and the Boston Tea Party the gross abuse of general warrants and Townshend Acts would lead directly to the Declaration of Independence and the Revolution.

It is that framework which influenced the writers of the 4<sup>th</sup> amendment. Although far more jurisprudence is placed on the importance of the first clause of the 4<sup>th</sup> Amendment, for historians, the notion that government may not issue warrants to law enforcement officers without any justification or any particular limits to seize goods or people was a powerful enough issue that it was a key ingredient in the formation not only of a provision of the Bill of Rights, but the formation of an entire nation.

*Horace Cooper is a senior fellow with the Heartland Institute and is a writer and legal commentator*

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**March 13, 2012 – Essay #17 – Amendment IV: Warrants Must Describe the Place and Persons With Particularity – Guest Essayist: William C. Duncan, Director of the Marriage Law Foundation**

Monday, March 12th, 2012

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 particularity describing the place to be searched, and the persons or things to be seized.*

Amendment IV: Particularity of Warrants

Limitation of the power of the government is not one of many possible approaches to governing under the U.S. Constitution. It is the very structure of the Constitution itself. Our Constitution is primarily a limitation on what the government it charters can do. The first ten amendments constituting the Bill of Rights, in particular, are not affirmative grants of privileges from a beneficent state to its subjects but a restrain on government in the interest of protecting the preexisting rights of citizens,

The structure of the Fourth Amendment, for instance, makes clear that the Framers understood the rights it protected from the government to be existing rights. This is consistent with the Framers' entire approach to constitutional government, an approach informed by careful study of history and, specifically, their own experience in self-government and its opposites. Much of that experience, of course, was gained as subjects of the British Crown and in the effort to respond to abuses of English power in the colonies, ultimately leading to the decision to seek independence.

The decision to include in the first set of amendments to the U.S. Constitution, a requirement of particularized warrants is a key example.

The primary relevant experience of the Framers on this matter came from the general warrants, called writs of assistance, used by the British to conduct wide-ranging searches for contraband in the colonies. A writ of assistance is court permission for government officials to conduct a generalized search, for instance for goods on which customs fees have not been paid. They contrasted with a more specific search warrant that would specify who, what and where to be searched in some detail. The practical effect of the difference should be obvious. If a government official is allowed by court to go into all the homes on a block looking for anything on which taxes have not been paid, you have a significant intrusion. If the court instead says that these officials can go to 555 Whatever Lane and look for money that has been stolen from the downtown bank, the intrusion is dramatically less.

The use of writs of assistance in the colonies provoked understandable protect. John Dickinson, in his 1767 Letters from a Farmer in Pennsylvania, noted the act of Parliament allowing for these writs empowered customs officers to “to enter into any HOUSE, warehouse, shop, cellar, or

other place, in the British colonies or plantations in America, to search for or seize prohibited or unaccustomed goods [meaning goods on which no customs had been paid].” He pointed out that while those kinds of writs had also been issued in England, “the greatest asserters of the rights of Englishmen have always strenuously contended, that such a power was dangerous to freedom, and expressly contrary to the common law, which ever regarded a man’s house as his castle, or a place of perfect security.” Thus, Dickinson argued: “If such power was in the least degree dangerous there, it must be utterly destructive to liberty here.”

The experience of the colonists with these practices bore fruit in the newly independent States. The 1776 Virginia Declaration of Rights, the Maryland Constitution of the same year and John Adams’ 1780 Constitution for Massachusetts all required that warrants for searches and seizures be specific in describing the place to be searched and the subjects of the search or seizure.

These precedents, of course, were adopted in the drafting of the Fourth Amendment, the language of which clearly prohibits the broad-wide-ranging searches so abhorrent to the colonists. It does so by allowing only search warrants “particularly describing the place to be searched, and the persons or things to be seized.” This is the particularity clause.

A Connecticut case from the early Nineteenth Century exemplified the type of warrants the Fourth Amendment was created to prevent: “it is not only a warrant to search for stolen goods supposed to be concealed in a particular place, but it is a warrant to search all suspected places, stores, shops and barns in Wilton. Where those suspected places were in Wilton is not pointed out, or by whom suspected: so that all the dwelling-houses and out-houses within the town of Wilton were by this warrant made liable to search.” (*Grumon v. Raymond*, 1 Conn. 40, 1814.

Today we would be shocked if a court were to authorize police to search an entire town for stolen goods. Yet, these kinds of warrants were commonly allowed in England prior to American Independence and seem to have been issued even into the 1800s here. What happened to change the legal culture?

Part of the answer is the Framers’ ability to apply what they had learned from experience. Americans had experienced the oppression of broad, intrusive searches and this led them to reject these as a proper instrument of government. They then ensured the lessons learned were reflected in the law through the Fourth Amendment.

The Framers wrought well and we are the inheritors of their wisdom in limiting the power of government. The English may have noted that the home is a case but the Fourth Amendment’s particularity requirement helped to give that concept the binding force it needed to be a reality.

***William C. Duncan is director of the Marriage Law Foundation ([www.marriagelawfoundation.org](http://www.marriagelawfoundation.org)). He formerly served as acting director of the Marriage Law Project at the Catholic University of America’s Columbus School of Law and as executive director of the Marriage and Family Law Research Grant at J. Reuben Clark Law School, Brigham Young University, where he was also a visiting professor.***

Tags: [Constituting America](#), [Fourth Amendment](#), [Janine Turner](#), [Marriage Law Foundation](#), [Warrants](#), [William C. Duncan](#)

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## **March 14, 2012 – Essay #18 – Amendment V: The Right to a Grand Jury – Guest Essayist: Allison R. Hayward, Vice President of Policy at the Center for Competitive Politics**

Tuesday, March 13th, 2012

### The Right to a Grand Jury

The grand jury occupies a unique place in our justice system. It does not prosecute, but the power of a federal prosecutor depends on the grand jury. It does not judge, but it can expose or shield defendants from judgment. It can protect citizens against baseless prosecution, but the reasons for its decisions are shrouded in secrecy. The grand jury originated in medieval and monarchist England, remained important enough at the Founding for the Framers to enshrine it in the Fifth Amendment, but today grand juries are only employed in the United States.

A grand jury consists of 16 to 23 members. The United States attorney (the prosecutor in federal criminal cases) presents evidence to the grand jury for them to determine whether there is “probable cause” to believe that an individual has committed a felony and should be put on trial. If the grand jury decides there is enough evidence, it will issue an indictment against the defendant.

The grand jury conducts its work in secret. Jurors cannot be required to explain to anyone, even the courts, why they proceeded in a case. Ideally, secrecy protects against a defendant fleeing the jurisdiction. It allows for free deliberations without threat or pressure from outside. It also discourages witness tampering. And finally, if the jury finds probable cause is lacking, the accused individual suffers no loss of reputation.

Grand juries possess broad powers of inquiry. They have subpoena power, and can compel testimony by providing immunity. At the same time, their proceedings are not adversarial. The jury is not assessing the guilt or innocence of any person.

As the Supreme Court stated, “it is axiomatic that the grand jury sits ... to assess whether there is adequate basis for bringing a criminal charge.” *U.S. v. Williams*, 504 U.S. at 51.

The insular quality to grand juries has provoked criticism. Because the prosecutor is the one official present during deliberations, critics complain that grand juries can become a rubber stamp — aiding unscrupulous or ambitious prosecutors, who may be pursuing interests hostile to the administration of justice. While the grand jury is enshrined in the Constitution, Congress has



the power to amend the rules by which juries are run. For instance, Congress could require prosecutors to present any evidence exonerating a defendant, give a defendant the right to appear before the jury, or guarantee a counsel's assistance for any defendant or target of an investigation.

*Allison Hayward graduated from Stanford University with degrees in political science and economics, and received her law degree from the University of California, Davis. She clerked for Judge Danny J. Boggs of the United States Court of Appeals for the Sixth Circuit. Hayward is Chairman of the Federalist Society's Free Speech and Election Law Practice Group. She also serves on the Board of the Office of Congressional Ethics. She is an active member of the California and Washington, D.C. bars, and she is a certified FINRA arbitrator.*

Tags: [Allison Hayward](#), [Constituting America](#), [Fifth Amendment](#), [Janine Turner](#), [Right to Grand Jury](#)

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### **March 15, 2012 – Essay #19 – Amendment V: Right Against Double Jeopardy – Guest Essayist: Professor Joerg Knipprath, Professor of Law at Southwestern Law School**

Wednesday, March 14th, 2012

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 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.*

The 1999 movie *Double Jeopardy*, starring Ashley Judd and Tommie Lee Jones, focused on a wife who was wrongfully convicted of murdering her husband who had staged his own killing. One theme suggested by the title and by some scenes of prison lawyering is that, having once been convicted of murder, the wife could not be tried again if she now murdered her husband. Hardly.



The protection against double jeopardy is deemed a fundamental human right with a tradition well-entrenched in Western Civilization going back at least to ancient Roman law. The doctrine was part of the English common law long before the Constitution, although, curiously, express double jeopardy protections were not well-represented in the early state constitutions or in the proposals for amendments submitted by the state conventions that ratified the Constitution. Incidentally, the phrase “life or limb” today is read as “life or [physical] liberty,” since drawing-and-quartering and other punishments that produce corporal maiming have gone out of style and would likely constitute “cruel and unusual punishment” in violation of the 8<sup>th</sup> Amendment.

In *Green v. U.S.* in 1957, the Supreme Court justified the doctrine as reflecting

*“the underlying idea...that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense, and ordeal compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.”*

On that last point, if the state gets numerous turns at bat, it only needs to be successful once, which produces significant incentive to try repeatedly. At the very least, such tactics will cause more defendants, emotionally and financially exhausted and faced with the deeper resources of taxpayer-funded prosecutors, to enter factually dubious guilty pleas.

The clause raises several questions. First, when does jeopardy “attach”? Second, what exactly can the government not do? Third, what exceptions are there?

Jeopardy attaches when a jury is empanelled and sworn. If the trial is to a judge only, it attaches when the first witness is sworn. If there is a guilty plea, it attaches when the court accepts the plea. An *acquittal* by the judge or jury bars the government from appeal because a retrial for that offense would violate the double jeopardy rule.

Notice that the government cannot retry the offender for the same offense. What if a defendant is acquitted of robbery, which combines larceny (taking and carrying away another’s personal property without consent and with the intent to deprive him of the property permanently) and assault (intentionally creating a reasonable apprehension of immediate bodily injury)? Can the prosecutor now seek to try the defendant for larceny and/or assault arising out of the same criminal act? The common sense reaction is “no.” That is also the legal stance, because two crimes constitute the “same offense,” unless *each* of them has at least one additional element that is different from the other. Here, while robbery has a different element than either larceny or assault (since it is a combination of the two), neither larceny nor assault has any additional element from robbery. A prosecutor who has failed in a prior trial cannot proceed against the same defendant for a “lesser-and-included” offense.

Likewise, a prosecutor who, for example, successfully prosecuted a defendant for larceny and has that conviction under his belt subsequently cannot roll the dice again and seek to try that defendant for the greater crime of robbery out of the same transaction. The lone exception to that rule is that a prosecution for battery (unlawfully using force against another that causes bodily

injury) does not bar a subsequent trial for murder if the victim eventually succumbs to his wounds from the attack.

While the rule gives defendants some basic and significant protections, it is also riddled with exceptions and qualifications. In that vein, a hung jury is no bar to retrial. Neither are certain motions for mistrial by the defendant where the mistrial is not caused by prosecutorial misconduct. For example, conditions arise that make a continuing fair trial impossible in that location. There is also generally no violation of double jeopardy for a retrial if the defendant appealed and was successful in overturning the earlier verdict, or if the prosecution successfully appealed a trial court dismissal of the case when there was no acquittal but the trial court based its decision on a legal motion.

Significantly, double jeopardy does not apply to non-criminal proceedings. A public official who is impeached and removed from office for a crime can also be prosecuted for that act under the criminal law. In similar vein, a defendant who is convicted or acquitted in a criminal trial can be sued by the victim for a civil wrong. A notorious example of that is the former football star and advertising pitchman O.J. Simpson. Despite his acquittal of murder charges for the killing of his estranged wife and another victim, he was subsequently found liable for civil damages for “wrongful death.”

Returning to our movie, yet another exception shows the lack of reliability of jailhouse lawyering (or of Hollywood screenwriters). The double jeopardy clause does not apply to different sovereigns. Conviction or acquittal under the laws of one sovereign does not bar a different sovereign from prosecuting the defendant under its law for the same charge arising out of the same conduct if the conduct affected that sovereign. Although they usually avoid duplication, the state of California could prosecute a drug dealer for violation of its drug laws and then turn the perpetrator over to the federal government for prosecution under federal drug laws. A version of that was the 1993 federal prosecution of four Los Angeles police officers for violation of federal civil rights laws arising out of the use of excessive force in arresting Rodney King in 1991. The officers had mostly been acquitted in a 1992 state prosecution arising out of the same incident.

The legal assumptions of the movie are flawed. Being wrongfully convicted of murder may entitle the defendant to civil damages from the government. But it does not create a dispensation from prosecution for a subsequent murder. The Constitution has no “get-out-of-jail-free-for-murder” coupons to be redeemed as the occasion demands. More pertinent, had Louisiana prosecuted the movie’s protagonist for the murder of her husband, the prior prosecution by the state of Washington would not have placed her twice in jeopardy of life or limb for the same offense.

***An expert on constitutional law, Prof. Joerg W. Knipprath has been interviewed by print and broadcast media on a number of related topics ranging from recent U.S. Supreme Court decisions to presidential succession. He has written opinion pieces and articles on business and securities law as well as constitutional issues, and has focused his more recent research on the effect of judicial review on the evolution of constitutional law. He has also spoken on business law and contemporary constitutional issues before professional and community forums. Read more from Professor Knipprath at: <http://www.tokenconservative.com/>.***

Tags: [Constituting America](#), [Double Jeopardy](#), [Fifth Amendment](#), [Janine Turner](#), [Joerg Knipprath](#), [Southwestern Law School](#)  
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## **March 15, 2012 – Essay #19 – Amendment V: Right Against Double Jeopardy – Guest Essayist: Guest Essayist: Charles E. Rice, Professor Emeritus of Law at the University of Notre Dame**

Thursday, March 15th, 2012

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 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.*

### **DOUBLE JEOPARDY**

[N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb.— U.S. Constitution, Fifth Amendment.

What are the purpose and origin of that constitutional protection? “The constitutional prohibition against ‘double jeopardy’ was designed to protect an individual from being subjected to the hazards of trial and possible conviction more than once for an alleged offense.... The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity... as well as enhancing the possibility that even though innocent he may be found guilty. In accordance with this philosophy... a verdict of acquittal is final, ending a defendant’s jeopardy, and even when ‘not followed by any judgment, is a bar to a subsequent prosecution for the same offence.’ ... Thus it is one of the elemental principles of our criminal law that the

Government cannot secure a new trial by means of an appeal even though an acquittal may appear to be erroneous.” *Green v. U.S.*, 355 U.S. 184, 188 (1959). (citations omitted.)

The importance of the double jeopardy protection is obvious. But its applications raise technical questions. For example, as the Supreme Court of the United States ruled, “[I]t is not even essential that a verdict of guilt or innocence be returned for a defendant to have once been placed in jeopardy so as to bar a second trial on the same charge.... A defendant is placed in jeopardy once he is put to trial before a jury so that if the jury is discharged without his consent he cannot be tried again.... This prevents a prosecutor or judge from subjecting a defendant to a second prosecution by discontinuing the trial when it appears that the jury might not convict. At the same time jeopardy is not regarded as having come to an end so as to bar a second trial in those cases where ‘unforeseeable circumstances... arise during [the first] trial making its completion impossible, such as the failure of a jury to agree on a verdict.’.... [A] defendant can be tried a second time for an offense when his prior conviction for that same offense had been set aside on appeal.” *Green v. U.S.*, 355 U.S. 184, 187-88 (1959) (citations omitted).

The United States Constitution created a system of dual sovereignties, federal and state. The protections of the Bill of Rights, including the protection against double jeopardy, were originally intended to bind only the federal government, the government of the United States. *Barron v. Baltimore*, 32 U.S. 243 (1833). For protection of their liberties against infringement by state governments, the people relied on guarantees in their state constitutions. Thus the Supreme Court, in *Palko v. Conn.*, 302 U.S. 319 (1937), declined to apply the double jeopardy protection strictly against the states. Three decades later, however, the Supreme Court reversed that restriction on account of what it described as the “fundamental” character of that protection: “Once it is decided that a particular Bill of Rights guarantee is ‘fundamental to the American scheme of justice,’ ... the same constitutional standards apply against both the State and Federal Governments.... The fundamental nature of the guarantee against double jeopardy can hardly be doubted. Its origins can be traced to Greek and Roman times, and it became established in the common law of England long before this Nation’s independence.... As with many other elements of the common law, it was carried into the jurisprudence of this Country through the medium of Blackstone, who codified the doctrine in his Commentaries.... Today, every State incorporates some form of the prohibition in its constitution or common law.” *Benton v. MD*, 395 U.S. 784, 795 (1969) (citations omitted).”

The protection against double jeopardy is limited by the federal character of our constitutional system. “[A]n act denounced as a crime by both national and state sovereignties is an offense against the peace and dignity of both and may be punished by each.... [T]he double jeopardy... forbidden [by the Fifth Amendment] is a second prosecution under authority of the Federal Government after a first trial for the same offense under the same authority. Here the same act was an offense against the State of Washington, because a violation of its law, and also an offense against the United States under the National Prohibition Act. The defendants thus committed two different offenses by the same act, and a conviction by a court of Washington of the offense against that State is not a conviction of the different offense against the United States and so is not double jeopardy.” *U.S. v. Lanza*, 260 U.S. 377, 382 (1922) (citations omitted).

A criminal assault under state law may also be a separate civil rights violation under federal law if the prerequisites of racial or other elements are present. When, however, two different units of government are subject to the same sovereign, the double jeopardy clause does bar separate prosecutions by them for the same offense. *Waller v. Florida*, 397 U.S. 387 (1970) (trial by a municipal court bars a trial for the same offense by a state court.) The dual sovereignty doctrine has also been applied to permit successive prosecutions by two states for the same conduct. *Heath v. Alabama*, 474 U.S. 82 (1985) (where defendant crossed the state line in committing a kidnap murder, he could be prosecuted for murder in both states.)

The clause generally has no application in noncriminal proceedings. *Helvering v. Mitchell*, 303 U.S. 391 (1938). But the protection against double jeopardy can apply to the imposition of sanctions that are civil in form but that constitute “punishment” in their application. *Breed v. Jones*, 421 U.S. 519 (1975) (juvenile court proceedings); *U.S. v. Halper* 490 U.S. 435 (1989) (imposition of a civil penalty under the False Claims Act triggers protection against double jeopardy if the penalty is very disproportionate to compensating the government for its loss and is obviously intended for retributive or deterrent purposes). Because a main purpose of the double jeopardy clause is the protection against the burden of multiple trials, a defendant who raises and loses a double jeopardy claim during pretrial or trial may immediately appeal the ruling, an exception to the general rule prohibiting appeals from nonfinal orders. *Abney v. U.S.*, 431 US 651 (1977)

In summary, the double jeopardy protection is truly fundamental. That basic character should not be obscured by the necessity of making technical distinctions in its application. Those distinctions, based on procedural or federalist factors, attest instead to the necessity of preserving the fundamental character of that protection not merely in general but in all of its applications.

***Charles E. Rice is Professor Emeritus at the University of Notre Dame law School. His areas of specialization are constitutional law and jurisprudence. He currently teaches “Law and Morality” at Notre Dame.***

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**March 16, 2012 – Essay #20 – Amendment V: Right Against Self- Incrimination – Guest Essayist: Professor Kyle Scott, Professor of American Politics and Constitutional Law, Duke University**

Thursday, March 15th, 2012

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 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.*

The 5th Amendment contains numerous, seemingly unconnected, components. However, there is a common theme. The common theme that runs throughout the amendment is liberty; it connects each of the components. The manner in which the amendment is constructed reflects the idea that the burden of proof falls on the government. In order to take someone's life, liberty or property the government must adhere to a strict set of standards in trying to prove guilt or cause. Perhaps the most important of these is the protection against self-incrimination. The 5th Amendment states that an individual cannot be forced to testify against himself. The provision became well-known in popular culture when accused mobsters would commonly take the fifth when they were put on trial. But the provision has been around since at least the sixteenth century when torture and forced testimony was common practice.

In order to get a confession, or to get someone to testify against himself, officers of the law would torture someone or hold their family or property in custody until they signed a confession or took a pledge that confirmed their guilt. Of course, banning such practices was not enough as the practices were done in secret when they were outlawed, or outsourced to unofficial officers of the state where judges or barristers could plausibly deny the existence of such practices. The only way to make sure such reprehensible practices did not occur was to exempt people from being a witness against themselves. If a person could not be asked to witness against himself it wouldn't do much good to torture him.

The provision increases the burden of proof on the government in criminal cases. A person cannot, during trial, be asked if they committed a crime. The government must prove the case against them. This may seem onerous and unnecessary but we should be quick to remember that the government can be as prone to misuses of power as individuals. This is but one additional check to make sure the government does not use its monopoly on force outside the bounds of law in a way that threatens the life, liberty, or property of individuals. Such a provision also bestows an increased level of legitimacy over judicial proceedings.

This provision, and perhaps this amendment moreso than any other, shows at what great lengths the First Congress went through to protect individual liberty. This provision shows that the government exists for the preservation of individual liberty, that individual liberty precedes government; and thus by extension, the primary purpose of government is to protect us, not to enhance itself or extend authority over us beyond what we grant it.

The mark of a good government, and of a people truly committed to the idea of liberty, is the degree to which they abide by procedures that make the deprivation of life, liberty, or property difficult. This must be true when we sympathize with the accused just as much as when find the accused to hold positions and values contrary to our own.

*Kyle Scott, PhD, teaches American politics and constitutional law at Duke University. He has published three books and dozens of articles on issues ranging from political parties to Plato. His commentary on contemporary politics has appeared in Forbes, Reuters.com, Christian Science Monitor, Foxnews.com, Washington Times and dozens of local outlets including the Philadelphia Inquirer and Baltimore Sun.*

Tags: [Constituting America](#), [Duke University](#), [Fifth Amendment](#), [Janine Turner](#), [Kyle Scott](#), [Self-Incrimination](#)

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### **[March 19, 2012 – Essay #21 – Amendment V: Right to Due Process to Prevent Deprivation of Life, Liberty, or Property – Guest Essayist: J. Eric Wise, partner at Gibson, Dunn & Crutcher LLP law firm](#)**

Sunday, March 18th, 2012

In that funny movie, *Monty Python and the Holy Grail*, a woman is tried for the crime of being a witch by placing her on a scale to see if she weighs more than a duck. Laugh now. In 9<sup>th</sup> Century England, procedure was scarcely better. Commonplace were absurdities such as the “ordeal,” where guilt or innocence might be determined by burning the accused with boiling water or a hot iron, trial by battle – including the use of retained champions – and “compurgation,” the testing of witnesses by a ritualistic chain of oaths which if completed proved innocence or if broken proved guilt.

In 1215 English nobles forced King John to place his seal on the Magna Carta at Runnymede. That document stated in clause 39 “No freeman shall be taken, or imprisoned, or disseized, or outlawed, or exiled, or in any way harmed—nor will we go upon or send upon him—save by the lawful judgment of his peers or by the law of the land.” It was not until 1354 that clause 39 was

re-codified, including “due process of law” in lieu of “save by the lawful judgment of his peers or by the law of the land.”

The Constitution originally had no bill of rights. Federalists argued a bill of rights was more appropriate to an all-powerful monarch, subject only to enumerated rights, than to a limited government, having only the powers vested in it by the people. Yet, to co-opt the opposition, James Madison introduced in the First Congress a bill of rights. Embedded in the Fifth Amendment are the words “nor shall any person be deprived of life, liberty or property without due process of law.”

“No, no!” said the Queen in *Alice in Wonderland*. “Sentence first — verdict afterwards.” Due process is in the least a guaranty of procedural fairness. As such, due process includes, *inter alia*, prohibitions against vagueness, the right to notice and a meaningful hearing at a meaningful time, and decisions supported by evidence with law and findings of fact explained. Exigencies and circumstances affect the extent of procedural requirements through balancing tests. In circumstances requiring emergency injunctive relief, minimal notice, if any, is required. Due process is not the same as judicial process. Citizen affiliates of Al Qaeda beware, the executive may kill you without a trial.

Substantive due process is perhaps of a more controversial sort. Under the doctrine of substantive due process, the clause implies unwritten rights denying, in certain circumstances, the power to enact legislation – or otherwise act – to deprive life, liberty or property *even with fair procedural application*. Legislation that the judiciary finds inherently arbitrary may be voided on substantive due process grounds.

Readers of the Declaration of Independence know that super-legal rights do self-evidently exist and are the source of the authority of the people to govern themselves, but it is hardly a straight path from A to B that it is the role of the judiciary to give natural rights expression as positive law. Further, substantive due process proponents nowadays do not hang their hat on a natural rights peg. Compare the language of Justice Samuel Case in *Calder v. Bull* (1798) regarding the “principles of the social compact” to that of the “penumbral rights” of *Griswold v. Connecticut* (1965). In any event, both supporters and detractors alike would be disingenuous to deny that this second sort of “due process” vests somewhat breathtaking power in the judiciary, and raises the critique that by substantive due process legislation may be made without legislative process.

It is important to remember that the due process clause of the Fifth Amendment restricts only federal power. Consequently, since the ratification of the Reconstruction Amendments, applications of substantive due process under the Fifth Amendment have been limited to hard to scratch places where the due process clause of the Fourteenth Amendment does not reach, such as the territories and the District of Columbia. It would not be fair, however, to deny substantive due process under the Fifth Amendment some negative attention it deserves. Perhaps the first Supreme Court case to dive deeply into the waters of substantive due process was *Dred Scott v. Sandford* (1857), in which, through layered and abominable errors of reasoning, Justice Taney found in the due process clause of the Fifth Amendment a right to property in other human beings that barred Congress from prohibiting slavery in the territories.



*J. Eric Wise is a partner at the law firm Gibson, Dunn & Crutcher LLP, practicing restructuring and finance.*

Tags: [Constituting America](#), [Due Process](#), [Fifth Amendment](#), [J. Eric Wise](#), [Janine Turner](#)  
Posted in [Analyzing the Amendments in 90 Days 2012 Project](#), [Constitution Amendment V](#), [J. Eric Wise](#) | [3 Comments](#) »

### **March 20, 2012 – Essay #22 – Amendment V: Right to Just Compensation in Eminent Domain Matters – Guest Essayist: Gordon S. Jones, Utah Valley University**

Monday, March 19th, 2012

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 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.*

“...nor shall private property be taken for public use, without just compensation.”

The power to take private property is not one of the “enumerated” powers set forth in the Constitution. But as a practical matter, one of the things that makes a government a government appears to be the power to take property. That right is called “condemnation,” or the power of “eminent domain.”

The theory is that without government, any private property is subject to confiscation by anybody stronger. Governments (and especially ours) exist to protect property from such arbitrary takings. The Declaration of Independence identifies “life, liberty, and the pursuit of happiness” as among the “inalienable rights,” but the Founding Fathers, relying on English theorist John Locke, understood “happiness” to include the right to private property. Early uses of this phrase actually say “life, liberty, and property.” Alexander Hamilton described “the security of property” as one of the primary purposes of government.

With the “takings” clause of the Fifth Amendment, Founding Father James Madison was only trying to provide property owners with at least the assurance that proper procedures would have to be observed in takings, and that owners would at least get something for their loss.

There are a number of concepts that need to be explored in understanding the Takings Clause: what is a “taking,” what is “public use,” and what is “just compensation”?

If the government takes your farm and builds a military base on it – occupies it – that is obviously a “taking.” But what if you own property on top of a mountain, and you want to build five houses on it that you can sell for \$1 million each. Government tells you that you can only build one house there, and that house will sell for only \$1.5 million. Has the government “taken” \$3.5 million from you?

If a Forest Ranger discovers a spotted owl nesting in your tree farm, you may not be allowed to cut the trees. Has government “taken” the value of the timber?

These are the kinds of questions governments and courts ask in deciding whether property has been “taken.” It would be nice to think that, after more than 200 years, we had clear answers to these and similar questions, but the fact is, we don’t. One Supreme Court Justice said that government could impair the value of property by regulation without paying compensation as long as it didn’t go “too far.” Not exactly the clearest standard.

What about “public use”?

If your county government takes your property and builds an airport on it (or a school or hospital), most would agree that the property had been taken for a “public use.” On the other hand, what if the property was taken and sold to a private developer who built an office building on it? Would that be a “public” use? Probably not, but if the property were in a run-down (“blighted”) area of town, and the development eliminated a row of crack houses and re-vitalized the economics and livability of the neighborhood, the courts might find such a taking justified (and therefore constitutional).

Again, you might think that there is a lot of “wiggle room” in these judgments, and you would be right. Some years ago, the State of Hawaii forced private landowners to sell their land to tenants. The Supreme Court upheld the forced sales as being for a “public use.” We might think such a judgment obviously wrong, but we might change our mind if we knew that in Hawaii at that time 72 owners had inherited from ancient times more than 90 percent of the private land in the islands.

A more questionable case occurred in 2005, when the city of New London, Connecticut took several private homes and sold them to a private developer for an office building. There was no question of “blight” in this case, but the city argued that it would get more tax revenue from the office building than it was getting from the private homes, so that the “public” would benefit. This case (*Kelo vs. New London*) generated a firestorm of opposition, moving many states to strengthen the safeguards on their eminent domain procedures. Critics of the *Kelo* decision argue that it has changed the words “public use” to the much looser “public purpose.”

Finally, what is “just compensation”? If the city wants to build a road across my property and offers me \$1 million for it, I might consider that “just,” and be happy to take it. On the other hand, if my grandfather is buried there, no amount of money could tempt me to sell willingly.

Governments have set up procedures for determining what the “fair market value” is for any property subject to condemnation. These involve the use of real estate appraisers, economists, and planning forecasters. They also typically involve extensive negotiations, which can be expensive for a private landowner – so expensive that the landowner eventually gives up and gives in to the government, which has all the resources of the taxpayer to call on to finance its battle.

The right to own property is part of what the Founding Fathers called the “natural law,” one of the “inalienable rights” mentioned in the Declaration of Independence. The Constitution was written for the purpose of “ensuring” those rights, so we should be very suspicious of governmental power that infringes the enjoyment of property rights. But it is obvious that completely unfettered use of property by one person could infringe the rights of other property owners. At the present time, the system we use to reconcile conflicting – or potentially conflicting – rights is the power of eminent domain, hedged up, as it must always be, with the procedural safeguards guaranteed by the Fifth Amendment: that the “taking” be for a “public use,” and that it be accomplished by “just compensation.”

*Gordon Jones, a long-time policy analyst in Washington, studied constitutional Law with Robert Horn at Stanford University, has his Master of Philosophy in Political Science from George Washington University, and teaches Law and Politics at Utah Valley University.*

Tags: [Constituting America](#), [Eminent Domain](#), [Fifth Amendment](#), [Gordon S. Jones](#), [Janine Turner](#), [Utah Valley University](#)

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### **March 21, 2012 – Essay #23 – Amendment V – Guest Essayist: Michelle Griffes, Manager of Programs and Curriculum Development at the Bill of Rights Institute**

Tuesday, March 20th, 2012

#### *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 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.*

Movies and television shows have popularized Fifth Amendment protections like “grand jury indictment,” “double jeopardy,” “pleading the Fifth,” and “due process,” but do Americans truly know what these clauses protect? Do Americans understand what their lives would be like without the protections of the Fifth Amendment? In order to explain the Fifth Amendment in its entirety, we will explore each of the five clauses of the Fifth Amendment, the basic history of the clause, and the protections provided by the clause.

The first clause in the Fifth Amendment reads: “No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury.” According to the Handbook for Federal Grand Jurors, a grand jury hears evidence against an accused person from the United States Attorney or Assistant United States Attorney in order to determine whether he or she should be brought to trial. The U.S. Attorney then has to approve the indictment as a check on the grand jury. [1] Grand juries were first recognized in the Magna Carta in 1215. As British subjects moved to North America, they brought English common law practices, including grand juries, with them. Eventually, indictments for capital crimes by grand juries were enshrined in the Bill of Rights.

The second clause in the Fifth Amendment states: “Nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb.” This clause is commonly known as “double jeopardy” and prevents a defendant from being charged for the same crime after acquittal, conviction, certain mistrials, or multiple punishments. The portion of the clause that refers to “life and limb” is derived from the possibility of capital punishment. [2] Protections against double jeopardy can be found as far back as the Old Testament and ancient Roman law. [3] Double jeopardy can be complicated by the differences between criminal and civil cases and state and federal cases. O.J. Simpson, for example, was acquitted in a criminal murder case, but he was found guilty in a civil case. Hate crime statutes also challenge double jeopardy protections, with some arguing that trying defendants for a hate crime after acquittal in a criminal case constitutes double jeopardy.

The Fifth Amendment also promises: “nor shall [any person] be compelled in any criminal case to be a witness against himself.” This is the famed “pleading the Fifth” assertion we often hear in American vernacular. The clause protects individuals from answering questions or making statements that might be used as evidence against them. [4] This protection was expanded outside the courtroom with the United States Supreme Court case *Miranda v. Arizona*, 1966. The Court ruled that the self-incrimination clause also applied in police interrogation. [5]

“[No person shall] be deprived of life, liberty, or property, without due process of law” is the fourth clause of the Fifth Amendment. Due process was first protected under the Magna Carta in which King John promised that he would act in accordance with the law through procedures. The U.S. government provided for due process rights in the Fourth Amendment and in the Equal Protection clause of the Fourteenth Amendment. In order to ensure justice, established procedures must be followed before depriving people of life, liberty, or property. These procedures include the rights to a speedy jury trial, an impartial jury, and to defend oneself. [6]

Property is first mentioned as part of the due process clause of the Fifth Amendment, but private property is mentioned again in the final clause. The clause states, “nor shall private property be

taken for public use, without just compensation.” If the state or federal government decides to take private property for public use, they must compensate the owners for that use. This is known as the “takings clause” or “eminent domain.”[7] Supreme Court has held that just compensation is measured by the current market value of the property. [8]

While Americans may hear about the Fifth Amendment protections regularly, they may not really understand the specific rights enumerated in each clause. The Fifth Amendment provides for grand jury indictments in capital crimes, protections against double jeopardy and self-incrimination, and protections of due process rights and just compensation for public use of private property. Each of these rights has a history in English common law or as far back as the Roman Empire, and the Founding Fathers believed that they needed to be explicitly provided for in our own government documents to ensure their protection.

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*Michelle Griffes is the Manager of Programs and Curriculum Development at the [Bill of Rights Institute](#), an Arlington, Virginia-based educational non-profit. Michelle obtained degrees from Michigan State University in Public Policy and Olivet College in Elementary and Secondary Education. The Bill of Rights Institute teaches students about the Founding Documents through teacher professional development seminars, curriculum production, and student programs including the annual [Being An American Essay Contest](#).*

Tags: [Bill of Rights Institute](#), [Constituting America](#), [Fifth Amendment](#), [Janine Turner](#), [Michelle Griffes](#)

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**March 22, 2012 – Essay #24 – Amendment VI: Right to a Speedy Trial – Guest Essayist: Cynthia Dunbar, attorney, author, speaker and Assistant Professor of Law at Liberty University**

Wednesday, March 21st, 2012

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 defence.*

The Sixth Amendment of the Constitution affords citizens of the United States the right to a speedy and public trial. It is important to note that this right, as every single right within the Bill of Rights, is not a right created by the civil government. Rather, they are rights that are deemed to already exist preserved from governmental deprivation. The belief in inherent rights possessed by mankind is the ideal behind the Magna Carta.

Chapter 40 of the Magna Carta of 1215 states “We...will not deny or defer to any man either justice or right.” This shows that the ultimate concern was that no man be deprived of justice. The inherent right all men possess to justice is at the heart of being afforded a speedy trial. It was thought that a miscarriage of justice could more readily occur in a system where men could be incarcerated for lengthy periods of time without the promise of a trial to present evidence of their potential innocence. Without the promise of a speedy trial, men could ultimately be imprisoned for an undefined sentence of time prior to ever having been lawfully determined to be guilty. The protections of the 6<sup>th</sup> Amendment have been said to be “an important safeguard to prevent undue and oppressive incarceration prior to trial, to minimize anxiety and concern accompanying public accusation and to limit the possibility that long delay will impair the ability of an accused to defend himself.” *United States v. Ewell*, 383 U.S. 116, 120 (1966)

While it is clear that the right to a speedy trial avoids lengthy periods of incarceration prior to determination of guilt, it is also clear that it serves other legitimate goals to ensure justice. First, it minimizes the threat that mere public accusation could create in its absence. Because one is promised a speedy trial, mere accusations do not hold the same threat since those accusations would be weighed upon a technical evidentiary standard at trial. Additionally, the preservation of the evidence itself can be seen. The delay of a trial can easily cause spoilage of evidence and diminished memories of witnesses who could be called to testify. Inaccurate or fuzzy memories serve to increase the likelihood of a miscarriage of justice. Ensuring a speedy trial is a necessary tool in ensuring that accurate testimony and evidence are presented at trial.

So we know we are afforded the right to a speedy trial and we know why we are afforded this right. But now the question is, “how to determine when and if this right has been abridged?” The courts have determined that this right becomes activated once a criminal prosecution begins. This right then is afforded to the accused once the prosecution of a crime has begun. It has also been determined that the right does not require a formal indictment or charge; it begins once restraints are imposed by arrest. *United States v. Marion*, 404 U.S. 307, 313, 320, 322 (1971)

This inherent or unalienable right to justice which all men possess served to give direction to our Founding Fathers. They saw that in order to practically achieve the greatest protection of this right, citizens must be assured the right to a speedy trial. The only hope that a falsely accused innocent man has of regaining his liberty is the preservation of accurate testimony and evidence and a prompt opportunity to confirm his innocence. This pursuit of justice is what lies at the heart of the constitutional right to a speedy trial.

*Cynthia Noland Dunbar is an attorney, author and public speaker and is frequently seen on Fox & Friends. A former elected member of the Texas State Board of Education, she currently is an Assistant Professor of Law at Liberty University School of Law and teaches on our Constitutional and common law heritage.*

Tags: [Constituting America](#), [Cynthia Dunbar](#), [Janine Turner](#), [Liberty University](#), [Right to Speedy Trial](#), [Sixth Amendment](#)

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### **March 23, 2012 – Essay #25 – Amendment VI: Right to a Public Trial – Guest Essayist: William C. Duncan, Director of the Marriage Law Foundation**

Thursday, March 22nd, 2012

Secret trials are the stuff of nightmares and a hallmark of a totalitarian state. The U.S. Supreme Court has noted that institutions employing secret trials “symbolized a menace to liberty.” In re Oliver, 333 U.S. 257, 269 (1948).

When the Framers of the Sixth Amendment included the requirement of a “public” trial, they were enshrining a longstanding protection of liberty. William Blackstone, a bestseller in the Framing era, noted public trials dated back to the Roman Republic. England had public trials before the Norman Conquest and a “right” to a public trial seems to have existed in the 1600s. The important American treatise writer, Joel Bishop suggested the right in the Sixth Amendment is attributable to “immemorial usage.” *Richmond Newspapers v. Virginia*, 448 U.S. 555, 565-568 (1980); Harold Shapiro, “Right to a Public Trial” 41 *Journal of Criminal Law & Criminology* 782 (1951).



The right is borrowed from the common law of England and contrasts with the civil law system (more common in Europe) which allows for private examination of witnesses. The Pennsylvania and North Carolina constitutions of 1776 both provided for open trials. There was little discussion of the provision in the debates over the Sixth Amendment. In *re Oliver*, 333 U.S. 257, 269 (1948); Max Radin, “The Right to a Public Trial” 6 *Temple Law Quarterly* 381 (1931).

For the individual being tried a public trial provides crucial protections. Quoting *In re Oliver* again: “the guarantee has always been recognized as a safeguard against any attempt to employ our courts as instruments of persecution. The knowledge that every criminal trial is subject to contemporaneous review in the forum of public opinion is an effective restraint on possible abuse of judicial power.” Page 270. Having proceedings out in the open provides “assurance that the proceedings were conducted fairly to all concerned” and discouraged “decisions based on secret bias of partiality.” *Richmond Newspapers v. Virginia*, 448 U.S. 555, 569 (1980).

For society at large public trials also serve valuable purposes. They discourage lying by witnesses (since someone who knows the truth could be in the courtroom), discourage bad behavior by participants, and provide an education on the legal system.

Put more simply, everyone (judge, attorney and witnesses alike), is likely to be on their best behavior when they know they are being observed. This is why parents whisper (or hiss) when they threaten their children at the grocery store.

This is a serious matter, though. In 1948, the Supreme Court could note: “we have been unable to find a single instance of a criminal trial conducted in camera [meaning in the judge’s chambers and not in open court] in any federal, state, or municipal court during the history of this country.” *In re Oliver*, page 266. That same year, an American citizen was arrested in Czechoslovakia and convicted of espionage in a secret trial ultimately escaping in 1952. Ken Lewis, “Leaving an Imprint” *St. Augustine Record*, September 26, 2003 at [http://staugustine.com/stories/092603/new\\_1830364.shtml](http://staugustine.com/stories/092603/new_1830364.shtml).

How many Americans have been spared a similar fate because of the wisdom of the Framers? Yet another debt of gratitude we owe them.

***William C. Duncan is director of the Marriage Law Foundation ([www.marriagelawfoundation.org](http://www.marriagelawfoundation.org)). He formerly served as acting director of the Marriage Law Project at the Catholic University of America’s Columbus School of Law and as executive director of the Marriage and Family Law Research Grant at J. Reuben Clark Law School, Brigham Young University, where he was also a visiting professor.***

Tags: [Constituting America](#), [Janine Turner](#), [Marriage Law Foundation](#), [Right to Public Trial](#), [Sixth Amendment](#), [William C. Duncan](#)

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**March 26, 2012 – Essay #26 – Amendment VI: Right to an Impartial Jury – Guest Essayist: Julia Shaw, Research Associate and Program Manager in the B. Kenneth Simon Center for Principles and Politics at the Heritage Foundation**

Sunday, March 25th, 2012

*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 defence.*

**The Jury Trial Clause**

The right to a trial by jury is essential to the American legal tradition. The Charter of the Virginia Company in 1606 guaranteed the colonists all the traditional rights of Englishmen, including the right to trial by jury. The Declaration of Independence recognized the importance of the right, when it condemned the King “for depriving us in many cases, of the benefit of Trial by Jury.”

When drafting the Constitution, the framers made the jury part of the structure of government: Article III states “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.” In drafting the Bill of Rights, the framers separately protected the right to a trial by an impartial jury in federal criminal cases in the Sixth Amendment.

In the early history of the United States, a jury consisted of 12 individuals who were drawn from the community in which the crime was committed. Though members may have some knowledge of a case before they enter the courtroom, they would consider the evidence presented to reach unanimous verdict. A jury decided both questions of fact and questions of law. Meaning, judges would not tell jury members what the law meant; instead, lawyers argued questions of law before the jury, and the jury decided how the law should be interpreted and applied.

The Sixth Amendment does not mention who can serve on a jury. Initially, federal courts looked to state laws to determine who could serve on a jury. In early American history, all states limited jury service to men, and all states except Vermont required jurors to be property owners or taxpayers. A few states prohibited blacks from serving on juries.

Since the Framing, the interpretation of the Jury Trial Clause has changed in several significant respects. First, juries now decide questions of fact and not question of law. Since the Supreme Court’s ruling in *Sparf and Hansen v. United States* (1895), judges tell the jury what the law means, and jurors are obliged to follow that definition. Although their power to determine questions of law has been eroded, juries still retain the raw power to check general laws, because a verdict of non-guilty is not reviewable.

Second, the clause now applies to both state and federal proceedings, according to the Supreme Court's ruling in *Duncan v. Louisiana* (1968).

Third, the Supreme Court has also altered the rules regarding the size of a jury and the requirement of unanimity. For hundreds of years, juries consisted of 12 individuals. In 1970, though, the Supreme Court ruled that juries could consist of as few as six members. Six-person juries must reach a unanimous decision, and unanimous decisions are required in federal cases. But, non-unanimous verdicts are permissible for 12-person juries in state courts: that means convictions by a vote of 11–1 and 10–2 are possible.

Fourth, the Supreme Court has ruled that both the Sixth Amendment and the Equal Protection Clause of the Fourteenth Amendment prohibit the jury qualifications of the Founding era. Race and sex are no longer grounds for preventing individuals from serving as jury members.

Perhaps the greatest change today is how few criminal cases ever go before the jury. Nearly half of felony convictions are achieved without juries. Guilty pleas and plea bargains account for the vast majority of felony cases. Guilty pleas were rare and discouraged during the Founding era, when jury trials were routine. Though these individuals are sentenced without jury trials, the Supreme Court recently concluded that certain federal sentencing guidelines violate the right to trial by jury.

***Julia Shaw is Research Associate and Program Manager in the B. Kenneth Simon Center for Principles and Politics at the Heritage Foundation.***

Tags: [Constituting America](#), [Heritage Foundation](#), [Janine Turner](#), [Julia Shaw](#), [Right to Impartial Jury](#), [Sixth Amendment](#)

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### **March 27, 2012 – Essay #27 – Amendment VI: Right to be Informed of the Charge – Guest Essayist: Professor Joerg Knipprath, Professor of Law at Southwestern Law School**

Monday, March 26th, 2012

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 defence.*

The due process clause of the Fifth Amendment embodies the principle that those vested with the power to govern must not act arbitrarily towards the citizenry. This principle has been a long-established and deeply-held value in Western Civilization, dating back to Stoic (and, subsequently, Judeo-Christian) conceptions of individual dignity. It was incorporated into the canon law of the medieval Catholic Church on the argument that, before banishing Adam and Eve from the Garden of Eden, God gave them a hearing. In Anglo-American constitutional history, it found expression in a provision of the Magna Charta extracted from King John by the nobles that “No free man shall be taken or imprisoned or dispossessed, or outlawed, or banished, or in any way destroyed, nor will we go upon him, nor send upon him, except by the legal judgment of his peers or by the law of the land.” Closer in time to the Constitution, that protection was included in substantially similar language, in the paradigmatic Massachusetts constitution of 1780.

It is self-evident that among the most fundamental protections against governmental caprice is the requirement that, before one is tried and subject to losing life, liberty, or property, one must be notified of the reasons by grand jury indictment or criminal information. Languishing in jail, or living under a cloud of unspecified suspicion, with the overbearing power of the State poised to strike at his life, liberty, or property for a reason not made known, exacts an emotional toll and prevents the targeted individual from preparing his defense. In the more modern context provided by the movie “Animal House,” operating under “double secret probation” puts the recipient at the whim of a vindictive governing bureaucracy.

Then why did the Framers not simply limit themselves to a due process protection, but provide various more precise protections for the accused? Individual clauses in the Fifth (the protection against compelled self-incrimination), Sixth, and Eighth Amendments (no excessive bail) Amendments are specifications of the broader contours of the due process guarantee in the Fifth Amendment. Many of these specifications arose out of the particular experiences of the Americans with British rule. The specific requirement of notification of criminal charges began to appear frequently in early state constitutions, but, unlike other specific protections such as jury trials, had been rare in earlier colonial charters and declarations of privileges and liberties. The Massachusetts constitution of 1780 again provides a model, “No subject shall be held to answer for any crime or offence until the same is plainly, substantially and formally, described to him....” Thus, an indictment must not only be clear, but must “contain the elements of the offense intended to be charged and sufficiently apprise the defendant of what he must be prepared to meet,” as the Supreme Court has opined.

The requirement of notice of charges applies not only to procedural steps that must be taken in regard to the accused. There is also a substantive component that the law under which he is charged be written in a way that furnishes him a reasonably definite standard of guilt. Again, this ties into more general due process notions that a law is unconstitutionally vague if the “average person is left to guess at its meaning,” or if, “based on common understanding and practices, the language of the law reasonably could be construed in several ways, one of which would make

the conduct legal.” The old saw that “ignorance of the law is no defense” loses all force if the language of the law is unduly vague.

One historical example of the dangerous malleability of law, especially in the hands of crafty and overbearing prosecutors, was the application of English treason law. Before the Statute of Treason was adopted in 1352, it included various crimes other than warring against the king or aiding his enemies. The contours changed as the king saw fit and extended to ordinary crimes against the “peace of the realm,” such as the murder of the king’s messengers and armed robbery. Even after the statute, it included counterfeiting and listed such oddities as “imagining the death of the king, his consort, or his eldest son; violating his consort, or eldest unmarried daughter, or the wife of his eldest son” even before the text discussed levying war against the king. That statute itself was frequently altered and applied in unpredictable ways until a series of reforms by, curiously, the 17<sup>th</sup> century court of Star Chamber and later Parliaments. Due to this history, as well as the harsh, even brutal, consequences that could result from conviction for treason, colonial charters and state constitutions sought to tighten the definition and reign in the consequences. The Framers of the Constitution followed suit and made treason the only clearly defined crime in the Constitution.

More recently, the Supreme Court has addressed the “notice” issue in striking down vagrancy laws and laws based on certain personal “characteristics.” For example, an ordinance from Jacksonville, Florida, was declared unconstitutional that punished, among others, “persons who use juggling or unlawful games or plays...persons wandering or strolling around from place to place without any lawful purpose or object, habitual loafers...persons neglecting all lawful business and habitually spending their time by frequenting houses of ill fame, gaming houses, or places where alcoholic beverages are sold or served, persons able to work but habitually living upon the earnings of their wives or minor children” as vagrants. To the Court, this law cast too wide a net and left too much unpredictable discretion to the police to provide a suitable (and constitutional) rule of law. Punishing (defined) aggressive begging is one thing; punishing people “hanging out” is another.

In similar vein, a New Jersey statute that penalized “gangsters” was struck down because it did not provide a usable definition. More recent anti-gang statutes and injunctions have survived constitutional scrutiny because they prohibit defined gang activities, rather than mere status as a gangster. Led by California’s Street Terrorism Enforcement and Prevention Act and the state’s pioneering use of anti-gang injunctions, a majority of states have enacted this type of legislation. The federal government also targets gangs through the Racketeer Influenced and Corrupt Organizations Act (RICO), which punishes gangster-focused conduct. The latter example also shows the dangers of broadly-worded laws, as the statute for a couple of decades was used against targets, such as financial institutions and other businesses, well beyond the intent of the statute’s drafters. One critic claimed that the only groups not targeted under the law were actual racketeers.

The courts recognize, however, that statutes are inherently vague. Language has its limits. Indeed, requiring too much definition would likely make a statute more ambiguous by increasing its complexity and verbosity. Moreover, statutes look forward and are intended to address actions still undone by persons still unknown. There has to be play in the joints. Conspiracy laws, and

statutes that prohibit mail and wire fraud, “unreasonable” restraints of trade, or conduct that the “reasonable person knows would annoy another by creating an unreasonable noise” provide sufficiently precise notice. Insufficiency of notice of the charges based on the purported vagueness of a law is almost invariably a futile argument. A defendant whose only hope for avoiding conviction is based on such a tactic is well advised to seek a plea bargain.

*An expert on constitutional law, Prof. Joerg W. Knipprath has been interviewed by print and broadcast media on a number of related topics ranging from recent U.S. Supreme Court decisions to presidential succession. He has written opinion pieces and articles on business and securities law as well as constitutional issues, and has focused his more recent research on the effect of judicial review on the evolution of constitutional law. He has also spoken on business law and contemporary constitutional issues before professional and community forums. Read more from Professor Knipprath at: <http://www.tokenconservative.com/>.*

Tags: [Constituting America](#), [Janine Turner](#), [Joerg Knipprath](#), [Right to Be Informed of Charge, Sixth Amendment](#), [Southwestern Law School](#)

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### **March 28, 2012 – Essay #28 – Amendment VI: Right to Confront Accuser – Guest Essayist: Horace Cooper, Senior Fellow with the Heartland Institute**

Tuesday, March 27th, 2012

#### **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 defence.*

*“...Right to confront your accuser...”*

Perhaps more so than any other provision, the 6<sup>th</sup> Amendment’s confrontation clause is one of the greatest criminal justice protections of the Constitution.

While many Americans today may not be aware, there was a time when trials didn't operate with the protections that we rely upon today. Consider the trial of Sir Walter Raleigh. Well known for promoting tobacco in England, he was an English aristocrat, writer, poet, soldier, courtier, spy, and explorer.

In 1603, Sir Walter Raleigh was arrested and accused of treason against King James. Raleigh was allegedly one of the primary conspirators of the so-called "Main Plot," an effort to end the rule of King James and install his cousin in his place.

The trial was held in the Great Hall of Winchester Castle and the primary evidence relied upon by the crown was the signed confession of Henry Brook, the Baron of Cobham. Throughout the trial, Raleigh requested that Baron Cobham be called in to testify so that he might demonstrate the falsity of the claims, "[Let] my accuser come face to face, and be deposed. Were the case but for a small copyhold, you would have witnesses or good proof to lead the jury to a verdict; and I am here for my life!"

Even though criminal law prevented the use of so called "hearsay" evidence, the crown's tribunal refused to compel Baron Cobham's testimony. Without the ability to publicly force the baron's testimony or to challenge his veracity, ultimately Raleigh was found guilty and imprisoned in the famous Tower of London.

This experience was a powerful one for the colonists coming to America and would significantly influence the contours of the 6<sup>th</sup> Amendment.

The modern Supreme Court has made it clear that the "Confrontation Clause guarantees an opportunity for effective cross-examination, not cross-examination that is in whatever way, and to whatever extent, the defendant might wish."

The power of the government to use its resources to accuse, indict and try an individual is considerable. The framers understood this concern and therefore provided for a means whereby the individual could have the ability to limit the impact of the government's power in this arena. The confrontation clause explicitly places a limit by requiring that evidence be presented by a bona fide witness capable of being "cross examined" or challenged on the witness stand.

Thus instead of unknown witnesses or unidentified individuals presenting allegations secretly to convict a person, the confrontation clause requires not only that the government identify those individuals as part of the trial, but to also allow the defendant to rebut or challenge any evidence they attempt to present.

Typically the confrontation rule requires that this occur in open court. This rule not only applies to witnesses, but also to any written documentation or other types of evidence that the government may wish to present in a trial. In other words, not only must a homeowner – who was an eyewitness – submit to "cross examination" in a burglary trial, any finger print or blood evidence must also be subject to a challenge by experts in finger print and forensic science.

Normally, evidence is testimonial, that is there is a person making the statement which is considered by the judge or jury and he or she must generally be available for cross examination.

While there may be an exception for a circumstance wherein the witness is unavailable, generally speaking the defendant must have had a prior opportunity for cross-examination of the witness before that testimony is allowed.

Furthermore the confrontation clause is one of the reasons that so-called “hearsay” evidence is limited in court. Hearsay simply covers the type of information that may prove useful for a trial that is presented by someone other than an eyewitness about information that typically only the eyewitness could recount. Because of the confrontation clause, even the limited evidence that is allowed to be presented under hearsay exemptions still must be presented by witnesses that can be challenged. For example, a so-called deathbed confession may be allowed to be entered as evidence. However the person or document presenting the evidence must be capable of being challenged regarding their motive or accuracy etc.

Without the confrontation clause, a valuable right would not exist that protects individuals against the power of the state. Per the terms of the confrontation clause, Ex Parte or out of court statements are generally not allowed, defendants are guaranteed the right of “personal examination” of the witness, the witness must testify under oath, and the jury must be allowed to observe the demeanor of the witness in making his statement.

*Horace Cooper is a senior fellow with the Heartland Institute and is a writer and legal commentator*

Tags: [Constituting America](#), [Heartland Institute](#), [Horace Cooper](#), [Janine Turner](#), [Right to Confront Accuser](#), [Sixth Amendment](#)

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### **March 29, 2012 – Essay #29 – Amendment VI: Right to Have Assistance of Counsel – Guest Essayist: Professor Kyle Scott, Professor of American Politics and Constitutional Law, Duke University**

Wednesday, March 28th, 2012

#### **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 defence.*

With the Constitution in general, and the Bill of Rights in particular, we speak of liberty. There can be no doubt that the Constitution and the Bill of Rights are liberty preserving and any act against liberty taken by the government runs against the true intention of the documents. But in the section of the 6th Amendment that guarantees the right to have the assistance of counsel we see equality creep in to the picture as well. The basic assumption is that if one is to receive a proper hearing one must have someone represent them with legal expertise. A trial by any other means would leave the one unrepresented by legal counsel at a competitive disadvantage. In that case, the matter would be decided not according to the law but by the superiority of the argument and legal expertise. The consequence would be that someone's liberty could be deprived in a way inconsistent with the law and its application to the facts thus depriving the defendant of due process. This part of the amendment operates under the assumption that to have liberty, each citizen must have equal protection under the law. When the law is applied unfairly, or intentionally advantages some over others, liberty is sacrificed. This has nothing to do with equality of outcome or equality of opportunity as those matters are commonly discussed in contemporary policy debates. Rather, it simply states that the law must be the final determinant of when someone's liberty may be restricted, not chance or caprice.

The rule of law is commonly understood to be something of an unbiased arbiter. It should not prejudice or hold bias against anyone for reasons unrelated to the relevant facts. The law also makes outcomes predictable. If the law is applied the same in all cases then I should know what to expect in all cases. The law produces a certain amount of certainty when it is known and unbiased. In a nation governed by the rule of law, I know what to expect from the law and from the government. Under a government without a known and settled law, only fear reigns with any predictability. Our futures and our liberty become uncertain and entirely dependent upon the will and whim of those in charge without equal protection under the law. This is why the law must be applied equally for equality under the law implies that those who make and enforce the law are as equally restricted by it as I am.

This holds true for relations between individuals as well. If the person I am dealing with has more liberty under the law than I do then I am at a disadvantage, one imposed by the state. For instance, if the government protects the right of individuals to make private contracts, and will also enforce the contracts if one side breaches it, then I can enter into an agreement knowing that the person will live up to their end of the bargain and if they don't I have recourse through the government. But, if the government only made it so I was bound by the contract, and not my business associate, then he could exploit this inequality in the law to his advantage. Under such a scenario there would be no reason to have contracts and business relationships would deteriorate. Even in a free market society, where one is allowed to succeed or fail in the market on their own, the government must uphold the rule of law equally so that it is our liberty that decides our success and failure and not the government. If the law is unequally applied then it is not our liberty that is deciding the outcome, but those who make the law determine our fate, thus making it not a free market at all.



And this brings us back to the court room. I am not an attorney, nor did I sleep at a Holiday Inn last night. So if you pitted me against a successful trial lawyer I would get creamed. The only chance I would have of winning is if I had counsel. The right to counsel guaranteed by the 6th Amendment makes sure that I cannot be denied counsel by the other party or by the government. If the government really wanted to send me to jail, regardless of whether I was really guilty, all it would have to do is say I wasn't allowed to have an attorney represent me. Think of what would happen if the government could use its power to deny me the one thing that would help guarantee a fair trial. The government could have somebody with legal specialization represent its interests but I would not have the same right. This would be unequal protection under the law and my fate would not be determined by the law but by its unequal application. Equality, the kind of which I write, is an essential component to the maintenance of liberty.

*Kyle Scott, PhD, teaches American politics and constitutional law at Duke University. He has published three books and dozens of articles on issues ranging from political parties to Plato. His commentary on contemporary politics has appeared in Forbes, [Reuters.com](http://Reuters.com), Christian Science Monitor, [Foxnews.com](http://Foxnews.com), and dozens of local outlets including the Philadelphia Inquirer and Baltimore Sun. He is a frequent contributor to [blogcritics.org](http://blogcritics.org) and maintains his own blog at [kyleascott.wordpress.com](http://kyleascott.wordpress.com)*

Tags: [Assistance of Counsel](#), [Constituting America](#), [Duke University](#), [Janine Turner](#), [Kyle Scott](#), [Sixth Amendment](#)

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## **[March 30, 2012 – Essay #30 – Amendment VI – Guest Essayist: Nathaniel Stewart, Attorney](#)**

Thursday, March 29th, 2012

### **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 defence.*

Sixth Amendment Overview

The Sixth Amendment is the centerpiece of constitutional criminal procedure. It forms the framework, the underlying first principles governing the process by which our society will try and treat those accused of a crime. As the English legal philosopher, William Blackstone, famously quipped, “better that ten guilty persons escape than that one innocent suffer,” expressing the ancient axiom—dating even to Genesis—that the law should be made to punish the guilty, but not the innocent.[1]

The Sixth Amendment sets out the legal strictures and protections designed to protect society from its criminals, and protect the innocent from society. To secure these protections, the Amendment prescribes three sets of rights: (1) the right to a speedy trial; (2) the right to a public trial; and (3) the right to a fair trial.

The Founding-generation was well aware that a speedy trial was a fundamental right of Englishmen. It was approved by the First Congress without discussion. The right to a speedy trial protects several related liberty interests, namely, the individual’s interests in avoiding a prolonged pretrial detention and in minimizing reputational damage due to an unjust or false accusation. It protects the innocent from suffering a *de facto* punishment—a lengthy pre-trial detention—before ever having the chance to defend himself. Furthermore, ensuring a speedy trial also helps to facilitate a fair trial—one designed to discover the truth of the matter, not just a verdict—since a prolonged delay may harm the accused’s legal defense as memories fade, evidence is lost or destroyed, or witnesses die or move away. The Founders made sure that the government could not merely charge the accused with a crime, infringe upon his liberties, damage his public reputation, and then fail to give him a legal forum for mounting a defense and clearing himself of the allegations. A defense must be afforded quickly, for as another old saying goes, “justice delayed is justice denied.”[2]

The right to a public trial is “a trial of, by, and before the people.”[3] As one legal scholar succinctly put it, a trial should be “a public thing, the people’s thing,” and included in the right to a public trial are “the rights to (a) a trial held in public, (b) featuring an impartial jury of the people, (c) who come from the community where the crime occurred.”[4] The Founders would not sanction secret criminal proceedings, and there was a deep Anglo-American tradition that trials be open and public spectacles. The Supreme Court acknowledged as much when it wrote: “by immemorial usage, wherever the common law prevails, all trials are in open court, to which spectators are admitted.”[5] Public trials serve a number of purposes in a number of ways, chief among them an added protection for the innocent. As Professor Amar has noted, “Witnesses for the prosecution may be less willing to lie or shade the truth with the public looking on; and bystanders with knowledge of the underlying events can bring missing information to the attention of the court and counsel. A defendant will be convicted only if the people of the community (via the jury) believe the criminal accusation—believe both that he did the acts he is accused of, and that these acts are indeed criminal and worthy of the community’s moral condemnation.”[6]

Finally, the Sixth Amendment’s protections provide the accused with a fair trial, affording him protections against an erroneous guilty verdict. We see this expressed in the constitutional right to an attorney—that is, the right to defense counsel—and “*to be informed of the nature and*

*cause of the accusation,”* as well as the right “*to be confronted with the witnesses against him,*” and the right to obtain “*witnesses in his favor.*” The process for trying the accused is to be fair and impartial. If the government can marshal its lawyers to prosecute, the accused must be entitled to the same. If the government can prepare its case for accusation, the accused must know of the charges. If the government can bring forth witnesses to testify against the defendant, the defendant must be allowed to confront them in open court and before a jury of his peers, and he is entitled to call witnesses on his own behalf. These procedural protections, too, are part and parcel of a Constitution constructed with deliberate checks and balances designed to preserve both liberty and order in a free society.

The constitutional right to a speedy, public, and fair trial at least helps to ensure—though it cannot guarantee—a just result, and it encourages the public’s continued confidence in a criminal justice system whereby all men are presumed innocent until proven guilty.

[1] See, Genesis 18:23-32: “Abraham drew near, and said, ‘Will you consume the righteous with the wicked? What if there are fifty righteous within the city? Will you consume and not spare the place for the fifty righteous who are in it?’[3] ... What if ten are found there?’ He [The Lord] said, ‘I will not destroy it for the ten’s sake.’”

[2] Often attributed to William Gladstone.

[3] Akhil Reed Amar, “Forward: Sixth Amendment First Principles,” 84 Georgetown L. J. 64 (1996).

[4] *Id.*

[5] *In re Oliver*, 333 U.S. 257 (1948).

[6] Akhil Reed Amar, “Forward: Sixth Amendment First Principles,” 84 Georgetown L. J. 64 (1996).

***Nathaniel Stewart is an attorney in Washington, D.C.***

Tags: [Constituting America](#), [Janine Turner](#), [Nathaniel Stewart](#), [Sixth Amendment](#)  
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**April 2, 2012 – Essay #31 – Amendment VII: Right to Trial in Civil Disputes – Guest Essayist: Julia Shaw, Research Associate and Program Manager in the B. Kenneth Simon Center for Principles and Politics at the Heritage Foundation**

Sunday, April 1st, 2012

**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.*

**Right to Trial by Jury in Civil Cases**

No one likes jury duty. When the summons arrives in the mail, most Americans look to check the box that gets them out of service. Why lose a day of work to spend a day deciding some dispute about a fence or a car accident?

Far from a wasted day, Alexis de Tocqueville praised the jury service in *Democracy in America* “as a school, free of charge and always open, where each juror comes to be instructed on his rights, where he enters into daily communication with the most instructed and most enlightened members of the elevated classes, where the laws are taught to him a practical manner and are put within reach within his intelligence by the efforts of the attorneys, the advice of the judge, and they very passions of the parties.” Indeed, de Tocqueville attributes Americans’ “practical intelligence and good political sense” to their maintenance of the civil jury.

At the Constitutional Convention, Hugh Williamson argued that the right to jury in civil trials should be included in the Constitution. Two delegates moved to insert the sentence “And a trial by jury shall be preserved as usual in civil cases” in Article III, but the Convention rejected this wording and did not include it in the Constitution.

Its absence proved to be a grave political miscalculation. The lack of a specific protection the right to trial by jury in civil cases accounted for the greatest opposition to the Constitution. The Anti-Federalists suggested that the absence meant that the right to trial by jury in civil cases would be abolished. The Federalists defended the omission by arguing that Congress, not the Constitution, should determine the rules for civil cases. But, this was a weak argument for two reasons. First, twelve of the states’ constitutions protected the right to trial by jury in civil cases. Second, during the American Revolution, the colonists objected that Parliament had deprived them of their right to trial by jury. It’s no surprise then that Congress passed the Seventh Amendment guaranteeing the right to trial by jury in civil cases without debate.

Justice Joseph Story argued in *Parsons v. Bedford* (1830) that the Seventh Amendment applied to all suits except suits of equity and admiralty. The Supreme Court, however, ultimately developed a more limited interpretation. The Court argued that the clause applies to the kinds of cases that existed under English Common Law when the amendment was adopted. The Seventh Amendment does not apply to civil cases that are “suits at common law.” It also does not apply to cases when “public” or governmental rights are at issue or when there are no analogous historical cases with juries. Personal and property claims against the United States by Congress do not require juries. Parties can waive the right to a jury in civil trials. Unlike in 1791, jury trials for civil cases no longer require a unanimous verdict from a 12-person jury.

In contrast to broad support for the right to trial by jury in the 18th century, modern jurists do not see the right to jury in civil trials as fundamental to the U.S. legal system. This explains why, unlike the Sixth Amendment’s protection of the right to trial in criminal cases, the Right to Jury in Civil Cases Clause is not incorporated against the states. Unlike the Sixth Amendment, the Seventh Amendment applies only in federal courts. The Seventh Amendment joins the Second Amendment and the Grand Jury Clause as the few parts of the Bill of Rights that the Supreme Court has not incorporated against the states.

When that jury summons arrives in the mail, we should think about service not as a wasted day but as an opportunity to participate in the justice system and to gain a deeper understanding of our rights. As Tocqueville remarked that serving on a civil jury “teaches men the practice of equity. Each, in judging his neighbor, thinks that he could be judged in turn. That is above all true of the jury in a civil matter; there is almost no one who fears being the object of a criminal persecution one day; but everyone can have a lawsuit.”

***Julia Shaw is Research Associate and Program Manager in the B. Kenneth Simon Center for Principles and Politics at the Heritage Foundation.***

Tags: [Constituting America](#), [Heritage Foundation](#), [Janine Turner](#), [Julia Shaw](#), [Right to Trial in Civil Dispute](#), [Seventh Amendment](#)

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**April 3, 2012 – Essay # 32 – Amendment VII: Trier of Fact Versus Law – Guest Essayist: J. Eric Wise, a partner at Gibson, Dunn & Crutcher LLP law firm**

Monday, April 2nd, 2012

**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.*

If you have good facts, pound the facts; if you have good law, pound the law; if you have nothing, pound the table. Aside from the good rule of focusing attention on the areas where one's case has strength, advocacy, as a form of rhetoric, also requires knowing your audience. In American criminal and civil procedure, where there is a jury, the jury is a trier of fact and the judge makes determinations of law.

The jury is a legal invention that can be traced back to at least 11th Century England, when the Domesday Book was assembled from information gathered by juries empaneled to catalogue property holdings throughout the realm. Juries of local people were assumed to be familiar with the local facts that would be the basis of the catalogue.

As the use of juries expanded, juries came to be considered a bulwark against tyranny, because while magistrates might align with a king, a jury of peers would check the king's power at trial. The Bill of Rights protects jury trials in civil and criminal matters.

The Sixth Amendment provides "In all criminal prosecutions, the accused shall enjoy the right to . . . 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." The Seventh Amendment provides "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 common law."

While most state constitutions have jury clauses, the Supreme Court has determined that the Sixth Amendment right to an impartial jury in criminal cases extends to the states through the operation of the Due Process Clause of the Fourteenth Amendment under the doctrine known as "substantive due process." However, the right to a trial in the state and district where the crime is committed, known as the Vicinage Clause, is not incorporated into the Fourteenth Amendment against the states. The right to a jury trial in a civil case is also not protected in state proceedings, unless protected under state law.

In jury trials, judges do not try questions of fact. Rather judges determine questions of law, including questions regarding the procedures by which the facts are developed in court. Judges further instruct the jury as to what is the law to which the facts are to be applied. In certain cases, juries may refuse to determine the facts at all and engage in what is known as jury nullification to satisfy its own views of what the law should be in the particular case. Arguments run here and there as to whether this is a check and balance of the justice system or whether it is a dereliction of the duties of jurors.

In certain cases and courts the judge is both the trier of fact and the trier of law. Commercial parties frequently waive the right to a jury trial. Administrative courts, as administrators, and bankruptcy courts, as courts of equity, largely do not employ juries. This is in part based on the opinion that the subject matter of administrative law and commercial issues may be too sophisticated for a jury. Left and Right take varying and perhaps contradictory positions on this. Some on the Right advocate for removal of juries in medical malpractice cases. The plaintiffs bar howls. The Left admires administrative law and great bureaucracies. They call it job creation. Almost all commercial interests are satisfied that juries are generally absent from involvement in bankruptcy cases, which require rapid determinations and understanding of complex financial issues.

As usual, Ronald Reagan may have put it best. In his First Inaugural Address he said first: “[W]e have been tempted to believe that society has become too complex to be managed by self-rule, that government by an elite group is superior to government for, by, and of the people. But if no one among us is capable of governing himself, then who among us has the capacity to govern someone else?” and then he said “Now, so there will be no misunderstanding, it is not my intention to do away with government. It is, rather, to make it work — work with us, not over us; to stand by our side, not ride on our back.”

***J. Eric Wise is a partner in the law firm of Gibson, Dunn & Crutcher LLP, where he practices restructuring and finance.***

Tags: [Constituting America](#), [J. Eric Wise](#), [Janine Turner](#), [Seventh Amendment](#), [Trier of Fact](#)  
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**April 4, 2012 – Essay # 33 – Amendment VIII: Right to Reasonable Bail – Guest Essayist: William C. Duncan, Director of the Marriage Law Foundation**

Tuesday, April 3rd, 2012

**Amendment VIII:**

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

**Amendment VIII: Reasonable Bail**

After arrest, a criminal defendant can be released if he offers some security to ensure he will appear at trial. The release and required security are called bail. Bail protects “the defendant’s interest in pretrial liberty and society’s interest in assuring the defendant’s presence at trial.” The idea is to set bail high enough that the person charged with a crime would not want to risk forfeiting it by refusing to show up at trial but not so high that a person can’t pay and go about life as normally as possible during the interim between arrest and trial. Other considerations will be the risk that the defendant would commit the same crime again while on bail. Donald B. Verrilli, Jr., “The Eighth Amendment and the Right to Bail: Historical Perspectives” *Columbia Law Review*, vol. 82, p. 328 (1982).

In some circumstances, the crime is so serious or the risk that the defendant would flee so great that bail would be entirely denied. For instance, in the past month or so, a British citizen accused of facilitating weapons shipments to Iran was denied bail (<http://www.forbes.com/sites/walterpavlo/2012/03/05/extradited-u-k-citizen-chris-tappin-denied-bail/>) as was the doctor accused of causing the death of a pop musician (<http://abcnews.go.com/US/michael-jacksons-doctor-conrad-murray-denied-bail/story?id=15784437#.T3C6BTfBt2A>).

The disputes lingering from the English Civil War and simmering religious hostility led to the “abdication” (actually flight from England after it was invaded by William of Orange at the request of some of the English nobility) of James II as King of England in 1688. When Parliament formally invited William and Mary to reign as joint monarchs, they drafted the Bill of Rights of 1689 ([http://avalon.law.yale.edu/17th\\_century/england.asp](http://avalon.law.yale.edu/17th_century/england.asp)) as a formal statement of the rights of Englishmen they expected the new monarchs to respect and protect. They also laid out some complaints against James including: “excessive bail hath been required of persons committed in criminal cases, to elude the benefit of the laws made for the liberty of the subjects.” They thus specified, “That excessive bail ought not to be required.”

Thus, the American colonists would have had an expectation, as Englishmen, of protection from excessive bail. The 1776 constitutions of a number of states specified protection of this right. The constitutions of Virginia, Delaware, and Pennsylvania enacted that year all prohibited “excessive bail.”



Given this history, it is not surprising that when James Madison was compiling proposals for a national Bill of Rights he would have included this requirement in what became the Eighth Amendment.

Of course, the key word is “excessive.” Requiring \$1 million bail before releasing the celebrity who gets himself arrested on government property to draw attention to a cause is probably excessive. Someone charged of a string of armed bank robberies, however, could probably expect that kind of bail if flight risk is a consideration (although he may be able to afford it if guilty).

A recent news story ([http://www.syracuse.com/news/index.ssf/2012/03/judge\\_questions\\_then\\_lowers\\_1.html](http://www.syracuse.com/news/index.ssf/2012/03/judge_questions_then_lowers_1.html)) describes a situation where a man was stopped for traffic violations, searched and when a loaded weapon was found in his car, charged with felony gun possession crime. The bail was set at \$1,000,000; another judge questioned that amount and the prosecutor asked for \$50,000. The judge set bail at \$10,000. Obviously, what some government officials find “excessive” will vary.

The Framers would insist that judges employ common-sense and fairness. That’s more likely where lawbreaking is not widespread and where citizens hold their leaders to account. Thus do rights on paper become rights in fact.

***William C. Duncan is director of the Marriage Law Foundation ([www.marriagelawfoundation.org](http://www.marriagelawfoundation.org)). He formerly served as acting director of the Marriage Law Project at the Catholic University of America’s Columbus School of Law and as executive director of the Marriage and Family Law Research Grant at J. Reuben Clark Law School, Brigham Young University, where he was also a visiting professor.***

Tags: [Constituting America](#), [Eighth Amendment](#), [Janine Turner](#), [Marriage Law Foundation](#), [Reasonable Bail](#), [William C. Duncan](#)

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**April 5, 2012 – Essay #34 – Amendment VIII: Right Against Excessive Fines – Guest Essayist: Allison R. Hayward, Vice President of Policy at the Center for Competitive Politics**

Wednesday, April 4th, 2012

**Amendment VIII:**

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

**Excessive Fines Clause**

The Eighth Amendment declares excessive fines to be unconstitutional. Along with the other clauses of the amendment, which prohibit excessive bail and cruel and unusual punishment, this clause sought to protect Americans against prosecutorial overreach by the government.

The Eighth Amendment echoed Art I, § 9, of the Virginia Declaration of Rights, which itself appropriated from the English Bill of Rights. Section 10 of the English Bill of Rights of 1689, like our Eighth Amendment, stated that “excessive Bail ought not to be required, nor excessive Fines imposed; nor cruel and unusual Punishments inflicted.”

The 1689 English version was meant to curb abuses by English judges. During the reigns of the Stuarts, judges had imposed heavy fines on the King’s enemies. In the 1680’s in particular, the use of fines became even more excessive and selective, and opponents of the King who could not pay were imprisoned. The authors of the 1689 Bill of Rights knew this only too well – having been themselves subjected to selective and heavy fines by the King’s judges.

The Eighth Amendment in general received little debate in the First Congress, and the Excessive Fines Clause received even less attention. Perhaps this is because the wisdom of these limitations was obvious to the Framers; at least eight of the original States that ratified the Constitution had some equivalent of the Excessive Fines Clause in their respective Declarations of Rights or State Constitutions.

Even so, there are two obvious ambiguities in the clause that have required interpretation. First, what kinds of payments are “fines?” Second, what fines should be considered “excessive?”

**I. What is a fine?**

Given that the Eighth Amendment is identical to a clause from the English Bill of rights, it is useful to know what a “fine” was thought to be in English law. English cases immediately prior to the enactment of the English Bill of Rights stressed the difference between civil damages and criminal fines. *Lord Townsend v. Hughes*, 2 Mod. 150, 86 Eng. Rep. 994 (C. P. 1677). A fine was defined as a payment to the state, not a state-ordered payment to another private citizen.

Accordingly, court-ordered damages paid to a private litigant, even punitive damages, have been held not to implicate the Eighth Amendment. *Browning-Ferris Industries v. Kelco Disposal*, 492 US 257 (1989). However, asset forfeiture, which requires property to be awarded to the government as punishment for some offense, is subject to the Eighth Amendment. *Austin v. United States*, 509 U.S. 602, 622 (1993).

## II. When is a fine “excessive?”

Whether a fine is excessive depends on its proportionality. That is, the amount of the forfeiture must bear some relationship to the gravity of the offense that it is intended to punish. *Austin v. United States*, 509 U. S., at 622-623. In the case of a monetary fine, a court would consider whether the value of the fine is in relation to the seriousness of the offense. A hypothetical extreme example would be exacting a million dollar fine to punish jaywalking. Closer cases are naturally harder to judge.

Unfortunately, the fines English judges had imposed were never described with much specificity. None of these sources suggests how out of proportion a fine must be in order to be deemed constitutionally excessive.

The Supreme Court has addressed this issue in a handful of cases. It has concluded that a forfeiture of hundreds of thousands of dollars is disproportionate when a defendant is guilty only of a failure to declare the funds when leaving the country.

*United States v. Bajakajian*, 524 U.S. 321 (1998). In the *in rem* asset forfeiture context, Justice Scalia has observed that the Constitution should prohibit seizure of property that cannot properly be regarded as an instrumentality of the offense— for example the building in which an isolated drug sale happens to occur. For him, the right question here is not *how much* the confiscated property is worth, but *whether* the confiscated property has a close enough relationship to the offense.

The Supreme Court has noted that legislatures have the primary duty to decide what fines are proportionate, and deserve deference to make such standards. The Court’s present interpretation of the excessive fines clause will reject an unconstitutionally excessive fine only when the amount of the forfeiture is *grossly* disproportional to the gravity of the defendant’s offense. As a result, the Eighth Amendment protects citizens against the most outrageous fines, but not against large but less extreme fines.

For further reading: Laurence Claus, Methodology, Proportionality, Equality: Which Moral Question Does the Eighth Amendment Pose? 31 Harvard J. of Law and Pub. Pol’y 38 (2008).

*Allison Hayward graduated from Stanford University with degrees in political science and economics, and received her law degree from the University of California, Davis. She clerked for Judge Danny J. Boggs of the United States Court of Appeals for the Sixth Circuit. Hayward is Chairman of the Federalist Society's Free Speech and Election Law Practice Group. She also serves on the Board of the Office of Congressional Ethics. She is an active member of the California and Washington, D.C. bars, and she is a certified FINRA arbitrator.*

Tags: [Allison R. Hayward](#), [Center for Competitive Politics](#), [Constituting America](#), [Eighth Amendment](#), [Janine Turner](#), [Right Against Excessive Fines](#)  
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## **April 6, 2012 – Essay # 35 – Amendment VIII: Right Against Cruel and Unusual Punishment – Guest Essayist: Nathaniel Stewart, Attorney**

Thursday, April 5th, 2012

### **Amendment VIII:**

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

### **Early Origins of the 8<sup>th</sup> Amendment's**

#### **“Cruel and Unusual Punishments” Clause**

Like many provisions of the Constitution and the Bill of Rights, the protection against “cruel and unusual punishments” prescribed in the 8<sup>th</sup> Amendment has deep English roots. The text of the 8<sup>th</sup> Amendment is taken almost verbatim from England's Declaration of Rights of 1689, an indictment of King James II that reads rather like our own Declaration of Independence and accuses the king and his government of mistreating the people and subverting the law.

Historians generally agree that the “cruel and unusual punishments” clause of the English Declaration of Rights was in response to abuses by the infamous Lord Chief Justice Jeffreys of the King's Bench during James II's reign. Lord Chief Justice Jeffreys presided over the “Bloody Assizes”—a special commission that tried, convicted, and executed hundreds of suspected rebels following the failed rebellion in 1685. The Bloody Assizes carried out punishments that

included drawing and quartering, burning, beheading, and disemboweling those convicted. But these punishments, as vicious as they might sound to us today, were specifically authorized by law at the time. More recent scholarship suggests that it was not the nature of the punishments that led to the Declaration of Rights provision, but the arbitrary sentencing power that Jeffreys had used in sentencing those found guilty. Many believed that Jeffreys was merely inventing special penalties for enemies of the king, and that those penalties and punishments were not authorized by the common law or by statute.

Thus, the Declaration of Rights objects to the “illegal and cruel punishments inflicted . . . All which are utterly and directly contrary to the known laws and statutes and freedom of this realm.” 1 Wm. & Mary, Sess. 2, ch. 2 (1689). Legal discussions at the time of the Declaration of Rights indicated that a punishment was not considered wrong only because it was severe or even disproportionate to the crime; but a punishment was “cruel and unusual” if it was “out of the Judges’ power,” “contrary to the law and ancient practice,” “without precedent,” “illegal,” or imposed by “pretence to a discretionary power.” The phrase “cruel and unusual” was often synonymous with “cruel and illegal.”

By the time of America’s founding many of the colonies had constitutions with provisions very similar to the “cruel and unusual punishments” clause of England’s Declaration of Rights. In 1791, five States prohibited “cruel or unusual punishments, and two more States prohibited “cruel” punishments. The U.S. Constitution’s Bill of Rights ultimately followed Virginia’s prohibition of “cruel *and* unusual punishments.”

Because there were no federal common-law punishments, the clause effectively served as a check upon the Congress, not upon federal judges, so there is some question as whether “unusual punishment” continued to mean a punishment “contrary to law” as it had meant under English law. Instead, “unusual punishment” came to mean one that “does not occur in ordinary practice.” Webster’s American Dictionary (1828). It is widely believed that by forbidding “cruel and unusual punishments,” the 8<sup>th</sup> Amendment prevents Congress from authorizing particular *kinds* or *modes* of punishment, especially cruel methods of punishment that are not regularly or customarily used.

The debates in the state ratifying conventions support the idea that the “cruel and unusual punishments” clause was designed to prohibit certain forms of punishment. In the Massachusetts Convention in 1788, for example, one objection to the Constitution (without a Bill of Rights) was that Congress was “nowhere restrained from inventing the most cruel and unheard-of punishments, and annexing them to crimes; and there is no constitutional check on it, but that racks and gibbets may be amongst the most mild instruments of discipline.” 2 J. Elliot, *Debates on the Federal Constitution* 111 (2d ed. 1854). A Bill of Rights was needed, they argued, in order to prevent Congress from “inventing” such punishments and resorting to vicious types of discipline.

Early commentaries on the Amendment also indicate that it was designed to outlaw certain types of punishment: “The prohibition of cruel and unusual punishments, marks the improved spirit of the age, which would not tolerate the use of the rack or the stake, or any of those horrid modes of torture, devised by human ingenuity for the gratification of fiendish passion.” J. Bayard, *A Brief Exposition of the Constitution of the United States* 154 (1840). And, as Justice Story observed in

his Commentaries on the Constitution, the 8<sup>th</sup> Amendment was “adopted as an admonition to all departments of the national government, to warn them against such violent proceedings, as had taken place in England in the arbitrary reigns of some of the Stuarts.” 3 J. Story, Commentaries on the Constitution of the United States § 1896 (1833).

As the history and origins of the 8<sup>th</sup> Amendment make clear, criminal punishments should not be arbitrary or exacted by judges contrary to the law; and neither should they be “unusual” or torturous methods of discipline that are beyond the ordinary forms of reproach. The 8<sup>th</sup> Amendment helps to protect against such punishments, and is yet another example of the Founders drawing upon their understanding of the rights of Englishmen, adapting the rights and laws of England to their own circumstance and government, and learning the lessons of history so as not to repeat the same mistakes.

*Nathaniel Stewart is an attorney in Washington, D.C.*

Tags: [Constituting America](#), [Cruel and Unusual Punishment](#), [Eighth Amendment](#), [Janine Turner](#), [Nathaniel Stewart](#)

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## **April 9, 2012 – Essay #36 – Amendment VIII: Guest Essayist: Matthew Mehan, Publius Fellow and U.S. History Teacher**

Sunday, April 8th, 2012

### **Amendment VIII:**

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

The adoption of this terse amendment, the shortest of them all, inspired very little debate among our founding fathers. These sixteen words reflect the hard-won and long-defended consensus of free society that just government remains so only if its punishments correspond proportionally to the crimes committed. The 8<sup>th</sup> Amendment stands as a testament to the humanism of our Constitution, which makes clear that the government of a free people must be known not for its severity, but instead for its measured humanity.

Each of the three components of the amendment aim to limit one of the government’s discretionary powers: (1) setting bail; (2) imposing fines; and (3) sentencing. The amendment implicitly recommends that the legislature specify proportional guidelines for these broad powers: how much bail; how high the fines; and how long or difficult the sentence. The wisdom

of having such an amendment stems from abuse of these powers dating back as far as the expansion of monarchical courts under William the Conqueror. William's descendent, King John, saw these powers greatly limited by the Magna Charta, which sought to reign in the king's unlawful use of royal courts. And the language of the 8<sup>th</sup> Amendment is taken almost word for word from the 1689 English Bill of Rights, which reaffirmed these limitations on the monarch, in this case, the Stuart dynasts. And in our own day, for the "excessive fines" clause to be applied, the Supreme Court ruled as recently as 1993 that "there must be a payment to a sovereign as punishment for some offense." From its historical origins to the present day, the amendment's primary focus has remained the same: the restriction of the sovereign government in favor of the liberty of a defendant. The 8<sup>th</sup> Amendment goes further than enumerate a federal power; it advises the legislature to do what the common law has always done, namely specify, as Blackstone put it, "the nature, though not the quantity or degree, of punishment...for every offence...." By doing so, the amendment protects the liberty of all, "for," as Blackstone continues, "if judgments were to be the private opinions of the judge, men would then be slaves to their magistrates; and would live in society, without knowing exactly the conditions and obligations which it lays them under."

A humane and just government, therefore, must permit reasonable accommodation for pre-trial liberty for those accused of a crime but not yet convicted. Thus, (1) "excessive bail shall not be required" because, if a citizen is innocent until proven guilty, then the citizen ought to have his or her liberty by means of reasonable bail even when accused. The Supreme Court has upheld some exceptions for those accused of particularly dangerous crimes, but overall, the amendment and subsequent case law have protected citizens' pre-trial liberty and right to post bail.

A humane and just government must not (2) impose "excessive fines." The 8<sup>th</sup> Amendment has been used by the courts to limit fines and penalties on the basis established in a 1998 case that those fines were "grossly disproportional to the gravity of a defendant's offense." By limiting the potentially capricious punishment of excessive fines, the amendment has made for a more peaceful and predictable civil society, one freer from unforeseen onerous fines, which confiscate property and lead to possible imprisonment.

And finally, a humane and just government does not (3) inflict "cruel and unusual punishment." The Supreme Court first saw this clause as a bar on brutal punishments extant at the time of the founders, horrors such as disembowelment or being dragged to execution. But the Warren court and due process has expanded this clause's application to a whole host of considerations as to what constitutes "cruel and unusual punishment," including deciding whether capital punishment is a disproportional penalty for certain crimes. While perhaps our founders would not have approved of its modern and wider application, nevertheless, the 8<sup>th</sup> amendment continues to function as a warning to government lest it become too severe or capricious in its task of punishment.

*Matthew Mehan is, among other things, a U.S. history teacher in Washington DC.*

Tags: [Constituting America](#), [Eighth Amendment](#), [Janine Turner](#), [Matthew Mehan](#), [Publius Fellow](#)  
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**April 10, 2012 – Essay #37 – Amendment IX: Rights Which Are Enumerated – Guest Essayist: W.B. Allen, Dean Emeritus, James Madison College; Emeritus Professor of Political Science, Michigan State University**

Monday, April 9th, 2012

**Amendment 9 – Construction of Constitution. Ratified 12/15/1791.**

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

The 9<sup>th</sup> Amendment to the Constitution was one of twelve submitted to the states for ratification in fall, 1789. Ten of the twelve were ratified by December 15, 1791, and came to be known as the “Bill of Rights.” An eleventh, the 27<sup>th</sup> Amendment, was ratified May 7, 1992. The final of the twelfth, applying the relevant terms of the “Bill of Rights” to the states was never ratified. However, the Supreme Court in the 20<sup>th</sup> Century adopted a doctrine of “incorporation” which imported many of the guarantees of the “Bill of Rights” as applying against the states through the 14<sup>th</sup> Amendment, adopted during the process of Reconstruction following the 1861-65 War for the Union.

The context for interpreting the 9<sup>th</sup> Amendment, therefore, is focused on the controlling ideas informing the “Bill of Rights.” The Supreme Court has never provided clear guidance concerning the 9<sup>th</sup> Amendment itself. A fundamental principle of constitutional interpretation, however, is that every article bears some intentional meaning which remains significant in understanding at minimum the intentions of the framers and the design of the institutions of self-government framed by the Constitution. In that sense, we may take the 9<sup>th</sup> Amendment to refer primarily to the question of the breadth of the guarantees mentioned in the other articles of the “Bill of Rights.” This follows the debate that took place over the ratification of the Constitution, in which the Antifederalists chiefly criticized the draft constitution as over-broad and threatening the rights of the people and their state institutions with the prospect of an unlimited federal/national government. The defenders of the Constitution (the Federalists) responded that the guarantees of individual rights familiar in most of the state constitutions of the founding era should not be included in a federal constitution precisely because the federal constitution was not designed to convey the kind of police power (health, safety, and morals) that would imperil individual rights, reserving that jurisdiction to the states. That argument is made most forcefully in essay number 84 of *The Federalist Papers*. An additional argument made there is the argument that any determinate listing of guaranteed rights would bear the unfortunate



implication that any specific guarantees omitted in the process of listing specific rights would imply the existence of a governmental power that had not been intended.

Once, therefore, the political compromise of adding a bill of rights to the constitution had been accepted, the authors of the amendments (mainly James Madison) thought it important to do everything possible to avert any unintended consequences of such an enumeration of rights. The 9<sup>th</sup> of Amendment is the first of two deliberately intended to restrict the breadth of the application of those guarantees in such a manner as neither to imply unlimited power in the federal/national government nor to imply individual rights were exhausted by such an enumeration. In that sense, the 9<sup>th</sup> Amendment creates a shadowy, unspecified realm in which certain additional rights may be discovered as reserved to the people and, to that extent, thus brought under the controlling language of the 1<sup>st</sup> Amendment, namely, that “Congress shall make no law respecting” such additional rights. It is in that spirit that the Supreme Court in the 1965 [Griswold v. Connecticut, 381 U.S. 479](#) decision discovered a constitutional “penumbra” within which a “right to privacy” sheltered and served to proscribe state prohibition of access to contraception. It was because of the incorporation doctrine through the 14<sup>th</sup> Amendment that the Court was able to make use of the “Congress shall make no law respecting” the unspoken right to privacy language to enunciate a limit upon the states. Though the Court has never said so, it should logically follow, therefore, that such a proscription against state policy can only be considered authoritative to the extent that it operates with equal effectiveness against the federal/national government. For the language of the 9<sup>th</sup> Amendment is primarily a language of restriction on the federal/national government, as are all of the “Bill of Rights”, and in the absence of ratification of the drafted 12<sup>th</sup> amendment, applying the same terms to the states, the primary meaning of all such language must be that it is a limitation upon the government of the United States. Besides contraception, the areas in which such application has occurred have been the parental right to educate children, the right to study a foreign language, the right to make and enforce contracts, etc.

***W. B. Allen is Dean Emeritus, James Madison College; and Emeritus Professor of Political Science, Michigan State University***

Tags: [Constituting America](#), [Enumerated](#), [James Madison College](#), [Janine Turner](#), [Michigan State University](#), [Ninth Amendment](#), [W.B. Allen](#)

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**April 11, 2012 – Essay #38 – Amendment IX: Guest Essayist: Brion McClanahan Ph.D., author of The Founding Fathers Guide to the Constitution**

Tuesday, April 10th, 2012

**Amendment IX:**

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

In the waning days of the Philadelphia Convention in 1787, George Mason of Virginia, Elbridge Gerry of Massachusetts and Luther Martin of Maryland began pressing for the addition of a comprehensive bill of rights to the final draft of the Constitution. Roger Sherman of Connecticut immediately rejected their plea. A bill of rights, he said, was unnecessary because “The State Declarations of Rights are not repealed by this Constitution; and being in force are sufficient...” Sherman, a man who Thomas Jefferson regarded as one of the finest statesmen of the founding generation, reasoned that because the Constitution was mute on civil liberties and because it was a document with delegated and enumerated powers for the general purposes of the Union—the States United—the general government could no more legislate on matters of trial by jury than it could on the minutia of state law. Gerry’s proposal to form a committee to draft of a bill of rights was unanimously defeated (votes were by State), and as a result Mason said he would rather cut off his right hand than sign the document. This exchange began the process for codifying the language of the Ninth Amendment.

During the ratifying process in the State conventions, several leading proponents of the document made arguments against a bill of rights that mirrored those Sherman gave in the Philadelphia Convention. James Wilson of Pennsylvania, perhaps the most ardent nationalist among the founding generation, said in the Pennsylvania Ratifying Convention that “A bill of rights annexed to a constitution is *an enumeration of the powers* reserved. If we attempt an enumeration, every thing that is not enumerated is presumed to be given. The consequence is, that an imperfect enumeration would throw all implied power into the scale of the government, and the rights of the people would be rendered incomplete.”

Alexander Hamilton of New York, the most famous nationalist of the founding period, echoed Wilson in *Federalist No. 84*. Adding a bill of rights, he said, “would contain various exceptions to powers which are not granted; and on this very account, would afford a colourable pretext to claim more than were granted. For why declare that things shall not be done which there is no power to do?” Both Hamilton and Wilson contended that a bill of rights would *destroy* liberty rather than protect it by allowing scheming men to enlarge the power of the central authority. In short, if a particular liberty was not protected by the list of rights, they believed it could be assumed that the government had the power to abridge that liberty. And, since all powers delegated to the general government were enumerated in the Constitution, they wondered why open that Pandora’s Box?

Thus, the modern Ninth Amendment was born. As proposals for a bill of rights flooded into James Madison's hands in the months after the Constitution was ratified, he quickly realized that individuals needed assurances that their liberties would not be circumscribed by the Constitution nor would they be left to flutter in the wind should ambitious men usurp power from the States or the people. The Tenth Amendment protects the States and most importantly the federal compact among the States. The Ninth does the same for the people individually by implicitly recognizing the validity—and to the founding generation supremacy—of the several State declaration of rights. It is an enhancer. The original preamble to the Bill of Rights expressly stated that they were “restricting clauses” on the general government only. The Ninth Amendment ensured that the powers of the general government as operating on individuals would be further checked by the States. State declaration of rights often tended to be more detailed and comprehensive and therefore served as a more effective shield for the people.

Madison said in 1789 that Hamilton's argument against the Bill of Rights was “one of the most plausible...I have ever heard against the admission of a bill of rights into this system; but, I conceive, that it may be guarded against.” He was referring to the Ninth Amendment. Of course, the powers of the general government in the modern era have spiraled out of control and today the two most ignored Amendments in the Bill of Rights are the Ninth and Tenth, arguably the most important Amendments to the founding generation. The States have always stood at the vanguard of individual liberty. American citizens should remember that their first line of defense against both the State *and* Federal government rests in their separate *State* bill of rights. The founding generation believed that those declared rights coupled with the Ninth Amendment would prevent the modern leviathan in Washington D.C. We need to protect their legacy.

***Brion McClanahan holds a Ph.D. in American History from the University of South Carolina. He is the author of The Founding Fathers Guide to the Constitution (Regnery History, 2012), The Politically Incorrect Guide to the Founding Fathers (Regnery, 2009), and Forgotten Conservatives in American History (forthcoming with Clyde Wilson, Pelican, 2012).***

Tags: [Brion McClanahan](#), [Constituting America](#), [Founding Fathers Guide to the Constitution](#), [Janine Turner](#), [Ninth Amendment](#)

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**April 12, 2012 – Essay #39 – Amendment X: Our Constitution a Grant of Limited Powers to the National Government – Guest Essayist: Dr. John S. Baker, Jr., Distinguished Scholar in Residence, Catholic University School of Law; Professor Emeritus, Louisiana State University Law Center**

Wednesday, April 11th, 2012

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.

**THE TENTH AMENDMENT**

Statements about the Tenth amendment tend towards opposing extremes. Some cite the Amendment in claiming more powers than the Constitution actually leaves in the states. On the other side, some claim that the Amendment is merely a “truism,” implying it does virtually nothing. The actual meaning of the Amendment lies in between these two one-sided views.

The Tenth Amendment reads as follows:

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.

The most important word is the one that does not appear in the text, i.e., “expressly.” It is common for those who place great weight on the Tenth Amendment to state incorrectly that the Amendment says “powers not expressly delegated to the United States...” The Amendment, however, pointedly omits the word expressly.

By contrast, somewhat similar language in the Articles of Confederation did include the word expressly.

Each state retains its sovereignty, freedom, and independence, and every power, jurisdiction, and right, which is not by this Confederation expressly delegated to the United States, in Congress assembled. (emphasis added)

What difference in meaning does the word “expressly” make? The difference is that which distinguishes a confederation from a government. The Articles of Confederation provides that “The said States hereby severally enter into a firm league of friendship with each other...” (emphasis added). The Articles recognize that the States retained their full sovereignty and entered into a special kind of alliance or league. The Articles constitute a treaty involving multiple sovereignties and having several purposes. As a treaty, however, it is still a contract and each State delegates only those powers expressly written into the contract. Although “[t]he Articles thereof shall be inviolably observed by the States,” the document creates no government having the power to enforce its provisions. It provides only for states to send representatives to meet as the “United States in Congress” and to manage those powers expressly given.

The Constitution that emerged from the Convention, as all understood, was not a confederation or simply a league of friendship. Opponents of the Constitution, known as the Antifederalists, concluded that therefore the Constitution would create a consolidated or centralized government. The Federalist (written by Madison, Hamilton and Jay under the pseudonym of “Publius”) countered that the Constitution created a federal government of only limited powers and left most powers of government in the states.

Not persuaded, the Antifederalists contended that the Constitution’s limits on the federal government could and would be swept aside by its “necessary and proper clause.” Their arguments in opposition to the Constitution emphasized the document’s lack of a bill of rights. They urged that a statement of rights was necessary to protect liberty by limiting the power of the federal government and specifically to undo the effect of the “necessary and proper” clause.

The Constitution drafted at the Constitutional Convention contained no bill of rights. This was not an oversight. The Convention voted down George Mason’s proposal that a bill of rights be added. Moreover, during the Ratification period, The Federalist (#84) argued “that bills of rights, in the sense and to the extent they are contended for, are not only unnecessary in the proposed constitution, but would even be dangerous.” A bill of rights was unnecessary because “a minute detail of particular rights is certainly far less applicable to a constitution like that under consideration, which is merely intended to regulate the general political interests of the nation.” It was dangerous because it “would contain various exceptions to powers not granted; and on this very account, would afford a colourable pretext to claim more than was granted.”

The Federalists and Antifederalists held opposing ideas about the best means to protect liberty. Whereas the Antifederalists gave priority to bills of rights, the Federalists distrusted the efficacy of such “parchment barriers.” Rather the Federalists drafted the Constitution on the premise that protecting liberty requires a structure of separation of powers within the federal government and a division of powers between the federal and state governments. For that reason, The Federalist said “The truth is ... that the constitution is itself, in every rational sense, and to every useful purpose, A BILL OF RIGHTS.”

Predictions of both the Antifederalists and Federalists have proved in part to be accurate. As the Antifederalists feared, the Necessary and Proper Clause has been used to expand the powers of the federal government greatly at the expense of the states, a trend aided (as discussed in a later essay) by the Seventeenth Amendment. The Federalists were correct that the Bill of Rights, aided by the Fourteenth Amendment’s judicially-developed doctrine of Incorporation, has been used to expand the powers of the federal government at the expense of the states.

The foundational explanation of the Necessary and Proper Clause came in Chief Justice Marshall’s opinion in *McCulloch v. Maryland* (1819). The opinion addressed the Necessary and Proper Clause as an additional, not the primary, reason for upholding the constitutionality of the Bank of the United States. Jeffersonian Republicans, many of whom had been Antifederalists, opposed this decision as an unconstitutional expansion of Congress’s powers. Chief Justice Marshall’s opinion, however, was perfectly consistent with, and generally tracked language in several essays from, The Federalist.

Over the years, especially since the New Deal, the centralizers of national power have often relied on a distorted interpretation of the Necessary and Proper clause which disregards the fundamental principle that the federal government is one of limited powers. Accordingly, they dismiss the Tenth Amendment as simply a “truism.” The defenders of state power, on the other hand, emphasize the Tenth Amendment, almost as if nothing else in the Constitution matters. They generally fail to understand The Federalist explanation – confirmed by Chief Justice Marshall’s opinion in *McCulloch* – that Congress has the fullness of those powers actually given to Congress and that the Constitution includes the Necessary and Proper Clause in order to leave no doubt about the fullness of the powers actually given.

When during the First Congress James Madison spoke for the Bill of Rights he had introduced, among other points he argued that they were of “such a nature as will not injure the Constitution.” Specifically, what became the Tenth Amendment did not injure the Constitution because it did not convert it to a confederation. That is to say, the Tenth Amendment pointedly did not use the word expressly.

As to any power actually given by the Constitution, Congress has the fullness of that power. Congress’s exercise of power is nevertheless limited– first by the fact that it is not given every power of government. Secondly, Congress encounters procedural limits on the implementation of its enumerated powers due to bicameralism and separation of powers. The division of powers between the federal and state governments which effectively limited Congress’s exercise of enumerated powers has been undermined by the Seventeenth Amendment’s provision for direct election of senators.

The U.S. government has over the years consolidated power to a degree feared even by the Federalists, and much more so by the Antifederalists. To point solely to the Tenth Amendment, however, as the primary limit on the expansion of federal power is to misunderstand the Constitution. The Tenth Amendment is a ‘truism’ in the sense that it merely confirms that the Constitution creates a federal government with a limited number of powers, those related to national defense, foreign affairs, foreign trade, and trade among the states. See Federalist # 23 and #45. Like the Necessary and Proper Clause, a proper interpretation of the Tenth Amendment must be connected to the Constitution’s structure of divided and separated power.

***Dr. John S. Baker, Jr. is the Distinguished Scholar in Residence at Catholic University School of Law and Professor Emeritus of Law at Louisiana State University Law Center.***

Tags: [Catholic University](#), [Constituting America](#), [Janine Turner](#), [John S. Baker Jr.](#), [Limit of Powers](#), [Tenth Amendment](#)

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**April 13, 2012 – Essay #40 – Amendment X: Rights Reserved to the States and the People – Guest Essayist: George Landrith, an attorney and President of Frontiers of Freedom**

Thursday, April 12th, 2012

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.

The Tenth Amendment:

Protecting Freedom Against Big Government

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.

The Tenth Amendment protects Americans from big, intrusive federal government action. The heart of the Tenth Amendment is that the federal government has only those powers explicitly listed in the Constitution and all other powers are reserved to the States and to the people, and therefore explicitly denied to the federal government.

In contrast, state governments have all powers not explicitly prohibited or withheld by the state constitution or by the U.S. Constitution. Thus, states have broader powers and can, do things that Congress cannot do. For example, states can require young students to attend school and drivers to purchase automobile insurance.

Too often those in Congress and the White House assume that the federal government can do whatever the majority wishes. However, the Founders clearly and explicitly intended to prevent the majority from doing whatever it wished. Thus, they gave the federal government a very limited and carefully chosen list of powers and they reserved all other powers for the states and the people. They also provided an elaborate system of checks and balances – all to limit the power of the majority to impose its will.

The Founders felt so strongly about limited federal power as a bulwark of liberty that they added the Ten Amendment as the final exclamation point in the Bill of Rights – the federal government could not trample the rights of the people by assuming powers that it did not have, and that had been reserved to the states and the people.

At the heart of the debate over Obamacare before the Supreme Court is the question – does the federal government have the authority under the U.S. Constitution to require citizens to purchase a product? If the justices can read and understand the simple language of the Constitution, they will strike down the law because the federal government does not have the authority to do what it attempted to do in this statute.



This author is not a supporter of the Massachusetts healthcare law, but it is constitutional. There are significant differences between the Massachusetts law and ObamaCare, but perhaps the biggest difference is that Massachusetts had the authority to pass its healthcare law. That doesn't mean it was a good idea, it just means it was constitutional. But the federal government did not have the authority to pass Obamacare. Obamacare exceeds the enumerated and limited powers given to the federal government and the limitations of the Tenth Amendment.

The Tenth Amendment is also an explicit statement of the governing principle of federalism. Federalism is the idea that there is a national government with limited powers and there are state governments with broader powers, both receiving their authority from the people. Simply stated, federalism recognizes the fact that the states are not merely political subdivisions of the federal government, but that they are separate governmental units that derive their power directly from the people and not from the federal government.

These are not old fashioned or outdated ideas. They constitute real and practical protections against the bullying powers of big government on the federal level. The Founders put in place checks and balances, limitations on power, and divisions of power – all designed to keep federal government from becoming too big, too powerful, and too intrusive. The Tenth Amendment is key to their wise designs to limit the power and scope of the federal government.

**George Landrith is an attorney and the President of Frontiers of Freedom**

Posted in [Analyzing the Amendments in 90 Days 2012 Project](#), [Constitution Amendment X](#), [George Landrith](#) | [2 Comments](#) »

**[April 16, 2012 – Essay #41 – Amendment X: Modern Issues of States' Rights – Guest Essayist: Brion McClanahan Ph.D., author of The Founding Fathers Guide to the Constitution](#)**

Sunday, April 15th, 2012

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.

Modern Issues Of States' Rights

Ninety percent, if not more, of what the central government does today is unconstitutional. All of the following legislation violates the Tenth Amendment: national healthcare, welfare, all federal education programs, federal highway construction and funding, the National Defense Authorization Act, gun control, the Federal Reserve System, etc., and these are just some of the



large issues. An itemized list based on a modern federal budget would be too substantial to publish in a book length project, let alone a short essay. Proponents of the Tenth Amendment in the founding generation viewed it as a necessary check on the power of the general government and in particular the famous “sweeping” or “elastic” clauses of the Constitution, i.e., the “general welfare clause,” the “supremacy clause,” the “necessary and proper clause,” and now the infamous “commerce clause.” The Tenth Amendment was designed to keep domestic issues under the purview of the States and leave matters of commerce (meaning interstate and international trade) and defense in the hands of the general authority. In essence, every time the central government abuses its Constitutional authority it is violating the Tenth Amendment. But for the sake of argument, the most important and egregious violations of the Tenth Amendment today are as follows:

“Obamacare”: Regardless of what the Supreme Court decides in June, the “Affordable Care Act” is a gross violation of the Tenth Amendment to the Constitution. In fact, the States would do well to individually strike it down by invoking the Tenth Amendment, as Thomas Jefferson and James Madison did with the Virginia and Kentucky Resolutions of 1798 in response to the blatantly unconstitutional Sedition Act. As per Article 1, Section 8, regulating healthcare is not one of the delegated powers of the general government, and the commerce clause does not apply in this case because the general government cannot regulate the commercial exchange of individuals nor can it mandate that individuals engage in a commercial activity. Proponents of the Constitution continually argued in 1787 and 1788 that if the Constitution was mute on an issue, then the general government did not have the said power. The States, however, can, and thus if the States want to address healthcare, and the respective State constitution allows it, they are free to do so.

The National Defense Authorization Act for 2012: While this piece of legislation has support among Republicans, it unconstitutionally enlarges the powers of the executive branch and has the potential to place all American citizens under martial law, thus unconstitutionally suspending the civil court system in the United States. The general government cannot constitutionally interfere with the State judicial systems nor can it constitutionally give the executive branch the power to suspend habeas corpus. Those are not delegated powers in the Constitution and thus violate the Tenth Amendment. Abraham Lincoln unilaterally suspended habeas corpus in 1861 and while Attorney General Edward Bates supported it and the Congress retroactively “authorized” it, he was heavily criticized at the time. The Supreme Court even struck down his heavy handed tactics and later negated congressional attempts to supersede State courts with military tribunals during the Reconstruction era. Congress has forgotten or neglected to remember those decisions.

The Federal Reserve: The FED is at the heart of the current economic meltdown, and central banking has long been a contentious issue in American politics. During the Philadelphia Convention in 1787, the Pennsylvania delegation suggested giving the power for chartering a bank to the Congress but were soundly defeated. No matter. In 1791, Alexander Hamilton made a central bank “constitutional” by stretching the “necessary and proper clause” of the Constitution, something he said would never happen when arguing for ratification in the Federalist essays. The Bank of the United States failed re-charter in 1811 but was replaced with another in 1816, with James Madison’s support. His reason was dubious. Time and circumstances, he said, had made the Bank constitutional. Central banking supporters never looked back. Of course, Andrew

Jackson destroyed this Second Bank of the United States, but the legislative precedent had been set. When the “Creature of Jekyll Island,” also known as the Federal Reserve System, appeared in 1913, thanks to Hamilton, Madison, and John Marshall who ruled the Bank was constitutional in the infamous 1819 *McCulloch v. Maryland* decision, no one questioned its constitutionality. But, if Americans followed the Constitution as ratified and amended by the Tenth Amendment, the Federal Reserve would fail the constitutional sniff test. Chartering a bank or a central banking system is not a delegated power of the general government.

**All Social Welfare Legislation Including Education and Entitlement Spending:** In the 1942 Supreme Court decision *Wickard v. Filburn*, the Court found that anything that might be considered “interstate commerce” fell under the authority of federal regulation, including economic activity such as growing your own food on your own land. In essence, the “commerce clause” has become the “Hey, you-can-do-whatever-you-feel-like Clause,” as federal judge Alex Kozinski pointed out in 2005. All federal social welfare spending falls either under the so called “commerce clause” or the “general welfare clause,” and according to the founding generation both were restricted by the Tenth Amendment. None of this legislation can be found in the enumerated powers of Article 1, Section 8 unless they are “stretched,” something opponents of the Constitution feared would happen. That was the driving force behind a “States’ Rights” amendment in the Bill of Rights to begin with. If the States had a backbone (and were not slopping at the federal trough) they would interpose their control over such issues, invoke the Tenth Amendment, and strike them from the books.

In 1788, Tench Coxe of Pennsylvania, an ardent supporter of the Constitution and member of the Continental Congress, wrote that,

[The general government] cannot interfere with the opening of rivers and canals; the making or regulation of roads, except post roads; building bridges; erecting ferries; establishment of state seminaries of learning; libraries; literary, religious, trading or manufacturing societies; erecting or regulating the police of cities, towns or boroughs; creating new state offices, building light houses, public wharves, county [jails], markets, or other public buildings...nor can they do any other matter or thing appertaining to the internal affairs of any state, whether legislative, executive, or judicial, civil or ecclesiastical.

And later he said, “In short besides the particulars enumerated, every thing of a domestic nature must or can be done by them [the States].” Translation, the general government in Washington D.C. cannot constitutionally do most of what it does today. To proponents of a Bill of Rights, the Tenth Amendment was there to legally ensure Coxe was correct. The Tenth Amendment is more than a protection of “States’ Rights,” it is a check on a tyrannical and unconstitutional abuse of authority by the central government.

***Brion McClanahan holds a Ph.D. in American History from the University of South Carolina. He is the author of The Founding Fathers Guide to the Constitution (Regnery History, 2012), The Politically Incorrect Guide to the Founding Fathers (Regnery, 2009), and Forgotten Conservatives in American History (forthcoming with Clyde Wilson, Pelican, 2012).***

Tags: [Brion McClanahan](#), [Constituting America](#), [Founding Fathers Guide to the Constitution](#), [Janine Turner](#), [States Rights](#), [Tenth Amendment](#)

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## **[April 17, 2012 – Essay #42 – Amendment XI: Right of States to Sovereign Immunity – Guest Essayist: Joerg Knipprath, Professor of Law at Southwestern Law School](#)**

Monday, April 16th, 2012

### **Amendment XI:**

*The Judicial power of the United States shall not be construed to extend to any suit 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 prince is not bound by the laws.” Thus wrote the lawyer-scribes who compiled the early-6<sup>th</sup> century compendium of Roman law known as the Code of Justinian. This aphorism defined a fundamental attribute of sovereignty. The sovereign has ultimate authority to make law. Therefore, he cannot be subject to a superior power that could adjudicate a claim that he has violated the law, since that would deny his ultimate authority.

In English constitutional theory, this principle became, “The King can do no wrong.” It was a mainstay of the early modern state and the Tudor and Stuart kings. In somewhat more circumscribed manner, it survived the Glorious Revolution of 1688 and became sufficiently tame as a political construct to be acceptable to English republicans and, through a later formulation, to their counterparts in the American states.

Few, if any, took this point literally, any more than Catholics deem the Pope literally infallible. As William Blackstone explained, the principle was simply that, “whatever may be amiss in the conduct of public affairs is not chargeable personally on the king.” In addition, the law “feels itself incapable of furnishing any adequate remedy, without infringing the dignity and destroying the sovereignty of the royal person.” For Blackstone, as for Justinian’s lawyers and for jurists before and since, the principle was driven by practicality, of not subjecting the ultimate political decision makers to suit over every injury, grave or slight, arising from making and executing public policy. Blackstone allows, however, that the king’s officials and ministers could be called to account for the wrongs that they did in erroneously carrying out public affairs to the injury of someone’s person or property.

Under American theory, constitutional sovereignty shifted from the king to the people. The “people” are incorporated into the states and the United States. In ordinary matters of public policy, practical sovereignty lies in the legislatures. Despite the unfortunate tendency of some political groups towards deification of the State, a fiction that “the people can do no wrong”

sounds alien to our ears. Still, the Supreme Court has broadly recognized the principle of “sovereign immunity” as having been carried over from English common law to the states when they declared independence in 1776. Moreover, the Court has underscored the universal nature of sovereign immunity by endorsing it for the United States, as well. One justification the Court has given sounds positively Blackstonian, namely, that a power to haul a state into court without its consent would be an affront to the state’s “dignity.”

The justices have also expressed particular opposition to money claims against a state. Their position may reflect the constitutional reticence of an unelected body to order funds to be appropriated when such funds would have to be raised by taxing or borrowing (“No taxation without representation”). More likely, it recognizes the political reality that courts have no real means to enforce such an order against an unwilling legislature.

Yet, Article III of the Constitution explicitly permits suits in federal court between states and various opponents, from the United States to foreign countries and their citizens, to other states and their citizens. It was argued that, by approving the Constitution, the states to that extent surrendered their sovereign immunity. So, too, thought Alexander Chisholm, the executor for one Robert Farquhar of South Carolina, when he attempted in 1793 to collect on a debt owed to the deceased by the State of Georgia for goods supplied to that state during the Revolutionary War. Georgia had refused to pay for the supplies on the convenient excuse that Farquhar was a British loyalist, though apparently a not-too-principled one.

Chisholm sued Georgia in the Supreme Court. Indeed, he was able to get the attorney general of the United States, Edmund Randolph, to argue the case for him. Georgia, relying on its sovereignty, deigned not even to appear so as not to give legitimacy to this judicial affront to its dignity, though it sent the justices a letter of protest denying their jurisdiction to hear the case. The justices ruled 4-1 against the state, on the aforementioned ground that the states had surrendered aspects of their sovereignty as the text of Article III makes clear, and, in Justice James Wilson’s scholarly opinion, on the ground that states as such were not sovereigns at all.

However, the majority may have got it wrong. The Constitution permits suits “between a State and Citizens of another State.” The *Chisholm* justices suggested that “between” meant the suit could be brought by the state or by the citizen. But the order of parties in the text could also mean that only the state could bring the suit, especially in light of the common law prohibition of suits against unwilling sovereigns.

Significantly, the wording of Article III alarmed Antifederalists during the ratification debates. Alexander Hamilton, in *Federalist* 81, responded by imagining a hypothetical dispute brought by a citizen of one state against another state over public securities, such as bonds, issued by the latter. This almost exactly foretold *Chisholm*. Hamilton strongly defended the states’ immunity from suit as natural to sovereignty and reflecting general practice. He belittled the reasoning later advanced by the *Chisholm* justices as arising from mere implication and a “forced and unwarrantable” construction of the Constitution’s language.

The virulent reaction in the states against the *Chisholm* case supports Hamilton’s reading of the Constitution. States-rights supporters saw the decision as confirming their suspicion that the new constitution’s federal structure was a smokescreen to deprive the states of their sovereignty and

reduce them to “tributary corporations” to the national government. A more concrete and immediate concern was that the decision opened the door for states to be sued over many unresolved war claims, a course that threatened their financial solvency.

In response, Congress proposed the Eleventh Amendment in 1794, which the states approved in less than one year, a record speed. While the Amendment prohibits only suits in federal court and only against a state by citizens of other states or foreign countries, the Supreme Court has held that the Amendment is just a particular example of the broader principle of sovereign immunity. The Court has ruled that a state also cannot be sued by its own citizens or in its own courts without its consent.

Does that mean that citizens are unable to have their rights vindicated against injurious government conduct? Not at all. Similar to what Blackstone opined was English practice, the Supreme Court has recognized a significant exception that allows suits against state officials, if such suits do not, in effect, seek money damages to be pried out of the state treasury. Thus, a state official can be sued to order him to refrain from engaging in violations of the petitioner’s constitutional rights. *State* sovereign immunity also does not prevent suits against cities and other local bodies. In limited cases, Congress can restrict the states’ sovereign immunity by statute. The United States in some instances can sue states to challenge violations of individual rights created under federal statutes. If a state initiates an action against a defendant, he can bring claims and defenses against the state arising out of the state’s suit.

Finally, the states can consent to be sued for injuries committed by their officials. It may seem counter-intuitive that governments would agree to be sued, but they generally have done so by laws that wholly waive their immunity (California) or that waive it in specified instances (the United States). Such consent meets political demands for compensation of injured parties, and it is more efficient than the previous alternative of having legislators laboriously introduce private bills of relief to be passed as ordinary laws.

*An expert on constitutional law, Prof. Joerg W. Knipprath has been interviewed by print and broadcast media on a number of related topics ranging from recent U.S. Supreme Court decisions to presidential succession. He has written opinion pieces and articles on business and securities law as well as constitutional issues, and has focused his more recent research on the effect of judicial review on the evolution of constitutional law. He has also spoken on business law and contemporary constitutional issues before professional and community forums. Read more from Professor Knipprath at: <http://www.tokenconservative.com/>.*

Tags: [Constituting America](#), [Eleventh Amendment](#), [Janine Turner](#), [Joerg Knipprath](#), [Southwestern Law School](#), [Sovereign Immunity](#)

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**April 18, 2012 – Essay #43 – Amendment XII: Reforming the Electoral College – Guest Essayist: Tara Ross, Author, Enlightened Democracy: The Case for the Electoral College**

Tuesday, April 17th, 2012

**Amendment XII:**

*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 the 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 XII: Reforming the Electoral College**

America's first four presidential elections were governed by Article II of the Constitution. The process worked well initially, which is perhaps unsurprising in retrospect. Nearly everyone expected that the revered General George Washington would be the nation's first President.

These expectations came to fruition when he was unanimously elected twice, in 1789 and 1792. The first contested presidential election did not occur until 1796.

This contested election *nearly* revealed a flaw in the voting process. But the next election, in 1800, brought the flaw more sharply into view, and it laid the groundwork for the introduction and ratification of the Twelfth Amendment. The provisions of this Amendment would replace Article II, Section 1, Clause 3 of the Constitution.

The problem stemmed from the fact that the original constitutional provision did not allow presidential electors to differentiate between their votes for President and Vice-President. Electors were simply expected to cast two ballots for President. When these votes were tallied, the first place winner became President and the second place winner became Vice-President. Such a process made sense in 1787, before the appearance of political parties. It made less sense after, as demonstrated during the election of 1800.

That year, the Democratic-Republican Party nominated Thomas Jefferson for President and Aaron Burr for Vice-President; the Federalist Party nominated John Adams and Charles Pinckney. Today, such nominations might seem rather routine, but in 1800, the practice of nominating separate candidates for President and Vice-President was relatively new.

When the vote was tallied, it was discovered that Jefferson and Burr had tied. Although the electors had intended to elect Jefferson for President and Burr for Vice-President, they were not permitted to distinguish between their votes for the two offices. The result was an electoral tie that threw the election into the Constitution's secondary election procedure, known as the House contingent election.

At the time, the House was still controlled by the outgoing Federalist Party. Many Federalists did not like Jefferson and hoped to thwart his election by supporting Burr. Meanwhile, the Democratic-Republican congressmen continued to support their intended presidential candidate, Jefferson. A stalemate continued for the better part of a week. Neither Jefferson nor Burr could obtain the nine state votes needed for victory. Six days and thirty-six ballots later, one Congressman finally yielded, paving the way for Jefferson's victory.

In the wake of such events, it was not long before a constitutional amendment was proposed to separate the voting for President and Vice-President. Such a solution might seem obvious to modern ears, but it was controversial in the early 1800s. The minority party, the Federalists, argued that the election process, as it then stood, made it possible for the minority party to have a representative in the executive branch. Some Democratic-Republicans also hesitated to change the election procedure. The Article II process had helped them in 1796 when John Adams, a Federalist, was elected President. Despite Adams's victory, Jefferson had been able to defeat the Federalist vice presidential candidate, Thomas Pinckney.

The proposed constitutional amendment failed to pass the Senate by a single vote when it was first proposed in 1801. In 1803, however, the Twelfth Amendment finally gained enough support to pass both the Senate and the House. North Carolina became the first state to ratify the amendment on December 21, 1803. The amendment became effective when New Hampshire

ratified it on June 15, 1804. Tennessee ratified it later, on July 27, 1804. Three states rejected the amendment.

The election process was tweaked and adjusted following the election of 1800, yet today it remains largely as the Founders created it. As a first step, the states cast electoral votes in the nationwide presidential election. If no candidate wins a majority of these state votes, then the House of Representatives must decide which of the top candidates will be the next President.

Tomorrow's post will explain how this process—created by Article II and slightly modified by the Twelfth Amendment—continues to operate in presidential elections today.

*Tara Ross is the author of [Enlightened Democracy: The Case for the Electoral College](#). More information about Tara can be found at [www.taraross.com](http://www.taraross.com) or on [Facebook](#) or [Twitter](#).*

Tags: [Constituting America](#), [Electoral College](#), [Enlightened Democracy](#), [Janine Turner](#), [Tara Ross](#), [Twelfth Amendment](#)

Posted in [Analyzing the Amendments in 90 Days 2012 Project](#), [Constitution Amendment XII](#), [Tara Ross](#) | [1 Comment](#) »

## **[April 19, 2012 – Essay #44 – Amendment XII: A Tie in the Electoral College – Guest Essayist: Tara Ross, Author, Enlightened Democracy: The Case for the Electoral College](#)**

Wednesday, April 18th, 2012

### Amendment XII:

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 the 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 XII: A Tie in the Electoral College

Anti-Electoral College activists sometimes worry that the presidential election could end in a tie. Such a scenario, they might grouse, would create a “stalemate” and could even lead to “The Apocalypse.”

But an electoral tie has occurred already. This election did not result in the Apocalypse, but, as yesterday’s post discussed, there were a few days of congressional stalemate before a President was elected. The then-new nation did not devolve into chaos and rioting. Instead, the biggest consequence of the electoral tie was the Twelfth Amendment. These provisions replaced Article II, Section I, Clause 3 of the Constitution and make it harder (but not impossible) for a presidential election to end in a tie.

The Twelfth Amendment works hand-in-hand with the still operative Article II, Section I, Clause 2: This clause makes each state responsible for deciding how to appoint its own electors. In early elections, state legislatures employed a wide variety of methods—sometimes even selecting electors on their own. Today, all states conduct statewide popular elections for this purpose.

In short, when you go to the polls on Election Day, you are not voting for presidential candidates, even if it seems that way. In reality, you are voting for a slate of individuals, called electors. Most states award their electors in a “winner-take-all” fashion, so the winner of the state receives the state’s entire slate of electors. As an example, Barack Obama “won” the State of Rhode Island in 2008. But what that really meant is that four Democratic electors—not Obama himself—were elected by Rhode Islanders on that day.

The Twelfth Amendment dictates the constitutional responsibilities of electors. The primary responsibility of these Rhode Island electors, along with other electors from the remaining states, was to represent their states in a second election—the real presidential election.

This election among states’ electors occurs on a congressionally designated day in December. The Twelfth Amendment requires that each elector cast two ballots: one for a presidential

candidate and one for a vice-presidential candidate. This requirement was a change from the Article II provision, which did not allow electors to distinguish between their votes for President and Vice-President. Both Article II and the Twelfth Amendment require that electors cast at least one ballot for someone who is not “an inhabitant of the same state with themselves.”

In practice, this means that a political party will handicap itself if it nominates presidential and vice-presidential candidates from the same state, because it automatically loses some votes from the home state of one candidate. In 2000, this provision caused Dick Cheney to make a point of establishing his residence in Wyoming. Had both Cheney and George W. Bush hailed from Texas, those electors would have been unable to vote for Cheney and Bush simultaneously.

After electors cast their ballots, their votes are recorded on “Certificates of Vote,” one of which goes to the President of the Senate, as required by the Twelfth Amendment. The President of the Senate presides over a joint session of Congress on January 6, and the votes are counted publicly at that time.

To be elected President, a candidate needs a majority of electoral votes. At this time, 270 votes constitute a majority of the Electoral College and will win the presidency for a candidate. If no candidate wins a majority, the Twelfth Amendment provides a back-up method for presidential selection. In this secondary election, the election of the President is sent to the House and the election of the Vice-President is sent to the Senate.

In the House vote, the Twelfth Amendment provides that each state delegation is granted one vote. (This remains unchanged from the original Article II procedure.) California, with its current delegation of fifty-three Congressmen, would cast one vote, as would South Dakota, with its single Congressman. A President is elected when one candidate wins a majority of states. Article II had allowed the House to choose from the top five presidential candidates (or two in the event of certain ties), but the Twelfth Amendment now requires the House to choose from only the top three presidential candidates.

The Twelfth Amendment also added a new procedure for election of the Vice-President: In the event that no candidate receives a majority, the Senate chooses from the top two vice-presidential candidates. Each Senator has one vote; Senators may vote for either of the top two vice-presidential contenders.

This system exists largely as it was originally proposed by the Constitutional Convention. The Twelfth Amendment tweaked the process, but substantively left the original procedure in place. Unfortunately, this system is now under attack.

The National Popular Vote movement seeks to convince a critical mass of states to award its electors to the winner of the national popular vote, instead of the winner of each state’s popular vote. NPV asks states to sign an interstate compact—basically, a contract—promising to take such action if enough other states sign on. If the movement succeeds, the constitutional election processes described in the Twelfth Amendment will remain only in theory. In practice, they will be gone. Instead, Presidents will be selected through a direct election system.

Surely the Founders would be disappointed in such a result. The Electoral College was a compromise between large and small state delegates at the Constitutional Convention. The delegates wanted the voice of the people to be reflected in the presidential election process, but they also recognized the need to protect minority groups—especially the small states—from the tyranny of the majority. Just as the composition of Congress reflected compromises between the large and small states, so did the presidential election procedure. Even the House contingent election, so disparaged by Electoral College opponents, was an important part of this compromise because of the advantage that it gave to small states.

The delegates would view efforts to abandon the Electoral College as unwise. Max Farrand reports on the delegates' views in *The Framing of the Constitution of the United States*: “[F]or of all things done in the convention the members seemed to have been prouder of that than of any other, and they seemed to regard it as having solved the problem for any country of how to choose a chief magistrate.”

Yes, the Electoral College is the solution for any country and any decade. The system that has served Americans so well for so long will continue to do so. If we let it.

*Tara Ross is the author of **Enlightened Democracy: The Case for the Electoral College**. More information about Tara can be found at [www.taraross.com](http://www.taraross.com) or on Facebook or Twitter.*

Tags: [Constituting America](#), [Electoral College](#), [Enlightened Democracy](#), [Janine Turner](#), [Tara Ross](#), [Twelfth Amendment](#)

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**[April 20, 2012 – Essay #45 – Amendment XII: Circumstances Allowing the Senate to Choose the Vice-President – Guest Scholar: Hans Eicholz, Historian and Senior Fellow with Liberty Fund, Inc., an educational foundation based in Indianapolis, Indiana](#)**

Thursday, April 19th, 2012

Amendment XII:

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 the 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.

#### Circumstances allowing the Senate to choose the Vice-President

The twelfth Amendment of the U.S. Constitution was born out of the immediate political experience of the fledgling republic as it strove to apply the provisions of its written fundamental law just over a decade after ratification.

Historically the powers associated with the executive branch have been among the most dreaded of all governmental functions. In the political struggles of seventeenth century England, the friends of both English and American liberty drew lessons about the need to constrain the prerogatives of monarchs and tyrants. That understanding shaped the indictment against the King of England in the Declaration of Independence, and shaped an important part of the debate over the original Constitutional provisions respecting the election of the American President and Vice-President.

What method of appointment would best assure the selection of leaders with the temperament and virtues necessary to remain under the law? This was the essential question discussed in the Philadelphia Convention when the second Article of the Constitution respecting the selection of the presidency was originally crafted.

Initially, no distinction was to be made in casting ballots for the election of the President and the Vice-President, but each elector was to nominate two individuals. It was hoped that such a process would filter out the influences of local prejudice if each elector were required to vote for

a second person not of his or her state. Some consideration, it was believed, would then likely be given to criteria beyond merely local interests. Thus Madison observed, “The second best man in this case would probably be the first in fact.” It was hoped that such a mode of selection, combined with an electoral college, would result in a process far removed from political intrigue and discourage political commotions.

In point of fact, however, that process resulted in considerable discord when the electoral vote was equally split, as happened in the election of 1800 between the two Democratic-Republican candidates of Jefferson and Burr. The equal division of electoral college votes caused the election to be thrown into the House of Representatives.

At this point, and against all expectations, Burr attempted to negotiate with the Federalist representatives in Congress, to obtain the highest office. Eventually thwarted in his machinations, Burr’s dishonorable conduct negated Madison’s initial hopes, revealing that a man of lesser character could yet hold the second position, and if the process of election was not remedied, might at some later election, even take first place through political intrigue and backroom negotiations! For this reason, the Congress set in motion the process to amend the Constitution in the selection of both President and Vice-President on the 9th of December 1803.

The primary alteration of the 12th Amendment required the explicit designation of the office for which each candidate was being designated. It preserved, however, certain aspects of the older provisions of Article II.

The process of the electoral college was maintained to ensure the independence of the executive from the legislative branch.

In matters of tied elections, it continued to send the selection of the Presidency to the House of Representatives, but with the selection of the two officers now split, the selection of a Vice-President in cases of an electoral tie, would go directly to the Senate.

In both cases, this process arose from the general principle of the Founders that in addition to the popular element reflected in the selection processes of the electoral college, regional considerations should continue to have their influence. The United States was not to be seen as simply one homogeneous national democracy, but was also a federal union of distinct state governments, a vital part of ensuring against the over concentration of power.

To this end, when breaking a Presidential tie, the House was to assemble its delegates by states and each state was to determine its votes as one: “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.”

Likewise, the Senate, being already organized on the federal principle, would break an electoral tie vote for Vice-President. Indeed, under the old system, the Senate was to perform this function in the event that the next most popular electoral candidates after the Presidential selection, were also tied. This portion of the 12th Amendment merely preserved that order of selection.

*Hans Eicholz is an historian and Senior Fellow with Liberty Fund, Inc., an educational foundation based in Indianapolis, Indiana.*

Tags: [Constituting America](#), [Hans Eicholz](#), [Janine Turner](#), [Liberty Fund](#), [Twelfth Amendment](#)  
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**Monday, April 23, 2012 – Essay #46 – Amendment XIII: Section 1 – Guest Essayist: W.B. Allen, Dean Emeritus, James Madison College; Emeritus Professor of Political Science, Michigan State University**

Sunday, April 22nd, 2012

### **Amendment 13 – Slavery Abolished, Ratified December 6, 1865.**

*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.*

**An Ordinance for the Government of the Territory of the United States, North- West of the River Ohio, known as the Northwest Ordinance or “The Ordinance of 1787,”** an act of the Congress of the Confederation of the United States, passed July 13, 1787.

*Article 6. There shall be neither slavery nor involuntary servitude in the said territory, otherwise than in the punishment of crimes whereof the party shall have been duly convicted: Provided, always, That any person escaping into the same, from whom labor or service is lawfully claimed in any one of the original States, such fugitive may be lawfully reclaimed and conveyed to the person claiming his or her labor or service as aforesaid.*

The 13th Amendment is often referred to as the first of the “Reconstruction Amendments.” While it is true that the abolition of slavery was certainly the first priority for the Congress that conducted the War for the Union, it is not exactly correct to pair the 13th Amendment with the 14th and 15th Amendments, which were literally debated in the context of the aftermath of the war and specifically adopted to extend the “privileges and immunities” of citizenship to the ex-slaves. The 13th Amendment, by contrast, was debated and adopted by the Congress while the war yet raged, and specifically as blow against the rebellion as well as an affirmation of the principle of equality at the heart of the Declaration of Independence. As such, the 13th

Amendment represents the cashing of the promissory note that Lincoln issued at Gettysburg in 1863.

The best way to analyze the 13th Amendment, therefore, is to recognize that it was adopted before the Reconstruction Congress took office. Then one may review the dramatic debates in the House of the Representatives and the Senate over the period from early 1864 until spring of 1865, when the resolution sending the 13th Amendment to the States was adopted. The debates of that era opened with a reports and discussion on “equality before the law,” “emancipation in the District of Columbia,” employment rights for American blacks, streetcar discrimination, and similar issues before eventuating in the direct discussion of national abolition.

What makes this progression of interest is that it reveals the Congress tentatively, cautiously, approaching the tricky question of national emancipation, although having a firm grasp of the fundamental rights at stake. What all conceded the Congress had the authority to legislate for the District of Columbia, some doubted that the Congress could even propose to the nation at large. In the end the idea of the authority of the people as a whole — the ultimate ratification authority — trumped arguments about “dispossession of property” and interfering with the “police power” in the states. The matter was sensitive not so much on account of the attitudes of the states in rebellion; it was sensitive because several Border States still held slaves but had been loyal to the Union. The idea of an uncompensated emancipation seemed a hard blow to many of their advocates and was, besides, a departure from the precedent of British emancipation in the West Indies a generation earlier. The argument was summed up by Senator Lazarus Powell, Democrat from Kentucky, April 8, 1864:

*“We were told by the Government in every form in which it could speak, at the beginning of this revolution, that whatever might be the result, the institutions of the States would remain as they were. The President in his inaugural address, announced that he had no constitutional power to interfere with the institution of slavery in the States. The Secretary of State announced it in a communication which he sent abroad. Congress, by a resolution, announced virtually the same thing when they declared that the object of the war was to restore the Union as it was and to maintain the Constitution as it is.”*

Senator Henry Wilson, Free Soiler and Republican from Massachusetts, however, would have none of it. The question for him was a matter of setting the nation “right” and removing a fundamental flaw in its fabric:

Throughout all the dominions of slavery republican government, constitutional liberty, the blessings of our free institutions were mere fables. An aristocracy enjoyed unlimited power while the people were pressed to earth and denied the inestimable privileges which by right they should have enjoyed in all the fullness designed by the Constitution.

Senator Charles Sumner, Republican from Massachusetts, summed the matter up with the observation that the proposed amendment was nothing less than the fulfillment of a promise first expressed at the founding and periodically renewed (as in the Missouri Compromise) only with great controversy. He pointed out, accordingly, that the proposed amendment was nothing less than “the idea of reproducing the Jeffersonian ordinance.”

A quick comparison of the text of the 13th Amendment with the language of Article 6 from the Northwest Ordinance will reveal the point of Sumner’s observation. What Jefferson authored and the Confederation Congress adopted and the new government under the Constitution of 1787 solemnly re-affirmed was, effectively, the incompatibility of republicanism and slavery. While that early declaration applied only to the Northwest Territory, and subsequently, the territorial division established by the Missouri Compromise (1820), its purpose and language were to declare the fundamentals of republican government, as the Northwest Ordinance on the whole does expansively (leading some to call it the “first national bill of rights”).

Although the 13th Amendment avoids the Ordinance’s language with regard to fugitive slaves, that omission is understandable where the objective is no longer to admit slavery anywhere, rather than to temporize with it where it already existed. It is safe to say, therefore, that the meaning of the 13th Amendment is authoritatively to be recovered from the intentions and meaning of the Northwest Ordinance — not a mere administrative regulation concerning slavery, but rather a dramatic recovery of the fundamental meaning of republican freedom.

*W. B. Allen is Dean Emeritus, James Madison College; and Emeritus  
Professor of Political Science, Michigan State University*

Tags: [Constituting America](#), [James Madison College](#), [Janine Turner](#), [Michigan State University](#), [Thirteenth Amendment](#), [W.B. Allen](#)

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## **[April 24, 2012 – Essay #47 – Amendment XIII: Section 1 – Guest Essayist: Horace Cooper, Senior Fellow with the Heartland Institute](#)**

Tuesday, April 24th, 2012

### **Amendment XIII, Section 2**

*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.*

*2. Congress shall have power to enforce this article by appropriate legislation.*

The Thirteenth Amendment to the United States Constitution officially made all forms of slavery and involuntary servitude except as punishment for a crime unlawful.



Introduced by Ohio Rep. James Ashley originally in 1863, it languished for over a year until companion legislation was introduced in the United States Senate. To give the resolution a final strong push, President Abraham Lincoln had pushed for its inclusion in the GOP platform in 1864 and personally persuaded Democrats from pro-union states to support the effort.

Ultimately, it was passed by the Senate on April 8, 1864, by the House on January 31, 1865, and adopted on December 6, 1865.

Historians record that when the House vote was announced the galleries cheered, congressmen embraced and wept, and Capitol cannons boomed a 100-gun salute. One Representative, Congressman George Julian of Indiana wrote in his diary, “I have felt, ever since the vote, as if I were in a new country.”

On December 18, Secretary of State William H. Seward declared that it had been officially ratified by the states. It was the first such change to the Constitution in 61 years, and it happened just two and a half months before President Lincoln would be tragically assassinated.

Since our country’s founding the issue of slavery had bedeviled our nation. At the Constitutional Convention good men like George Mason of Virginia argued vehemently against slavery, warning his fellow delegates: “Every master of slaves is born a petty tyrant. They bring the judgment of heaven on a country. As nations cannot be rewarded or punished in the next world, they must be in this. By an inevitable chain of causes and effects, providence punishes national sins by national calamities.”

While the Constitution that was ultimately adopted failed to completely resolve the slavery issue, it was neither completely silent nor neutral.

The oft-criticized 3/5<sup>th</sup> compromise specially limited the ability of southern slave-holding states to obtain equal representation in the House of Representatives with that of the non-slave-holding northern states. Ultimately this would result in a pro-freedom tilt in the House of Representatives. The Constitution also gave Congress the power to prohibit the importation of new slaves after 1808, which Congress promptly did once it was legally allowed to.

## **Section 2. Congress shall have power to enforce this article by appropriate legislation**

With the passage of the 13<sup>th</sup> Amendment (specifically clause 2) Congress was given full power to stamp out slavery in all its forms. The motivations of the Members of Congress give us a great degree of insight into the meanings and operations of clause 2 of the 13<sup>th</sup> Amendment. While most discussions of the 13<sup>th</sup> amendment include the 14<sup>th</sup> and 15<sup>th</sup>, Congress’ treatment is quite different. At the time of its introduction, its Republican supporters in Congress and abolitionists across the land saw this amendment and Section 2 in particular as a comprehensive tool to root out not just slavery, but all of its vestiges.

It is for this reason that they didn’t stop with just banning or ending slavery; they empowered Congress to root it out. Their goal was to assure that the ending of slavery wasn’t a hollow victory, that passage lead to a national commitment to adopt whatever substantive changes were needed to eliminate all “badges and incidents of slavery.”

The men surrounding the introduction were very clear in their objectives. Leaders like Senator James Harlan, Rep. Thaddeus Stevens, Sen. Charles Sumner, and Rep. Wilson were virulently anti-slavery. They worked assiduously to draft language that would cover “every proposition regarding slavery.” And they also saw the 13<sup>th</sup> amendment as the affirmation of the founder’s principles. Rep. Godlove Orth (R-IN) said that the 13<sup>th</sup> Amendment to “be a practical application of that self-evident truth” of the Declaration of Independence “that all men are endowed by their creator with certain inalienable rights; that among these are life, liberty, and the pursuit of happiness.”

It was in this context that within days of passage of the 13<sup>th</sup> Amendment, Members of Congress began debating new statutes to achieve the Thirteenth Amendment’s purposes. The first bill introduced roughly a week after the amendment was ratified was S. 427 by Senator Henry Wilson (R-MA). This bill prohibited states, municipalities, corporations and all persons from excluding any person on account of race from travel on railroads or navigable waters. Although this bill ultimately stalled in Congress, within 2 years four laws using the congress’ enforcement power would be enacted: The Civil Rights Act of 1866, The Slave Kidnapping Act of 1866, the Peonage Act of 1867, and the Judiciary Act of 1867. The Civil Rights Act of 1866 in particular set the pace for an aggressive intervention on the part of Congress on behalf of the newly freed slaves. It provided litigants the right to transfer their legal disputes to federal court when the local and state court system failed to allow them an opportunity for relief. Across the nation the new law aided families and individuals that had never had access to the court or to equal protection of the law.

Unfortunately for the abolitionists, subsequent elections and the deaths of key leaders would result in an ebbing of enthusiasm for use of the 13<sup>th</sup> amendment’s authority to remediate the wrongs of slavery. The deaths of Salmon P. Chase, Thaddeus Stevens, and Edwin Stanton were huge losses for the freedom agenda. And new President Andrew Johnson was particularly hostile to their efforts going so far as to veto many of the remaining anti-slavery measures that could pass Congress. But the final death knell for robust authority arising under the 13<sup>th</sup> amendment came from the Supreme Court.

In a series of lawsuits groups together as the Civil Rights cases, the Supreme Court struck down parts of the Civil Rights Act of 1875 (18 Stat. 335) originally proposed by Senator Charles Sumner and Representative Benjamin F. Butler (both Republicans) in 1870, passed by Congress in February, 1875 and signed by President Grant on March 1, 1875.

The Act protected everyone, regardless of race, color, or previous condition of servitude, to the same treatment in “public accommodations” (i.e. inns, public conveyances on land or water, theaters, and other places of public amusement). Violators could face a penalty anywhere from \$500 to \$1,000 and/or 30 days to 1 year in prison. In a setback that the drafters of the 13<sup>th</sup> amendment would not have expected, the Supreme Court ruled that the 13<sup>th</sup> amendment like the 14<sup>th</sup> and 15<sup>th</sup> amendment didn’t authorize Congress to intervene in private non-government areas. The Court’s ruling would stifle Congress’ ability to exercise its Section 2 power for nearly a century.

It is ironic that many of the 1875 Act's provisions were later enacted in the Civil Rights Act of 1964 and the Fair Housing Act, this time using the federal power to regulate interstate commerce.

Eventually the Court would reverse itself. In 1968, in a case called *Jones v. Alfred H. Mayer Co.*, the US Supreme Court case once again dealt with the Civil Rights Act of 1866. In that case they held that Congress could regulate the sale of private property in order to prevent racial discrimination: "42 U.S.C. § 1982 bars all racial discrimination, private as well as public, in the sale or rental of property, and that the statute, thus construed, is a valid exercise of the power of Congress to enforce the Thirteenth Amendment."

A long time coming, the view of the framers was finally validated. Today as during Reconstruction, Congress, the President and the Courts recognize that Section 2 gives Congress the power to "determine what are the badges and incidents of slavery, and the authority to translate that determination into effective legislation" to prevent its effects.

**[Horace Cooper is the Director of the Institute for Liberty's Center for Law and Regulation and is a legal commentator](#)**

Tags: [Constituting America](#), [Heartland Institute](#), [Horace Cooper](#), [Janine Turner](#), [Thirteenth Amendment](#)

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### **[April 25, 2012 – Essay #48 – Amendment XIV, Section 1 – Citizenship Defined – Guest Essayist: Professor Joerg Knipprath, Professor of Law at Southwestern Law School](#)**

Tuesday, April 24th, 2012

Amendment XIV, 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.*

The citizenship clause of the 14th Amendment is one of four amendments to the Constitution that were intended to overturn or clarify Supreme Court rulings (the 11th, 16th, and 26th were the others). Prior to 1857, there had been much scholarly discussion and political debate, but no resolution or consensus, whether the basis of American citizenship was dependent or

independent of state citizenship. Many supported the view expressed by South Carolina's John C. Calhoun in his famous Senate speech on the Force Bill in 1833, "[Every] citizen is a citizen of some State or Territory, and as such, under an express provision of the Constitution, is entitled to all privileges and immunities of citizens in the several States; and it is in this and no other sense that we are citizens of the United States." On the other hand, James Madison, discussing the need for Congress to provide uniformity in naturalization in Federalist 42, appears to assume that American citizenship cannot be left to the vagaries of state definitions.

The Supreme Court thoroughly examined the issue in the Dred Scott case in 1857. Chief Justice Roger Taney's majority opinion addressed the interplay between state citizenship and American citizenship. He reasoned that "people of the United States" in the preamble and "citizens" in other parts were synonymous. The people of the United States were composed of the people of the States, as it was they who were the parties to the Constitution in light of the adoption process by state conventions. The "people" of those states were the "free" inhabitants. This was a concept of specific meaning, referring to whites only, not people brought to the colonies as slaves or their descendants, even if thereafter they had been freed. Accordingly, only those descended from white inhabitants and those people naturalized under federal law (since the first statute in 1790, only whites) could be American citizens. This fundamental principle overrode later decisions by individual states to recognize additional classes of state citizens. Scott had no basis claiming citizenship as that term was used in the Constitution. Therefore, he had no power to sue in federal court as a "citizen" of Missouri.

Taney's argument had a weak link in that there were freed blacks, some of whom could vote in 5 of the 13 states at the adoption of the Constitution. Moreover, the privileges and immunities clause of the Articles of Confederation (the pre-cursor to its counterpart in the Constitution of 1787) had discussed the body of the states' citizens in terms of their "free inhabitants." An amendment proposed by South Carolina to insert "white" after "free" was overwhelmingly rejected in 1778. If that was correct, slaves could not claim citizenship, but free blacks could. Just in case, Taney cut off that argument by stating that Scott's residence with his master in Wisconsin territory could not transmute his status from slave to free.

The main dissenting opinion, by Justice Benjamin Curtis, exploited that weakness, insisting that the Constitution established an understanding of American citizenship that plausibly could extend to all free persons born in the United States. Curtis agreed, however, that the states determined the basic parameters of citizenship, and that American citizenship was derived from the scope of citizenship recognized by the state of birth. The laws of Scott's state of birth, Virginia, treated him as a slave; therefore he was not at that time a citizen of the United States. Nor would a slave who was temporarily taken into a free state thereby be made free. But when his master took him to reside in a free territory, Wisconsin, that action made Scott a free man and a citizen of the United States. When taken back to live in Missouri, he returned as a free man and became a citizen of that state.

Curtis accepted a unitary basis of citizenship for those born in the United States, one that was determined basically by state law. Taney, on the other hand, accepted a duality: United States citizenship was established by the understanding of the Framers of what made someone part of the "people of the United States." While states could define state citizenship for themselves, they

(or the Congress) could not go against this fundamental principle. Hence, even after the Civil War, freed blacks could not be citizens of the United States, short of a constitutional amendment.

Accepting Taney's constitutional argument, Congress took that path with the 14th Amendment. United States citizenship was de-coupled from state citizenship, and the latter was made subordinate to the former. National citizenship appears based on place of birth ("jus soli"), the English common law principle going back to feudal antecedents when one's station was connected to the soil where one was born. However, the amendment also adds that the person must be "subject to the jurisdiction" of the United States. This clearly excludes those children born in the United States to foreign diplomats. Does it also exclude those who are born in the United States to parents who happen to be here temporarily or illegally?

The Supreme Court addressed that clause in 1898 in *U.S. v. Wong Kim Ark*. The majority ruled very broadly that anyone (other than the children of foreign diplomats) born on U.S. soil was a U.S. citizen. The dissent argued that the competing international law doctrine of blood relationship ("jus sanguinis") applied, which required not only birth in the U.S. but that the child's father did not owe allegiance to a foreign power. This was an old principle of Roman law and ancient Greek practice still used in many countries today. It would keep the native-born children at least of those who are here merely as visitors from claiming birthright citizenship.

How does this affect the current debate about "anchor babies" in connection with illegal entrants into the United States? Proponents of unrestricted citizenship argue for the broad language of *Wong Kim Ark* that generally has prevailed in the courts. However, there are several weaknesses. First, the issue of illegal entrants, or even of temporary visitors, was not addressed there. Mr. Wong himself had lived in the U.S. all of his life. Wong's parents had been duly admitted as immigrants to the U.S. with a permanent domicile and were engaged in a business. They were not mere passers-through. Nor were they here illegally, a concept that was not an issue in American immigration law until the Chinese Exclusion Act of 1882, years after the Wongs arrived. It was unnecessary for the Court to give such a broad reading to the 14th Amendment, and the justices simply may not have been aware of the ramifications of their language.

Second, the law-of-the-soil tradition carried with it "indelible allegiance." Thus, a British subject could not renounce British citizenship, which led the British navy, after American independence, to search American vessels and "impress" into British service naturalized American citizens of British ancestry. Americans have roundly rejected that principle.

Third, the debates over the 14th Amendment included remarks by Senator Jacob Howard of Michigan, the amendment's sponsor, that seem to say that the amendment does not apply to children of any foreigners or aliens, even if those children are born in the United States.

Fourth, Congress on several occasions throughout American history has employed *jus sanguinis*, for example, in legislation to recognize as citizens by birth the children born abroad to American citizens. This suggests that the 14th Amendment's *jus soli* principle applies, unless Congress, as part of the sovereign powers of the national government, passes a law that rests on a different principle.

Overturning a century-old precedent is difficult, but distinguishing it due to changed social circumstances unanticipated at the time is more persuasive. Still, eroding the *jus soli* interpretation of the citizenship clause is a longshot, but the public debate likely will intensify the pressure for some political or constitutional accommodation.

*An expert on constitutional law, Prof. Joerg W. Knipprath has been interviewed by print and broadcast media on a number of related topics ranging from recent U.S. Supreme Court decisions to presidential succession. He has written opinion pieces and articles on business and securities law as well as constitutional issues, and has focused his more recent research on the effect of judicial review on the evolution of constitutional law. He has also spoken on business law and contemporary constitutional issues before professional and community forums. Read more from Professor Knipprath at: <http://www.tokenconservative.com/>.*

Tags: [Constituting America](#), [Fourteenth Amendment](#), [Janine Turner](#), [Joerg Knipprath](#), [Southwestern Law School](#)

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**[April 26, 2012 – Essay #49 – Amendment XIV Privileges or Immunities – Guest Essayist: Kevin R. C. Gutzman, M.P.Aff., J.D., Ph.D., Associate professor of the Department of History and Non-Western Cultures at Western Connecticut State University](#)**

Wednesday, April 25th, 2012

Amendment XIV, 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 1, Clause 2 of the 14th Amendment says, “No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States.” This Privileges or Immunities Clause applies a prohibition previously limiting the Federal Government’s powers to the state governments.

From the Federal Government’s earliest days, the Supreme Court, the Congress, and the president assumed that when the Constitution used technical legal terms having fixed historic

meanings, those terms were to be read as having those meanings. If we apply this rule of construction to the Privileges or Immunities Clause, the precedent to which we must look is Justice Bushrod Washington's decision in the case of *Corfield v. Coryell* (1823). In that case, Washington—sitting as circuit justice for Pennsylvania—described the “privileges and immunities of citizens in the several States,” mentioned in Article IV, Section 2.

According to Washington:

The inquiry is, what are the privileges and immunities of citizens in the several States? We feel no hesitation in confining these expressions to those privileges and immunities which are, in their nature, fundamental; which belong, of right, to the citizens of all free governments; and which have, at all times, been enjoyed by the citizens of the several States which compose this Union, from the time of their becoming free, independent, and sovereign.... They may ... be all comprehended under the following general heads: protection by the government; the enjoyment of life and liberty, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety; subject nevertheless to such restraints as the government may justly prescribe for the general good of the whole. The right of a citizen of one State to pass through, or to reside in any other State...; to claim the benefit of the writ of habeas corpus; to institute and maintain actions of any kind in the courts of the State; to take, hold and dispose of property, either real or personal; and an exemption from higher taxes or impositions than are paid by the other citizens of the State...[,] to which may be added, the elective franchise, as regulated and established by the laws or constitution of the State in which it is to be exercised. These, and many others which might be mentioned, are, strictly speaking, privileges and immunities, and the enjoyment of them by the citizens of each State, in every other State, was manifestly calculated (to use the expressions of the preamble of the corresponding provision in the old Articles of Confederation) “the better to secure and perpetuate mutual friendship and intercourse among the people of the different States of the Union.”

The first case in which the Supreme Court had an opportunity to construe the Privileges or Immunities Clause was *The Slaughter-House Cases* (1873). There, the Court divided the privileges and immunities of American citizens between those that are protected by state governments and those that are, as Section 1 of the Fourteenth Amendment puts it, “privileges or immunities of citizens of the United States.” While it declined to list all of the ones that fell under the Fourteenth Amendment, it did say that virtually all of our rights remained rights of state citizenship, not rights “of citizens of the United States”—just as they had been before the Fourteenth Amendment.

So, some of the “privileges or immunities of citizens of the United States” that it listed were “to come to the seat of government to assert any claim he may have upon that government, to transact any business he may have with it, to seek its protection, to share its offices, to engage in administering its functions[;] ... the right of free access to its seaports, through which operations of foreign commerce are conducted, to the sub-treasuries, land offices, and courts of justice in the several States[;] ... [a citizen's right] to demand the care and protection of the Federal government over his life, liberty, and property when on the high seas or within the jurisdiction of a foreign government[;] ... [t]he right to peaceably assemble and petition for redress of grievances[;] the privilege of the writ of habeas corpus[;] ... the right to use the navigable waters of the United States, however they may penetrate the territory of the several States[;] ... all rights

secured to our citizens by treaties with foreign nations[;] ... [the] privilege ... to become a citizen of any State of the Union by a bona fide residence therein, with the same rights as other citizens of that State[; ... and] the rights secured by the thirteenth and fifteenth articles of amendment, and by the [rest of the] fourteenth....”

Nowadays, liberal critics commonly decry the Court’s decision in *Slaughter-House* for not creating numerous new rights for federal courts and Congress to enforce against the states under the cover of the Fourteenth Amendment. However, as the *Slaughter-House* majority pointed out, to have taken a different position would have made the Court the “censor” of all state and local legislation with a supervisory power over all state laws. While the 20th-century Supreme Court carved out precisely such a role for itself, the Reconstruction-era justices remained committed to the Founders’ vision of a decentralized government in which most decisions were made by elected officials. It is unsurprising that they did not behave as modern liberal judges would behave.

*Kevin R. C. Gutzman, M.P.Aff., J.D., Ph.D. is an American historian and New York Times bestselling author. He is an associate professor of the Department of History and Non-Western Cultures at Western Connecticut State University.*

Tags: [Constituting America](#), [Fourteenth Amendment](#), [Janine Turner](#), [Kevin Gutzman](#), [Western Connecticut State University](#)

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### **[April 27, 2012 – Essay #50 – Amendment XIV Due Process Protection – Guest Essayist: Professor Will Morrissey, William and Patricia LoMothe Chair in the United States Constitution at Hillsdale College](#)**

Thursday, April 26th, 2012

Amendment XIV, 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.

What Is “Due Process of Law”?

Enacted in 1868, the Fourteenth Amendment numbers among the “Civil War amendments”—those that aimed to settle the relations of the states to the federal government. First among the



much-controverted issues prior to the war was slavery, abolished throughout the nation in the Thirteenth Amendment. But slavery had thrived underneath the constitutional carapace of “states’ rights.” If state governments were not restrained from abridging the citizen rights of the former slaves, for example, what would prevent them from reintroducing de facto racial servitude in some other guise?

For example, why could the states not practice oppression against any group it chose to target by making it subject to arbitrary arrest or imprisonment or to summary judgment without benefit of trial? The Constitution prohibited the federal government from doing such things, but what about the other levels of government?

Thus the Fourteenth Amendment says that no state may “deprive any person of life, liberty, or property, without due process of law.” Readers of our founding documents will find that language very familiar. Rightly so: the phrase reproduces the language of the Fifth Amendment, which itself follows the famous words of the Declaration of Independence: “We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty, and the pursuit of Happiness.” Jefferson’s words follow those of the English philosopher John Locke, who identified life, liberty, and property as fundamental natural rights.

This means that the Framers took natural rights—rights endowed by our Creator—and made them into civil rights—rights formally recognized in our fundamental man-made law. Designed and implemented by human beings, governments exist in order to secure our natural rights, and one way to secure those rights is forthrightly to enunciate them in the supreme law of our land, ratified by the only sovereign body under God Americans recognize—themselves.

But if governments are instituted to secure our natural rights against those who would violate them, by what right does government punish the violators? Does effective punishment not require the government to deprive criminals of their property—by fining them—their liberty—by imprisoning them—and even their lives—by executing them for the most heinous offenses against our natural and civil rights? How can government do this without contradicting itself—without violating the very rights government is supposed to secure?

The basic principle of justice is to repay good acts with good acts, bad acts with bad acts. (The basic law of charity is to repay bad acts with good acts, but charity goes beyond justice). The ‘bad’ or rights-depriving acts of just punishment are actually good in the sense that they punish those guilty of committing bad acts against the good. This repays the bad in their own coin and may deter those who are thinking of committing bad acts. Justice metes out equal things to equals: good things to the good, bad things to the bad.

But how do we determine who is guilty of a bad act? Parents mete out what might be described as informal punitive justice to their misbehaving children. This usually involves the quick procedure of look, see, and swat. Children do not deserve a jury of their peers, primarily because such a juvenile jury would be as foolish and unruly as they. Adult fellow-citizens are a different matter. As persons capable of ruling ourselves by reason, we deserve more careful treatment. The care we owe to children entails bringing them up to rule themselves by reason, preferably before they get big enough to do serious damage. The care we owe our fellow citizens entails treating

them as such—as persons who should know better than to behave as if auditioning for the next episode of Cops.

This is where due process of law comes in. As an American citizen, your civil rights may not be abridged as punishment for any crime without the observance by the executive and judicial authorities of well-established legal procedures, including a list of the charges against you and the opportunity to defend yourself against them in court. That is, any punishment involves the government in depriving the accused of some important civil right, a right it normally would be entrusted to secure. To do so fairly, the government must ‘make a case’ against you—persuade a reasonable judge or jury of your peers that you deserve such deprivation.

Today, this form of due process is often called “procedural due process”—a rather odd-sounding redundancy. What process is not procedural? This locution is meant to distinguish adherence to proper legal procedure from another thing called “substantive due process.”

Strictly defined, due process of law limits executive and judicial power to acts that insure a defendant’s fair chance actually to defend himself civilly, without needing to defend himself physically by running away or fighting back. Due process helps to make civil society civil. Substantive due process limits not only executive or judicial power but legislative power. Substantive due process holds that Congress and (with the Fourteenth Amendment) the state legislatures may no longer pass laws that abridge your life, liberty, or property. For example, an American version of the infamous Nuremberg Laws of Nazi Germany, depriving a particular religious or ethnic group of their civil liberties and thus rendering them less than fully-protected citizens, would clearly violate the civil rights to liberty and property of all members of that group. The “substantive” in the phrase “substantive due process” thus refers to the substance of a given law itself as distinguished from the procedures employed to enforce the law. Due process initially held that you could not be deprived of your civil rights to life, liberty, and property without proper legal procedures; it now meant that legislatures could not deprive you of such rights in the first place. This assurance may seem unnecessary because those rights are already protected by the Constitution as a whole. Be that as it may, the assertion of substantive due process causes a serious dilemma because it returns the country to the original problem that due process was intended to solve: if legislatures cannot secure the rights of the good by enacting laws that injure or ‘correct’ the bad, how will the rights of the good be secured at all? It seems that the very substantiality of substantive due process contradicts justice itself.

Having caused the problem, the Court soon got round to re-solving it, this time at the expense of the legislatures and of the people, and to the aggrandizement of themselves. In its first move, habitual since the 1940s especially, the Supreme Court has claimed that due process places the states under the requirement to adhere not only to those amendments (such as amendments thirteen and fourteen) that specifically restrict the states, but also to adhere to the whole Bill of Rights, which of course originally applied to the acts of the federal government only. So, for example, the first amendment ban on religious establishment by the federal government left state religious establishments undisturbed; now, the courts could invalidate any such establishments by invoking the due process clause understood “substantively” and not just “procedurally.”

This vast expansion of the scope of the due process clause solved the problem of the protection of our civil rights, but only at the expense of intensifying the problem of American self-

government. In practice the Court's behavior has proved highly selective. In the case of the Second Amendment protection of the right to bear arms, the Court has often chosen to overlook state restrictions on that right. At the same time, the Court has at times deployed substantive due process in establishing hitherto unknown and entirely unsuspected "constitutional rights". It has done so by making a second move, namely, to widen the definition of the rights to life, liberty, and property. The Court-asserted rights to abortion (established in *Roe v. Wade* [1973]) and to homosexual activity (established in *Lawrence v. Texas* [2003]) clearly go far beyond anything the framers of the Fourteenth Amendment could have been thinking of back in 1868. The justices have combined substantive due process with their invention of unenumerated Constitutional rights—seen perhaps most glaringly in the 1965 *Griswold v. Connecticut* decision (in which the majority opinion claimed that the "right to privacy" existed in the "penumbra" of the right to liberty—an expansive and ill-defined emanation, indeed). The doctrine of substantive due process added to a very broad definition of civil rights has enabled the Court effectively not merely to adjudicate but to legislate—a power previously thought to reside in, well, the legislature.

By placing the states under the entire Bill of Rights, and then by defining "rights" penumbrically (I invent the word for the occasion, imitating the creativity of the distinguished justices in my own small way), the Court has done far more than to abridge the powers of the state governments. It has effectively given itself the power to amend the Constitution. Under the original theory of American constitutionalism, only the people—the sovereigns—held this sovereign power. But now the judges exercise it too, making a portion of the federal government sovereign over the (formerly) sovereign people. While the founders asserted the natural rights and sovereign power of the people to establish civil rights over the government-made rights of Englishmen as the basis of their independence from the Empire, the Supreme Court has effectively revolutionized the American Revolution, making Americans into Europeans, again—the New World back into the Old.

*Will Morrissey holds the William and Patricia LaMothe Chair in the United States Constitution at Hillsdale College; his books include Self-Government, The American Theme: Presidents of the Founding and Civil War and The Dilemma of Progressivism: How Roosevelt, Taft, and Wilson Reshaped the American Regime of Self-Government.*

Tags: [Constituting America](#), [Due Process](#), [Fourteenth Amendment](#), [Hillsdale College](#), [Janine Turner](#), [Will Morrissey](#)

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**Monday, April 30, 2012 – Essay #51 – Amendment XIV, Section 1: Equal Protection Under the Law – Guest Essayist: Professor Joerg Knipprath, Professor of Law at Southwestern Law School**

Sunday, April 29th, 2012

Amendment XIV, 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*

Supreme Court Justice Oliver Wendell Holmes once dismissively declared the equal protection clause to be the “usual last resort of constitutional arguments.” At the time, 1927 in the notorious case of *Buck v. Bell*, Holmes could not have foreseen the explosion in the use of the equal protection clause that would occur a generation later.

The Declaration of Independence had famously asserted the proposition, self-evident to the Founders, that “all Men are created equal.” But this was a metaphysical proposition in that there was to be no aristocracy by birthright, a moral one in that we are all (with allowance for the truly insane) equally imbued with free will, and a religious one in that we are all children of God. The Founders were hardly so naïve to believe that all people are physically, intellectually, and emotionally equal, never mind that they are alike. Aristotle had written in the *Politics*, “Democracy arises out of the notion that those who are equal in any respect are equal in all respects; because men are equally free, they claim to be absolutely equal.” Aristotle viewed this as a fatal flaw of democracy, a theme echoed in Madison’s *Federalist* 10. In a trenchant dissection of the instability of democracies, Madison sarcastically observed, “Theoretic politicians, who have patronized this species of government, have erroneously supposed that, by reducing mankind to a perfect equality in their political rights, they would, at the same time, be perfectly equalized and assimilated in their possessions, their opinions, and their passions.”

Moreover, the very real presence of slavery in the great majority of the states demonstrated the limitations of the concrete application of the Declaration’s sentiments. While Thomas Jefferson, agonizing over the institution of slavery from which he personally benefitted, might write, “I tremble for my country when I reflect that God is just,” it was also the case, as the historian Forrest McDonald observed, “Few of his countrymen trembled with him.”

In practice, then, both simple human differences as well as more profound human inequalities have to be taken into account in a successful social order. Regarding the former, the law routinely discriminates by drawing lines that target some in the community for unfavorable treatment. The tax code, for example, is a mass of discriminations. As to the latter, attempts to equalize conditions that arise from the human inequalities about which Madison wrote is a

prescription for totalitarian government. That is the dark side of egalitarianism and exposes the tension between equality and liberty.

Moving from a manifesto for independence to a plan for governing the Union, the Framers did not imbed either a general principle of non-discrimination or one of equality of condition in the Constitution. There are only specific limited instantiations of non-discrimination, such as the protection offered under the privileges and immunities clause of Article IV to persons coming into a state from another and under the commerce clause to out-of-staters competing with local businesses.

There is, however, no equal protection clause. That had to await the adoption of the 14th Amendment. However, as was the case with the 13th and 15th Amendments, that provision had to do solely with race discrimination and, more directly, the conditions that resulted from institutionalized slavery based on the black man's race. The 14th Amendment was the immediate product of concern over the constitutionality of the Civil Rights Act of 1866, a law passed under the 13th Amendment. That statute was an anti-discrimination law. Since it prohibited race discrimination in various matters and did not limit itself to slavery as such or apply only in former slave states, there were doubts about the ability of the 13th Amendment to support this law. To cure that defect, a movement for another constitutional amendment, the eventual 14th, arose in Congress under the auspices of the Joint Committee on Reconstruction and the leadership of Congressman John Bingham of Ohio and Senator Jacob Howard of Michigan.

The equal protection clause was only intended to insure formal equality before the law and only regarding race discrimination. That its reach did not extend further was made clear by the Supreme Court in 1872 in the *Slaughterhouse Cases*, in which a claim by butchers that a Louisiana law violated, among others, their right to equal protection under the 14th Amendment was rejected almost summarily. As Justice Samuel Miller declared, "We doubt very much whether any action of a State not directed by way of discrimination against the negroes as a class, or on account of their race, will ever be held to come within the purview of this provision." In a companion case decided on the same day, *Bradwell v. Illinois*, a claim by a woman that the state's refusal to allow women to practice law violated the 14th Amendment did not even produce an argument by her attorneys or a discussion by the Court of a violation of the equal protection clause. The singularly race-focused nature of the equal protection clause was reiterated by the Court of that era in the *Civil Rights Cases* and *Plessy v. Ferguson*.

Leaving aside a few odd cases involving unenumerated fundamental rights, it was not until the 1950s that the Supreme Court began to consider non-race-related equal protection claims, and it was not until *Reed v. Reed* in 1971 that a claim of unconstitutional sex discrimination was successful. In the last several decades, the Court has used the equal protection clause to strike down state laws that discriminate against various classes of aliens, illegitimate children, and homosexuals. Race, ethnicity, religion, national origin and (many) alienage classifications are considered constitutionally "suspect," meaning that they are presumptively unconstitutional and subject to "strict judicial scrutiny." Sex and illegitimacy are "quasi-suspect" classifications subject to "intermediate" scrutiny. In either case, the government must show greater need for such discrimination than would be required for ordinary discriminations by government, such as

age, wealth, disability, or other classifications. This means effectively that racial and other such differences must not be formally recognized in laws.

The expansion of non-discrimination protection has made obsolete Justice Holmes' comment about the futility of equal protection clause claims. The Constitution now protects more broadly against discrimination by government than was the case in the 1920s, and certainly than in the 1790s. Still, there is generally no obligation by government to eliminate inequalities that result from human nature and capabilities or from what might be called expansively the human condition. President Obama, speaking years ago at an academic gathering, bemoaned the Supreme Court's failure to use the equal protection clause to equalize economic and social conditions of inequality, but the Court has generally avoided such judicial legislation. The only exceptions have been in matters related to access to courts, such as the right of an indigent defendant to a paid attorney.

Beyond those few cases, the justices have declined numerous invitations to turn the Constitution from one of rights against the community (a "negative" constitution) to one of rights from the community (a "positive" constitution). Human experience shows that the latter always becomes one of obligations to the community, as government grows and individual liberty shrinks. Certain justices would be happy to move in the direction of the European model to enact their ideal egalitarian world. Justice Ruth Ginsburg's admonition to the Egyptians that they follow the South African constitution rather than the American in establishing their new system comes to mind. But the increasingly precarious economic status of the welfare state shows the wisdom of the Court in not amending the Constitution to remake the equal protection clause into a constitutional forge of egalitarianism.

*An expert on constitutional law, Prof. Joerg W. Knipprath has been interviewed by print and broadcast media on a number of related topics ranging from recent U.S. Supreme Court decisions to presidential succession. He has written opinion pieces and articles on business and securities law as well as constitutional issues, and has focused his more recent research on the effect of judicial review on the evolution of constitutional law. He has also spoken on business law and contemporary constitutional issues before professional and community forums. Read more from Professor Knipprath at: <http://www.tokenconservative.com/>.*

Tags: [Constituting America](#), [Equal Protection](#), [Janine Turner](#), [Joerg Knipprath](#), [Southwestern Law School](#)

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**Tuesday, May 1, 2012 – Essay # 52 – Amendment XIV, Section 2 – Guest Essayist: Timothy Sandefur, Author and a principal attorney at the Pacific Legal Foundation**

Monday, April 30th, 2012

**Amendment XIV, 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.*

The end of the Civil War brought radical changes to the United States Constitution. Leaders of the victorious Republican party hoped now to make the principles for which they waged such a punishing war into a permanent part of the Constitution. The Fourteenth Amendment renounced the “states’ rights” theories that so prevalent before the war, by declaring first that all Americans are citizens of the United States first and foremost, and only secondarily of the states where they reside. States had formerly, enjoyed authority to determine both state and federal citizenship; now the nation would determine both. Second, the Amendment prohibited states from depriving Americans of their “privileges or immunities”—i.e., of the rights that belong to all Americans—or of equal protection of the law, or of life, liberty or property without due process of law. These new guarantees ensured that the theory of “paramount national citizenship,” for decades the backbone of the Republican anti-slavery crusade, would be enshrined forever in the nation’s highest law.

But the Amendment was not concerned only with these crucial abstract principles. It was also a matter of practical politics. The second section of the Amendment—pointing toward the future Fifteenth Amendment—punished any state that deprived people of the right to vote. Southern states, after all, could be expected to take steps to bar their former slaves—now citizens—from exercising their new rights as citizenship. Rather than banning such interference outright, as the Fifteenth Amendment would do, this provision declares that if a state deprives “any of the male inhabitants” who are 21 or older from voting in a federal or state election, that state will lose seats in the House of Representatives.

This provision that overrode the Constitution’s infamous “three-fifths” clause, whereby Congress was apportioned on the basis of the white populace along with “three-fifths” of the slaves, and it marked the first steps toward a democracy in which all races could participate. Of course, there was also a steely political reality behind Congress’s choice of language: if southern states were restored to the union, and apportioned Congressmen on the direct basis of population, the

Republicans might soon find themselves outvoted in Congress, destroying their unique opportunity for constitutional reform. Thus the Amendment permitted states to deprive people of the right to vote on account of their having “participat[ed] in rebellion, or other crime.”

The inclusion of the word “male” was also a calculated political move, and it also sparked a clash among the Amendment’s friends. Never before had the U.S. Constitution conditioned the right to vote on sex, and in fact, at the time the Constitution was originally ratified, some states allowed women to vote. But no state allowed women to vote in 1868, and had the Amendment been written in language that included female suffrage, the proposal would have faced far more opposition within the Northern political coalition. But adding a provision that explicitly allowed states to disenfranchise women put the nation’s imprimatur on discrimination, and offended many of the same female activists who had helped lead the Abolitionist movement. Some of them—including Elizabeth Cady Stanton and Susan B. Anthony—now opposed any guarantee of voting rights that was not gender-neutral. The former slave Frederick Douglass was more pragmatic. He believed strongly in women’s suffrage, but that was a goal for another day. “Woman has a thousand ways to attach herself to the governing power of the land and already exerts an honorable influence on the course of legislation.” But “the Negro is mobbed, beaten, shot, stabbed, hanged, burnt, and is the target of all that is malignant in the North and all that is murderous in the south.”

Although section 2 was largely rendered obsolete by the Fifteenth and Nineteenth Amendments—which barred states from discriminating on the basis of race or sex when it comes to the right to vote—it has still played an important role in shaping the power of states to deprive certain groups of voting rights. In a 1974 case, the Supreme Court ruled that states may disenfranchise felons, pointing out that the Fourteenth Amendment explicitly allowed this. And in 1970, Justice John Marshall Harlan, whose grandfather had been the lone dissenter in *Plessy v. Ferguson*, relied partly on the language of section 2 to conclude that the Fourteenth Amendment did not allow Congress to interfere with a state’s power to determine voter qualifications.

That the Amendment’s language regarding the right to vote was so quickly superseded by the Fifteenth Amendment should come as no surprise. The Fourteenth Amendment was just one step in a long-overdue effort to make the Declaration of Independence’s promise of equal liberty a reality for all.

**Timothy Sandefur is a principal attorney at the Pacific Legal Foundation and author of *Cornerstone of Liberty: Property Rights in 21st Century America* (Cato Institute, 2006) and *The Right to Earn A Living: Economic Freedom And The Law* (Cato Institute, 2010).**

Tags: [Constituting America](#), [Fourteenth Amendment](#), [Janine Turner](#), [Pacific Legal Foundation](#), [Timothy Sandefur](#)

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**Wednesday, May 2, 2012 – Essay # 53 – Amendment XIV, Section 3 – Guest Essayist: Timothy Sandefur, Author and a principal attorney at the Pacific Legal Foundation**

Tuesday, May 1st, 2012

**Amendment XIV, 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.*

America has never faced another crisis, like the Civil War. Art historian Robert Hughes has called it “America’s *Iliad*,” and that is an apt term, because the War was not only a bloody struggle for the nation’s future; it was also the emblematic crisis of the American soul. All of the cross-currents and crises of our Constitution can be found to intersect there, or to be prophesied in its still resounding clashes. This is true not only of such legal controversies as whether a state has the power to secede, or whether the president can suspend the writ of habeas corpus in an emergency, but also of much more personal issues as the sense of betrayal and recrimination that arose from a struggle of brother with brother, of father with son. Section 3 of the Fourteenth Amendment reflects this personal element of the War. It bars any person from serving in state or federal office who, having taken an oath to serve as a state or federal officer, had broken that oath to serve the Confederacy. The Amendment gives Congress power to remove the disability by a two-thirds vote.

This provision was not just aimed at Confederate soldiers, but also at prominent citizens, as well. Former President, John Tyler had given up his citizenship when the war began and was elected to the Confederate Congress; former Vice President John Breckenridge became a Confederate general, and Justice John Campbell resigned from the U.S. Supreme Court to become Jefferson Davis’ Assistant Secretary of War. Leaders of the victorious union realized that, as with so many military conflicts, a triumph at arms would prove futile in the long run if the enemy’s political leaders were allowed to retain political power, and they saw the removal of the Confederacy’s elite from political power as a necessary step toward reconstructing the nation on the principles of equality and liberty for which the union had fought.

Yet the goal of reconstruction was not merely to exclude the former confederates, but to reintegrate them into American society, and barring people from participating in society would prove counterproductive. Presidents Abraham Lincoln and Andrew Johnson preferred simply requiring former Confederates to swear that in the future they would support the Constitution.

And a year before the Fourteenth Amendment was ratified, the Supreme Court struck down a particularly harsh oath requirement imposed by the state of Missouri, which barred people from certain private occupations if they had participated in the rebellion. That prohibition, declared the Court in *Cummings v. Missouri*, amounted to retroactive punishment in violation of the ex post facto clause. The authors of the Fourteenth Amendment, therefore, held open the opportunity for former confederate leaders to return to the mainstream of political life in the restored union.

Yet section 3 had stranger consequences for reconstruction than its authors could have imagined. In May, 1865, Confederate President Jefferson Davis was arrested in Georgia and held on charges of treason. Some Republican leaders insisted he be prosecuted, but moderates were more interested in moving on, and the Johnson Administration sought some way to postpone the prosecution. As Judge C. Ellen Connally explained in a 2009 *Akron Law Review* article, Chief Justice Salmon Chase found an opportunity for such delay in section 3 of the Fourteenth Amendment. Chase, who along with another federal judge, presided over Davis' treason trial, argued that the case must be dismissed because, like the Missouri law at issue in *Cummings*, the Amendment's prohibition on serving in public office was a criminal punishment. That meant Davis could not also be tried for treason without violating the constitutional ban on "double jeopardy." The other judge disagreed, which sent the issue to the full Supreme Court for resolution—but before the Court could decide, President Johnson issued a general amnesty, bringing a permanent end to Davis' prosecution.

A civil war is a great tear in the fabric of a nation, which can never be wholly mended. Section 3 of the Fourteenth Amendment is a testament to the profound political and personal wounds that "America's *Iliad*" inflicted on the country.

***Timothy Sandefur is a principal attorney at the Pacific Legal Foundation and author of Cornerstone of Liberty: Property Rights in 21st Century America (Cato Institute, 2006) and The Right to Earn A Living: Economic Freedom And The Law (Cato Institute, 2010).***

Tags: [Constituting America](#), [Fourteenth Amendment](#), [Janine Turner](#), [Pacific Legal Foundation](#), [Timothy Sandefur](#)

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**Thursday, May 3, 2012 – Essay # 54 – Amendment XIV, Section 4 – Guest Essayist: Timothy Sandefur, Author and a principal attorney at the Pacific Legal Foundation**

Thursday, May 3rd, 2012

**Amendment XIV, 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.*

The fourth section of the Fourteenth Amendment is rather obscure, or was until recently. It declares that “[t]he 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.” In a 1935 case, *Perry v. United States*, the Supreme Court held that the do-not-question provision applies to all federal debts, and bars the federal government from repudiating debts.

Barring the repayment of Confederate debt was not only a blow to southern rebels, but to their supporters worldwide. The Civil War was vastly expensive, and raised the national debt to over a billion dollars, and its financial consequences reverberated for decades afterwards. The victorious Union was especially bitter about international support for the Confederacy; in one instance, that anger nearly led to war with Britain, which refused to pay U.S. claims for damages inflicted by an English-built Confederate warship called the *CSS Alabama*. That dispute was only resolved in 1871 by a treaty.

In the years since, this section has rarely given rise to much debate—until the summer of 2011, when Congress began debating the Obama Administration’s request to extend the nation’s “debt ceiling.” Federal law requires Congress to authorize incurring more debt to pay for federal programs, and by last summer, when the national debt stood at more than \$14 trillion, Republicans in Congress resisted allowing more red ink. They demanded concessions from the White House, and refused to agree to the tax increases demanded by the President. In mid-July, as the negotiations grew strained, some of the President’s supporters argued that Congressional refusal to allow further debt would violate the Fourteenth Amendment. South Carolina Congressman James Clyburn urged Obama to invoke Section Four and raise the debt ceiling by executive order, and Yale Law Professor Jack Balkin, Treasury Secretary Timothy Geithner, and even former President Bill Clinton (who, like Obama, was once a law professor) agreed. They argued that failing to raise the debt limit would increase the risk of a national default, which would amount to an unconstitutional “questioning” of the debt.

But Harvard Law School professor Laurence Tribe disagreed. In an article in the *New York Times*, Tribe explained that the Amendment does not bar Congress from making financial choices that might increase the risk of default. And even if it did, other constitutional provisions give Congress—not the President—the responsibility for borrowing money. Worse still, the government would probably lose more than it would gain from unilateral presidential action, because investors would then fear that the Administration might take other unprecedented actions undermining their investments. To his credit, President Obama showed little interest in invoking the Fourteenth Amendment, and within a month, Republicans and Democrats had reached a compromise.

Still, the debt ceiling debate revealed an important point about the Constitution. Some of its provisions seem to hibernate for years, little studied by law students, and rarely the subject of lawsuits, until a crisis draws public attention back to clauses that were written in anticipation of future problems. The Constitution is a promise, not only about how the government will operate on a daily basis, but about how we will act when the unexpected occurs. It must, as Justice George Sutherland once said, be obeyed as much when it pinches as when it comforts.

**Timothy Sandefur is a principal attorney at the Pacific Legal Foundation and author of *Cornerstone of Liberty: Property Rights in 21st Century America* (Cato Institute, 2006) and *The Right to Earn A Living: Economic Freedom And The Law* (Cato Institute, 2010).**

Tags: [Constituting America](#), [Fourteenth Amendment](#), [Janine Turner](#), [Pacific Legal Foundation](#), [Timothy Sandefur](#)

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### **Friday, May 4, 2012 – Essay # 55 – Amendment XIV, Section 5 – Guest Essayist: Timothy Sandefur, Author and a principal attorney at the Pacific Legal Foundation**

Friday, May 4th, 2012

*Amendment XIV, Section 5:*

*The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.*

Section 5 of the Fourteenth Amendment seems unprepossessing, but it has become the focus of some of the most important constitutional disputes in recent decades. That section gives

Congress the power to enforce the Fourteenth Amendment “by appropriate legislation.” But what kind of legislation is “appropriate”?

It seems obvious that these words were added to allow Congress to pass civil rights laws; indeed, the Amendment was partly written in response to President Andrew Johnson’s assertion that the Civil Rights Act of 1866 was unconstitutional. By allowing Congress to pass legislation to protect the “privileges or immunities” of all Americans, along with their rights to due process of law and the equal protection of the laws, the Fourteenth Amendment’s authors hoped that the new guarantees would give real substance to the nation’s “new birth of freedom.” The 1866 Civil Rights Act was followed by others in 1871 and 1875. But the latter Act—which prohibited racial discrimination in “public accommodations” like theaters and restaurants—was held unconstitutional in an 1883 decision called the Civil Rights Cases. The Supreme Court ruled that the Amendment only allowed Congress to prohibit state governments from racial bias, but that Congress could not forbid private citizens from discriminating. The only dissenter in that decision was Justice John Marshall Harlan, who years later would also write the only dissent in *Plessy v. Ferguson*. He argued that the Civil Rights Acts should still be held constitutional under the Thirteenth Amendment, because racial discrimination was a component of the “slavery” that that Amendment prohibited.

After the Civil Rights Cases, Congress began relying on another constitutional provision for power to prohibit discrimination: the Commerce Clause. The Civil Rights Act of 1964, the Americans with Disabilities Act of 1990, and other laws bar businesses from discriminating or impose other restrictions on them do so only on the theory that their activities have some effect on interstate commerce. Although in the 1976 case of *Runyon v. McCrary*, the Court seemed to agree with Justice Harlan that the Thirteenth Amendment allowed Congress to ban private racial discrimination, Congress and the courts have still continued to rely on the Commerce Clause.

The difference between using Section Five of the Fourteenth Amendment and using the Commerce Clause became especially important in the wake of a 1990 Supreme Court decision involving religious freedom—a decision that provoked a showdown between Congress and the Court. That case, *Employment Division v. Smith*, was interpreted by some religious conservatives as watering down the First Amendment’s protections for religious liberty. Congress responded to those by passing the Religious Freedom Restoration Act, which tried to instruct courts on how to address First Amendment Claims. Congress said it was using the powers given to it by Section Five, because the law was designed to provide greater protection for federal civil rights. But the Supreme Court disagreed in a follow-up case called *City of Boerne v. Flores*. It ruled that Section Five does not give Congress limitless power to protect rights in whatever way it pleases; in order to qualify as “appropriate legislation,” a law passed under this Section must be “congruent and proportional” to the harms that Congress wants to prevent. Congress cannot simply create new “rights” under this provision, or alter the meaning of existing rights as understood in judicial precedents. It can only remedy specific wrongs to actual, existing rights.

This “congruence and proportionality” rule for deciding what laws are “appropriate” under the Fourteenth Amendment has remained controversial ever since. On one hand, it makes sense, because the Amendment was meant to give Congress power to enforce the constitutional guarantees that states had regularly ignored before the Civil War, not to dictate what those rights

mean, let alone to give federal lawmakers limitless power to implement whatever programs they see fit. On the other hand, the Constitution contains no explicit “congruence and proportionality” requirement, and allowing judges to decide what laws are “congruent and proportional” seems to weaken Congress’s ability to check or balance the courts. *City of Boerne* is a prime example: Congress perceived the *Smith* case as a threat to constitutional values, and enacted what it hoped would be a remedy—but the Court struck down that law, also, thus creating a constitutional trump card. When Congress responded to that decision with yet another law expanding protection for religious freedom, it did so under a different constitutional provision entirely.

The conflict between the Commerce Clause and Section Five has also been at the center of recent cases involving the principle of “sovereign immunity”—the long-standing legal privilege under which states cannot be sued without their consent. The Supreme Court has held that Congress cannot simply eliminate this privilege, except under Section Five of the Fourteenth Amendment, if doing so meets the “congruent and proportional” test. Thus in *Nevada v. Hibbs* (2003), the Court ruled that Congress could nullify the state’s legal immunity in order to enforce federal laws that were “narrowly targeted” against sex discrimination by employers. The law in question there was the Family and Medical Leave Act of 1993, which requires employers—including state governments—to give employees time off to care for sick family members. But the same law requires employers to give workers time off for their own medical needs. When a Maryland state employee was denied leave to care for his own medical condition, he sued the state, which tried to have the case thrown out on sovereign immunity grounds. The case went to the Supreme Court, which ruled against the employee last month. The self-care provisions of the Act, wrote Justice Anthony Kennedy, were not the same kind of civil rights protections that were at issue in the *Hibbs* case. That meant that “abrogating the States’ immunity from suits for damages for failure to give self-care leave is not a congruent and proportional remedy.”

Decisions like these show how the constitutional tensions that led to the Civil War live on. In the wake of an awful war caused in part by the states’ resistance to federal authority, the Fourteenth Amendment’s authors wanted to give Congress power to enforce the civil rights of all Americans. But they also preserved the autonomy of state governments, because they understood that a decentralized federal system can be essential to protecting individual freedom. Today, courts and Congress struggle to find an acceptable balance between different constitutional clauses and between different conceptions of the role of government in safeguarding civil rights.

**Timothy Sandefur is a principal attorney at the Pacific Legal Foundation and author of *Cornerstone of Liberty: Property Rights in 21st Century America* (Cato Institute, 2006) and *The Right to Earn A Living: Economic Freedom And The Law* (Cato Institute, 2010).**

Tags: [Constituting America](#), [Fourteenth Amendment](#), [Janine Turner](#), [Pacific Legal Foundation](#), [Timothy Sandefur](#)

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**May 6, 2012 – Essay #56 – Amendment XIV – The 14th Amendment’s Impact on the Constitution – Guest Essayist: Eric Wise, a partner in the law firm of Gibson, Dunn & Crutcher LLP**

Sunday, May 6th, 2012

**Amendment XIV:**

*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.*

*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.*

*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.*

*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.*

*5: The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.*

After the Civil War came the Reconstruction Amendments. Thinking about the Civil War leads to thinking about the compromises in the Constitution over slavery, which in turn leads to



thinking about the Declaration of Independence. The Declaration embodied the principles that were compromised, “the proposition that all men are created equal.” The Reconstruction Amendments in a sense constitutionalize the promise of the Declaration and represent a “new birth of freedom,” eliminating the compromises in the Constitution over slavery. While the 13<sup>th</sup> Amendment prohibits *de jure* slavery and the 15<sup>th</sup> Amendment secures voting rights, the 14<sup>th</sup> Amendment is as a guaranty against *de facto* slavery.

The Constitution of 1789 contained a few key limits on state action. No state could enter into treaties, coin money, pass bills of attainder or ex post facto laws, impair contracts or confer nobility, impose tariffs, conduct foreign policy or make war. Citizens of each state were entitled to the privileges and immunities of citizens in the several states, but states had the power to determine who was a citizen. Every state was guaranteed a Republican form of government.

States could make laws with respect to almost any other subject matter, and enforce them as they saw fit, subject only to the state constitution. The states had broad latitude to shape their laws, to determine issues with respect to fairness and rights, and therewith shape the habits – the virtues and vices – of their peoples. This latitude included, by intention, the power to impose and protect slavery (and by extension other social and political perversions, short of monarchical government). The 14<sup>th</sup> Amendment fundamentally changed this.

Section 1 of the 14<sup>th</sup> Amendment reads:

*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.*

The citizenship clause extinguished the *ante bellum* issues created by *Dred Scott v. Sanford* (1854) on questions of citizenship. The privileges and immunities clause placed alien and resident persons in a state on equal footing. The due process clause guaranteed fair procedure in an actions under state law. The equal protection clause provided for federal oversight as to the equal application of laws to persons within each state. Additionally section 2 of the 14<sup>th</sup> Amendment eliminated the three-fifths compromise provisions regarding apportionment of representatives.

As a federal guaranty of certain rights, the 14<sup>th</sup> Amendment subjects states to federal supervision with respect to fairness and basic rights, whether or not state constitutions already provide such guarantees. That oversight has provides the federal government – in particular the federal judiciary – with great power to shape the institutions and character of people where once the states had almost exclusive authority.

Judicial construction of the 14<sup>th</sup> Amendment has changed over time and with it the direction of federal influence over state affairs. Cases such as *Lochner v. New York* (1905) and *Adkins v. Children’s Hospital* (1923) upheld “freedom of contract” as a protected right until the doctrine was reversed in *West Coast Hotel v. Parrish* (1937). Equal protection case *Brown v. Board of Education* (1954) profoundly changed – indeed rescued — the American social landscape,



dismantling racial segregation. Equal protection case *Hernandez v. Texas* (1954) created protected classes of racial and ethnic groups. Through 14<sup>th</sup> Amendment cases the First, Second, Fourth, portions of the Fifth, Sixth and Eighth Amendments have incorporated against the states under the doctrine of “substantive due process.”

Also through the 14<sup>th</sup> Amendment, the judiciary has incorporated rights against the states that are implied by “penumbras” and “emanations” of other express Constitutional provisions. For example, *Griswold v. Connecticut* (1965) established a right to privacy which limited the right of a state to prohibit the use of contraceptives. And there is *Roe v. Wade* (1973), a 14<sup>th</sup> Amendment case, famously establishing a national rule over the regulation of abortion, where previously each state had set its own rules, including prohibiting abortion in many states. These last two cases raise an important question. Was the 14<sup>th</sup> Amendment intended to displace the state legislatures with the nine justices of the Supreme Court to the extent it has in practice?

***J. Eric Wise is a partner in the law firm of Gibson, Dunn & Crutcher LLP, where he practices restructuring and finance***

Tags: [Constituting America](#), [Eric Wise](#), [Fourteenth Amendment](#), [Janine Turner](#)

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### **May 7, 2012 – Essay #56 – Amendment XIV – The 14th Amendment’s Impact on the Constitution – Guest Essayist: Justin Dyer, Ph.D., Author and Professor of Political Science, University of Missouri**

Sunday, May 6th, 2012

#### **Amendment XIV:**

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.*

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.*

*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.*

*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.*

*5: The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.*

In his *Notes on the Constitutional Convention of 1787*, James Madison observed “the real difference of interest” between states “lay, not between large & small but between N. & Southn.” “The Institution of slavery & its consequences,” Madison maintained, “formed the line of discrimination.” At several points, the original Constitution struck a compromise between these competing interests. The most obvious: slaves would be counted as three-fifths of a person for the purposes of representation (Art. 1§2), Congress would not proscribe the African slave trade until 1808 (Art. 1§9), and runaway slaves would be returned to the state from which they fled (Art. 4§2).

Yet even in these provisions, the word “slavery” never appeared. As Supreme Court Justice John McLean noted, one reason the Constitution crafted in Philadelphia did not mention slavery directly is because “James Madison, that good and great man, was solicitous to guard the language of the instrument.” Indeed, Madison recorded in his notes on the convention that “it would be wrong to admit in the Constitution the idea that there could be property in men” because men, by nature, were not consumable merchandise. And so in “the provision respecting the slave trade, in fixing the ratio of representation, and providing for the reclamation of fugitives from labor,” McLean maintained, “slaves were referred to as persons, and in no other respect are they considered in the Constitution.”

McLean’s comments came in a spirited dissenting opinion in *Dred Scott v. Sandford* (1857), a case in which the Chief Justice of the Supreme Court claimed, among other things, that “the right of property in a slave is distinctly and expressly affirmed in the Constitution” and that African slaves and their descendents (including free blacks) were not *and could never become* citizens of

the United States. The *Dred Scott* decision, in turn, set off a firestorm of controversy and was among the precipitating causes of the Civil War— a conflict that would claim some six hundred thousand American lives.

Although the war wrought enormous damage to the southern infrastructure and exacted a heavy price in both blood and treasure, one of the enduring legacies of the conflict was the adoption of the Thirteenth, Fourteenth, and Fifteenth Amendments to the Constitution during the first few years after Appomattox. Collectively known as the Reconstruction or Civil War Amendments, these provisions ended slavery, granted birth citizenship, protected the privileges and immunities of citizens, prohibited states from denying anyone the equal protection of the laws or the due process of law, and prohibited racial discrimination in state and national voting laws.

Section 1 of the Fourteenth Amendment, in particular, was written with the *Dred Scott* decision in mind. “All persons born or naturalized in the United States,” the Amendment declares, “. . . are citizens of the United States and the state wherein they reside.” No longer is there room for debate about whether the descendants of slaves are full citizens of the American republic. The Amendment also introduced into the Constitution several restrictions on state governments: “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.”

Initially, there was some debate about how radical a transformation the Fourteenth Amendment worked in the American federal system. According to some members of the Thirty-Ninth Congress, the answer (at least theoretically) was “not much.” As Iowa Congressman James Wilson contended, the amendment established “no new right” and declared “no new principle.” Rather, it was in line with the general principles that had always undergirded American government. In this, Wilson echoed the sentiment of the runaway-slave-turned-abolitionist, Frederick Douglass, who argued that the “Federal Government was never, in its essence, anything but an anti-slavery government . . . If in its origin slavery had any relation to the government, it was only as the scaffolding for the magnificent structure, to be removed as soon as the building was completed.”

The Fourteenth Amendment, which held out the promise of meaningful freedom to newly freed slaves, was also interpreted as something emanating from the principles of the founding. “Let it be remembered,” the Fourteenth Amendment’s principal architect John Bingham declared, quoting an address by the Continental Congress in 1783, “that the rights for which America has contended are the rights of human nature.” To borrow a metaphor made popular by Abraham Lincoln, the end of slavery and the protection of equal civil rights was the working out of an aspiration already present in the American founding, an aspiration summarized by the core political teaching in the Declaration of Independence that “all men are created equal and endowed by their Creator with certain inalienable rights.”

And yet the story of Reconstruction begins, rather than ends, with the Civil War Amendments. Although the post-war Constitution guaranteed equal protection to all persons and an equality of civil rights among citizens, the reality on the ground has often been much different. From the history of Jim Crow to the twentieth century civil rights movement to the debates about

fundamental rights today, the tension between the principles of the revolution and the realities of American constitutional politics is one of the enduring features of American government.

*Justin Dyer teaches political science at the University of Missouri. He is the author of [Natural Law and the Antislavery Constitutional Tradition](#) and the editor of [American Soul: The Contested Legacy of the Declaration of Independence](#).*

Tags: [Constituting America](#), [Fourteenth Amendment](#), [Janine Turner](#), [Justin Dyer](#), [University of Missouri](#)

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**[May 7, 2012 – Essay #56 – Amendment XIV – The 14th Amendment’s Impact on the Constitution – Guest Essayist: Robert P. George, McCormick Professor of Jurisprudence, Director of the James Madison Program in American Ideals and Institutions, Princeton University](#)**

Sunday, May 6th, 2012

**Amendment XIV:**

*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.*

*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.*

*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.*

*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.*

*5: The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.*

#### Some Key Aims of the 14<sup>th</sup> Amendment

With the defeat and collapse of the Confederacy, President Lincoln and other Republican leaders began designing and putting into place policies to heal the bitter divisions of civil war and to make good on the promises of freedom and justice on which the nation—“conceived in liberty and dedicated to the proposition that all men are created equal”—was founded. These policies centrally included amendments to the Constitution to abolish slavery and deal with the all-too-predictable reality of intimidation and discrimination against the newly freed slaves and their descendants. The assassination of the President did not shut down these efforts. In 1866, slavery and involuntary servitude were abolished by adding a thirteenth amendment. Then, in 1868, a fourteenth and fifteenth were added. This brief essay will focus on some (though not all) of the principal aims of the fourteenth.

The first sentence of the Amendment overturns a key provision of the notorious 1857 case of *Dred Scott v. Sandford*—a Supreme Court decision that not only purported to invalidate congressional authority to restrict slavery in U.S. territories, but also held that blacks (even free blacks) could not be citizens of the United States. The sentence says: “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.” So a former slave who was born, let us suppose, in Virginia and resides there, or in any other state, is a citizen of the United States and of the Commonwealth of Virginia (or whatever state he happens to reside in).

The second sentence of the Amendment does the work of protecting the former slaves and their descendants from various forms of legally sanctioned discrimination and mistreatment. It says: “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.”

In exercising power (especially that of a legislative nature), a worry was that state officials would attempt to deny the former slaves and their progeny the privileges and immunities they possessed by virtue of their American citizenship. Their right to travel between states, for example, might be unfairly restricted. The privileges and immunities provision would stand as a bulwark against such abuses.

In exercising power of a judicial nature, the framers and ratifiers of the 14<sup>th</sup> Amendment worried that state officials, such as judges, would mistreat the former slaves. And so the due process provision was included to make clear that no person could be executed (deprived of life), jailed or imprisoned (deprived of liberty), or subjected to a forfeiture of goods or a monetary fine (deprived of property) without a fair and impartial hearing before a duly constituted tribunal in which proper procedures (including such things as a presumption of innocence, a right to examine or cross-examine witnesses, and a right to introduce exculpatory evidence) were observed.

In exercising yet other forms of power (especially executive power), the concern was that state officials would abuse their authority by failing to afford to blacks the protections of law given to whites. Even perfectly fair laws, if applied differently based on race, will result in substantive unfairness. Having a law against murder that on its face protects everyone is not worth much to a victim or potential victim if officials charged with the execution of the laws can with impunity apply them discriminatorily. Therefore, the Republicans included a specific provision prohibiting states from denying to any person within their jurisdiction the equal protection of the laws.

Notice that nowhere in these two sentences (that together constitute Section One of the 14<sup>th</sup> Amendment) does the word “blacks” (or “negroes,” or the words “persons of African descent”) appear. Nor is the word “race” or any synonym for the word used. Rather, the terms of these provisions are *general*. The privileges and immunities provision refers to “citizens,” without specifying race, color, ethnicity, or anything of the type. The due process and equal protection guarantees refer to “persons,” again without specifying race, etc. And so these provisions protect *everyone* against certain abuses by states—not just blacks, though it was, to be sure, a concern to protect the former slaves and their descendants that provided the motivation for the 14<sup>th</sup> Amendment.

How would the guarantees of Section One of the 14<sup>th</sup> Amendment be enforced against states that attempted to strip persons of their privileges and immunities as citizens, or deprive them of life, liberty, or property without due process of law, or deny them the equal protection of the laws? For the answer, we must skip down to Section Five of the Amendment, which specifically addresses the enforcement question. The first thing to note, is that neither in this Section nor anywhere else in the Amendment is it contemplated that the courts will be the enforcers of its guarantees. The second thing to notice is that enforcement power is expressly granted to the Congress, to wit, “Congress shall have power to enforce, by appropriate legislation, the provisions of this article.” And so the 14<sup>th</sup> Amendment adds a new delegated power to those

already possessed by the people’s representatives in the national legislature: the power to enact laws protecting the privileges and immunities of citizens and the rights of all persons within the jurisdiction of states to due process of law and the equal protection of the laws.

Does this mean that the 14<sup>th</sup> Amendment radically alters the constitutional system under which the national government is a government of delegated and enumerated (and, therefore, limited) powers and the states are governments of general jurisdiction possessing plenary authority (“police powers”) to protect public health, safety, and morals, and advance the common good? No, that system of federalism and “dual sovereignty” remains in place. But in certain key respects the Amendment adds to the authority of the national government and restricts the power of states. So it is an error to suppose that the 14<sup>th</sup> Amendment changes everything; and it is no less an error to suppose that it changes nothing.

***Robert P. George is McCormick Professor of Jurisprudence, Director of the James Madison Program in American Ideals and Institutions at Princeton University***

Tags: [Constituting America](#), [Fourteenth Amendment](#), [Janine Turner](#), [Princeton University](#), [Robert P. George](#)

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## **May 8, 2012 – Essay #57 – Amendment XV – Guest Essayist: Colin Hanna, President, Let Freedom Ring**

Monday, May 7th, 2012

### **Amendment XV:**

*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.*

*2: The Congress shall have power to enforce this article by appropriate legislation.*

The Fifteenth Amendment to the United States Constitution was passed by Congress on February 26<sup>th</sup> 1869, and ratified by the States on February 3<sup>rd</sup>, 1870. Although many history books say that it “conferred” or “granted” voting rights to former slaves and anyone else who had been denied voting rights “on account of race, color, or previous condition of servitude,” a close reading of the text of the amendment reveals that its actual force was more idealistic. It basically *affirmed* that no citizen could rightfully be *deprived* of the right to vote on the basis of that citizen’s race, color or previous condition of servitude – in other words, that such

citizens *naturally* had the right to vote. That is how “rights” should work, after all; if something is a right, it does not need to be conferred or granted and cannot be infringed or denied.

It is worth noting that the Fifteenth Amendment only clarified the voting rights of all *male* citizens. States have the power to define who is entitled to vote, and at the time of the signing of the Constitution, that generally meant white male property owners. The States gradually eliminated the property ownership requirement, and by 1850, almost all white males were able to vote regardless of whether or not they owned property. A literacy test for voting was first imposed by Connecticut in 1855, and the practice gradually spread to several other States throughout the rest of the 19<sup>th</sup> Century, but in 1915, the Supreme Court ruled that literacy tests were in conflict with the Fifteenth Amendment.

Section 2 of the Fifteenth Amendment sets forth the means of enforcing the article: by “appropriate legislation.” It was not until nearly one hundred years later, with the passage of the Voting Rights Act of 1965, that the enforcement of the Fifteenth Amendment was sufficiently clarified that no State could erect a barrier such as a literacy test or poll tax that would deny any citizen the right to vote, as a substitute for overtly denying voting rights on the basis of race or ethnicity. The Civil Rights Act of 1957 had taken a step in that direction, but practices inconsistent with the Fifteenth Amendment remained widespread. The Nineteenth Amendment, ratified in 1920, had granted women the right to vote. The only remaining legal barrier to citizens is age, and that barrier was lowered to 18 by the Twenty-Sixth Amendment, ratified in 1971. Many people do not realize that a State could permit its citizens to vote at a lower age than 18, and none has.

The moral inconsistency between a Declaration of Independence that proclaimed that all men (and, by widely accepted implication, all women) were created equal, and a Constitution that tolerated inequality based on race and gender, required more than 150 years to be resolved. The ratification of the Fifteenth Amendment in 1870 was one of the major milestones along that long path.

***Colin Hanna is the President of Let Freedom Ring, a public policy organization promoting Constitutional government, economic freedom, and traditional values. Let Freedom Ring can be found on the web at [www.LetFreedomRingUSA.com](http://www.LetFreedomRingUSA.com).***

Tags: [Colin Hanna](#), [Constituting America](#), [Fifteenth Amendment](#), [Janine Turner](#), [Let Freedom Ring](#)

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**May 9, 2012 – Essay #58 – Amendment XV, Section Two – Guest Essayist: Professor Joerg Knipprath, Professor of Law at Southwestern Law School**

Tuesday, May 8th, 2012

**Amendment XV:**

*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 power to enforce this article by appropriate legislation.*

As do its older companions among the three Reconstruction Amendments, the Fifteenth Amendment authorizes Congress to make laws to enforce its provisions. Congress acted almost immediately after the amendment's adoption to protect the voting rights of black citizens through the Enforcement Act of 1870. Just six years later, however, the Supreme Court blunted that statute's use as a practical tool to prevent Southern interference with the voting rights of blacks.

For the next eighty years, the focus of 15<sup>th</sup> Amendment law shifted to the Supreme Court as it struck down various ingenious ways, such as "grandfather clauses" and literacy tests, that states developed to continue the disenfranchisement of blacks. Not until 1957 did Congress involve itself again. Finally, in 1965, Congress used Section 2 to pass the Voting Rights Act of 1965. That statute is the most significant law passed under this section, and its constitutionality was quickly upheld in two major Supreme Court rulings in 1966.

The statute prohibits the use of any procedure or test that has the purpose or effect of abridging a citizen's right to vote on account of race. Moreover, it requires that certain states and other political units that seek to change voting procedures must obtain pre-clearance from the Justice Department. These mechanisms, direct prohibition and pre-clearance from federal authorities, are key features of this potentially far-reaching statute. The latter requirement especially is controversial. Justice Hugo Black noted, a "federal law which assumes the power to compel the States to submit in advance any proposed legislation they have for approval by federal agents" threatens the system of structural federalism because it "approaches dangerously near to wiping the States out as useful and effective units in the government of our country."

Section 2 is a remedial provision, similar to Section 2 of the 13<sup>th</sup> Amendment and Section 5 of the 14<sup>th</sup> Amendment. As to the last of these, the Supreme Court has held that any Congressional act must solely remedy violations by the states of the 14<sup>th</sup> Amendment and must not simply create new statutory rights to sue. Congress must show that the action by the states that the law prohibits is a violation of the 14<sup>th</sup> Amendment, as determined by Supreme Court precedent. Once such a violation is established, the law must seek to remedy that violation. The characteristics of a remedy are that it targets only the wrongdoers and the offending behavior, and is in place only as long as is needed to cure the problem. Under the 14<sup>th</sup> Amendment, that test would be met if the law targeted governmental bodies or government officials for sanction, was limited to states

that engaged in the unconstitutional conduct, and applied only as long as the violation continued. The Court has coined a fancy and sonorous phrase for this requirement, calling it one of “congruence and proportionality.”

While the Court has not formally adopted the same test for Section 2 of the 15<sup>th</sup> Amendment, language from the lower courts and from the Supreme Court in the 2009 decision in *Northwest Austin Municipal Utility District v. Holder* suggests that this is the likely test that will be applied to laws under this section. The provisions of the Voting Rights Act originally met this test. The most controversial section of the Act, the pre-clearance provision, only applies to states or other political units, and only to those that engaged in violations of the 15<sup>th</sup> Amendment and abridged the right to vote of various racial or ethnic groups (usually blacks or citizens of Mexican ancestry). The statute was in effect only for five years and allowed a “bail-out” if a political subdivision could show that the reason it was covered by the statute (determined through a voting participation formula) was not due to any unlawful discriminatory practice.

Since then, however, the Act’s constitutionality has become more problematic. It has been re-adopted four times, the latest extension, in 2007, for 25 years. Entire states, such as Texas, continue to be subject to its restrictions. Bail-outs were rare, if they occurred at all, before 1982. Between 1982 and 2009, only 17 political units (e.g. towns or cities) out of 12,000 that are covered by the law successfully bailed out. The Justice Department consistently opposed and blocked bail-out suits.

Conditions in the states have changed since 1965. Indeed, the evils of unbalanced voting rates between whites and others are greater today in some states that are not subject to the Act’s coverage formula. *All* changes in election law are covered by the statute and must be shown not to have a racially discriminatory effect on voting and must receive Justice Department approval. As one frustrated Georgia Congressman tartly remarked, “If you move a polling place from the Baptist church to the Methodist church, you’ve got to go through the Justice Department.”

This was precisely the problem faced by a small water district in Texas that wanted to move the voting place for election of its board from a private house to a public school. The district was formed in 1987 and never engaged in voting discrimination in violation of the 15<sup>th</sup> Amendment. But, since Texas was covered by the Act, the district was covered, and the Justice Department opposed the district’s suit to bail out of coverage.

The Supreme Court heard the *Northwest Austin* case in 2009. While the justices did not reach the constitutionality of the Act, the oral argument and the opinion served strong notice that the Court was skeptical that current social and political conditions warranted a “remedy” based on a formula reflecting nearly 50-year-old evidence. At argument, Chief Justice Roberts and Justice Alito wondered why the Act had not been extended to other states where there were greater voting disparities between whites and racial and ethnic minorities than in the covered states. Such unequal treatment goes against the basic constitutional presumption of equality among the states and can only be avoided in unusual cases. The opinion noted the “federalism cost” of interference with the fundamental political decisions of states, the same concern that Justice Black had raised 40 years earlier.

Since *Northwest Austin*, several additional political subdivisions have been able to extricate themselves from the Act's preclearance requirement, including the first outside the state of Virginia. Local politicians, the Justice Department, and the lower courts may have received the Court's signal and are facilitating bail-outs as a way to avoid having the Court declare the Act unconstitutional.

The Act is an object lesson of how a problem begets a law that remains long after the events that gave rise to it are past. The Act was to be "temporary," but such measures rarely are. It is in truth a remedy without an ill and becomes thereby part of a political spoils system.

Constituencies develop whose economic livelihood or political influence depends on the continued existence of the law and the perpetuation of the appearance of need for it. Those constituencies include the bureaucrats and lawyers in the Justice Department, but also the politicians—federal, state, and local—who can use their support for the Act as evidence of political virtue to further their own power. The political system may be unable to reform itself under such circumstances, and it remains for the courts to declare that the emperor lacks clothes.

*An expert on constitutional law, Prof. Joerg W. Knipprath has been interviewed by print and broadcast media on a number of related topics ranging from recent U.S. Supreme Court decisions to presidential succession. He has written opinion pieces and articles on business and securities law as well as constitutional issues, and has focused his more recent research on the effect of judicial review on the evolution of constitutional law. He has also spoken on business law and contemporary constitutional issues before professional and community forums. Read more from Professor Knipprath at: <http://www.tokenconservative.org/>.*

Tags: [Constituting America](#), [Fifteenth Amendment](#), [Janine Turner](#), [Joerg Knipprath](#), [Southwestern Law School](#)

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**May 10, 2012 – Essay #59 – Amendment XVI – Guest Essayist: Marc Lampkin, Shareholder at Brownstein Hyatt Farber Schreck and graduate of the Boston College Law School**

Thursday, May 10th, 2012

**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.*

**Power to Tax Incomes**

The 16<sup>th</sup> Amendment is an excellent example of why it is important to act judiciously and cautiously when it comes to amending the Constitution. Most Americans recall that when our nation was founded, the framers did not agree to allow the federal government to tax the income of its citizenry. In fact they specifically included a proviso that provided that neither income taxes nor any other type of direct taxes could be collected by the federal government. Instead of collecting taxes in that manner, up until passage of the 16<sup>th</sup> Amendment the federal government was funded primarily by indirect taxes – duties and sales taxes.

One of the reasons that the founders wanted to limit the type of taxing authority of the federal government was that it was a way to ensure that the individual citizen was protected from an overbearing federal authority. The consensus was that if Congress had the power to assess taxes directly on individuals they could single out certain individuals or all individuals for excessive taxation and there would be no upper limit on the amount assessed.

Sales taxes or import duties were indirect taxes that while affecting the livelihoods of individuals could be more readily avoided if individuals felt they were unfair or unwise. Nevertheless, a direct tax combined with Congress' power to control the military meant that taxation power could reach any individual for any reason and it was for that reason viewed as a threat on liberty.

Although this understanding waned after the first 50 years or so of the Constitution's ratification, the Supreme Court acted vigilantly to ensure that federal lawmakers accepted the restraint on Congress' taxing power. However, there was at least one period when the Court relented – the Civil War. The Supreme Court upheld the Revenue Act of 1861. This law assessed a 3% flat tax on almost all income.

Nevertheless, subsequently the Court returned to form and refused to allow Congress to continue income taxes or other direct taxes.

Around the turn of the century far more conversation among policy makers focused on ways to increase revenues for the treasury.

Fairly quickly a rift was revealed. More Democrats than Republicans supported the idea of an income tax. Moreover, when the measures were introduced GOP Senators would delay or filibuster action on the measure. This practice over about a decade led to some of the first campaign themes that one party – the Republicans – was “the party of the rich.”

By the time President Taft came to office, due to the failure of the GOP to explain to the public why it thought a federal income tax as a concept was a bad idea, most Americans generally held favorable views about the income tax and were suspicious that the Republicans were solely motivated by a desire to protect wealthy individuals from taxation.

Additionally due to the shellacking the GOP took in the federal elections of 1892, it was felt by party leaders that the GOP’s position advocating steady increases in tariff rates on household goods was a non-starter. It was in this environment that President Taft began publicly advocating alternatives to tariff funding for the federal government including advocating an income tax.

Some of his critics in the Democratic Party thought they saw an opening to once again push the income tax but the same pattern of the last decade continued. A bill would be introduced and then quietly killed in the Senate. Only difference was that now the bills being introduced were by Republicans and but since nothing changed in terms of enactment the Republicans were given a pass in the political arena.

In April 1909, Texas Senator Joseph W. Bailey, a conservative Democrat who also opposed income taxes, came up with a plan that would ultimately upset the apple cart. He decided to embarrass the Republicans by trying to get them to publicly admit that they actually opposed income tax bills.

The progressives within the GOP including Teddy Roosevelt, Hiram Johnson, and Robert La Follette waxed enthusiastically on behalf of the bill. This placed President Taft in an awkward position. He wanted to be seen as being for an income tax, yet he wasn’t ready to actually enact one.

Perhaps his plan was too clever. In any event, the strategy that he came up with to once again kill the measure would ultimately fail. Recognizing that the same plan of having GOP members block it wouldn’t work with so many “progressive Republicans” supporting the measure, the new strategy was predicated on making the income tax measure a Constitutional amendment. Taft and his team counted on conservative state legislatures refusing to go along with the idea and letting it stall out in the hinterlands.

As part of the plan, President Taft formally requested the amendment and the House and Senate duly acted. The House vote was 318-14 and the Senate voted unanimously. However, the states didn’t balk as anticipated. In February of 1913 it was ratified just 4 years after Congress has submitted it to the states.

Today income taxes are the principle source of income for the federal government.

*Marc Lampkin is a Shareholder at Brownstein Hyatt Farber Schreck and is a graduate of the Boston College Law School*

Tags: [Constituting America](#), [Janine Turner](#), [Marc Lampkin](#), [Sixteenth Amendment](#)  
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**May 11, 2012 – Essay #60 – Amendment XVI – Guest Essayist: James D. Best, author of Tempest at Dawn, a novel about the 1787 Constitutional Convention, and Principled Action, Lessons from the Origins of the American Republic**

Friday, May 11th, 2012

**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.*

**Reform or Revision?**

The infamous XVI Amendment gave the national government the authority to tax income ... *from whatever source derived*. Income tax has always been divisive. In the early twentieth century, the amendment was promoted with the phrase “soak the rich,” and the level of progressiveness in the tax codes has been contentious ever since. Many feel that it is only fair that those with more money should pay the lion’s share, while others think fairness means that every American should contribute at least something to the national coffers.

In Federalist 10, James Madison wrote, “The apportionment of taxes on the various descriptions of property is an act which seems to require the most exact impartiality; yet there is, perhaps, no legislative act in which greater opportunity and temptation are given to a predominant party to trample on the rules of justice.” For the hundred years that the XVI Amendment has been in place, *exact impartiality* has been a rarity.

There are many odious aspects of our current income tax. T. Coleman Andrews, commissioner of the IRS under Eisenhower said, “It opened up our homes, our papers and our effects to the prying eyes of government agents.” An IRS appeal is through tax courts without juries, and if a taxpayer loses, the individual must pay before suing the government. Congress relishes playing three-card Monte with the tax code by deftly moving taxes up, down and sideways, while slipping loopholes to favored constituents. Tax policy seldom has any relationship to economic growth, keeping markets free, or preserving personal liberty. For those of us who are recordkeeping

impaired, the laws are a nightmare and a huge waste of valuable time. And last, we work and struggle to make ends meet, and instead of getting thanks for all the money we send to Washington, there's always some politician trying to make us feel guilty because we didn't send more.

Should the XVI Amendment be reformed or revised? Probably. Revision of the XVI Amendment could potentially fix many issues about the application of income tax, but it would not resolve our growing debt issues. The federal government spends about a quarter of our national production, much of it financed with debt that has climbed to unfathomable levels. Reforming or revising the XVI Amendment might squeeze the revenue side, but it won't guarantee spending restraint. The government has no restrictions on borrowing or printing money.

Congress has shown that it won't fix the tax code or spending. As we've witnessed since the Tax Reform Act of 1986, tax cuts and simplification only buy a short recess from offensive rates and burdensome regulations.

Without an ironclad restraint, government will continue to tax and spend recklessly. If permanent change is desired, it will require amending the Constitution. The real question is what kind of constitutional reform is needed. It's possible we could have a public debate and resolve the fairness issue once and for all. For example, a flat tax would be good for the individual and boost economic growth, but most Americans have come to believe progressive rates equate to fairness. Another proposed reform would repeal the XVI Amendment in favor of a national sales tax—sometimes called the fair tax. Critics have pointed out that these reforms have their own problems, but even if they present an improvement, they seem unlikely to get out of Congress or be ratified by thirty-eight state legislatures.

If the goal is to make income tax fairer or trade it for a different tax, then a revision of the XVI Amendment could do the trick. However, if the goal is to collapse the deficit—and eventually the debt—then reform needs to address both the income and spending sides. This means that revision of the XVI Amendment should probably be done in conjunction with a Balanced Budget Amendment. A consolidated reform approach would provide the best chance of ratification and fixing our country's finances. Alas, that would take leadership. Where is Alexander Hamilton when you need him?

**James D. Best is the author of *Tempest at Dawn*, a novel about the 1787 Constitutional Convention, and *Principled Action, Lessons from the Origins of the American Republic*.**

Tags: [Constituting America](#), [James Best](#), [Janine Turner](#), [Sixteenth Amendment](#), [Tempest at Dawn](#)  
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**May 14, 2012 – Essay #61 – Amendment XVII: Direct Election of Senators – Guest Essayist: Dr. John S. Baker, Jr., Distinguished Scholar in Residence, Catholic University School of Law; Professor Emeritus, Louisiana State University Law Center**

Sunday, May 13th, 2012

**Amendment XVII:**

*1: 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.*

*2: 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.*

*3: 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.*

Many Americans wonder why it is that the federal government continues to expand its power at the expense of the states and local governments. As the Supreme Court observed in *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985), “the adoption of the Seventeenth Amendment in 1913 ... alter[ed] the influence of the States in the federal political process.” Ironically, it was state legislatures that insisted on adopting the Seventeenth Amendment even though it virtually guaranteed their loss of power. The Seventeenth Amendment inflicted a near death-blow to federalism.

The first sentence of the Seventeenth amendment substitutes “elected by the people thereof” for the words “chosen by the Legislature thereof” in the language of the first paragraph of Article 1, Sect. 3. The amendment also provides the procedure for filling vacancies by election, but permitting states by legislation to allow the state’s governor to make temporary appointments.

Prior to the 17th Amendment, the Constitution provided for US senators to be elected by the legislature of each state in order to reflect that the Senate represented the states, as contrasted with the House which represented the people of each state. Originally, U.S. senators did represent their own states because they owed their elections to their state legislature, rather than directly to the voters of the state. The Senate, thus, carried forward the (con)federal element from the Articles of Confederation, under which only the states were represented in the national legislative body. As noted in The Federalist, the fact that state legislatures elected U.S. senators made the states part of the federal government. As intended, this arrangement



provided protection for states against attempts by the federal government to increase and consolidate its own power. In other words, the original method of electing senators was the primary institutional protection of federalism.

In the decade prior to the Civil War, over the issue of slavery, and increasingly after the Civil War, some state legislatures failed to elect senators. That development, plus charges that senators were being elected and corrupted by corporate interests prompted some states to adopt a system of *de facto* election of senators, the results of which were then ratified by the state legislatures. Proposals for a constitutional amendment providing for direct popular election of senators were long blocked in the Senate because most senators were elected by state legislatures. Over time, the number of senators elected *de facto* by popular election increased. Also, states were adopting petitions for a constitutional convention to consider an amendment to provide for popular election of senators. As the number of states came closer to the number requiring the calling of a Constitutional Convention, the Senate allowed what became the Seventeenth Amendment to be submitted to the states for ratification.

A major factor promoting direct popular election of senators was the Progressive Movement. This movement generally criticized the Constitution's system of separation of powers because it made it difficult to enact federal legislation. The Framers had done so in order to protect liberty and to create stability in government. The Progressives, on the other hand, wanted government to be more democratic and, therefore, to allow easier passage of national legislation reflecting the immediate popular will.

By shifting the selection of senators to the general electorate, the 17th amendment not only accomplished those purposes; but it also meant that senators no longer needed to be as concerned about the issues favored by state legislators. Predictably, over time, senators voted for popular measures which involved "unfunded mandates" imposing the costs on the states. Senators were able to claim political credit for the legislation, while the states were left to pay for new national policies not adopted by the states. Such unfunded mandates would have been unthinkable prior to adoption of the 17th amendment.

Ironically, more than the required number of state legislatures ratified the Seventeenth Amendment, with little or no realization that they were diminishing the power of their own states and undermining federalism generally. Many legislators apparently thought they had more important matters to attend to than devoting time to the struggles that often revolved around electing a senator. Such an attitude might have been understandable at a time when the federal government had much less power vis-a-vis the states. What those legislators did not appreciate was that the balance of power favorable to the states was due to the fact that state legislatures controlled the U.S. Senate. Over time, since adoption of the Seventeenth Amendment, the balance of power has inevitably consistently shifted in favor of the federal government.

***Dr. John S. Baker, Jr. is a Distinguished Scholar in Residence at Catholic University School of Law and Professor Emeritus of Law at Louisiana State University Law Center.***

Tags: [Catholic University](#), [Constituting America](#), [Janine Turner](#), [John S. Baker](#), [Seventeenth Amendment](#)

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**May 15, 2012 – Essay #62 – Amendment XVII: Reform or Revision? – Guest Essayist: Ralph A. Rossum, Ph.D., the Salvatori Professor of American Constitutionalism at Claremont McKenna College**

Monday, May 14th, 2012

**Amendment XVII:**

*1: 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.*

*2: 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.*

*3: 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.*

**Seventeenth Amendment**

The Seventeenth Amendment replaced the Constitution's original indirect election of the U.S. Senate by state legislatures with direct election by the people; it was approved by the Congress on May 12, 1912, was ratified by the requisite three-fourths of the state legislatures in less than 11 months, and was declared to be a part of the Constitution on May 31, 1913. Not only was it ratified quickly, it was ratified by overwhelming numbers: In 52 of the 72 state legislative chambers that voted to ratify the Seventeenth Amendment, the vote was unanimous, and in all 36 of the ratifying states, the total number of votes cast in opposition to ratification was only 191, with 152 of these votes coming from the lower chambers of Vermont and Connecticut.

While state ratification of the Seventeenth Amendment came quickly and easily, approval by the Congress did not. The first resolution calling for direct election of the Senate was introduced in the House of Representatives on February 14, 1826. From that date until the adoption of the Seventeenth Amendment 86 years later, 187 subsequent resolutions of a similar nature were also introduced before Congress, 167 of them after 1880. The House approved six of these proposals before the Senate reluctantly gave its consent.

By altering how the Senate was elected, however, they also altered the principal mechanism employed by the framers to protect federalism. The framers understood that the mode of electing (and especially re-electing) senators by state legislatures made it in the self-interest of senators to preserve the original federal design and to protect the interests of states as states. This understanding was perfectly captured by Alexander Hamilton during the New York Ratifying Convention on June 24, 1788, when he explicitly connected the mode of electing the Senate with the protection of the interests of the states as states. “When you take a view of all the circumstances which have been recited, you will certainly see that the senators will constantly look up to the state governments with an eye of dependence and affection. If they are ambitious to continue in office, they will make every prudent arrangement for this purpose, and, whatever may be their private sentiments or politics, they will be convinced that the surest means of obtaining reelection will be a uniform attachment to the interests of their several states.”

Hamilton’s arguments to the contrary, notwithstanding, the states quickly and overwhelmingly ratified an amendment that removed the principal structural means for protecting the original federal design and the interests of the states as states. Four factors explain why they did so.

The first was legislative deadlock over the election of senators brought about when one political party controlled the state assembly or house and another controlled the state senate. Prior to the ratification of the Seventeenth Amendment, there 71 such legislative deadlocks, resulting in 17 senate seats going unfilled for an entire legislative session or more. These protracted deadlocks often led to the election of “the darkest of the dark horse” candidates, occasionally deprived the affected states of representation in the Senate, always consumed a great deal of state legislative time that was therefore not spent on other important state matters, and powerfully served to rally the proponents of direct election.

A second factor was the political scandal that resulted when deadlocks were occasionally loosened by the lubricant of bribe money. While corruption was proved to be present in only seven cases of the 1,180 senators elected from 1789 to 1909, these instances were much publicized and proved crucial in undermining support for the original mode of electing senators.

A third factor, closely related to the second, was the growing strength of the Populist movement and its deep-seated suspicion of wealth and influence. It presented the Senate as “an unrepresentative, unresponsive ‘millionaires club,’ high on partisanship but low in integrity.”

And, when Populism waned, Progressivism waxed in its place, providing a fourth (and ultimately decisive) factor: The Progressives believed that the cure for all the ills of democracy was more democracy. Their goal was, as Woodrow Wilson proclaimed in his 1912 campaign book *The New Freedom*, for government to be not only “of, by, and for” the people, but “through the people.”

***Ralph A. Rossum, Ph.D. is the Salvatori Professor of American Constitutionalism at Claremont McKenna College. He is the author of a number of books including Federalism, the Supreme Court, and the Seventeenth Amendment, Antonin Scalia’s Jurisprudence: Text and Tradition, and American Constitutional Law (8th edition).***

Tags: [Claremont McKenna College](#), [Constituting America](#), [Janine Turner](#), [Ralph Rossum](#), [Seventeenth Amendment](#)

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## **May 16, 2012 – Essay #63 – Amendment XVIII, Section 1 – Guest Essayist: Gordon Lloyd, Ph.D., Professor of Public Policy at Pepperdine University**

Wednesday, May 16th, 2012

### **Amendment XVIII:**

*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 One of the 18<sup>th</sup> Amendment contains only forty-four words. These few words are intended, however, to introduce a remarkable and clear change in the relationship between the federal government and the individual American citizen. In popular terminology, this section prohibited, and criminalized, what was formerly a matter of taste or culture, namely, the purchase and consumption of alcoholic beverages. But, as we shall see, there is a bit more nuance and ambiguity in this section than what is captured by the common understanding. Language matters and the thoughts behind the words also matter. In addition, sometimes, what isn't said is as important as what is said.

We can collect the words that are indeed said into five separate but related categories. 1) After one year from the ratification of this article 2) the manufacture, sale, or transportation of intoxicating liquors 3) within, the importation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof 4) for beverage purposes 5) is hereby prohibited.

This is the first time that an amendment to the Constitution would not take effect immediately upon receiving the requisite votes of 3/4 of the state legislatures, but at a later designated time. The amendment was ratified on January 16, 1919 and went into effect on January 17, 1920. Why designate a one-year delay? The thought was that one-year would give American business, government, and citizens sufficient time to adjust their life style to a new, and so the proponents thought, improved American way of life.

Americans, for most of their history, however, accepted that the Constitution limited the reach of the federal government to few and defined objects leaving the rest of public policy to state and local governments or to the private sector. The Constitution “enshrined” the rights of the individual and the states over against the federal government in the Bill of Rights, also known as the first ten amendments.

True, the 14<sup>th</sup> -15<sup>th</sup> Amendments, passed in light of the civil war, limited, for the first time, what state governments could and could not do. Specifically, no state could deny the civil rights and voting rights of recently freed African Americans. And the 13<sup>th</sup> Amendment also constitutionally limited what Americans could own: it declared that no American could own another person.

A second feature to Section One of the 18<sup>th</sup> Amendment, therefore, is that it introduces over 100 years after the Founding amendments, and fifty years from the Civil War amendments, into the very Constitution itself, the proposition that we as individual Americans do not own ourselves with respect to the consumption etc., of certain beverages. Not having a drink is made the moral equivalent of not owning a slave?

The prohibition of alcohol was not a phenomenon at either the Founding or the Civil War. The case for federal, and then constitutional, prohibition grew out of the success of the Temperance Movement. Their appeal to end the evil of drink spread across the various states in the late nineteenth century and into national politics in the early twentieth century. Overwhelming majorities of both political parties in Congress endorsed National Prohibition in 1917. Thus, surprisingly, a formerly politically decentralized and alcohol drinking nation overwhelmingly accepted the Temperance argument that drinking was a moral issue, rather than a matter of personal taste, and that it ought to be constitutionally prohibited.

The fascinating interrelationship between the 16<sup>th</sup>, 17<sup>th</sup>, 18<sup>th</sup>, and 19<sup>th</sup> Amendments—the so-called Progressive Amendments—is beyond the scope of this essay. But we do need to ask: What is Progressive about Prohibition? Both movements see the “cleaning up” of the American political system, with its “smoked filled rooms,” on the one hand, and reforming public conduct and getting rid of saloons on the other hand, as twin forces in the transformation of America into a better nation.

But, once again, language is important. The clear and purposeful prohibition language covering the importation, exportation, and domestic “manufacture, sale, or transportation” shows the moral side of America. But what is not said in this “mission statement” shows the endurance of entrepreneurial politics in American life. This is the third feature that is important in Section One.

Despite the common interpretation, Section One does NOT prohibit “the purchase and consumption of alcoholic beverages.” The words, “purchase,” “consumption,” and “alcohol,” are not mentioned. What is found there instead is the phrase “intoxicating liquors.” This leaves open to future Congressional debate, and political exemptions, what is “intoxicating” and what are “liquors?” What about “sacramental wine,” and “medicinal alcohol?” Shall they be exempt? After all, the prohibition is “for beverage purposes.” Nor is anything said about eating purposes. This ambiguous language is not accidental; it reflects the persistence of entrepreneurial politics in America.

*Professor of Public Policy at Pepperdine University, Dr. Lloyd is the coauthor of three books on the American founding and sole author of a book on the political economy of the New Deal. His latest coauthored book is The Two Narratives of Political Economy. He currently serves on the National Advisory Council for the Walter and Leonore Annenberg Presidential Learning Center through the Ronald Reagan Presidential Foundation.*

Tags: [Constituting America](#), [Eighteenth Amendment](#), [Gordon Lloyd](#), [Janine Turner](#), [Pepperdine University](#)

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## **May 17, 2012 – Essay #64 – Amendment XVIII, Section 2 – Guest Essayist: William C. Duncan, Director of the Marriage Law Foundation**

Thursday, May 17th, 2012

### **Amendment XVIII:**

*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*

*Section 2: The Congress and the several States shall have concurrent power to enforce this article by appropriate legislation.*

### **Amendment XVIII, Section 2**

The Prohibition amendment only lasted in force for fourteen years from 1920 to 1933 (though it was ratified in 1919 by its terms it did not become effective until one year later) remains the only amendment to have been repealed in its entirety. The substance of the amendment has already been addressed so is there any more to learn from this footnote in constitutional history?

There is one important lesson we can learn from the amendment's enforcement section about federalism and the respective roles of the national and state governments

Section two of the 18<sup>th</sup> Amendment provides: "The Congress and the several States shall have concurrent power to enforce this article by appropriate legislation." This language is unique among the constitutional amendments. Beginning with the Civil War Amendments, drafters often began to include some kind of enforcement language in amendments, typically specifying that Congress could pass legislation to ensure the amendment's intent was carried out. The 18<sup>th</sup>

Amendment provided for “concurrent” jurisdiction between the national government and the States.

The concept of jurisdiction is central to our constitutional system. Because we have a federal system, with authority and responsibility divided between two different entities—the national government and the States—and because ours is a government of enumerated powers in which the Constitution gives to the national government authority to do only what that document specifies it may do, a grant of authority to carry out a new role must be specified in an amendment to the Constitution unless the amendment’s effect is self-executing.

The significance of the enforcement provision of the 18<sup>th</sup> Amendment is first that it specifies the branch of the national government responsible for enforcement is Congress and that it is to carry out this responsibility through legislation. Even this Progressive Era enactment respected the separate roles of branches of the national government. Consistent with every other aspect of the Constitution, this amendment was to be made effective not by judicial opinion or administrative branch lawmaking. So, the 18<sup>th</sup> Amendment reminds us that under the United States Constitution lawmaking is the prerogative of the legislative branch.

Second, the amendment specified that Congress will be exercising power concurrently with the States. Since the States had already been making alcohol policy previous to the 18<sup>th</sup> Amendment, it is clear that the amendment’s proponents recognized their inherent power to do so and only amended the Constitution so as to provide a *new* power of Congress; a power that (a) it did not have before and (b) it could not have unless specifically provided (enumerated) by an addition to the Constitution.

Thus, though the amendment is no longer enforceable it still provides a helpful reminder of the way in which our system is intended to function. While the powers of the national government are to be “few and defined” (Federalist 45), the states are free to do whatever they are not specifically prohibited from doing by the Constitution or the reserved powers of the people themselves.

Even the most cursory glance at current political controversies would remind us of exactly how important this reminder is.

***William C. Duncan is director of the Marriage Law Foundation ([www.marriagelawfoundation.org](http://www.marriagelawfoundation.org)). He formerly served as acting director of the Marriage Law Project at the Catholic University of America’s Columbus School of Law and as executive director of the Marriage and Family Law Research Grant at J. Reuben Clark Law School, Brigham Young University, where he was also a visiting professor.***

Tags: [Constituting America](#), [Eighteenth Amendment](#), [Janine Turner](#), [Marriage Law Foundation](#), [William C. Duncan](#)

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**May 18, 2012 – Essay #65 – Amendment XIX – Guest Essayist: Julia Shaw, Research Associate and Program Manager in the B. Kenneth Simon Center for Principles and Politics at the Heritage Foundation**

Friday, May 18th, 2012

**Amendment XIX:**

*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.*

The Nineteenth Amendment

The [Nineteenth Amendment](#) prohibits the federal government or state governments from denying individuals the right to vote on the basis of sex. It also grants Congress the power to impose this rule through legislation.

The Constitution introduced in 1787 was a gender-neutral document: It actually did not prohibit women from voting. [The Framers gave individual states the power to determine who could participate in elections](#). All states granted men suffrage. In 1797, though, [New Jersey made history by recognizing the right of women to vote](#). Never before in all of recorded history had women exercised the right to vote.

Because the Constitution did not prohibit women from voting, no constitutional amendment was technically necessary for women to exercise suffrage. This is evident in the variety of strategies that the women's suffrage movement used to secure the right to vote.

The first strategy involved the interpretation of the Fourteenth Amendment. [Section 2](#) of that amendment prohibited denying "male inhabitants" the right to vote, suggesting that the Constitution granted only men the right to vote. Proponents of women's suffrage argued that the [Citizenship Clause](#) and the [Privileges or Immunities Clause](#) of the Fourteenth Amendment prevented states from denying women the right to vote in federal elections. In *Minor v. Happersett* (1874), however, the Supreme Court dismissed this argument.

The second strategy focused on convincing individual states to remove voting qualifications related to sex. These efforts were eventually quite successful. Wyoming entered the Union in 1890 with women's suffrage, becoming the first state since New Jersey to allow women to participate in elections on an equal basis with men. By the time the Nineteenth Amendment was



ratified, 30 states already granted voting rights to women for members of the House, members of the Senate, or the President.

The third and final strategy involved amending the Constitution to prevent states from imposing sex-based voting qualifications. The first of such amendments was proposed in 1869. In 1897, a California Senator proposed what would become the Nineteenth Amendment. The Amendment was ratified in 1920 with essentially the same wording as the [Fifteenth Amendment](#).

There has been little litigation over the [Nineteenth Amendment](#). The Supreme Court addressed the amendment directly in *Breedlove v. Suttles* (1937), a case in which Georgia law exempted women from a tax but required men to pay it upon registering to vote. The Court ruled that the amendment protected the right of both men and women to vote but did not limit a state's authority to tax voters.

***Julia Shaw is Research Associate and Program Manager in the B. Kenneth Simon Center for Principles and Politics at the Heritage Foundation.***

Tags: [Constituting America](#), [Heritage Foundation](#), [Janine Turner](#), [Julia Shaw](#), [Nineteenth Amendment](#)

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## **May 21, 2012 – Essay #66 – Amendment XX, Section 1 – Guest Essayist: Frank M. Reilly, Esq., a partner at Potts & Reilly, L.L.P.**

Sunday, May 20th, 2012

### **Amendment XX, Section 1:**

*The terms of the President and Vice President shall end at noon on the 20<sup>th</sup> day of January, and the terms of Senators and Representatives at noon on the 3<sup>d</sup> 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.*

Terms of the President and Congress

Prior to the 20<sup>th</sup> Amendment, the Constitution did not specify the beginning and ending dates of the terms of the President, Vice President, and Congress. The Constitution defined the length of the terms of the various offices, and Congress ultimately enacted laws to set March 4 as the term starting date of all elected federal officeholders. Our nation's earliest federal elections were held prior to December of each even numbered year, and in 1845, Congress set the first Tuesday following the first Monday of November of each even numbered year as a uniform federal election date. As a result, officeholders remained in office after the November elections for about four months until the 4<sup>th</sup> of March of the following year. During the 18<sup>th</sup> century, such officeholders began to be called 'lame ducks'.

From the late 18<sup>th</sup> century and into the 20<sup>th</sup> century, the lack of efficient and speedy transportation made the election process necessarily slow. Today's ability to almost instantaneously report election returns did not exist in the days without electricity, telephones, electronic voting devices and the Internet. It could take days or weeks of horseback travel by electors from remote areas of the country to assemble to cast that state's electoral votes for President and Vice President. It could take as long for members of Congress and the elected executives to then travel to Washington to take office. Thus, the four month "lame duck" period between election day and the start of new terms of newly elected (or re-elected) officeholders was a practical necessity.

Sometimes either Congress or the President took actions during those "lame duck" periods that the public, or incoming officeholders, felt were unfair and that should have waited until the newly elected representatives could take office. For example, the famous case of *Marbury vs. Madison*, in which the U.S. Supreme Court claimed its authority to interpret the Constitution, was a dispute over a staff appointment made by President John Adams after President Thomas Jefferson was elected, but before Jefferson took office.

Transportation and technology advances ultimately reduced the need for a long transition period after an election. Further, public concern about legislation enacted during "lame duck" sessions of Congress, motivated Nebraska Senator George W. Norris to propose the 20<sup>th</sup> Amendment. After over a decade of debate, and immediately preceding Franklin D. Roosevelt's first election as the 32<sup>nd</sup> president, Congress passed the resolution proposing the amendment on March 2, 1932. The states ratified the amendment by January 23, 1933, the shortest period of time between a congressional proposal of an amendment and its ratification by three-fourths of the states.

The amendment, rather than a change in the law by Congress, was necessary because it shortened the terms of incumbent officeholders, the length of whose terms the Constitution had been specifically set. The amendment shortened the "lame duck" period by half to about 2 months, with Congress taking office on January 3 and the President taking office on January 20 after each of their elections. The first president affected by this change was Franklin D. Roosevelt following his second election in 1936.

Legislative history shows that the purpose of the 20<sup>th</sup> Amendment was to not only shorten the 4 month "lame duck" period, but also to prevent "lame duck" sessions of Congress. However, the 20<sup>th</sup> Amendment contains no specific language to prohibit "lame duck" sessions, and Congress has

met in many such sessions since after the states adopted the amendment. Political debate about lame duck" sessions, however, has been raised on several recent occasions.

On November 13, 1980, a "lame duck" President Jimmy Carter nominated future Supreme Court Justice Stephen G. Breyer as a justice of the United States Court of Appeals for the 1<sup>st</sup> Circuit, and the "lame duck" Senate confirmed the appointment in December, 1980. In December 1998, the House of Representatives voted to impeach President William J. Clinton during a "lame duck" session. Some argued that these actions violated the spirit, if not the letter, of the 20<sup>th</sup> Amendment, but no one challenged the actions in court.

In 2000, some discussed the potential interplay between the 20<sup>th</sup> Amendment, and the 12<sup>th</sup> Amendment, which requires that the House of Representatives select the president if no candidate receives a majority of the electoral votes cast for president. During the time in which the presidential election results between George W. Bush and Albert Gore, Jr. were still undetermined, some scholars questioned whether a "lame duck" House of Representatives could select the president if neither Bush nor Gore received a majority of the electoral votes, or whether the issue would have to wait until the newly elected House of Representatives convened.

While the 20<sup>th</sup> Amendment's original intent has been publicly debated, there are no reported court cases involving the amendment.

***Frank M. Reilly, Esq., is a partner at Potts & Reilly, L.L.P., Attorneys & Counselors in Austin and Horseshoe Bay, Texas***

Tags: [Constituting America](#), [Frank M. Reilly](#), [Janine Turner](#), [Potts and Reilly](#), [Twentieth Amendment](#)

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**May 22, 2012 – Essay #67 – Amendment XX, Section 2 – Guest Essayist: Marc Lampkin, Shareholder at Brownstein Hyatt Farber Schreck and graduate of the Boston College Law School**

Monday, May 21st, 2012

**Amendment XX, Section 2:**

*The Congress shall assemble at least once in every year, and such meeting shall begin at noon on the 3<sup>rd</sup> day of January, unless they shall by law appoint a different day.*

The XXth Amendment is fairly straightforward. Often referred to as the “Lame Duck Amendment” the XXth Amendment’s purpose is to update gaps in the original draft of the Constitution setting the time and dates for the Congress and the President — in particular the amendment changed when terms of elected federal officials begin and end in order to line their terms beginning and ending with the election process.

The amendment’s purpose is to limit the chances that when Congress meets the legislators casting the votes were duly elected, rather than retirees or those who had failed to win re-election.

The primary sponsor of the XXth Amendment was Senator George W. Norris of Nebraska. Senator Norris believed it to be his greatest legislative achievement. It was passed on March 2, 1932.

When the Constitution was originally ratified, the outgoing Congress under the Articles of Confederation had set March 4, 1789 as the date for which the new federal government would begin. On an ongoing basis the Constitution provided that the Congressional session would begin on the first Monday in December.

In addition, the second session would begin a month after the election and continue until March 3. This had the effect of allowing Members to serve during the second session even if they had retired, were defeated, or simply had not chosen to run for re-election.

Initially the schedule made sense as it accommodated the travel and weather difficulties that faced the new nation. At the time of the founding, roads were bad and travel long distances was often difficult. Having four months from Election Day to the start of the session seemed prudent. However, over time, the improvement in road building and the use of trains and boats made such a delay unnecessary.

In addition, the time delay had other pernicious effects. When President Roosevelt was first elected he was required to wait four months before he could begin any steps to respond to the Great Depression. Many across the nation believed that the provisions in the Constitution setting the dates for a 19<sup>th</sup> century world were particularly unhelpful in the 20<sup>th</sup> century.

This led to the push for passage of the XXth Amendment.

In addition to limiting “lame-ducks” from setting policy at the national level, the XXth Amendment also means that there was a shorter period between the election and the convening of the new Congress and that the outgoing President would have time to consider the outgoing Congress’ legislation.

***Marc Lampkin is a Shareholder at Brownstein Hyatt Farber Schreck and is a graduate of the Boston College Law School***

Tags: [Constituting America](#), [Janine Turner](#), [Marc Lampkin](#), [Twentieth Amendment](#)  
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**[May 23, 2012 – Essay #68 – Amendment XX, Section 3 – Guest Essayist: David J. Bobb, Director, Hillsdale College Allan P. Kirby, Jr. Center for Constitutional Studies and Citizenship in Washington, D.C., and lecturer in politics](#)**

Tuesday, May 22nd, 2012

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 elect 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.*

On January 6, 2001, Vice President Al Gore presided over his own political funeral. On that day, a joint session of Congress certified the final Electoral College vote that put George W. Bush into the White House. Vice President Gore had the unenviable task of wielding the gavel at the certification of his Republican foe’s victory.

Imagine now not a political funeral at the end of a presidential election, but an actual funeral—for a president-elect—in between the November election and the January certification of electoral votes. That’s the main scenario the third section of the Twentieth Amendment is designed to address.

Largely unrelated to the first two sections of the Twentieth Amendment, which shortened the time of the lame-duck presidency, the third section of the amendment has prompted, it seems, more unanswered hypothetical scenarios than it has answered. Although it sought to address gaps left by previous efforts to address presidential secession, this section (and the fourth that follows) still leaves much to constitutional and legislative conjecture.

As legal scholar Akhil Amar pointed out in Senate testimony in 1994, the main problem with the Twentieth Amendment, left unanswered by the Twenty-Fifth or any legislation on the matter, is that “it is not self-evident that a person who dies *before* the official counting of electoral votes in Congress is formally the President elect.” The very term “President elect” is left ambiguous, then, with the result, according to Amar, of a possible confusion about the electoral status of the decedent.

What’s worse, Amar further wonders, is what would happen if the presumed presidential election victor dies before the Electoral College meets in December? “What is a faithful elector to do here?” Amar queries. The elector gets no guidance from the Constitution, although Congress did refuse to count three electoral votes cast for candidate Horace Greeley, who passed away after he earned the votes but before the College had met.

Push the dismal early death scenario even earlier, and the problems mount. What if a candidate perishes just before the November election? Or what would happen if both president-elect and vice-president elect are simultaneously slain, in advance of the congressional certification of the electoral count?

The scenarios are endless, and while the Presidential Succession Act of 1947 tried to plug holes that existed, there are numerous scholars today that are convinced that more legislative fixes are still required. In one notable recent move, the Continuity of Government Commission—a joint effort of the American Enterprise Institute and the Brookings Institution—offered suggested remedies to problems in presidential succession that since their 2009 proposal have not been adopted by Congress.

Despite the questions that abound about this amendment’s third section, there exists a notable irony that almost came to fruition just after the passage of the Twentieth Amendment. As the Continuity of Government Commission’s report details, had President-elect Franklin D. Roosevelt not escaped an assassin’s bullet that claimed the life of the mayor of Chicago, the Vice President-elect, John Nance Garner, would have assumed office under the terms of the Twentieth Amendment’s third section.

***David J. Bobb is director of the Hillsdale College Allan P. Kirby, Jr. Center for Constitutional Studies and Citizenship, in Washington, D.C., and lecturer in politics.***

Tags: [Constituting America](#), [David J Bobb](#), [Hillsdale College](#), [Janine Turner](#), [Twentieth Amendment](#)

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## **May 24, 2012 – Essay #69 – Amendment XX, Section 4 – Guest Essayist: William C. Duncan, Director of the Marriage Law Foundation**

Wednesday, May 23rd, 2012

### **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.*

The Twentieth Amendment (ratified in 1933) addresses two issues—lame duck Congresses and presidential succession. In regards to the latter, the amendment provides for a number of different eventualities with the basic theme being an attempt “to smooth out additional succession wrinkles.” Akhil Reed Amar, “Presidents, Vice Presidents, and Death: Closing the Constitution’s Succession Gap” *Arkansas Law Review*, vol. 48, p. 215 (1995).

Section 4 addresses a longshot eventuality but one that is certainly not inconceivable. For this section to be invoked, two things must happen. First, a presidential election would have to produce no clear winner because none of the candidates had an Electoral College majority. In this circumstance, the Constitution empowers the House of Representatives to determine the winner. Second, one of the major candidates would have to die before the election controversy was resolved. The second has never happened but the first has occurred twice in our nation’s history.

In 1824, four candidates divided the Electoral College votes with Andrew Jackson securing the most at 99. Since none had a majority, the House of Representatives chose from the top three candidates (as required by the Twelfth Amendment) and essentially between Jackson and John Quincy Adams (who received 84 Electoral College votes). The House selected Adams 13-11 (voting was by state delegation). See John Sacher, “The 1824 Election: The Corrupt Bargain?” *Franklin’s Opus*, February 24, 2012 at <http://franklinsopus.org/2012/02/the-1824-election-the-corrupt-bargain/>.

In 1876, Samuel Tilden won the popular vote for president with 51% to 48% for Rutherford Hayes. Tilden, however, received only 184 Electoral College votes, one shy of the needed

majority. Twenty Electoral College votes from four States were in dispute; precisely the number Hayes would need to become president. Congress created an independent Electoral Commission with fifteen members—five senators, five representatives and five justices of the U.S. Supreme Court. The Commission met in the Supreme Court’s chambers and heard arguments about the various state Electoral College votes. The Commission voted to give Florida’s votes to Hayes 8-7. The legislation creating the Commission required both houses of Congress to reject Commission rulings if the rulings were to be invalidated. Thus, while the House rejected the Commission rulings on Florida, and later Louisiana, Oregon and South Carolina, since the Senate voted to uphold them, the Commission’s decisions stood and Hayes was awarded all of the disputed Electoral College votes making him president. A last minute filibuster by House Democrats failed and in the early morning of March 2, 1877 Hayes was awarded the presidency with a one-vote Electoral College majority. The inauguration was held three days later. See “Finding Precedent: Hayes v. Tilden: The Electoral College Controversy of 1876-1877” Harper’s Weekly at <http://elections.harpweek.com/09Ver2Controversy/Overview-1.htm>.

Assuming this scenario was to occur again and one of the candidates tragically dies, section 4 empowers Congress to enact legislation that would determine what should happen.

*William C. Duncan is director of the Marriage Law Foundation ([www.marriagelawfoundation.org](http://www.marriagelawfoundation.org)). He formerly served as acting director of the Marriage Law Project at the Catholic University of America’s Columbus School of Law and as executive director of the Marriage and Family Law Research Grant at J. Reuben Clark Law School, Brigham Young University, where he was also a visiting professor.*

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**[May 25, 2012 – Essay #70 – Amendment Twenty-One, Section 1 – Guest Essayist: Lawrence J. Spiwak, President of the Phoenix Center for Advanced Legal and Economic Public Policy Studies](#)**

Thursday, May 24th, 2012

### **Amendment XXI, Section 1:**

*The eighteenth article of amendment to the Constitution of the United States is hereby repealed.*

Ending Prohibition: Are there Lessons to be Learned?

In this essay, my intention is not to focus on the fact that the 21<sup>st</sup> Amendment repealed Prohibition, but to explore briefly what lessons we can learn from the experience.



To quickly summarize the facts, the 18<sup>th</sup> Amendment was enacted in 1919, which prohibited the “manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States.” However, as detailed in the excellent [Ken Burns documentary](#), Mark Thornton’s seminal book entitled [The Economics of Prohibition](#), and [elsewhere](#), despite its altruistic intentions, Prohibition didn’t decrease alcohol abuse but increased it; Prohibition didn’t eliminate crime but created it; and Prohibition certainly didn’t increase prosperity but robbed the treasury of taxes. As a result, Prohibition was repealed in 1933 by the 21<sup>st</sup> Amendment. (Significantly, because of fear of grassroots political pressure from the temperance movement, the 21<sup>st</sup> Amendment is, thus far in American history, the *only* constitutional amendment ratified by state conventions rather than by the state legislatures.)

Given this debacle, I think there are at least a few lessons I think we can learn:

To begin, Prohibition provides an excellent example—albeit a bit dysfunctional one—of the amendment process spelled out by Article 5 at work, in that we as a society were able to self-correct a policy gone horribly wrong. Indeed, although I’m sure Prohibition was enacted with the best of intentions, the Prohibition experience nonetheless epitomizes the “law of unintended consequences.”

That said, here is an interesting question to ponder: let us assume that rather than elevate Prohibition to the full fledged level of a Constitutional Amendment, we only went so far as to pass a law that prohibited the “manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States.” Would it have been easier for us to self-correct Prohibition via either a new law through the legislative process or a Constitutional challenge in the courts? Probably. As a result, Prohibition also teaches us to exercise some degree of caution and careful thought before we seek to undertake another effort to amend the Constitution.

Yet, but perhaps most importantly, Prohibition forces us to recognize the old maxim that if we are to be a society of laws, then the public must believe in the legitimacy of the law. Indeed, in undertaking research for this essay, I came across a telling quote by wealthy industrialist John D. Rockefeller, Jr. from 1932, whereby he wrote:

“When Prohibition was introduced, I hoped that it would be widely supported by public opinion and the day would soon come when the evil effects of alcohol would be recognized. I have slowly and reluctantly come to believe that this has not been the result. Instead, drinking has generally increased; the speakeasy has replaced the saloon; a vast army of lawbreakers has appeared; many of our best citizens have openly ignored Prohibition; respect for the law has been greatly lessened; and crime has increased to a level never seen before.”

So what is it about Prohibition that caused many Americans literally to lose faith with their own Constitution? Certainly, we have a lot of laws that constrain personal behavior (e.g., prohibitions against murder; prohibitions against fraud and theft; prohibitions against treason), but everybody generally accepts these constraints as necessary to ensure a functioning society. What was it about Prohibition that, to use Mr. Rockefeller’s words, “created a vast army of lawbreakers...”?

Although I'm sure different people can provide different answers to this question, I come out with the view that Prohibition failed because Americans simply came to realize that the government had no business sticking its nose into their personal lives and interfering with their proverbial "pursuit of happiness." Thus, because many Americans viewed the law as violating their basic civil liberties, they saw no reason to comply with the law.

To illustrate my point, let's take the following extreme hypothetical example. As many readers of Constituting America are well aware, Americans cherish their Second Amendment right to bear arms. Now, let's assume that a huge "firearms temperance" movement sweeps the nation and, as a result, a new Constitutional amendment is enacted that repeals the Second Amendment and prohibits the "manufacture, sale, or transportation of firearms within, the importation thereof into, or the exportation thereof from the United States." In such a hypothetical case, while law abiding citizens could no longer own guns to hunt or to protect their families, do we honestly think that gun-related crimes would disappear or that a vibrant black market for firearms would not instantly blossom? Of course not. In such a case, I have no doubt that after a few years of many unintended consequences, there would be a forceful movement to repeal my hypothetical amendment too.

In sum, Prohibition teaches us that while it is possible to correct bad policy decisions, any time we seek to elevate an issue to the level of a Constitutional Amendment we should do so with both great discipline and respect for individual liberty. If we do not learn the lessons from Prohibition, however, then we are doomed to repeat them in the future.

*Lawrence J. Spiwak is president of the Phoenix Center for Advanced Legal and Economic Public Policy Studies ([www.phoenix-center.org](http://www.phoenix-center.org)), a non-profit research organization based in Washington, DC. He is a member in good standing in the bars of New York, Massachusetts and the District of Columbia. The views expressed in this article do not represent the views of the Phoenix Center or its staff.*

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**May 28, 2012 – Essay #71 – Amendment Twenty-One, Section 2 – Guest Essayist:  
Frank M. Reilly, Esq., a partner at Potts & Reilly, L.L.P.**

Monday, May 28th, 2012

**Amendment XXI, Section 2:**

*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.*

The 21<sup>st</sup> Amendment is the only amendment to the Constitution which repeals another amendment. The amendment which it repealed, the 18<sup>th</sup>, became effective in 1920 and it prohibited

*“the manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States”*

and its territories. The passage of the 18<sup>th</sup> Amendment, and the subsequent enactment by Congress of its enabling legislation, named the Volstead Act, began a period known as the Prohibition. The Prohibition era lasted a little over 13 years until the states ratified the 21<sup>st</sup> Amendment in 1933.

The framers of the 18<sup>th</sup> Amendment, encouraged by the strong temperance movement and the Anti-Saloon League, hoped that a national prohibition on the use of alcoholic beverages would make the nation a better, and more moral place. President Calvin Coolidge, who served from 1923 to 1929 as our nation’s 30<sup>th</sup> president, called Prohibition the “greatest social experiment of modern times.” Others, such as former President William Howard Taft, who had served as president from 1909 to 1913 and who served as Chief Justice of the U.S. Supreme Court during much of the Prohibition period, predicted that

*“the business of manufacturing alcohol, liquor and beer will go out of the hands of law-abiding citizens and will be transferred to the quasi-criminal classes.”*

Taft’s prediction ultimately came true, and many entities that previously made alcoholic beverages, as well as new operations, clandestinely (and sometimes openly) violated the law. The fulfillment of Taft’s prediction, and the other unintended consequences of the Prohibition, was a cruel irony for those who wanted Prohibition to foster a more chaste nation.

Instead of reducing crime and improving the national morality, crime and immorality significantly increased during Prohibition. “Speakeasies,” bars quietly operating in violation of the law, sprang up in larger cities, and in contrast with the swinging-door saloons they replaced, they welcomed the women that began to frequent the new bars. It is said that it became popular within the national culture to violate the law, and a whole class of ordinary citizens became criminals. Private stills produced barrels and barrels of moonshine, some operations were small and served a family or a small group of people; others were larger operations operated by the underworld. Bootlegging gangsters, such as Al Capone, had their heyday. Similar to the illicit drug imports today, international criminals worked hard to bring whiskey, rum and other spirits into the country, more often succeeding than failing at their tasks.

Others found clever ways around the Prohibition. For example, the Napa Valley vineyards of the Beringer family made and sold legal “raisin cakes” from dried grapes, and packaged them with warning labels that said “Caution: will ferment and turn into wine.” Sales of sacramental wine, used in church services to celebrate communion and which was exempt from the Prohibition laws, skyrocketed, and many assumed that some priests and rabbis of the time were bootlegging on the side. People with doctor’s prescriptions were able to purchase 1 pint of spirits per week for “medicinal purposes.” While these exemptions in the law were used for legitimate purposes, organized crime syndicates frequently took advantage of these exemptions and cooked their books to use the legitimate services as front operations to bootlegging.

The Prohibition ushered in at least two additions to popular culture: NASCAR races and the cocktail. In the southern United States, some bootleggers retrofitted cars to run loads of whiskey on a fixed fee, per case basis. These stock cars were built with a heavy duty chassis so that revenue agents would not see an overloaded car, and a souped up engine so the agents could not catch it. These modified stock cars led to the genesis of the National Association for Stock Car Auto Racing after races by moonshine runners became popular in the south. Finally, the cocktail – an alcoholic spirit mixed with a sweet or strongly flavored mixer – was invented to cover up the bad taste of homemade gin or whiskey.

Support for Prohibition began to wither with increased public recognition of: Prohibition’s failures; costly, corrupt and inefficient enforcement efforts; a recognition by some Prohibitionist business leaders that taxing liquor could reduce the impact of rising income taxes; the prospect of new jobs that could be created with a newly legal liquor industry; and finally, the political and economic distractions of the Great Depression. In 1932, Congress passed a resolution to send the 21<sup>st</sup> Amendment to the states for ratification, and within a year two-thirds of the states ratified the amendment. The law began to fracture even before the amendment became effective. In the spring of 1933, prior to the ratification, newly elected President Franklin D. Roosevelt asked Congress to repeal portions of the Volstead Act to allow the brewing of real beer (“near beer” had been allowed under Prohibition; it tasted like real beer but had an extremely low alcohol content). After the 21<sup>st</sup> Amendment became effective, the remainder of the federal Prohibition laws were repealed, and significant taxes were added to the sale of liquor.

***Frank M. Reilly, Esq., is a partner at Potts & Reilly, L.L.P., Attorneys & Counselors in Austin and Horseshoe Bay, Texas***

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**May 29, 2012 – Essay #72 – Amendment XXII – Guest Essayist: Michaela Goertzen, Speechwriter, Office of Alaska Lt. Governor Mead Treadwell**

Monday, May 28th, 2012

**Amendment XXII:**

*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 the President more than once. But this Article shall not apply to any person holding the office of President, when this Article was proposed by the 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.*

*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.*

**A Terminal Debate**

*“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...”*

Presidential term limits in America are conventional, not controversial. They are an accepted fact of today’s executive cycle – one of the few things in politics that doesn’t provoke divided public comment. Yet, a brief review of executive eligibility reveals that the issue has not gone uncontested.

As I considered the political philosophy behind this amendment, I had to confront the tension between the precedent set by George Washington (he reluctantly accepted a second presidential term, and declined a third) and the Federalist Papers’ appeal for indefinite eligibility:

*“Nothing appears more plausible at first sight, nor more ill-founded upon close inspection, than a scheme which in relation to the present point has had some respectable advocates – I mean*

*that of continuing the chief magistrate in office for a certain time, and then excluding him from it, either for a limited period or forever after.” (Federalist #72)*

The Federalist Papers are pretty much the gold standard in analyzing human motivation/selfish ambition and how it can be expected to play out in political office; so when Alexander Hamilton says that term limits could not be more ill-founded, I am prone to believe him.

He goes on to enumerate a convincing list of the disadvantages of putting an expiration date on a qualified president – namely, that term-limits discourage the accountability of the man and the stability of the office. Furthermore, he argues that it is counterintuitive to drain the collected wisdom and experience from the office of the president, while that president remains the popular choice.

But for all of Hamilton’s logic, when George Washington – the first practitioner of American political principle – voluntarily retired his post after eight years, I am inclined to respect that, as well. There was nothing to withhold him, but Mt. Vernon and principle. Given Washington’s outstanding record of public service, I am more inclined to believe it was principle.

One of the most central principles of our republic – underscored in the Declaration of Independence – was the rejection of tyranny. Washington demonstrated that a self-effacing executive was just as important as separation of power and an educated public to guarding against it.

FDR was the only president to breach the unspoken, two-term rule by winning four consecutive elections. A few years after, the 22<sup>nd</sup> amendment was ratified to make it a written rule. The occasional congressman will try to repeal it, but so far their legislation has never made it out of committee. Subsequently, both Presidents Reagan and Clinton could have won third terms, but, per the amendment, none have thrice been president. Still, the philosophy of the Federalists has not undone the precedent of the founder.

***Michaela Goertzen is a speechwriter at the office of Alaska Lt. Governor Mead Treadwell***

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**May 30, 2012 – Essay #73 – Amendment XXII – Guest Essayist: James D. Best, author of *Tempest at Dawn*, a novel about the 1787 Constitutional Convention, and *Principled Action*, Lessons from the Origins of the American Republic**

Tuesday, May 29th, 2012

**Amendment XXII:**

*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 the President more than once. But this Article shall not apply to any person holding the office of President, when this Article was proposed by the 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.*

*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 XXII: Reform or Revision?**

Until 1940, presidents honored the George Washington precedent of serving for only two terms. In that year Franklin Roosevelt defied tradition and won a third term, then later a fourth term. Roosevelt died in office in 1945. Presidential term limits became a huge issue in the 1946 watershed election, and a new generation swept into office, many of them returning soldiers. The new congress was young, idealistic, and committed to change. One of their first priorities was the XXII Amendment, which was ratified by the states in early 1951. Since then, we have had eleven presidents, but so far only four have been restricted from another term by this amendment.

There have been many proposals to reform or revise the XXII Amendment. Congress has repeatedly submitted bills to repeal the amendment, but none has ever made it out of committee. Some have proposed that the restriction be revised to consecutive terms, and others want a super-majority of both houses to have the ability to override the restriction.

The XXII Amendment ought to be left in place without revision.

The president is often called the most powerful person in the world. To a great extent, that is true. Over the centuries, presiden-tial power has increased enormously, both domestically and inter-nationally. This was not the intent of the delegates to the Constitutional Convention. The

president was supposed to be a co-equal partner in a three-branch government focused on the needs of Americans.

The greatest increase in presidential power came from the growth in government. As the national government grew, from around 4 percent of gross domestic product in the 1920s to 25 percent in 2010, presidential power grew exponentially because all but a smidgeon of that money ended up in the executive branch. The bigger the national government grows, the more powerful the executive is as an individual.

In *United States v. Curtiss-Wright Export Corp* (1936), the Supreme Court ruled that the president has almost unrestricted powers in international affairs. The Court said that this singular authority over foreign affairs is “the very delicate, plenary and exclusive power of the President as sole organ of the federal government in the field of international relations—a power which does not require as a basis for its exercise an act of Congress.” One of the few exceptions to this *exclusive* power is Senate approval of treaties.

This ruling by itself did not make the president the most powerful person on the world stage. Three other developments made that happen. The first was that the American free enterprise system built the largest, most robust economy in the world. The second development was the vacuum of power after World War II. The Soviets were dangerous, and their ambitions for empire threatened the world. Someone had to step into the breach. The third development was the devastating power and global reach of modern weaponry.

Both inside and outside the United States, the president is enormously powerful. The Framers of the Constitution feared concentrated power, and they were especially fearful of concentrated power in single person. The Framers would have immediately searched for ways to curtail this power, and term limits would be at the forefront of their consideration. We need an ironclad XXII Amendment to bolster the idea that this power is only on loan for a limited period.

Power corrupts. Let us hope it takes longer than eight years.

***James D. Best is the author of [Tempest at Dawn](#), a novel about the 1787 Constitutional Convention, and [Principled Action](#), Lessons from the Origins of the American Republic.***

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**May 31, 2012 – Essay #74 –Amendment XXIII – Guest Essayist: Julia Shaw,  
Research Associate and Program Manager in the B. Kenneth Simon Center for  
Principles and Politics at the Heritage Foundation**

Wednesday, May 30th, 2012

**Amendment XXIII:**

*The District constituting the seat of Government of the United States shall appoint in such manner as the 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.*

**The 23<sup>rd</sup> Amendment**

The Twenty-third Amendment grants residents of the District of Columbia the electoral votes to participate in the election for the country's President and Vice President. From 1800 until 1960, when Congress passed the [Twenty-third Amendment](#), residents of the District of Columbia were not constitutionally able to participate in presidential elections. Residents voted for President for the first time in 1964 after the states ratified the [Twenty-third Amendment](#). To understand the significance of this Amendment, one must first understand the Founders' purpose in creating District of Columbia.

[The Founders designed the District of Columbia to protect the federal government](#). Since the federal government exercises certain powers over state governments, having the capital city located in one particular state would give that state tremendous influence over the federal government. Allowing one state to control the federal government would violate the principle of federalism. Here's how James explained it in *Federalist* No. 43:

The indispensable necessity of complete authority at the seat of Government carries its own evidence with it. It is a power exercised by every Legislature of the Union, I might say of the world, by virtue of its general supremacy. Without it, not only the public authority might be insulted and its proceedings be interrupted, with impunity; but a dependence of the members of the general Government, on the State comprehending the seat of the Government for protection in the exercise of their duty, might bring on the national councils an imputation of awe or influence, equally dishonorable to the Government, and dissatisfactory to the other members of the confederacy.

The Twenty-third Amendment gives D.C. a voice in selecting the president and vice president through the Electoral College, but clarifies that [D.C. is not a state](#): D.C. receives the number of

electoral votes “equal to the whole number of Senators and Representatives in Congress to which the District would be entitled *if it were a State*.”

The Amendment also empowers Congress to decide the method by which the District selects presidential electors. This is comparable to the power given to state legislatures. Currently, the District of Columbia has a maximum of three electoral votes, regardless of population. Congress chose a winner-take-all system (the same system used in every state but Maine and Nebraska) to choose presidential electors, meaning that the candidate who receives the majority of votes in a popular vote receives all of the District’s electors.

The Twenty-third Amendment underscores the Founders’ wisdom in designing the federal city. The Founders wisely crafted a federal district for the seat of government. They made the capital independent from, and therefore not subservient to, the authority of a particular state.

***Julia Shaw is Research Associate and Program Manager in the B. Kenneth Simon Center for Principles and Politics at the Heritage Foundation.***

Posted in [Analyzing the Amendments in 90 Days 2012 Project](#), [Constitution Amendment XXIII](#), [Julia Shaw](#) | [2 Comments »](#)

## **June 1, 2012 – Essay #75 – Amendment XXIV, Section 1 – Guest Essayist: William C. Duncan, Director of the Marriage Law Foundation**

Thursday, May 31st, 2012

### **Amendment XXIV, 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 any poll tax or other tax.*

In an effort to circumvent the Fifteenth Amendment’s requirement that the States not deprive a citizen of the right to vote based on race, in the decades from 1890 to 1910 some States began implementing various requirements which were purportedly neutral regarding race but which had the (intended) effect of preventing black citizens from voting. One of the requirements was a poll tax, a specific fee for voting that prevented the poor from voting. (Often the laws were written in

a way that would allow white citizens to vote without paying the fee or implemented in this way, such as where a politician bought votes by paying poll taxes for the voters.)

As the moral wrongness of this kind of restriction became harder to deny, States began to remove some of these requirements. Some States had repealed their poll taxes by World War II and others removed them for soldiers in the 1940s. As the national government became more involved in promoting civil rights and ending racial discrimination in the 1950s, the number of states with poll taxes was down to five (Alabama, Arkansas, Mississippi, Texas, and Virginia).

In 1959, the report of the Commission on Civil Rights (created by the Civil Rights Act of 1957) suggested a national law to allow all Americans to vote subject only to age and residency requirements. One result was the proposal of an amendment to the Constitution to specifically prohibit the imposition of poll taxes. President John F. Kennedy supported the “uncontroversial” amendment. The lack of controversy stemmed from the fact that only five States had such taxes.

Federal courts had previously held poll taxes were not prohibited by the Constitution, so an amendment was necessary. Congress proposed the amendment in August 1962 and it was ratified less than a year and a half later in January 1964.

The Twenty-fourth Amendment only applied to federal elections but not long after its ratification, the U.S. Supreme Court ruled that poll taxes in State elections were unconstitutional because they discriminated against the poor. *Harper v. Virginia State Board of Elections*, 383 U.S. 663 (1966) at [http://scholar.google.com/scholar\\_case?case=10289081725638058283&q=harper+v.+virginia+state+board+of+elections&hl=en&as\\_sdt=2,45&as\\_vis=1](http://scholar.google.com/scholar_case?case=10289081725638058283&q=harper+v.+virginia+state+board+of+elections&hl=en&as_sdt=2,45&as_vis=1).

Virginia passed a law which gave voters a choice between paying the poll tax “or filing a certificate of residence six months before the election.” Congressional Research Service, “Abolition of the Poll Tax” at <http://www.gpo.gov/fdsys/pkg/GPO-CONAN-2002/pdf/GPO-CONAN-2002-9-25.pdf>. The U.S. Supreme Court ruled this law conflicted with the new amendment because it created a significant barrier to voting as the only alternative to paying the poll tax. *Harman v. Forssenius*, 380 U.S. 528 (1965) at [http://scholar.google.com/scholar\\_case?case=1269987767365696368&q=harman+v.+forssenius&hl=en&as\\_sdt=2,45&as\\_vis=1](http://scholar.google.com/scholar_case?case=1269987767365696368&q=harman+v.+forssenius&hl=en&as_sdt=2,45&as_vis=1).

Additional source: Alexander Keyssar, *The Right to Vote: The Contested History of Democracy in the United States* (Basic Books: 2000)

***William C. Duncan is director of the Marriage Law Foundation ([www.marriagelawfoundation.org](http://www.marriagelawfoundation.org)). He formerly served as acting director of the Marriage Law Project at the Catholic University of America’s Columbus School of Law and as executive director of the Marriage and Family Law Research Grant at J. Reuben Clark Law School, Brigham Young University, where he was also a visiting professor.***

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## **June 4, 2012 – Essay #76 – Amendment XXIV, Section 2 – Guest Essayist: Joerg Knipprath, Professor of Law at Southwestern Law School**

Sunday, June 3rd, 2012

### **Amendment XXIV:**

*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 any poll tax or other tax.*

*2: The Congress shall have power to enforce this article by appropriate legislation.*

A poll tax is an ancient device to collect money. It is a tax on persons rather than property or activity. As a regressive tax from the standpoint of wealth, it is often unpopular if the amount at issue is steep. But it can also be unpopular for other reasons.

In the United States, such a capitation tax was assessed in many states on the privilege of voting. Amounts and methods varied. One of the last poll taxes of this type, that of Virginia, was just \$1.50 per person at the time it was struck down by the Supreme Court in 1966. That is not more than \$10.00 in current money, hardly an exorbitant price, except for the truly destitute. But the problem was more than the amount. It was the manner of administration.

The common practice was to require that the tax be paid at each election, and that a potential voter demonstrate that he had paid the tax for a specified number of previous elections. If not, those arrearages had to be paid to register to vote in the ongoing election. The effect of the tax was to hit many lower income groups, but primarily Southern blacks, whose participation in elections dropped to less than 5% during the first part of the 20<sup>th</sup> century. To be sure, that low rate of participation was not entirely due to the poll tax, but that tax was a particular manifestation of a regime of suppression of political participation by blacks.

The 15<sup>th</sup> Amendment had been adopted to prohibit overt racial discrimination in qualifying to vote. However, the poll tax and other restrictive measures, such as literacy tests, were not, strictly speaking, race-based, so they did not come within the 15<sup>th</sup> Amendment. A different solution was needed, according to those who saw the poll tax as intolerable. Literacy tests, if fairly administered (though often they were not), had a clear connection to the responsible exercise of the voting franchise that poll taxes lacked. After all, especially in those years before the electronic media, having a literate electorate was a significant community interest. Republican theory has traditionally looked to having those with the most interest and highest

stake take the leading role in the community. Literacy provided a foundation to acquire the knowledge needed for a wise and effective participation in *res publica*. Poll taxes, on the other hand, are just revenue-raising devices, and, since they are applied equally *per capita*, they are removed from republican considerations of having those with the highest economic stake in society direct the political affairs of that society.

Opposition to the poll tax increased during the 1930s and President Roosevelt briefly attacked it in 1938. But FDR had to be mindful of the powerful influence of Southern Democratic barons in the Senate and the crucial role that the Southern states played in the politically dominant Democratic coalition. By the 1940s, the House of Representatives passed legislation to outlaw poll taxes but a Southern-led filibuster in the Senate killed the effort. By 1944, the Republican Party platform and President Roosevelt (though not his party's platform) called for the tax's abolition.

Eventually, qualms arose about using ordinary legislation to block the tax. Article I of the Constitution places principal control over voter qualification in the hands of the states. The 15<sup>th</sup> Amendment (race) and the 19<sup>th</sup> Amendment (sex) had limited the states' discretion. To many—even opponents of the poll tax—the message from those amendments was that limitations on state power had to proceed through specific constitutional amendment. The opinions issued by the Supreme Court seemed to echo those sentiments, as the Court had accepted the predominant role of the states in that area even when it struck down the racially-discriminatory “white primaries” in the South in the 1940s and 1950s. The debate allowed Southern supporters of the poll tax to characterize the controversy as a states' rights issue.

The effort to adopt a constitutional amendment to ban poll taxes dragged on through the 1950s into the 1960s, even as support for the tax grew weaker. Literacy tests remained widespread, even in the North. But Southern states, too, abandoned poll taxes until, in 1960, only 5 states retained them. Finally, in March, 1962, the Senate approved what would become the 24<sup>th</sup> Amendment. This time, no Southern filibuster occurred. In August of that year, the House concurred. The concerns over state sovereignty remained, in that the amendment proposed to abolish poll taxes only in federal elections, leaving states and municipalities free to continue the practice for their internal affairs.

When the amendment was sent out to the states, every state of the old Confederacy, but two, refused to participate, still portraying the matter as a states' rights issue. The two exceptions were Mississippi, which formally rejected the amendment, and Tennessee, which approved it. Outside the South, every state adopted the amendment between November, 1962, and March, 1964, except Arizona and Wyoming.

But, as mentioned, states were still free to adopt poll taxes for local elections. This apparently was a call to action for the Supreme Court. Casting constitutional caution to the wind, the Court in *Harper v. Virginia Board of Elections* in 1966 struck down the Virginia poll tax for state and local elections. Creating an odd alloy of different constitutional concepts, due process and equal protection, Justice William Douglas announced for the majority that poll taxes impermissibly discriminated on the basis of wealth and/or improperly burdened a fundamental right to vote. In any event, the opinion announced, the Virginia tax violated the 14<sup>th</sup> Amendment.

The Court obviously was aware of the 24<sup>th</sup> Amendment, so recently adopted. But the learned justices must have found the effort to amend the Constitution through the proper Article V process unsatisfying. It appears that the 24<sup>th</sup> Amendment, having been limited to federal elections to avoid further intrusion into state sovereignty over voting qualifications, was not constitutionally rigorous enough. The Constitution, as it thus stood, was unconstitutional in the eyes of the Supreme Solomons. If the Court was right in *Harper*, members of Congress and of the state legislatures could have saved themselves much trouble and just used the 14<sup>th</sup> Amendment to declare all poll taxes unconstitutional. Congress could have accomplished the goals of the 24<sup>th</sup> Amendment, and more, just by passing a law to enforce these supposed rights protected under the 14<sup>th</sup> Amendment.

Of course, traditionally the 14<sup>th</sup> Amendment was not understood to provide direct restrictions on state control of voting qualifications. Otherwise, the 15<sup>th</sup> Amendment, as it applies to states, would have been unnecessary. The Court had used the 15<sup>th</sup> Amendment to strike down certain voting restrictions on race earlier in the 20<sup>th</sup> century, and did not even begin to take gingerly steps towards the 14<sup>th</sup> Amendment until striking down the “white primaries.”

Not much significance, other than as a symbol and a constitutional curiosity remains of *Harper*. The Court since then has repudiated the notion of wealth as a constitutionally “suspect” classification entitled to strict judicial scrutiny under the equal protection clause. As well, the notion of voting as a fundamental right protected under the due process clause, has had a checkered history.

Rights conceptually are “fundamental” if they do not depend on a political system for their existence; they are “pre-political” in the sense of the Anglo-American social contract construct that the Framers accepted. Freedom of speech and the right to carry arms for self-defense come to mind. Voting is an inherently political concept that does not exist outside a political commonwealth, and the scope of the voting privilege (that is the meaning of “franchise”) is, necessarily, a political accommodation. Even republics, never mind monarchies, have no uniform understanding of who may be qualified to vote. The great historical variety of arrangements of republican forms of government, and the inherently political nature of defining them, is one reason the Supreme Court has not officially involved itself in defining what is a republican form of government guaranteed under the Constitution.

A final word about the 24<sup>th</sup> Amendment: Historically, many republics, including the states in our system, required voters to meet designated property qualifications, as a reflection of having a sufficient stake in the community to vote responsibly (and to pay for the cost of government). Strictly speaking, the 24<sup>th</sup> Amendment does not forbid those. The Supreme Court has upheld property qualifications for voting for special governmental units, such as water districts. One wonders, whether the abolition of such qualifications, if they were required in all elections, would need a constitutional amendment today, or whether the Supreme Court would just wave the magic wand of the 14<sup>th</sup> Amendment, as it did in *Harper*.

*An expert on constitutional law, Prof. Joerg W. Knipprath has been interviewed by print and broadcast media on a number of related topics ranging from recent U.S. Supreme Court decisions to presidential succession. He has written opinion pieces and articles on business and securities law as well as constitutional issues, and has focused his more recent research*

*on the effect of judicial review on the evolution of constitutional law. He has also spoken on business law and contemporary constitutional issues before professional and community forums. Read more from Professor Knipprath at: <http://www.tokenconservative.com/>.*

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### **June 5, 2012 – Essay #77 –Amendment XXV, Section 1 – Guest Essayist: Hadley Heath, Senior Policy Analyst at the Independent Women’s Forum**

Monday, June 4th, 2012

#### **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.*

The 25<sup>th</sup> Amendment was ratified in 1967 to clarify the Presidential line of succession established in Article II of the Constitution. For the sake of national security, and to avoid the turmoil of contested authority – with which the Founders were familiar after a revolutionary war – the new nation established a clear, indisputable contingency plan in the case of a Presidential death, resignation, or removal from office.

This provision in the Constitution points to the underlying idea that America’s destiny does not live or die with one person or one leader, but that she is always ready to continue thriving, even in the face of a national tragedy or crisis.

Fully nine U.S. Vice Presidents have come to the office of President in this way – eight because of the death of a President. One occasion, the resignation of President Richard Nixon, resulted in Vice President Gerald Ford taking the office of President in 1974. This has also been the only such occasion (of a Vice President ascending to the office of President) that occurred after the ratification of Amendment XXV.

Previous to this Amendment, the nation looked to Article II, Clause 6 for guidance. This clause states that in case of a Presidential disqualification or death, the “powers and duties” of the President will devolve to the Vice President. However, the language of this clause left unclear whether the Vice President would indeed *become* the next President, or if he would simply execute the duties of the office until a new President could be elected.

Precedent resolved this controversy, when the first Presidential death occurred in 1841. President William Henry Harrison died in office, and Vice President John Tyler took the oath of office to succeed him as President.

Amendment XXV finally clarified in supreme Constitutional law that the successor to the office of President would indeed become President, not simply become “acting President.”

Because they are established as first in line for succession, the Vice Presidents of the United States are subject to the same eligibility requirements as Presidents. According to Article II of the Constitution, these requirements are that the person be a natural-born citizen, at least 35 years old, and have spent at least 14 years residing in the U.S.

The Constitution gives Congress the authority to further define the line of succession. The Presidential Line of Succession Act of 1947 established that the next successors would be the Speaker of the House of Representatives, the President Pro Tempore of the Senate, followed by the members of the Presidential Cabinet in order of their department’s establishment.

The 25<sup>th</sup> Amendment – along with Article II of the Constitution and the Presidential Line of Succession Act – make provision for the United States to have continuous leadership, even in the event of the disqualification or death of the national leader. This important establishment, in law, is meant to guarantee a peaceful and seamless transition.

So far in our history, although the occasions have been rare, this part of our government’s structure has provided new leadership in the face of national tragedy and hardship. This clearly serves to underscore the American idea that the future of our nation is not in the hands of one man or one executive, but that as a people we’ve consented to the leadership of duly elected and vetted leaders, as designed by the Constitution.

***Hadley Heath is a Senior Policy Analyst at the Independent Women’s Forum.***

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**June 6, 2012 – Essay #78 –Amendment XXV, Section 2 – Guest Essayist: Hadley Heath, Senior Policy Analyst at the Independent Women’s Forum**

Wednesday, June 6th, 2012

**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.*

The 25<sup>th</sup> Amendment, Section 2, explains that in a vacancy in the office of Vice President, the President must act to select a new Vice President, and the Congress must confirm the President’s choice. More broadly, this Amendment (ratified in 1967) clarifies the line of succession in the executive branch as established in Article II of the Constitution.

Without this Section or this Amendment, it was unclear what to do in the case of a Vice Presidential death or disqualification. Would the Speaker of the House ascend to this office? Would the people elect a new Vice President? Actually, neither happened. But before the 25<sup>th</sup> Amendment, the office of the Vice President was simply left vacant 16 times, and it stayed that way until the next election.

Eight times the President of the United States died, and the Vice President left office to become President. Seven times the Vice President died. Once, Vice President John Calhoun resigned in order to become a U.S. Senator.

But for the sake of continuity, and in order to keep the important office of Vice President filled, the U.S. ratified this Amendment. It makes it clear that the President will nominate someone, and the Congress will confirm. The Congressional confirmation also ensures that the people have a representative voice in approving the new Vice President.

After all, the office of the Vice President carries with it unique Constitutional duties and shouldn’t be left empty. According to Article I of the Constitution, the Vice President also serves as President of the U.S. Senate, and must cast a vote if there is a tie. The Vice President is also charged with overseeing, counting and presenting the votes of the Electoral College.

The Vice President also serves an important informal role as the assistant to, or spokesperson for the President. This role varies from administration to administration, depending on the relationship between the two leaders.

In American history since 1967, only two back-to-back occasions have called for the selection of a Vice President in the manner prescribed by Amendment XXV. In 1973, Vice President Spiro

Agnew resigned. President Richard Nixon nominated Gerald Ford to the Vice Presidency, and Congress confirmed him.

The following year, 1974, President Nixon resigned. This meant that Gerald Ford would ascend to the Presidency, allowing him to select a nominee for Vice President to fill his now-vacant office. He selected Norman Rockefeller, who was also confirmed by the Congress. This situation resulted in both a President and a Vice President who were not elected in a general election by the Electoral College.

Elections are essential to the American system of governance: They allow the people to select their own leaders. But, on the rare occasion that these elected leaders cannot perform their duties, Amendment XXV prescribes how new leadership will take charge.

Amendment XXV, Section 2, ensures that the people are at least represented in the selection of this new leadership; the requirement of the new Vice President's confirmation by Congress means that Members of the House and Senate – the representatives of the people – can check the power of the executive in making this new appointment.

This Section of Amendment XXV serves the important purpose of maintaining the offices of President and Vice President in a manner consistent with government for, of, and by the people.

***Hadley Heath is a Senior Policy Analyst at the Independent Women's Forum.***

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### **June 7, 2012 – Essay #79: Amendment XXV: Presidential Succession Section 3 – Horace Cooper, legal commentator and the Director of the Center for Law and Regulation at the Institute for Liberty**

Thursday, June 7th, 2012

#### 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.*

Since the nation's founding there have been lingering questions about the presidential succession process. As drafted by the framers, Article II of the U.S. Constitution provided that the vice

president shall “discharge the Powers and Duties” of the president in the case of the president’s “Death, Resignation, or Inability.”

Seemingly clear enough in 1787, it increasingly became obvious there were serious gaps in the process. Congress was given the responsibility to work out the details for what might occur if both the Vice President and President were incapacitated. At the same time the Constitution was opaque over what constituted inability or scenarios in which a previously incapacitated President might have his authority restored.

Until the 25<sup>th</sup> amendment was ratified, the vice presidency had been vacant 16 times after a president or vice president had died or resigned. \*

President Garfield tragic assassination was a major case in point regarding Presidential Succession. Assassin Charles J. Guiteau disgruntled over not being able to obtain a federal post shot President Garfield. The president would slip in and out of comas over the next 80 days. As a result he would perform only one official act during this period – the signing of an extradition paper. President Woodrow Wilson was disabled by a stroke in 1919–1921. Many presidents have suffered shorter periods of disability. In no instance were the disability provisions invoked. \*

Many in Washington thought that President Eisenhower’s heart attack in 1955 and then subsequent stroke in 1957 made clear that the modern presidency needed a succession plan. However, the subsequent campaign between Nixon and Kennedy, either of whom would set the record for youngest president in US history moved the issue to the back burner.

Ironically, it was the assassination of President John F. Kennedy in 1963, which brought the issue immediately to the forefront. This far into the 20<sup>th</sup> century the United States couldn’t answer long-standing questions such as when the president died, did the vice president automatically become president, or only serve as acting president? What happened when the vice presidency was vacant? The Twenty-fifth Amendment, would at long last answer these questions.

Stymied during the Eisenhower administration, this time the urgency was clear. Even The American Bar Association endorsed the proposal. On January 6, 1965, Senator Birch Bayh formally proposed the amendment. It was passed by Congress on July 6, 1965, and ratified on February 10, 1967, making it the 25th Amendment to the Constitution.

Reportedly Presidents G HW Bush and Bill Clinton established detailed plans in compliance with Section 3 to deal with incapacity during their terms although ultimately they never needed to be invoked.

***Horace Cooper is a legal commentator and the Director of the Center for Law and Regulation at the Institute for Liberty***

\* THE TWENTY-FIFTH AMENDMENT: ITS COMPLETE HISTORY AND APPLICATIONS,” BY JOHN FEERICK (1992)

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**June 8, 2012 – Essay #80 – Amendment XXV, Section 4 – Guest Essayist: Horace Cooper, Director of the Institute for Liberty’s Center for Law and Regulation, and a legal commentator**

Friday, June 8th, 2012

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.*

Section 4 is the only part of the 25th amendment which has never been invoked. It was created especially to empower the Vice President, together with a majority of the Cabinet or of “such other body as Congress may by law provide”, to declare when necessary that the President of the United States is disabled. This would occur by formally submitting a written declaration to the President pro tempore of the Senate and the Speaker of the House of Representatives. Upon its delivery, the Vice President would become Acting President.

Section 4 is meant to be invoked if Vice President and the Cabinet determine that the President's incapacitation prevents him from discharging the duties of his office and the President does not voluntarily proffer a written declaration to that effect.

Since this provision may involve a conflict between the President and the rest of his administration there are safeguards to prevent the invocation occurring unfairly. Therefore, the President may resume exercising his Presidential duties in response to the Vice President's declaration by sending a written declaration to the President pro tempore and the Speaker of the House explaining that he is able to assume his duties.

It is only then that if the Vice President and Cabinet remain unsatisfied with the President's condition, they may within four days submit another declaration to the House Speaker and the Senate President Pro Tempore that the President is incapacitated.

If this occurs, Both Houses of Congress must assemble within 48 hours if not already in session to make a determination. Within 21 days of assembling or of receiving the second declaration by the Vice President and the Cabinet, a two-thirds vote of each House of Congress is required to affirm the President as unfit. Upon this finding by the Congress, Section 4 states that the Vice President would "continue" to be Acting President.

Should the Congress resolve the issue in favor of the President, or if the Congress makes no decision within the 21 days allotted, then the President would "resume" discharging all of the powers and duties of his office.

If for some reason the Congress sides with the President yet the Vice President and Cabinet determine later that the President is incapacitated, the Vice President can continue to invoke Section 4. The President could send a declaration stating that he is capable of handling his duties and presumably the allotted 21-day Congressional procedure would start again..

History notes that there have been at least two occasions where there was serious consideration of invoking Section 4. The first involved the March 30, 1981 assassination attempt against Ronald Reagan. A group of Presidential advisors gathered at his bedside following his surgery and in conjunction with the doctors findings, determined that he was competent to carry on the affairs of state. The second occasion also involved President Reagan.

Late in his term, President Reagan replaced his chief of staff – Donald Regan – with Howard Baker. Howard Baker was pressed according to media reports to make an assessment as to whether President Reagan then 76 was "mentally sharp." After holding a meeting with the President and the rest of his staff, Baker easily concluded that President Reagan was capably handling his duties as President.

***Horace Cooper is a legal commentator and the Director of the Center for Law and Regulation at the Institute for Liberty***

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## **June 11, 2012 – Essay #81 – Amendment XXVI, Section 1 – Guest Essayist: Janice Brenman, Attorney**

Monday, June 11th, 2012

Amendment XXVI:

*The right of citizens of the United States, who are 18 years of age or older, to vote, shall not be denied or abridged by the United States or any state on account of age.*

### The Twenty-Sixth Amendment: Empowering America's Youth

Throughout our nation's history the right to vote has remained a cornerstone of cherished civil liberties and democratic processes. This right, however, was granted to select members of the populace until a century and a half ago. The end of the Civil War brought about 3 "Reconstruction Amendments" aimed to bring constitutionally granted "blessings of liberty" to the black male populace – the 3rd of these, the 15th Amendment, ratified in 1870, granted voting rights regardless of "race, color, or previous condition of servitude." Half a century later, women were also granted the right to vote, after various organizations staged a protracted series of processions and protests. Several countries, such as Sweden, Finland (then known as the Grand Duchy (Dutch-ee)), Britain and Australia, had already forged ground in this area at the end of the 19th century. The resulting 19th Amendment was ratified in 1920, which prohibited state and federal sex-based voting restrictions. Additional suffrage privileges were granted with ratification of the 24th Amendment in 1964 – which guaranteed that voting rights of citizens

*"shall not be denied or abridged by the United States or any State by reason of failure to pay any poll tax or other tax."*

Age was the next obstacle to overcome.

The Constitution allowed states to dictate voting qualifications, subject to restrictions incorporated into Amendments. One of these Amendments, the 14th, mandated an age 21

minimum for male suffrage, with the caveat of withholding any state's representation in Congress should this right be denied. With the onset of World War II, many young men and women under age 21 entered military service, sparking discussions about reducing the voting age to 18. It seemed ironic that one could be called up for military service at 18 and denied the right to vote for the country one was entrusted to defend. So, in 1942, four Congressmen introduced resolutions to reduce the age to 18. Over 150 proposals were initiated, some setting the age to 19. In the early 1950s, Senate debated one of "18" resolutions, but it failed by a vote of 34 to 24. By the late 1960s, the Vietnam War was rapidly escalating and thousands of young Americans enlisted, or, were drafted for active duty overseas. As of 1968, 25% of the troops were under age 21 and made up an even higher percentage of casualties. 'Old enough to fight, old enough to vote' became a mantra for the burgeoning Baby Boom generation.

The resolutions for lowering the voting age began to gain momentum once again. Congress held hearings on the subject between 1968 and 1970. These hearings touched on the link between military service and voting, but primarily focused on the increased educational levels of modern youth. Their discussions also focused on the ever-increasing responsibilities of the 18-21 year old demographic: attending college, driving automobiles, drinking alcohol (in subsequent years, states raised this age to 21), holding jobs, starting families, being tried as adults in court. Concurrently, in a narrow 5-4 vote, the United States Supreme Court ruled in *Oregon v. Mitchell* (1970) that 18 year olds could vote in federal elections, but not in those held at the state, or, local levels.

States now were tasked with evaluating their suffrage-age laws, and sixteen states did just that in 1970. Six states lowered the age and ten remained unswayed. Other states began to weigh administrative and cost advantages in matching the new federal framework. Congress then added a provision to the Voting Rights Act in 1970 setting the minimum voting age to 18 for both national and state elections, arguing it had broad power to protect voting rights under Section 5 of the 14th Amendment. With that, Congress accelerated its commitment to incorporate the youth suffrage movement within the framework of the Constitution. Congress passed the 26th Amendment March 23, 1971. In the fastest ratification process on record (107 days), three fourths of the states ratified this landmark proposal July 1, 1971.

Note: Amendment 14, section 2, of the Constitution was modified by section 1 of the 26th amendment.

***Ms. Janice R. Brenman is a former prosecutor now in private practice in Los Angeles. She has commented in major legal publications on the subject of legal reform and celebrity influence on the legal system. She has also appeared in medical malpractice, products liability and complex civil litigation, and is well versed in all forms of discovery. From 1999 to 2000, Ms. Brenman was a City Prosecutor and Community Preservationist. She clerked for the Honorable Rupert J. Groh(Grow), Jr., of the United States District Court for the Central District of California. Ms. Brenman also worked researching, writing and editing under a Nobel Prize winning laureate.***

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**June 12, 2012 – Essay #82 – Amendment XXVI, Section Two – Guest Essayist: Horace Cooper, Director of the Institute for Liberty’s Center for Law and Regulation, and a legal commentator**

Tuesday, June 12th, 2012

Amendment XXVI:

*Section 1: The right of citizens of the United States, who are 18 years of age or older, to vote, shall not be denied or abridged by the United States or any state on account of age.*

*Section 2: The Congress shall have the power to enforce this article by appropriate legislation.*

18-Year Olds Right to Vote

Section 2. The Congress shall have the power to enforce this article by appropriate legislation.

Perhaps one of the few instances where the issue of congressional power was litigated prior to passage of the amendment, section 2 of the 26<sup>th</sup> amendment has this distinction. Many Americans today do not realize that the debate over the minimum age to vote in the U.S. began during World War II and the issue continued to grow even as the War wound down. President Dwight Eisenhower was the first U.S. president to officially endorse lowering the voting age to 18. For most of its history, the U.S. had adopted 21 as the minimum age.

President Eisenhower, like a growing number of American policymakers, recognized a clear disparity between 18 year olds being old enough to fight for their country in war and yet they were not considered responsible enough to cast a vote in electing the representatives that could decide the policy. This sensible argument was powerful enough to persuade Georgia and Kentucky to lower the minimum voting age during World War II.



Unfortunately the process of state-by-state reform didn't appear to be moving fast enough for its advocates. By the time of the Vietnam War, it had become increasingly clear that Congress had to take some action in this area. Between the budget pressures, anti-war efforts, and the need to rely on the draft, Washington policymakers determined that they should act affirmatively to lower the voting age.

Taking the lead nearly 20 years after serving as Vice-President to President Eisenhower, President Nixon agreed to sign a law that amended the Voting Rights Act to lower the voting age to 18 for all Federal, State, and local elections. There was a problem with this solution: it didn't meet Supreme Court muster.

The act signed into law in 1970 was challenged in the federal courts. In *Oregon v. Mitchell* the Supreme Court declared that the Congress didn't have the authority to set a minimum age requirement for voting in state and local elections.

President Nixon would then call upon Congress to adopt a Constitutional amendment to remedy the matter. It passed Congress in March 1971 and would set a record – 4 short months – as the fastest ratification of any of the amendments to the Constitution. By July, President Nixon would certify that the amendment had indeed been ratified.

***Horace Cooper is a legal commentator and the Director of the Center for Law and Regulation at the Institute for Liberty***

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**June 13, 2012 – Essay #83 –Amendment Twenty-Seven – Guest Essayist: James D. Best, author of Tempest at Dawn, a novel about the 1787 Constitutional Convention, and Principled Action, Lessons from the Origins of the American Republic**

Wednesday, June 13th, 2012

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.*

The 27<sup>th</sup> Amendment states that any law Congress passes that alters their compensation cannot take effect until after the next election.

On September 25, 1789, Congress proposed twelve constitutional amendments. In a little over two years, ten of these were ratified by the states. These very first amendments to the Constitution became our revered Bill of Rights.

The first rejected amendment proscribed a complex formula for determining the size of the House of Representatives. The second failed amendment, known as the Compensation Amendment, was written by James Madison in response to Antifederalist claims that Congress possessed the power to vote themselves rich salaries. Although this amendment failed in 1791, it eventually became the 27<sup>th</sup> Amendment.

The 11<sup>th</sup> Amendment took less than a year to ratify. Prohibition (18<sup>th</sup> Amendment) took 14 months, while repeal (21<sup>st</sup> Amendment) took only nine months. Women's suffrage (19<sup>th</sup> Amendment) took 14 months to ratify. Giving 18 year olds the right to vote (26<sup>th</sup> Amendment) took only a little over three months. So why did it take 203 years to ratify the 27<sup>th</sup> Amendment?

In 1791, Americans didn't see compensation of Congress as a big issue—at least, not enough of an issue to threaten liberty. If Congress became too greedy, voters would simply throw them out of office. In 1873, Congress did vote itself a retroactive raise. In a pique, Ohio ratified the Compensation Amendment. No other states followed suit, so the amendment languished—until the 1980s. Surprisingly, a grassroots campaign was ignited by an undergraduate term paper written by Gregory Watson. (He received a C grade for the paper.) On May 7, 1992, the Compensation Amendment was finally ratified by enough states to make it officially the 27<sup>th</sup> Amendment.

The irony is that this two-century process may have been made meaningless by later court decisions. Since the amendment was ratified, the only court challenge claimed that the annual Cost of Living Allowance (COLA) violated this amendment. A few taxpayers and a congressman filed suit, but a lower court ruled that the taxpayers did not have standing (standing is a legal

interest in the issue that entitles the party to seek relief). It further ruled that an automatic COLA was not an independent law subject to the amendment. On appeal, the Tenth Circuit ruled that the congressman also did not have standing. If neither taxpayers nor congressmen have standing, it's hard to imagine a successful challenge.

Madison had crafted a clear, single sentence that 203 years later became part of the Constitution. It's doubtful that Congress would be foolish enough to violate this minor restriction on their pay increases.

We often hear laments that our politicians no longer honor their pledge to preserve, protect and defend the Constitution of the United States. This is backward. The Constitution was not written for politicians. Our political leaders have no motivation to abide by a two hundred year old restraining order. Americans must enforce the supreme law of the land. The first outsized words of the Constitution read *We the People*. It's our document. It was always meant to be ours, not the government's. It is each and every American's obligation to preserve, protect, and defend the Constitution of the United States.

***James D. Best is the author of [Tempest at Dawn](#), a novel about the 1787 Constitutional Convention, and [Principled Action](#), Lessons from the Origins of the American Republic.***

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## **June 14, 2012 – Essay #84 – Proposed Congressional Apportionment Amendment, Essayist: David Eastman, 2011 Claremont Institute Abraham Lincoln Fellow**

Thursday, June 14th, 2012

Before we conclude our 90 Day Amendment Study, we now take a look at some pending Constitutional Amendments, which have not been adopted:

The first in this short series is an amendment on Congressional Apportionment – Essayist: David Eastman, 2011 Claremont Institute Abraham Lincoln Fellow

### **Proposed Congressional Apportionment Amendment**

*“After the first enumeration required by the first article of the Constitution, there shall be one Representative for every thirty thousand, until the number shall amount to one hundred, after which the proportion shall be so regulated by Congress, that there shall be not less than one hundred Representatives, nor less than one Representative for every forty thousand persons, until the number of Representatives shall amount to two hundred; after which the proportion shall be*

*so regulated by Congress, that there shall not be less than two hundred Representatives, nor more than one Representative for every fifty thousand persons.”*

Few today may be able to tell you, but the most immediate concern in the minds of many Americans following the adoption of the Constitution was not first amendment rights concerning freedom of speech, but rather first amendment rights concerning the number of representatives in Congress. And though it receives comparatively little attention in our own day, it was this issue that the Congress was compelled to tackle in the very first constitutional amendment it adopted (September 25, 1789).

Concerns over congressional apportionment predated ratification of the Constitution and were the subject of fully three of the Federalist Papers, in one of which Madison remarked “Scarce any article, indeed, in the whole Constitution seems to be rendered more worthy of attention by the weight of character and the apparent force of argument with which it has been assailed” (Federalist 55). The initial apportionment scheme that generated such high-spirited controversy was as follows:

“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...”

New Hampshire (3)  
Massachusetts (8)  
Rhode Island (1)  
Connecticut (5)  
New York (6)  
New Jersey (4)  
Pennsylvania (8)  
Delaware (1)  
Maryland (6)  
Virginia (10)  
North Carolina (5)  
South Carolina (5)  
Georgia (3)  
Total (65)

Madison defended this portion of the proposed Constitution against a two-pronged attack: first, that the number of representatives in Congress, being too few, was inadequate to prevent corruption of the legislative body; and second, that such a number would deprive the body of sufficient knowledge owing to the inability of members of Congress to effectively represent such a large number of constituents. Also relevant was the concern that if the House of Representatives were ever to become too numerous, its character as a representative body would be undermined. Despite Madison’s best efforts to answer these concerns, they persisted, leading several states to propose amendments to this portion of the Constitution, which they submitted to the Articles Congress with their respective ratification documents.

These, and other requests submitted by the states, resulted in the first twelve amendments passed by the United States Congress and submitted to the states on September 25, 1789. Ten of the twelve were soon adopted as the Bill of Rights, and the eleventh would lay silently awaiting ratification until approved by the State of Michigan and finally added to the Constitution 202 years later, on May 7, 1992.

The twelfth and final amendment, the Congressional Apportionment Amendment, was ratified by a majority of states at the time of its passage, but less than the three-fourths required for adoption. This could be due in part to a transcription error that resulted in a mathematically impossible apportionment formula once the population of the United States reached 8 million and before it reached 10 million. The apportionment scheme now in use is determined by Congress, in keeping with the original text of the Constitution.

As it has already secured the approval of Congress, the Apportionment Amendment could follow the path taken by the 27th Amendment and be adopted if ratified by additional states. However, its passage today is unlikely, not only due to the passage of time but also due to the fact that approval would be of limited practical effect as the scheme currently approved by Congress is already in harmony with the Amendment. It seems Congress has been successful, at least as concerns this particular amendment, in fixing a number that is neither so numerous that passions become unwieldy, nor so few that states come to question the ability of their representatives to be independent voices amidst the representatives of other states.

*David Eastman is a former U.S. Army Captain, a Claremont Lincoln Fellow. He can be reached at [david@davideastman.org](mailto:david@davideastman.org).*

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### **June 15, 2012 – Essay #85 – Proposed Amendment: Titles of Nobility Amendment – Guest Essayist: Horace Cooper, Director of the Institute for Liberty’s Center for Law and Regulation, and a legal commentator**

Thursday, June 14th, 2012

Proposed Amendment: Titles of Nobility Amendment:

*If any citizen of the United States shall accept, claim, receive or retain, any title of nobility or honour, or shall, without the consent of Congress, accept and retain any present, pension, office or emolument of any kind whatever, from any emperor, king, prince or foreign power, such person shall cease to be a citizen of the United States, and shall be incapable of holding any office of trust or profit under them, or either of them*

Introduced in 1810, the so-called Titles of Nobility Amendment (TONA) was sponsored primarily by Maryland Senator Philip Reed. Historians argue that this amendment's purpose was two-fold. One to make it more difficult for foreign agents to buy or influence votes in state and federal elections, and secondly to prevent saboteurs and enemies of America from promising land, wealth, and titles to officers in the military or other prominent appointees in government as a way to undermine their loyalty to the United States.

Senator Reed, the primary sponsor, was quite a character. A revolutionary war hero, purportedly during the battle of Stony Point, he cut off the head of an American deserter and had it displayed on a pike as a deterrent to other deserters.

As a Senator from Maryland, Senator Reed and his constituents were keenly aware of the younger brother of French Ruler Napoleon Bonaparte's marriage to the daughter of wealthy Baltimore merchant William Patterson. Jerome Bonaparte's marriage to Elizabeth Patterson (the Paris Hilton of her day) not only scandalized Northeastern American society, suggestions that the marriage would result in a lifetime annuity and a title for Ms. Patterson and her heirs was sufficient to remind American leaders of the need to minimize the ability of foreigners to influence American society and its political structure.

Primarily supported by Federalists, the amendment's substance galvanized the Congress getting broad support. The resolution passed both houses of Congress in 1810: the United States Senate by a vote of 19 to 5 and by the House of Representatives by a vote of 87 to 3. It was sent to the states and awaits action for ratification. According to the Supreme Court, in a case entitled *Coleman v. Miller*, the amendment is still available to be considered and ratified by the various states, as there is no deadline for ratification specified when Congress initially proposed the amendment. As least 26 more states would have to ratify the amendment in order for it to become part of the Constitution today.

This amendment was ratified by 12 state legislatures:

1. [Maryland](#) (December 25, 1810)
2. [Kentucky](#) (January 31, 1811)
3. [Ohio](#) (January 31, 1811)
4. [Delaware](#) (February 2, 1811)
5. [Pennsylvania](#) (February 6, 1811)
6. [New Jersey](#) (February 13, 1811)
7. [Vermont](#) (October 24, 1811)
8. [Tennessee](#) (November 21, 1811)
9. [North Carolina](#) (December 23, 1811)

1. [Georgia](#) (December 31, 1811)[1]
2. [Massachusetts](#) (February 27, 1812)
3. [New Hampshire](#) (December 9, 1812)

Senator Reed lived to be 69 years of age, dying in 1829. A memorial marks his grave to this day as one of Kent Maryland's most distinguished citizens.

Today the only controversy about this so-called "Titles of Nobility Act" is whether it was already ratified. Historians overwhelmingly agree that the amendment was not ratified. In 1833, the brilliant and highly regarded judge and commentator Joseph Story wrote "it has not received the ratification of the constitutional number of states to make it obligatory, probably from a growing sense, that it is wholly unnecessary" and the 1848 edition of Bouvier's *Law Dictionary* recorded that TONA "has been recommended by Congress, but it has not been ratified by a sufficient number of states to make a part of the constitution."

***Horace Cooper is a legal commentator and the Director of the Center for Law and Regulation at the Institute for Liberty***

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### **June 18, 2012 – Essay #86 – A Look Back in History: Proposed Amendment – Slavery and the States – Guest Essayist: Horace Cooper, Director of the Institute for Liberty's Center for Law and Regulation, and a legal commentator**

Sunday, June 17th, 2012

Proposed Amendment: Slavery and the States Amendment:

State's sole right to regulate slavery proposal:

*No amendment shall be made to the Constitution which will authorize or give to Congress the power to abolish or interfere, within any State, with the domestic institutions thereof, including that of persons held to labor or service by the laws of said State.*

This proposed amendment is the so-called Corwin Amendment. Passed by the 36<sup>th</sup> Congress on March 2, 1861, the Corwin Amendment offered by Ohio Representative Thomas Corwin was presented as a means of forestalling the secession of Southern states prior to the beginning of the Civil War.

It had become increasingly clear to many in Congress that a conflict was occurring over the status of slave versus non-slave states that could have cataclysmic effects on the Union. In the 36<sup>th</sup> session alone, there were more than 200 different measures introduced regarding the subject of slavery including nearly 60 Constitutional amendments.

The Corwin Amendment sought to forbid any future attempts to amend the Constitution to empower the Congress to “abolish or interfere” with slavery as a way to ensure that southern states would not feel obligated to leave the American Union. Presented as a last ditch effort to prevent the collapse of the Union, the proposal didn’t have the intended effect. The newly formed Confederate States of America organized and declared that it would pursue a path of independence completely ignoring Congress’ intentions with the Corwin Amendment.

Notably the Corwin Amendment has the distinction of being the only constitutional amendment to have an actual numerical designation assigned to it by Congress—the proposing resolution includes the name “Article Thirteen.”

After passing the House and Senate, congressional leaders prevailed upon incoming President Lincoln to send a letter to each governor alerting them that the amendment had passed. While President Lincoln never endorsed the measure, he acquiesced to the request.

By the time President Lincoln had been elected, seven southern states had seceded and within a few months four others would join them. While Lincoln had not campaigned on a platform to end slavery where it existed, he had pledged to use the power of the federal government to prevent slavery from spreading to territories that were not yet states. His willingness then to send the letter was yet another demonstration of the lengths he was attempting to go to prevent the dissolution of the union.

Ohio has the distinction of being the first legislature to ratify the amendment on May 13, 1861. However by March 31, 1864 the commencement of the Civil War and changing public sentiment led the legislature to rescind its ratification. Since Congress did not include a final ratification date for this proposed amendment, it technically is still pending. In 1963 more than a century after it was ratified, Texas state representative Henry Stollenwerck introduced a resolution to ratify in the Texas statehouse. It was referred to the House of Representatives’ Committee on Constitutional Amendments on March 7, 1963, and received no further consideration.

It is noteworthy that the Confederate Constitution contained no provision like that found in the Corwin amendment. Even though the Confederate charter explicitly authorized slavery in the Confederacy, it didn’t seek to prevent or bar future amendments that might restrict or abolish slavery.

Most scholars believe that even if the Corwin Amendment had been adopted it would not have been irreversible. That is to say, Congress and the states could bar Congressional interference with slavery if they wanted but they couldn’t bar a subsequent Congress and the states from either repealing the amendment the same way they did when they adopted prohibition and then repealed it later or adding new amendments that had the same effect. In other words, the mere adoption of the Corwin Amendment would not have prevented a subsequent Congress from



passing an amendment to ban slavery or to protect the voting rights of blacks who were formerly slaves.

*Horace Cooper is a legal commentator and the Director of the Center for Law and Regulation at the Institute for Liberty*

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**June 19, 2012 – Essay #87 – Proposed Amendment: Child Labor Ban – Guest Essayist: Horace Cooper, Director of the Institute for Liberty’s Center for Law and Regulation, and a legal commentator**

Monday, June 18th, 2012

Proposed Amendment: Child Labor Ban Amendment:

*Section 1: The Congress shall have power to limit, regulate, and prohibit the labor of persons under eighteen years of age.*

*Section 2: The power of the several States is unimpaired by this article except that the operation of State laws shall be suspended to the extent necessary to give effect to legislation enacted by the Congress.*

The **Child Labor Amendment** is a proposed and still-pending amendment to the US Constitution offered by Ohio Congressman Israel Moore Foster in 1924, during the 68<sup>th</sup> Congress.

Perhaps one of the biggest political fights of the 20<sup>th</sup> century involved the question of whether the federal government had or should have authority to regulate child labor. Alexander Hamilton and Horatio Alger stood on one side representing those who thought that child labor was a positive influence and on the other side stood influential novelist Elizabeth Stuart Phelps and a host of high society New Englanders who believed that this constituted a completely unnecessary and even ruinous exploitation of the nation’s youth.

Estimates varied about the size and scope of the problem. The 1880 census reported that roughly 17% of all children were “gainfully employed.” By 1910 that number had risen to nearly 19%. However even at its highest point, the lion share of the youths working did so on a farm, and mostly that of their own families. Fewer than 25% worked in canneries or any manufacturing plants.

The first state to restrict child employment was Massachusetts. In 1836 they banned 15 year olds from manufacturing jobs and then six years later adopted a law making it illegal to allow 12 year olds to work for more than 10 hours a day. By the turn of the century 28 states had adopted child labor laws.

However, leaders of the Teddy Roosevelt wing of progressivism within the Republican Party felt that state action was insufficient. They argued that it was essential that the feds take over these regulations in order to make them uniform and also in order that the rules could be as aggressive as was practical to end the scourge of child labor.

Historians report that they started by trying to ban the interstate transport of articles produced in factories or mines that employed children under 14. The Department of Commerce announced the creation of a Federal Children's Bureau and began a full-throated contribution to the fight with updates and missives about the need for federal action.

Senator Albert Beveridge an early backer of a federal ban solicited and reported on the claims by known socialist agitators that there were thousands of "thumbless boys and girls who don't know how to play."

The promoters of federal action even went so far as to include a ban in the 1912 Republican platform causing President Taft to break with the party when he declared federal child-labor law unconstitutional. Unfortunately by the time that President Wilson would come into office – even after having opposed the concept while campaigning – he would determine that it was expedient to sign a ban into law. The Supreme Court would promptly strike down the measure arguing that "Freedom of Commerce will be at end, and the power of states over local matters may be eliminated" if the law were allowed to stand.

Nevertheless, Congress was undaunted. Congress came back this time with a measure that proposed a 10% profits tax on all industries that violated the recommended child labor standards. This too the Supreme Court struck down – this time 8-1.

It was then that the advocates decided that a Constitutional Amendment was in order. Congressman Israel Foster of Ohio and Senator Samuel Shortlidge of CA introduced the measure. They worded the amendment to cover not just employment, but work generally. In other words, the amendment purported to give the federal government the power to intervene on behalf of any child under the age of 18 who was responsible for "chores" as well as those who actually worked at factories.

Starting off with support from the NEA, the American Legion, the YWCA, the PTA, and even Presidents Warren and Harding the amendment seemed unstoppable.

The Child Labor Amendment has been ratified by the legislatures of the following 28 states:

1. [Arkansas](#) in 1924
2. [Arizona](#) in 1925
3. [California](#) in 1925
4. [Wisconsin](#) in 1925

5. [Montana](#) in 1927
6. [Colorado](#) in 1931
7. [Illinois](#) in 1933
8. [Iowa](#) in 1933
9. [Maine](#) in 1933
10. [Michigan](#) in 1933
11. [Minnesota](#) in 1933
12. [New Hampshire](#) in 1933
13. [New Jersey](#) in 1933
14. [North Dakota](#) in 1933
15. [Ohio](#) in 1933
16. [Oklahoma](#) in 1933
17. [Oregon](#) in 1933
18. [Pennsylvania](#) in 1933
19. [Washington](#) in 1933
20. [West Virginia](#) in 1933
21. [Idaho](#) in 1935
22. [Indiana](#) in 1935
23. [Utah](#) in 1935
24. [Wyoming](#) in 1935
25. [Kentucky](#) in 1936
26. [Kansas](#) in 1937
27. [Nevada](#) in 1937
28. [New Mexico](#) in 1937.

However, two arguments would ultimately stop the Child Labor Ban amendment in its tracks. The first was the claim that alcoholism and drunkenness among fathers was the reason why so many young people were in the workplace. And secondly, groups like the Women's Constitutional League of Maryland effectively explained that at the end of the day, "The fathers and the mothers are better prepared to pass judgment upon the needs and the welfare of their children than this Congress is."

A new opposition coalition developed made up of the Catholic Church, farmers, and ordinary families. Together along with the claim that most of the “chidsavers” were childless caused much of the momentum to slow and then ultimately reverse.

In true ironic fashion, it was Massachusetts where the amendment would face its major defeat. The Archbishop of Boston mounted a vigorous campaign against the amendment as being anti-family and claimed that it would “take from parents the right and duty to educate and guide their children.” Suddenly the Lutherans joined in the effort. An advisory referendum was scheduled for the state and the amendment lost in a lopsided vote 697,563 to 241,461. This was the beginning of the end.

Perhaps the most significant consequence of the introduction of the Child Labor Ban Amendment is that the right of the people to determine ultimately what the policies and rules of their nation would be remain with the people through the state legislatures. In a landmark case, *Coleman v. Miller* the US Supreme Court in a dispute over the Child Labor Ban Amendment officially recognized that if Congress does not specify a ratification deadline, then the proposed amendment remains pending business. Today, with 50 states in the Union, the ratifications of 10 additional states would be required to incorporate the proposed Child Labor Amendment into the Constitution.

***Horace Cooper is a legal commentator and the Director of the Center for Law and Regulation at the Institute for Liberty***

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## **June 20, 2012 – Essay #88 – A Look At Another Proposed Amendment: Women’s Equal Rights – Guest Essayist: Allison R. Hayward, political and ethics attorney**

Tuesday, June 19th, 2012

Another Proposed Amendment: Women’s Equal Rights:

*Section 1. Equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex.*

*Section 2. The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.*

*Section 3. This amendment shall take effect two years after the date of ratification.*

This history of the Equal Rights Amendment (ERA) is best understood in context with other great efforts as securing equality before the law for all. But the ERA has also been used as a political tool in efforts to secure electoral advantage. As with most social initiatives, the story offers a complicated mix of high purpose, low tactics, compromise, and for ERA supporters, frustration that extends to this day.

The roots of the ERA trace to 1848, when a group of activist social reformers and abolitionists met in Seneca Falls, New York, to discuss the rights of women. This meeting produced a statement, which among other things called for the elimination of the subjugation of women, voting rights, and absolute equality. But the immediate battle then raging was over slavery, and despite their efforts, women's rights activists could not broaden the equal rights guarantees of the post-Civil War Amendments to protect women from discrimination as well as African Americans.

But other social reformers saw women's rights as a tool. Anti-liquor activists believed the women's vote would support "dry" candidates for state and federal office, and ultimately would secure a constitutional amendment prohibiting the manufacture, transport or sale of alcoholic beverages. A coordinated campaign began around the turn of the 20<sup>th</sup> century to secure women's voting rights at the state level, in conjunction with the election of prohibitionist candidates and passage of state prohibition laws. The impact is evident in this timeline – only four states (Wyoming, Colorado, Utah and Idaho) had guaranteed women the right to vote before 1910. Eleven states and the territory of Alaska enacted women's suffrage laws between 1910 and the ratification of the 19<sup>th</sup> Amendment in 1920. Twelve more allowed women to vote for President – eleven extending this right in 1917-19, which not coincidentally was the period when both women's suffrage and Prohibition underwent Constitutional ratification.

In 1923, Alice Paul wrote what became the modern Equal Rights Amendment at a second Seneca Falls meeting commemorating the meeting of 1848. By this time, women had secured the right to vote and had been instrumental in the passage of Prohibition, and understandably women's rights activists believed it was time to complete a constitutional guarantee of rights for women.

As with suffrage rights, a number of states adopted their own "ERA" type constitutional guarantees. Some state laws were enacted independent of the ERA campaign, but a number of others were adopted during the decade of debate over the ERA when it came before the states in 1972. Most state adopted ERA amendments between 1971 and 1978, when the campaign to adopt the federal Equal Rights Amendment (ERA) was at its height. The effort eventually failed, three states short of its final goal.

Even so, twenty states have adopted constitutions or constitutional amendments providing that equal rights under the law shall not be denied because of sex. Some read like the ERA, but others are narrower. For example California 1879 law (the nation's earliest), guarantees equal rights to "entering or pursuing a business, profession, vocation, or employment."

Supporters of ERA continue to argue its necessity, pointing out, among other things, continued pay inequities between men and women. But others argue that a constitutional amendment could be both too broad and ineffective. Larger social phenomena, such as the fact many women raise children, care for other family members, and for other reasons do not follow general male career trajectories go far to explain pay inequities. ERA would bar discrimination based obstacles women face in the workplace, but labor laws, corporate policies, and negotiated conditions of employment already provide existing means to address those.

What laws and practices would ERA abolish? Could there be unintended consequences? Interestingly, labor reformers in the early part of the 20<sup>th</sup> century thought so. They opposed efforts to abolish discrimination based on sex, because they believed it would jeopardize women's gains in workplace conditions and hours.

Reasonable laws should recognize that women and men are physically different, and these differences can sometimes matter. Pretending as if there were no differences in life expectancy, strength, metabolism, or estrogen would be irrational, even if in a strict sense "equal." If our legal regime protects men and women's choices consistent with the rights of others — recognizing that those choices will not be identical — equality is better served than by imposing a flat guarantee of equal rights.

*Allison R. Hayward is a political and ethics attorney in California*

Posted in [Allison Hayward](#), [Analyzing the Amendments in 90 Days 2012 Project](#) | [2 Comments »](#)

### **June 21, 2012 – Essay #89 – Proposed Amendment: D.C. Statehood – Guest Essayist: Nathaniel Stewart, Attorney**

Wednesday, June 20th, 2012

Proposed Amendment: D.C. Statehood Amendment:

*District of Columbia Statehood Proposal:*

*Section 1. For purposes of representation in the Congress, election of the President and Vice President, and article V of this Constitution, the District constituting the seat of government of the United States shall be treated as though it were a State.*

*Section 2. The exercise of the rights and powers conferred under this article shall be by the people of the District constituting the seat of government, and as shall be provided by the Congress.*

*Section 3. The twenty-third article of amendment to the Constitution of the United States is hereby repealed.*

*Section 4. 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.*

The nation's capital city, Washington, DC, is a federal city, and it constitutes "the seat of Government of the United States." [1] After great debate and deliberation over the location for the nation's capital, the Founding generation settled upon a compromise in 1791. Congress first raised the subject of a permanent capital for the government of the United States in 1783, and it was ultimately addressed in Article I, Section 8 of the Constitution (1787), which gave the Congress legislative authority 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. ..." In 1788, Maryland gave to Congress "any district in this State, not exceeding ten miles square," and in 1789 the state of Virginia ceded an equivalent amount of land. In accordance with the "Residence Act" passed by Congress in 1790, President Washington in 1791 personally selected the diamond-shaped area along the shores of the Potomac River that is now the District of Columbia.

The Founders well-understood that the District of Columbia was under the control and jurisdiction of Congress itself, and the city was not itself a state, nor did it sit within the boundaries of any existing state. This helped to ensure the federal government's independence from state politics or inter-state quarrels that might develop and hinder federal action. As a federal district, however, the capital did not have an elected local governor, nor did city residents have the right vote in national elections.

Nearly 200 years later, in 1961, the 23<sup>rd</sup> Amendment to the Constitution granted District residents the right to vote in Presidential elections, and it gave the District the number of electors in the electoral-college that it would have if it were a state. The amendment did go so far as to provide the District with its own Senators or members of Congress, but the District has since gained a non-voting delegate in the House of Representatives.

A decade later, the left-wing political activist Julius Hobson formed the D.C. Statehood Green Party, which began campaigning for statehood for the District. The movement for statehood, helped by Democratic Senator Ted Kennedy, was instrumental in Congress passing the District of Columbia Home Rule Act in 1973, granting the city an elected mayor and city council.

The movement pressed on, seeking full statehood for the District, and in 1978 Congress passed the District of Columbia Voting Rights Amendment. The amendment was then sent to the states for ratification. The new amendment would have repealed the 23<sup>rd</sup> Amendment and given the District four electors (instead of three), as well as voting members in the Senate and House of Representatives. The proposed amendment met with stiff opposition from the states who feared that granting the District voting members in Congress would dilute their own representation. According to its terms, the proposed amendment would be “inoperative” if it was not ratified within seven years of the date it was submitted for ratification. The deadline for ratification was August 22, 1985, and only sixteen of the fifty states had ratified the proposal before the time limit had expired, well-short of the thirty-eight needed for ratification.

In 1980, DC residents passed the District of Columbia Statehood Constitutional Convention of 1979, calling for a constitutional convention for a new state. Two years later, voters ratified the constitution for “New Columbia,” the proposed 51<sup>st</sup> state in the Union, but the campaign for statehood stalled after the proposed DC Voting Rights Amendment failed in 1985. Since then, statehood advocates have periodically proposed legislation to enact the “New Columbia” state constitution, but it has never been passed by Congress, and the last serious congressional debate on the issue took place in November 1993, when D.C. a statehood proposal was defeated in the House of Representatives by a vote of 277 to 153. Much of the momentum has since dissipated from the statehood campaign, and it is unlikely to be revisited by Congress or ratified by the several states anytime soon.

[1] U.S. Const. Amendment 23.

*Nathaniel Stewart is an attorney in Washington, D.C.*

Posted in [Analyzing the Amendments in 90 Days 2012 Project](#), [Nathaniel Stewart](#) | [1 Comment »](#)



**June 22, 2012 – Essay #90 – America’s experiment in self-government reveals itself in the Amendment process – Guest Essayist: The Honorable John Boehner, 53rd Speaker of the U.S. House of Representatives**

Friday, June 22nd, 2012

I’m honored and delighted Constituting America would extend me an opportunity to conclude this year’s round of essays on the amendment process and to address the genius of the U.S. Constitution.

Our Founding Fathers believed in some simple and yet, for their times, absolutely revolutionary ideas. One of these ideas was that every individual possessed fundamental rights even prior to these rights ever being put into writing. Recall the words of the Declaration that these rights were “unalienable” and their existence a “self-evident” truth.

Another revolutionary idea was that government power or action essentially occurs at the expense of individual rights and liberties. This idea turned completely upside down the reality of nearly every government in history to that point. Most systems of rule placed a monarch, tyrant, or oligarchy at the top of subservient masses. Even in colonial times, many of us may forget, Americans were “subjects” to the British crown.

A remarkable thing about our system is that we place all of the citizenry at the top of the hierarchy.

At the Constitutional Convention in 1787, the Founders put in writing exactly how Americans would rule themselves within a framework of individual liberty. The document announced to the world a new concept: limited government at the heel of free people.

George Washington described this concept in a letter to a nephew shortly after the conclusion of the convention. “The power under the Constitution will always be in the people. It is entrusted for certain defined purposes, and for a certain limited period, to representatives of their own choosing; and whenever it is executed contrary to their interests, or not according to their wishes, their servants can, and undoubtedly will, be recalled.”

Moreover, not only could representatives be changed, but the document itself could be altered. The Constitution’s amendment process is self-government at work. Other writers of this series over the past 90 days highlight more than two centuries of reform and adjustment. Our Founders set up an amazing basic framework where citizens will forever have the privilege and right, under Article V, of making amendments.

During my early years in the House I worked for the ratification of the 27th Amendment, a provision dealing with Congressional pay originally part of the Bill of Rights but left un-ratified until 1992. It was a privilege to see the genius of our Founders at work again, two centuries later. My respect for that genius has only grown.

Shortly after my swearing in as Speaker of the House at the start of the 112th Congress, the Constitution was read in full on the House floor. To the best of my knowledge, this had never been done before in American history. I hope and trust a new tradition has been initiated.

This was done not only to honor liberty-loving Americans who take seriously Washington's advice to recall "contrary" representatives, but because my Republican colleagues had promised to put our founding documents in their proper perspective. In our Pledge to America, we said: "We pledge to honor the Constitution as constructed by its framers and honor the original intent of those precepts that have been consistently ignored – particularly the Tenth Amendment, which grants that all 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."

My colleagues and I also passed a House rule that requires Members to cite Constitutional authority in every piece of legislation they introduce. The American people deserve to know that the laws we pass and the actions we take comport with the spirit of our Constitution.

Let me again thank Constituting America for their education work. They live by the admonition of James Madison: "A well-instructed people alone can be permanently a free people."

Since its ratification in 1788 the success of our Constitution has been a precious gift worth defending. It is a light for the rest of the world and a torch to be handed to future generations.

***The Honorable John Boehner represents the 8<sup>th</sup> Congressional District of Ohio, and is serving in the 112<sup>th</sup> Congress as the 53<sup>rd</sup> Speaker of the U.S. House of Representatives.***

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