New Jersey State Bar Foundation

The BILL of RIGHTS: UP CLOSE

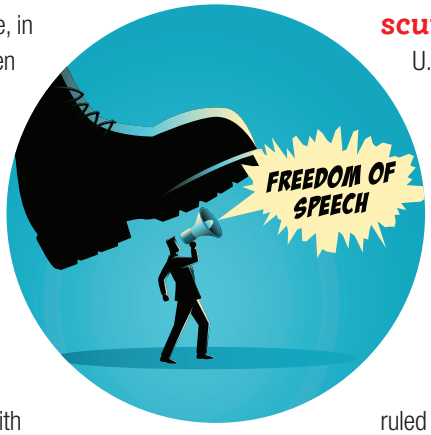
★ A Deep Dive into the Bill of Rights ★

Freedom of Speech Vital to Democracy

Supreme Court Justice Benjamin Cardozo wrote in a **majority opinion** that freedom of speech "is the matrix, the indispensable condition of nearly every other form of freedom."

Other countries don't enjoy the same right to free speech that Americans do. But it wasn't always that way in the USA.

Since the nation's early beginnings there have been government efforts to curb free speech. For example, in 1798 President John Adams signed into law the Alien and **Sedition** Acts, a series of four laws that curtailed immigration and prohibited opposition to the government by, among other things, forbidding protest and censoring the press. Citizens could face jail if they were to "write, print, utter, or publish…any false, scandalous and malicious writing" against the government.



Whether the statements were true or not didn't matter and ultimately 25 citizens, including some journalists and one legislator, were charged with sedition. The Act was never challenged in the courts and expired when President Adams left office. When President Thomas Jefferson took office in 1801 he pardoned the 10 people who had been **convicted** under the Act.

This Is War

During World War I, efforts were made to curb Americans' free speech, especially in speaking out against the war. In a message to Congress after war was declared with Germany, President Woodrow Wilson called for a "redefinition of national loyalty." The President said there were "millions of men and women of German birth and native sympathy who live amongst us," and "if there should be disloyalty, it will be dealt with a firm hand of repression."

Congress passed the Espionage Act of 1917 two months after the declaration of war. The Act allowed postal officials to ban newspapers from the mail and stated that anyone convicted of obstructing the **draft** would face a $10,000 fine and up to 20 years in jail. Congress also passed the Sedition Act of 1918, which made it a federal offense to use "disloyal, profane, **scurrilous**, or abusive language" about the U.S. Constitution, the government, the American uniform or the flag. There were more than 2,000 prosecutions under these two acts with more than 1,000 convictions. The constitutionality of the acts was challenged at the U.S. Supreme Court, which issued a number of free speech rulings in 1919, always coming out on the side of government.

For example, in *Schenck v. U.S.*, the Court ruled that government can restrict expressions that "would create a clear and present danger that they will bring about the **substantive** evils that Congress has a right to prevent." In *Abrams v. U.S.*, the Court decided that the First Amendment didn't protect printing leaflets urging resistance to the war effort and in *Debs v. U.S.* the Court ruled that anti-war speech designed to impede recruiting was not protected. All of the defendants in these cases were convicted under the Espionage Act of 1917.

Another free speech case, *Whitney v. California*, came before the Supreme Court in 1927. Charlotte Anita Whitney had been convicted under California's Criminal **Syndicalism** Act for helping to establish the Communist Labor Party of America in the state. The Court upheld her conviction, ruling that California had not

violated her free speech rights because states may prohibit speech that incites crime or disturbs the peace or threatens the overthrow of the government.

While *Whitney* was decided in favor of the government, it was Justice Louis Brandeis' **concurring opinion** in the case that would change the tide of the Court's views on free speech.

"If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the process of education, the remedy to be applied is more speech, not enforced silence," Justice Brandeis wrote.

The Court would **overturn** *Whitney* in 1969 with its decision in another free speech case and Justice Brandeis' concurrence would be cited in more than 300 federal and state free speech cases.

Without Saying a Word

The courts have identified three types of First Amendment protected speech—pure speech (verbal or written), speech plus action (demonstrations or protests) and symbolic speech (flag burning, T-shirts).

The Supreme Court weighed in on symbolic speech or freedom of expression with its ruling in the 1969 case of *Tinker v. Des Moines*. The case involved Mary Beth Tinker, a 13-year-old student at a junior high school in Des Moines, Iowa. She and four other students, including her brother John, were suspended for wearing black armbands to school in protest of the Vietnam War. Tinker's parents sued the school claiming it violated the students' free speech rights. The case ended up before the U.S. Supreme Court where in a 7-2 decision the justices sided with Tinker. In the Court's **majority opinion**, Justice Abe Fortas famously wrote that students, as well as teachers, do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gates."

It is because of the *Tinker* ruling that the American Civil Liberties Union and other advocacy groups have successfully defended students' rights to wear armbands protesting other causes, as well as, among other things, the right to wear pro-LGBTQ T-shirts to school.

There Are Limits

It is important to note that the First Amendment only protects your freedom of speech from government censorship. This applies to federal, state and local government, which includes public schools, public universities or any entity that accepts federal money. The First Amendment does not provide protections against private businesses, organizations or schools. That means what is prohibited in a public school on free speech grounds would not be prohibited in a private one. For example, a private school could suspend a student for publicly criticizing school policy or an employer could potentially fire an employee for expressing his or her political views while on the job.

Legal scholars will tell you that no right is absolute and there are limits to freedom of speech. Lata Nott, a fellow at the Freedom Forum in Washington, DC and an attorney specializing in First Amendment issues, says there are nine free speech exceptions that have been carved out by the U.S. Supreme Court. They are: obscenity, fighting words, defamation, child pornography, perjury, blackmail, incitement to imminent lawless action, true threats and solicitations to commit crimes. Nott also notes that some experts would add treason to the list if committed verbally. Plagiarism of copyrighted materials is also not protected.

What About Hate Speech

Many Americans think that the First Amendment should not protect hate speech and some are under the misunderstanding that it doesn't.

"There's certainly an argument to be made that some speech isn't worth listening to, or that hate speech can intimidate the people it's directed towards, thus having a chilling effect on their speech," Nott says. "But the reason that the First Amendment protects hate speech is because of just how difficult it is to draw a line between free speech and hate speech, or even come up with a universal definition of what hate speech is."

Carving out a First Amendment exception for hate speech, Nott says, would involve the government deciding what type of speech is too offensive to be heard.

"Once you grant the government that power, it's easy for it to be used to stifle protest and dissent," she says.

The Supreme Court has weighed in on hate speech as well with the 2011 case of *Snyder v. Phelps*. Fred Phelps, the now-deceased leader of the Westboro Baptist Church, believed that God punishes the U.S. for its tolerance of gays in the military and often picketed, along with his followers, at the funerals of soldiers. They would hold signs with hateful messages and shout those messages as well. Albert Snyder, whose son Lance Corporal Matthew Snyder was killed in Iraq, sued Phelps and the Westboro Baptist Church after they picketed his son's funeral. The Court sided with Phelps and the church in an 8-1 decision.

In his majority opinion, Chief Justice John Roberts called the signs "particularly hurtful" but noted that the picketing was in a public area.

"Such speech cannot be restricted simply because it is upsetting or arouses contempt," Chief Justice Roberts wrote. "If there is a bedrock principle underlying the First Amendment it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable."

First Amendment — Freedom of Speech Discussion Questions

1. What do you think about Americans' free speech being curtailed during World War I? Do you think free speech should be curbed during wartime? Is there ever a time when free speech should be curtailed?
2. Should all types of speech and expression be equally legitimate in a democracy? Why or why not?
3. The article mentions nine exceptions to free speech that the U.S. Supreme Court has carved out. Do you agree with all the exceptions? Would you make any additions to that list? If so, what? If not, why?
4. How can we as a society work to change the underlying attitudes that lead to hate speech, rather than trying to restrict the speech itself?

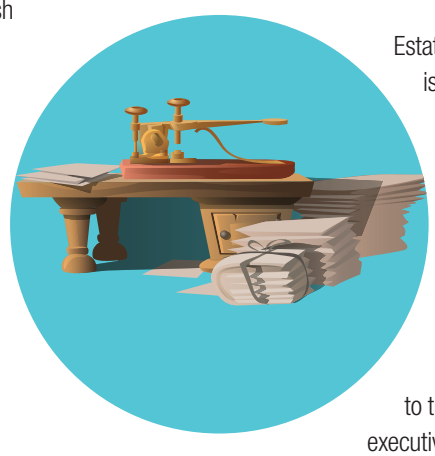
Freedom of the Press Guards Against Tyranny

Thomas Jefferson once said, "Our liberty depends on the freedom of the press, and that cannot be limited without being lost." He also said, "Nothing can now be believed which is seen in a newspaper. Truth itself becomes suspicious by being put into that polluted vehicle." So, it was sort of a love/hate relationship.

Still, the Framers of the U.S. Constitution safeguarded press freedom by enshrining it in the First Amendment. Lata Nott, a fellow at the Freedom Forum in Washington, DC and an attorney specializing in First Amendment issues, says that's because the Founding Fathers had vivid memories of the British government censoring American newspapers.

"They had a clear understanding that a free press was necessary to serve as a watchdog on government and keep it from descending into **tyranny** and corruption," Nott says.

That understanding may have been influenced by the trial of John Peter Zenger in 1735. Zenger was a printer and published *The New York Weekly Journal*. The newspaper was quite critical of William S. Cosby, New York's royal governor at the time, and reported on many incidents of corruption connected to him.



As publisher of the newspaper, Zenger was charged with **libel**. To be convicted of libel in those days the only proof needed was that the accused actually published or printed the "libelous" information, something that Zenger admitted. The validity or truth of the reporting didn't matter. Today, the bar for proving libel is higher (more on that later).

In his appeal to the jury, Zenger's attorney, Andrew Hamilton (no not that Hamilton) argued that their **verdict** wasn't just about Zenger.

"It is not the cause of one poor printer, nor of New York alone, which you are now trying," Hamilton said. "It may in its consequence affect every free man that lives under a British government on the main of America. It is the best cause. It is the cause of liberty."

Despite instructions from the judge that they were only to decide the question of whether Zenger had in fact published the issues of the newspaper in question, the jury came back with a verdict of not guilty. Historians believe it is because of this trial and verdict that other publishers felt liberated to print the truth in their newspapers, which aided the course of revolution.

The Fourth Estate

The press is often referred to as the Fourth Estate. The term dates back to 1787 England and is credited to Edmund Burke, a statesman and member of Parliament. Burke was remarking on the Parliament's House of Commons being opened to newspaper reporting. He reportedly pointed to the reporter's gallery and said, "There were three estates in Parliament, but in the Reporters Gallery yonder, there sat a Fourth Estate more important far than they all."

In the United States the three estates refer to the three branches of government—legislative, executive and judicial. The press, and all forms of news media, is considered the Fourth Estate and seen as providing a check on elected leaders.

The press is not always revered and has been accused of sensationalism and distorting facts. Today, some citizens, as well as elected officials, call some press "fake news." Before "fake news" the term used was "yellow journalism."

The yellow journalism description dates back to the 1890s and came out of a newspaper war in New York between titans of publishing, William Randolph Hearst and Joseph Pulitzer. At the time, both publishers were trying to boost the circulation of their newspapers—*New York World* (Pulitzer) and *New York Journal* (Hearst). The papers used sensational and often misleading headlines; faked interviews and comic strips to do it. It was actually

the comic strip, The Yellow Kid, published in both newspapers that gave birth to the name "yellow journalism."

In a 1958 journal article about the New York press, Sidney Pomerantz, a professor at City College of New York, quotes a trade publication for the newspaper industry in 1898, which wrote, "The public is becoming heartily sick of fake news and fake extras. Some of the newspapers in this town have printed so many lying dispatches that people are beginning to mistrust any statement they make." Professor Pomerantz goes on to say that by the turn of the century yellow journalism was on the decline, although some aspects, including banner headlines and color comics, remain to this day.

So, does freedom of the press protect yesterday's "yellow journalism" and today's "fake news?" Nott says it does.

"The First Amendment protects lies, which makes it extremely difficult for the government to stop something from being published," Nott says. "But a publisher who runs a false statement of fact that damages someone's reputation can be sued by that person for libel afterwards."

Press and the Courts

Harkening back to the criticisms of yellow journalism, the press is also criticized for the way it covers criminal trials, with some believing it jeopardizes the right to a fair trial.

According to Nott, the First Amendment implicitly guarantees the right for the press to attend criminal proceedings, which allows them to report on matters of public concern and also serve as a watchdog on the courts. However, Nott also acknowledges that press coverage of a criminal case can have an adverse impact on a person's right to a fair trial, including when the media publishes information before a trial that **prejudices** potential jurors, or when media coverage sensationalizes the proceedings, turning them into entertainment.

Nott says that the U.S. Supreme Court has provided guidance on squaring freedom of the press and a defendant's right to a fair trial.

"Sometimes judges will **sequester** juries to keep them from publicity, or allow for a change of venue to make sure that the jury is unbiased," Nott says. "Judges can also issue gag orders to keep people from talking about the case, but that's considered an extreme remedy that's only restricted to situations where there is intense publicity and no alternative measures are possible."

One of the most important U.S. Supreme Court cases affecting freedom of the press was the 1964 decision in *New York Times v. Sullivan*. The case involved a full-page ad, taken out by supporters of Martin Luther King Jr., that *The New York Times* published in 1960. The ad criticized the police and other elected officials in Montgomery, Alabama for the mistreatment of civil rights protesters. The copy of the ad contained some factual errors and Montgomery Police Commissioner L.B. Sullivan sued the newspaper for defamation (libel). An Alabama court awarded Sullivan $500,000 in damages and the Supreme Court of Alabama affirmed that ruling. *The Times* **appealed** the decision to the U.S. Supreme Court.

In a unanimous decision, the U.S. Supreme Court ruled that public officials must prove actual **malice** on a newspaper's part in order to claim damages for false defamatory statements.

In the Court's majority opinion, Justice William Brennan wrote, "We consider this case against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials."

The Court's ruling introduced a new First Amendment test for determining defamation or libel. "The constitutional guarantees require, we think, a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not."

World Looks to America

According to Freedom House, an independent watchdog organization dedicated to expanding freedom and democracy on a global scale, "media freedom has been deteriorating around the world for the past decade." In its 2019 report, titled Freedom and the Media, Freedom House maintains that only 13 percent of the world has what would be termed a free press, which is defined as an environment where political news coverage is tough and there are safety protections for journalists.

Despite America's issues with so-called "fake news" and our past of yellow journalism, Freedom House says that other countries look to the United States as a shining example of freedom of the press.

"Press freedom is one of the most fundamental pillars of American democracy, and constitutional protections in the United States are stronger than in any other country in the world." However, they caution that U.S. citizens could forget this with all the "mudslinging and incendiary commentary" directed at the press. Freedom House urges U.S. leaders and teachers to "reiterate the extent to which we all benefit from professional journalists who hold those in power to account."

First Amendment — Freedom of the Press Discussion Questions

1. How do you think America's commitment to freedom of the press impacts our daily lives?
2. In what ways would the United States be different if we did not have a free press?
3. The Supreme Court has said, "debate on public issues should be uninhibited, robust and wide-open." Do you agree with that statement? Why or why not?
4. What are some examples of modern-day "yellow journalism?"

Allowing the Freedom to Practice Religion or Not

There are more than 300 religious denominations in the United States. From those who believe in one God, to those who believe in multiple Gods, to those who don't believe in God at all, the First Amendment's freedom of religion clause protects them all.

There is no mention of God in the U.S. Constitution, except a reference to the date as the Year of Our Lord. Religion is actually only mentioned twice in the U.S. Constitution—in the First Amendment and also in the third clause of Article VI.

No Religious Tests

Article VI of the U.S. Constitution contains a clause stating: "…no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States." According to David Hudson, a First Amendment scholar at the Freedom Forum in Washington, DC, one reason for inclusion of the clause was a fear that the government would impose a religious **orthodoxy** as had been done in England.

"We didn't want a situation like England had with Henry VIII and the Anglican Church," says Hudson. "We did want a degree of religious freedom."

In England, anyone that was not a member of the Church of England, the state religion, was not allowed to hold office and all government officials were required to swear oaths of loyalty to the **monarch** and disavow foreign loyalties such as the pope. Essentially, the religious tests were instituted to keep Catholics out of government.

Many of the early American settlers, including the Pilgrims and the Puritans, had fled England due to religious persecution. That fact makes it puzzling to note that many of the colonies established an official religion and required residents to follow them.

In an article for *Smithsonian Magazine*, historian Kenneth C. Davis, wrote, "In newly independent America, there was a crazy quilt of state laws regarding religion. In Massachusetts, only Christians were allowed to hold public office, and Catholics were allowed to do so only after renouncing **papal** authority. In 1777, New York State's constitution banned Catholics from public office (and would do so until 1806). In Maryland, Catholics had full civil rights, but Jews did not. Delaware required an oath affirming belief in the Trinity. Several states, including Massachusetts and South Carolina, had official, state-supported churches."

In 1961, the U.S. Supreme Court issued a ruling regarding religious tests in the case of *Torcaso v. Watkins*. Maryland's governor had appointed Roy Torcaso, an **atheist**, as a notary public. Maryland's State Constitution required "a declaration of belief in the existence of God" in order to hold state office. Torcaso refused to offer such an oath and his appointment was revoked. He sued and lost at the state level, with the Maryland Court of Appeals ruling: "The petitioner is not compelled to believe or disbelieve, under threat of punishment or other compulsion. True, unless he makes the declaration of belief, he cannot hold public office in Maryland, but he is not compelled to hold office."

Torcaso **appealed** to the U.S. Supreme Court and won. The Court unanimously held: "There is, and can be, no dispute about the purpose or effect of the Maryland Declaration of Rights requirement before us—it sets up a religious test which was designed to and, if valid, does bar every person who refuses to declare a belief in God from holding a public 'office of profit or trust' in Maryland."

As to the reasoning of the Maryland Court of Appeals, Justice Hugo Black, who wrote the opinion of the U.S. Supreme Court, said, "The fact that a person is not compelled to hold public office cannot possibly be an excuse for barring him from office by state-imposed criteria forbidden by the Constitution."

Some states still contain language in their constitutions requiring office holders to maintain certain religious beliefs, including one that mention a belief in a "Supreme Being" (South Carolina) and one that mentions a future state with "rewards and punishments" (Pennsylvania). In addition, some states put religious requirements

on jurors. The Court's decision in *Torcaso* and other Court decisions make the requirements unenforceable.

Keeping It Separate

You've probably heard the phrase "separation of church and state" to explain that the United States doesn't sanction one religion over another or favor religion over no religion. The words "separation of church and state" don't actually appear in the U.S. Constitution, but the Establishment Clause does.

"It is the first 10 words of the Bill of Rights," Hudson says. "'Congress shall make no law respecting an establishment of religion,' and the U.S. Supreme Court has interpreted that part of the First Amendment to provide for separation between church and state."

The phrase is attributed to a letter that Thomas Jefferson wrote in reply to the Danbury Baptists in 1802. As a religious minority, they were concerned that there was no explicit protection of religious liberty in Connecticut's state constitution. In his letter President Jefferson referred to the U.S. Constitution's Establishment Clause and contended that it built "a wall of separation between Church and State."

Hudson says that Jefferson's letter to the Danbury Baptists is an important historical source, and the Supreme Court has relied on it when deciding Establishment Clause cases.

As with most of the Founding Fathers, Jefferson believed in keeping religion out of government. When he was governor of Virginia he tried to pass legislation that would have guaranteed legal equality for all religions (this was before the Bill of Rights). He argued, "It does me no injury for my neighbor to say there are twenty gods or no God. It neither picks my pocket nor breaks my leg."

James Madison, who wrote the Bill of Rights and is considered the Father of the Constitution, argued that government support of any one religion is a threat to religion in general. "Who does not see," Madison said, "that the same authority which can establish Christianity, in exclusion of all other Religions, may establish with the same ease any particular sect of Christians, in exclusion of all other Sects?"

Not Totally Separate

So, if the Framers of the Constitution believed in separation from religion, why is "In God We Trust" on our money and why does the federal government have ritualistic practices, like an opening prayer in Congress?

Hudson says there is a difference between total separation of church and state and some separation.

"There is a huge debate over how best to interpret the Establishment Clause," Hudson says. "One argument is that it is designed to prohibit the creation of a national church or to prohibit discrimination between religious sects, but not total separation."

In 2014, the U.S. Supreme Court decided the case of Town of *Greece v. Galloway*, ruling 5-4 that the practice of reciting a prayer before town board meetings in Greece, NY was not a violation of the Establishment Clause.

"The town of Greece does not violate the First Amendment by opening its meeting with prayer that comports with our tradition and does not coerce participation by **non-adherents**," Justice Anthony Kennedy wrote in the Court's **majority opinion**. "That the First Congress provided for the appointment of a chaplain only days after approving language for the First Amendment demonstrates that the Framers considered legislative prayer a **benign** acknowledgment of religion's role in society."

In her **dissenting opinion**, Justice Elena Kagan pointed out that council members in Greece, NY could have told chaplains to keep the prayers non-denominational or clergy from different faiths could have been invited to give a prayer instead of focusing for the most part on Christian ministers.

"So month in and month out for over a decade, prayers steeped in only one faith, addressed toward members of the public, commenced meetings to discuss local affairs and distribute government benefits," Justice Kagan wrote. "In my view, that practice does not square with the First Amendment's promise that every citizen, irrespective of her religion, owns an equal share in her government."

Testing Religion

To help courts decide Establishment Clause cases, the U.S. Supreme Court came up with a three-prong test, known as the Lemon Test. It came out of the 1971 U.S. Supreme Court decision in *Lemon v. Kurtzman*, where the Court ruled 8-1 that Pennsylvania's Nonpublic Elementary and Secondary Education Act violated the First Amendment's Establishment Clause. The Act provided state aid to religious elementary and secondary schools.

The Lemon Test asks three questions in order to determine whether a law violates the Establishment Clause. Does the law have a legitimate **secular** purpose? Does the law endorse or disapprove of a religion? Will government become too entangled in religion because of the law? (The answers should be yes, no and no in order for the law to pass the test.) If the law fails any one of the three questions, it would be deemed unconstitutional.

So, would moments of silence in public schools pass the Lemon Test? As long as the moment is neutral and does not encourage prayer. Students can choose to use the time to pray, that is their First Amendment right, but the school cannot sanction the moment of silence as prayer.

The American Civil Liberties Union points out in its "Your Right to Religious Freedom" handout, "If a school official has told you that

you can't pray at all during the school day, your right to exercise your religion is being violated." Students are allowed to pray whenever they want as long it doesn't disrupt class and they are not forcing others to pray with them.

Hudson says that the religious clauses contained in the U.S. Constitution are necessary. "In a religiously diverse society," Hudson says, "we need freedom of religion."

First Amendment — Freedom of Religion Discussion Questions

1. What are the benefits of having religious freedom in America?
2. Do you believe having "In God We Trust" on our money and opening prayers in Congress constitutes a true "separation of church and state" in the United States? Explain.
3. What do you think about the Lemon Test? Is it a fair and accurate way to determine whether a law conforms to the Establishment Clause and separates church and state? Explain.

First Amendment Freedoms Allow For Dissent

From the Boston Tea Party in 1773 to the Black Lives Matter Movement today, Americans have met oppression with protest. The Founding Fathers believed strongly in a citizen's right to express **dissent**, preserving the right in the First Amendment to the U.S. Constitution.

Cedric M. Powell, a professor at Louis Brandeis School of Law and a First Amendment expert, says that the amendment protects many forms of speech and expression. He notes that the five freedoms protected by the First Amendment—speech, press, religion, assembly and petition—build upon and reinforce each other.

In this article, we're going to focus on the freedoms of assembly and petition. Let's start with petitioning the government.

Addressing Grievances

The First Amendment stresses the right to "petition the Government for a **redress of grievances**." The right dates back to 13th Century England's Magna Carta, which acknowledged "the right of subjects to petition the king."

In the Declaration of Independence, sort of America's final list of official grievances to the king, the colonists wrote: "In every stage of these Oppressions we have Petitioned for Redress in the most humble terms: Our repeated Petitions have been answered only by repeated injury. A Prince, whose character is thus marked by every act which may define a Tyrant, is unfit to be the ruler of a free people."

King George's disregard for the colonists' grievances could be one reason the Framers felt strongly that the right should be included in the Bill of Rights. The U.S. Supreme Court has said that the right to petition the government is "among the most precious liberties safeguarded by the Bill of Rights." Examples of rights derived from the First Amendment's petition clause are the right to file lawsuits, institute letter-writing campaigns (whether snail mail or email), and collect signatures for ballot initiatives or referendums. Essentially, any public expression of grievances intended to provoke government action is protected under the petition clause.

American citizens took advantage of the right of petition to advocate for the end of slavery in the United States, specifically in the capital of Washington, DC. Since the capital was on federal land, it was within the authority of Congress to abolish slavery within its borders; however, the idea angered the Southern members of Congress.

In the mid-1830s, Congress received more than 130,000 petitions from **abolitionists** requesting an end to slavery. In 1836, the House of Representatives passed a resolution that automatically postponed action on all anti-slavery petitions. John Quincy Adams, the former President of the United States who then served as a Massachusetts congressman in the House, led the Northern initiative to **rescind** the resolution, pointing out that it stifled the right to petition. The "**gag rule**," as it was called, was lifted in 1844.

Protesting Can Bring Change

The right to protest originates from the First Amendment's "right of the people peaceably to assemble" clause. It is the right to assemble that is the hallmark of activism, allowing for the marches of the civil rights movement, the women's rights movement, the protests against the Vietnam War, and today's protests for police reform.

Professor Powell believes that protesting can move the country forward by allowing all citizens to express their ideas, to engage issues in the public square and diffuse the potential for violence because all viewpoints are given a full hearing.

"Protest also highlights flaws in our democracy, it uncovers structural inequality, and it offers ideas for progressive social change," Professor Powell says. "Protest helps our democracy function, it tells our leaders that they should consider different policy choices so that all citizens are included."

Freedom of association also derives from the First Amendment's right to assemble. The U.S. Supreme Court reinforced the right with its 1958 decision in *NAACP v. Alabama*. The State of Alabama wanted to prevent the NAACP from conducting business in the state and issued a **subpoena** for the organization's membership list. The Court ruled that the request violated the 14th Amendment. The Court held: "The freedom to associate with organizations dedicated to the advancement of beliefs and ideas is an inseparable part of the Due Process clause of the 14th Amendment."

Professor Powell says, "An engaged citizenry needs to be able to form coalitions, reach out to groups, form alliances and friendships, and all of this is based upon the freedom to associate. Citizens also need to be able to get together to go to the public square to express their viewpoints; and, they need to do so together as an assembled group."

Right to Protest not Unlimited

So, if the right to protest is protected, why are so many protesters arrested? Professor Powell says that is because there are limits to peaceful protest.

"The government cannot tell protesters what to say or how to say it, but it can regulate the time, place, and manner of that expression," he says.

Protesters can peacefully assemble and protest in front of the courthouse or city hall, Professor Powell says, but the government, in the form of law enforcement, can intervene when political protest moves into unlawful conduct.

"For example, burning a police car is certainly a form of 'protest,' but it is unlawful criminal conduct and a protester would not have a First Amendment defense to this criminal act," Professor Powell says.

Is Looting and Destruction Part of Protesting?

While **looting** is not protected under the U.S. Constitution, many historians point out that the Boston Tea Party was just that. The colonists dumped 45 tons of tea into Boston Harbor, which was worth an estimated $1 million. That would be considered destruction of property, and Professor Powell notes that the First Amendment would not have protected that destruction.

Today, political scientists and sociologists contend that views on looting and destruction of property depend on who is doing the looting and destruction. For example, the colonists are thought of as patriots and the Tea Party a valiant demonstration of rebellion. But the protests sparked by the death of George Floyd at the hands of the Minneapolis police, and the hundreds of other protests in response to the numerous deaths of unarmed Black people at the hands of law enforcement across the country, are not thought of in the same way.

In an article for *The Atlantic*, Lorenzo Boyd, the director of the Center for Advanced Policing at the University of New Haven, explained how sometimes destruction of property is a way to get attention for a cause.

"In Baltimore, they've been saying for generations how bad the Baltimore Police Department was, but nobody listened. And then Freddie Gray got killed, and nobody listened," Boyd said. "And then they started protesting; nobody listened. But as soon as the CVS burned in Baltimore, the whole world watched."

That type of protest can be risky, according to Professor Powell.

"Destruction of property is not protected as protest or political speech," he says. "It is criminal conduct, and the mere fact that it is done as 'protest' does not mean that it is not criminal conduct. Under the First Amendment, there is a distinction between speech, which is protected, and conduct, which is unprotected and can be regulated by the government."

First Amendment — Freedom to Protest Discussion Questions

1. Have you ever been to a protest or know someone who has? What was the protest for? Do you think protests can bring about change? Why or why not?
2. Government, in the form of law enforcement, has the right to determine whether a protest is unlawful, leaving what is "unlawful" up to interpretation. What do you consider unlawful protesting and why?
3. When it comes to protest, speech and destruction of property are not considered equal. Do you think there is ever a time to use destruction of property for protest? Explain your reasoning.

The Evolution of the Second Amendment

"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." These 27 words that comprise the Second Amendment have been endlessly debated by legal scholars, judges and justices in the modern age who still argue over its meaning.

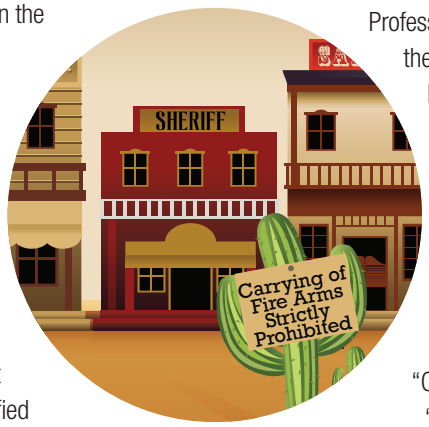
One problem with the amendment, and perhaps the reason for so much debate, is that its single sentence is poorly worded. Darrell Miller, a professor at Duke Law School, points out that there has even been disagreement over how many commas it has.

The reason the amendment is poorly phrased could be because it went through a number of revisions in the House of Representative and then more in the Senate before it was sent to the states for **ratification**. The Second Amendment that the House passed 24 to 22 read: "A well regulated militia, composed of the body of the People, being the best security of a free State, the right of the People to keep and bear arms shall not be infringed, but no person religiously scrupulous of bearing arms shall be compelled to render military service in person."

In his book, *The Second Amendment A Biography*, Michael Waldman writes that once the amendment was sent to the Senate for consideration, it was trimmed down to what we're familiar with today.

"Of note, the senators removed the description of the militia as being 'the body of the people.'…And they deleted entirely the provision allowing **conscientious objectors** to avoid service," Waldman writes. "We do not know why these changes were made. Many other amendments were rewritten, always to trim words, tighten **syntax**, and combine thoughts."

Many gun control advocates argue that when the Second Amendment was written, "arms" referred to muskets, not handguns or semi-automatic weapons that are available today. Professor Miller, a cofounder of the Center for Firearms Law, which advances **nonpartisan** scholarship about the Second Amendment and serves as a clearinghouse for information about gun rights and regulation, says that is not a persuasive argument. He points out that constitutional rights cover many technologies that did not exist at the time the Bill of Rights was ratified in 1791.



"For example, the First Amendment right to free speech covers video games, although such games weren't invented until the 20th century," Professor Miller says. He also notes there are weapons that don't count as "arms" under the Second Amendment, including nuclear bombs and nerve gas.

"They don't count as Second Amendment 'arms' for reasons other than their age," he says.

Interpreting the Amendment

Interpretations of the Second Amendment, according to legal scholars, are divided into two camps—collective rights advocates and individual rights advocates, depending on which clause of the amendment you choose to emphasize. Those that believe the amendment protects a collective right to bear arms, emphasize the "well-regulated militia" clause, believing the Framers of the Constitution meant that the states "collectively" had the right to defend themselves against the federal government.

Those that emphasize the "keep and bear Arms" clause favor the individual right theory and believe that all citizens have the right to gun ownership for protection.

Professor Miller says that the notion that the amendment protects the right of self-protection is a source of confusion in Second Amendment debates.

"The Second Amendment protects a kind of device used for self-defense; it doesn't actually say anything about self-defense," he says. "Currently, self-defense is mostly a matter of state criminal law, not Second Amendment law. Whether self-defense law will merge into Second Amendment law over time is an open question."

Not So Wild in the West

In *Gun Law History in the United States and Second Amendment Rights*, Robert J. Spitzer, a political science professor at SUNY Cortland, writes "gun possession is as old as America, so too are gun laws." For instance, Professor Spitzer wrote that as early as 1686 New Jersey enacted a gun control law that prohibited wearing weapons because "they induced Fear and Quarrels." Professor Spitzer noted in his essay that even before the first substantial federal gun control law—the National Firearms Act—was passed in 1934, there were nearly 1,000 gun control laws on the books at the state level.

You may be surprised to learn that in what is known as the Old West—towns like Tombstone, Deadwood and Dodge City—there were strict gun control laws. In Dodge City, for example, there were signs that read: "Carrying of Fire Arms Strictly Prohibited."

"Tombstone had much more restrictive laws on carrying guns in public in the 1880s than it has today," Adam Winkler, a professor at UCLA School of Law told *Smithsonian Magazine*. "Today, you're allowed to carry a gun without a license or permit on Tombstone streets. Back in the 1880s, you weren't."

In fact, the legendary gunfight at the O.K. Corral took place because the cowboys would not surrender their guns upon entering the town, as was the law.

"People were allowed to own guns, and everyone did own guns [in the West], for the most part," Professor Winkler said. "Having a firearm to protect yourself in the lawless wilderness from wild animals, hostile native tribes, and outlaws was a wise idea. But when you came to town, you had to either check your guns if you were a visitor or keep your guns at home if you were a resident."

Along Came Heller

According to Professor Miller, until the mid-20th Century, legal scholars agreed that the Second Amendment protected collective rights, not an individual right.

"It was fairly well-established that the Second Amendment only pertained to the militia, so there weren't really any Second Amendment grounds to challenge regulations on private possession of firearms," Professor Miller says.

The U.S. Supreme Court's 1939 decision in *United States v. Miller* upheld the constitutionality of the 1934 National Firearms Act, which restricted and taxed the manufacture and sale of firearms. The opinion of the Court stated: "In the absence of any evidence tending to show that possession or use of a 'shotgun having a barrel of less than eighteen inches in length' at this time has some reasonable relationship to the preservation or efficiency of a well-regulated militia, we cannot say that the Second Amendment guarantees the right to keep and bear such an instrument."

Professor Miller notes that gun rights advocates made a concerted effort to change the Court's opinion and they succeeded with the 2008 U.S. Supreme Court decision in *District of Columbia v. Heller*. The case involved Dick Heller, who sued the District of Columbia over its ban on handguns in the home. The case ultimately ended up before the U.S. Supreme Court, which sided with Heller and in doing so affirmed an individual right to keep and bear arms. In the **majority opinion** of the Court, Justice Antonin Scalia cautioned that the right the Court was affirming is not unrestricted.

"Like most rights, the right secured by the Second Amendment is not unlimited," Justice Scalia wrote. "[It is] not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose."

In *McDonald v. Chicago*, which came before the U.S. Supreme Court two years after *Heller*, the Court struck down a similar handgun ban and ruled that the Second Amendment applies to the states as well as to the federal government.

In that case's majority opinion, Justice Scalia referred to the *Heller* decision, writing, "Self-defense is a basic right, recognized by many legal systems from ancient times to the present day, and in *Heller* we held that individual self-defense is 'the central component' of the Second Amendment right."

So, can the United States find a balance between gun rights and gun control? Professor Miller thinks it is possible and says there is a misperception that any gun regulation violates the Second Amendment. It doesn't.

"Even staunch gun rights advocates agree some regulation is constitutional," Professor Miller says. "For example, no one is seriously advocating that violent criminals should have a right to bear arms or that loaded guns should be allowed on airplanes. The disagreement isn't about whether the Second Amendment allows for regulations; the disagreement is over what those regulations are or should be."

Second Amendment Discussion Questions

1. When it comes to the Second Amendment, which camp would you be in—the collective rights camp or the individual rights camp? Explain your reasoning.
2. Professor Miller points out that the U.S. Constitution covers technologies that didn't exist when it was written and mentions video games. What other technologies can you think of that the Constitution would protect today that did not exist when it was written?
3. After learning some history about the Second Amendment, what do you think of gun ownership overall? What do you think a reasonable gun control law would be?

No Quarter Given

Can you imagine being forced to shelter someone you don't know in your home indefinitely? We're not talking about a distant cousin that annoys you by borrowing your stuff without asking. We're talking about a British soldier that is essentially occupying your house and you're expected to pay for his upkeep.

In the 1700s, that situation was reality for American colonists and is one of the many reasons they rebelled against the British government.

Quartering Acts

After the French and Indian War ended in 1763, England decided to keep a standing or permanent army in the colonies to protect its territory. In 1765, the English Parliament passed the first Quartering Act, which required the colonists to incur the cost of providing lodging and provisions for the British soldiers stationed there. That meant finding them acceptable **barracks**. If barracks weren't available then the colonists would need to find the soldiers a place to stay whether at an inn, livery stable or a "private building." In addition, the colonists had to provide "supplies" for the British soldiers, meaning they had to feed them as well. The colonists considered the Quartering Act "taxation without representation," which was a violation of English law. English law also prohibited the presence of a standing army in times of peace without the consent of the people.

Tensions ran high as the colonists resented the British maintaining a standing army among them. They considered it a threat, and making matters worse, the colonists were made to pay for the army they resented. Things came to a head in Boston in 1770. At the time, thousands of British soldiers were being quartered there among the more than 15,000 Boston citizens. On March 5, 1770 a skirmish between one British soldier and a colonist escalated and when the dust cleared, five colonists were dead. The incident became known as the Boston Massacre and it would fuel the fire of revolution.

After the Boston Tea Party in December 1773, a political protest where the colonists tossed 342 chests of imported tea into Boston Harbor, the British retaliated by passing a second Quartering Act. The Quartering Act of 1774 extended the list of alternative dwellings where British soldiers could be quartered to "private homes." That meant that if the colonists could not find adequate lodging for the soldiers elsewhere, they were required to open their homes to them. You can imagine this did not sit well with the Americans.

The quartering of soldiers so enraged the colonists it was among the grievances outlined in the Declaration of Independence. So, it was no surprise that the Framers of the U.S. Constitution would include in the Bill of Rights an amendment that addressed the issue. The Third Amendment to the U.S. Constitution states: "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."

Still Relevant?

While the Third Amendment was relevant when it was ratified in 1791, what does it have to offer us today?

The amendment has the distinction of being the least litigated amendment in the U.S. Constitution. Still, the Third Amendment has been cited in lawsuits as evidence that the Founding Fathers valued privacy. For instance, in the 1965 landmark U.S. Supreme Court decision of *Griswold v. Connecticut* the Court held that, under First, Third, Fourth and Ninth amendment grounds, the U.S. Constitution protected a married couple's right to use birth control.

In the majority opinion of the Court, Justice William O. Douglas wrote, "The Third Amendment in its prohibition against the quartering of soldiers 'in any house' in time of peace without the consent of the owner is another facet of that privacy."

Some legal scholars claim that the amendment is proof that the Framers of the U.S. Constitution meant to protect citizens from government intrusion and suggests a "right to privacy."

Bernard Bell, a professor at Rutgers Law School and a constitutional law expert specializing in privacy law, doesn't see the Third Amendment as having very much to do with privacy rights.

He says that while privacy can be hard to define, in terms of constitutional law it can be expressed as **autonomy** or freedom of action and also as the right to be free from physical intrusions and informational privacy.

"Even as to privacy in another sense, the right to informational privacy and freedom from physical intrusion by government, the Third Amendment has had little importance over the history of our country," Professor Bell says. "To be sure, what the amendment prevents, having to house soldiers in one's home, would be extraordinarily intrusive. But governments have not sought to quarter troops in private homes. And surely we have a more robust right to informational privacy and freedom from physical intrusion than that."

In terms of citizens' privacy rights, Professor Bell thinks the Fourth Amendment provides more protection.

"In short, the Third Amendment has little value on any privacy issue other than quartering troops in homes," Professor Bell says, "and thus is irrelevant to current privacy arguments."

What's a Soldier?

While the U.S. Supreme Court has given it little attention, the Third Amendment has been interpreted in lower courts. A 1982 ruling in *Englblom v. Carey* by the U.S. Court of Appeals for the Second Circuit determined that national guardsmen are soldiers and that the Third Amendment can be applied to the states. This decision only set precedent in New York, Vermont and Connecticut.

In 2015, a Nevada district court rejected claims by a Henderson, Nevada family that their Third Amendment rights were violated when the Henderson police seized their home without a warrant. In that case, the court ruled that the police are not soldiers.

Third Amendment Discussion Questions

1. Do you think the Third Amendment is still relevant today? Why?
2. If an amendment is no longer relevant in modern times, should it be stricken from the Constitution? What is your reasoning?
3. Some legal scholars see the Third Amendment as upholding privacy rights. In the article Professor Bell disagrees. What do you think? Explain your reasoning.
4. Can you think of a modern example, real or imagined, of a Third Amendment violation?

Protecting Privacy in the Past and the Future

In 1763, William Pitt, the 1st Earl of Chatham, gave a speech in Parliament's House of Lords where he said: "The poorest man may in his cottage bid defiance to all the forces of the Crown. It may be frail—its roof may shake—the wind may blow through it— the storm may enter—the rain may enter— but the King of England cannot enter! All his forces dare not cross the threshold of the ruined tenement!"

The Framers of the U.S. Constitution may have had that speech in mind when they came up with the Fourth Amendment, which is all about privacy. The amendment states: "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."

According to Melanie D. Wilson, a professor at The University of Tennessee College of Law and a Fourth Amendment expert, constitutional scholars aren't sure why the Framers chose to include the word "effects" in the Fourth Amendment, and notes that the U.S. Supreme Court hasn't specifically defined the word.

"From the Court's many cases, we can infer that it means personal property. The Court has used the term when discussing a Jeep, luggage, a package and cell phones," Professor Wilson says. "The word 'papers' was included by the Framers after the government in England used a broad, general warrant to initiate a prosecution of a politician and his supporters, using that warrant to arrest multiple suspects and to seize their papers as evidence."

An Adaptable Amendment

The Framers couldn't anticipate phones, let alone cell phones, so how can the Fourth Amendment be applied today?

Professor Wilson says that rather than using narrow language, the Framers wrote the Fourth Amendment in "broad terms of reasonableness." As a result, she says the amendment is holding up well in the technological age, applying to technology that the Framers could not have imagined.

"More specifically, the language requiring that searches and seizure of 'effects' be reasonable, includes new technology, such as cell phones," Professor Wilson says. "In fact, in 2014, the U.S. Supreme Court decided a case, *Riley v. California*, in which it declared that when police search someone's cell phone, they need either a warrant from a judge or an emergency excusing such a warrant. In other words, the Fourth Amendment has not been redefined for technology, but fortunately, its language is flexible enough to cover the technology age."

The Fourth Amendment also protects digital property, known as electronic information and data, just like any other property, Professor Wilson says. Again, she points to the Supreme Court's decision in *Riley v. California*.

"In that case, the Court held that all of the data, including videos, photos, notes, emails, text messages, and other electronic

records, on the cell phone of a man lawfully arrested was protected by the Fourth Amendment," she says. "This means that police may not access all of that information unless it is objectively reasonable to do so. And, generally, reasonableness would require that law enforcement officers ask a judge's permission in the form of a search warrant."

Professor Wilson cautions that even though the Fourth Amendment generally protects our electronic data, we can lose that protection if we do not guard the private nature of the information.

"Law enforcement officers violate the Fourth Amendment when they intrude on someone's 'reasonable expectation of privacy,'" Professor Wilson says. "But, if we knowingly expose our property or electronic data to the public, we cannot claim a reasonable expectation of privacy in that data, and it will not be deemed 'unreasonable' under the Fourth Amendment should police search or seize the data."

For example, Professor Wilson says, if the owner of a cell phone intentionally discards the phone or leaves it in a public place or trash bin without taking steps to protect the data on it, he or she cannot complain should police find the phone and search it for pictures and phone contacts.

Exclusionary Rule

While the Fourth Amendment generally prohibits law enforcement from conducting searches without a warrant, before the establishment of what is known as the exclusionary rule, any evidence obtained by police was admissible in a criminal trial if deemed relevant by the trial judge.

The exclusionary rule is a court-made rule that was established in 1914 with the U.S. Supreme Court's decision in *Weeks v. United States*. The case involved Freemont Weeks, who was convicted of using the mail for the purpose of transporting lottery tickets, a violation of federal law. When Weeks was arrested, police officers went to his house to search it. They had no search warrant, but a neighbor told them where Weeks kept a key. In two separate searches, both conducted without a warrant, the police seized papers, letters and envelopes belonging to Weeks.

The illegally seized evidence was used against Weeks at trial and he was **convicted**. On **appeal** the U.S. Supreme Court unanimously held that the evidence was seized in an illegal search and therefore should have been excluded at trial, giving birth to the exclusionary rule.

"The tendency of those who execute the criminal laws of the country to obtain convictions by means of unlawful searches and enforced confessions…should find no sanction in the judgment of the courts which are charged at all times with the support of the Constitution and to which people of all conditions have a right to appeal for the maintenance of such fundamental rights," Justice William R. Day wrote in the Court's **majority opinion** in *Weeks*. "If letters and private documents can thus be seized and held and used in evidence against a citizen accused of an offense, the protection of the Fourth Amendment declaring his right to be secured against such searches and seizures is of no value, and, so far as those thus placed are concerned, might as well be stricken from the Constitution. The efforts of the courts and their officials to bring the guilty to punishment, praiseworthy as they are, are not to be aided by the sacrifice of those great principles established by years of endeavor and suffering which have resulted in their embodiment in the fundamental law of the land."

In the 1920 U.S. Supreme Court case of *Silverthorne Lumber Co. v. United States*, the exclusionary rule was expanded to include the doctrine that would become known as "the fruit of the poisonous tree." Essentially, the phrase means that if the "tree" is tainted, so is the "fruit." Said in another way, if a search (that's the tree) is unlawful, then the fruit (that's the evidence found) is also unlawful.

Professor Wilson says that the exclusionary rule is one of the primary remedies to discourage police from Fourth Amendment violations. In theory, she says that someone could sue the police for monetary damages or an **injunction** to stop future violations, but those remedies are not particularly effective for a variety of legal reasons.

"The exclusionary rule, when applied, is a more potent remedy to deter police from engaging in unlawful searches and seizures," Professor Wilson says. "When the rule is applied, evidence that is 'the fruit' of unlawful police actions, meaning evidence found because police searched or seized when they were not allowed to, is excluded from use at trial."

For example, she says if police conduct an illegal search and find drugs or guns or other incriminating evidence, that evidence cannot be used in the case against the accused.

"If police know that they will lose valuable and important evidence if they act unlawfully, they are less likely to act unlawfully," Professor Wilson says.

Chipping Away

In recent years, Supreme Court rulings have begun to chip away at the exclusionary rule. Professor Wilson says the Court has "done so concerned that police mistakes should not result in guilty people escaping prosecution and punishment."

For example, she notes, if police arrest a suspect, incorrectly believing there is an active warrant for his arrest, based on a mistake in the police database, any evidence police find on the suspect can still be used at a criminal trial unless it can be proven that police knew they were making a mistake.

"Although our Fourth Amendment protections have not technically been reduced," Professor Wilson says, "the Supreme Court has reduced the negative consequences to police for violating those rights. As a consequence, police have fewer incentives to err on the side of respecting Fourth Amendment rights when deciding whether to conduct a search or a seizure of us or our property."

Fourth Amendment Discussion Questions

1. As citizens, we have a right to a 'reasonable expectation of privacy.' This refers to many things including our personal technology. However, if we "knowingly expose our property or electronic data to the public, we cannot claim a reasonable expectation of privacy." What do you think "knowingly exposing property" looks like when it comes to our electronic data? Professor Wilson gives one example. What other examples can you come up with?
2. The Fourth Amendment, written in 1787, can still apply to the technological advancements today because the Framers used broad language. Is the intentional use of broad language helpful or harmful to our judicial system today? Explain why.
3. What do you think about the U.S. Supreme Court chipping away at the exclusionary rule? Should the focus be on not letting a guilty person go free or protecting the right to privacy no matter the cost? Explain.

Fifth Amendment All About Protecting Individual Rights

Of all the amendments in the Bill of Rights, you may be most familiar with the Fifth, especially if you're a fan of cop shows or courtroom dramas. You've probably heard the term, "Taking the Fifth." You may even have a vague idea of what double jeopardy is.

So, let's get into it. The Fifth Amendment consists of five clauses—grand jury protection, double jeopardy, right against self-incrimination (that's where you take the Fifth), right to due process and the takings clause.

According to David A. Harris, a professor at the University of Pittsburgh School of Law, the Framers of the U.S. Constitution included the rights laid out in the Fifth Amendment after seeing firsthand the way a government can abuse the rights of citizens. Professor Harris, who teaches courses on criminal justice policy and criminal procedure, says the U.S. Constitution created a good government structure and then the added amendments protect individual rights, as well as the rights of citizens to oversee the government.

"The Fifth Amendment is geared toward protecting the individual against the use of government power, chiefly through the criminal process," Professor Harris says.

Grand Jury

The first clause of the Fifth Amendment states: "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or **indictment** of a Grand Jury…" So, first of all, a capital crime is one that, if convicted, the punishment could be life in prison or death. The courts have determined over the years that an infamous crime is essentially a **felony** where the accused faces a prison term of more than one year. These types of federal crimes are the only ones where a **defendant** is entitled to a grand jury.

A grand jury is made up of ordinary citizens, selected from the regular jury pool and consists of anywhere from 12 to 23 members. Sitting on a federal grand jury requires a longer time commitment than regular jury duty, anywhere from 18 to 36 months. A grand jury, however, doesn't meet everyday during that time period, like a regular jury would. Usually a grand jury meets either once a week or a few times a week to hear cases.

A prosecutor presents the case and must convince the members of the grand jury that there is **probable cause** that the accused should be **indicted** for the crime. The grand jury does not decide guilt. If it is convinced that there is enough evidence to proceed, it will issue an indictment and a trial will be held with a different jury.

While the other four clauses of the Fifth Amendment were incorporated by the 14th Amendment to apply to the states, the grand jury clause was not. Many state courts employ grand juries as well, but defendants don't have a Fifth Amendment right to a grand jury for criminal charges brought in state courts.

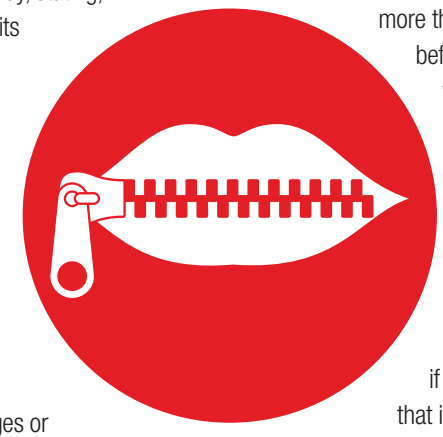
Double Jeopardy

Per the Fifth Amendment: "…nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb…" So, when is someone put "in jeopardy?"

"Jeopardy in this sense means to have criminal charges filed against oneself, and then to be put on trial and have that trial begin, with the seating of a jury," Professor Harris says. "Once those things happen, the person is 'in jeopardy' on those charges, whatever they are."

The thing that is in "jeopardy" is the liberty of the accused who, depending on the crime, could face a long prison sentence, or the possibility of losing their life if convicted of a crime that carries the death penalty. Professor Harris says that if the accused is **acquitted**, he or she cannot be retried on those charges—that would be when double jeopardy kicks in.

In the 1957 U.S. Supreme Court case of *Green v. United States*, Justice Hugo L. Black wrote about double jeopardy, stating, "The underlying idea…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."



Professor Harris notes that there are ways to get around double jeopardy, including filing federal charges after an acquittal on state charges or vice versa.

That happened in the infamous Rodney King case, where Los Angeles police officers were acquitted in 1992 of state criminal charges in his beating, but then were tried in federal court and convicted of federal civil rights violations.

Taking the Fifth

The concept behind the right against self-incrimination ("nor shall be compelled in any criminal case to be a witness against himself…") is that individuals charged with a crime should be proven guilty. Defendants should not have to prove their innocence. The Miranda Warning, another term you may have heard of from television and movies, comes from this Fifth Amendment right.

The requirement that law enforcement advise a suspect of his or her right against self-incrimination derives from the 1966 U.S. Supreme Court case of *Miranda v. Arizona*. Ernesto Miranda was arrested in 1963 and accused of the rape and kidnapping of an 18-year-old woman. Miranda confessed to the crime under police questioning; however, his attorney argued that Miranda wasn't informed that he did not have to speak to police, or that he could request an attorney.

The Court held in *Miranda* that "the prosecution may not use statements…stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination."

In other words, the police are required to advise suspects in custody of their rights under the U.S. Constitution. As a result of the Court's ruling, Miranda's conviction was thrown out and his confession could not be used against him at his re-trial. Things didn't go so well for Miranda there. Relying on other evidence against him, the prosecution secured a conviction and he was sentenced to 20-30 years in prison. The *Miranda* case is why we call it a Miranda Warning. It is also sometimes used as a verb, as in to Mirandize someone who is under arrest.

Was the *Miranda* ruling needed or did it just clarify a right already granted by the Fifth Amendment? Professor Harris says, while the Fifth Amendment already forbade the "use of government coercion to force people to confess," Miranda Warnings do more than just clarify that right. He also notes that before the *Miranda* ruling, the courts simply asked whether a confession had been given voluntarily and without coercion, making it easy for police to use what he calls "questionable tactics."

"The Miranda Warning is designed to do more than simply ask whether the statement was given without coercion," Professor Harris says. "It is designed to inform the citizen that she doesn't have to answer or speak, but that if she does, police will use it against her, and that if she would like legal representation before or even during a statement, she can have a lawyer. None of that is included in the Fifth Amendment, so the Miranda Warnings are designed to support and safeguard the Fifth Amendment guarantees."

It should be noted that, while the Miranda Warning provides protection for suspects, it doesn't mean that he or she cannot be charged or tried for a criminal act. It simply means that any confession or statement given without a Miranda Warning could be ruled inadmissible. Other evidence obtained apart from an inadmissible confession could be used against the suspect.

Taking the Fifth is not only available to the accused. Witnesses can also invoke it during a trial. According to the 1965 U.S. Supreme Court decision in *Griffin v. California*, a prosecutor can't infer to the jury that a defendant is guilty if he or she elects to use their Fifth Amendment right not to testify. Juries are allowed, however, to draw a negative inference on their own if a witness "Takes the Fifth."

Due Process and the Takings Clause

The last two clauses of the Fifth Amendment read: "… 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 due process clause simply deals with the administration of justice, acting as a safeguard from the arbitrary denial of a citizen's basic rights. The clause is repeated in the 14th Amendment, which ensured that it was applied to the states as well as federally.

The takings clause is also known as the power of **eminent domain**. Essentially, this clause means the government can take your private property if the purpose of the seizure is for public use. However, before they seize it, the government must compensate you for that property.

Public use was originally interpreted as the building of roads, bridges or schools—projects that benefit the general public. U.S. Supreme Court decisions have expanded the definition and use of the eminent domain power. With the 1954 case of *Berman v. Parker*, the Court expanded public use to include the redevelopment of a **blighted** area in Washington, D.C. The Court unanimously ruled that, "If owner after owner were permitted to resist these redevelopment programs on the ground that his particular property was not being used against the public interest, integrated plans for redevelopment would suffer greatly."

With the 2005 ruling in the case of *Kelo v. City of New London*, the Court, in a 5-4 decision, broadened the public use basis for eminent domain to include property that was not blighted but which the government determined was not being put to its best economic use. This was the first time the government had used the takings clause to benefit a private entity. Speaking for the Court's minority, Justice Sandra Day O'Connor voiced concern over the decision and what it would mean for the poor.

"Under the banner of economic development, all private property is now vulnerable to being taken and transferred to another private owner, so long as it might be upgraded—i.e., given to an owner who will use it in a way that the legislature deems more beneficial to the public," wrote Justice O'Connor in her **dissenting opinion**. "The beneficiaries are likely to be those citizens with disproportionate influence and power in the political process, including large corporations and development firms. The Founders cannot have intended this perverse result."

You may be wondering why the takings clause is included in the Fifth Amendment when the other clauses apply to criminal proceedings. Professor Harris isn't sure.

"It is perhaps united with the criminal aspects of the Fifth by the Fifth Amendment's due process clause, which mentions 'life, liberty, or property,'" he says.

Fifth Amendment Discussion Questions

1. Being on a jury requires a person to sit through a trial. Some trials are quick and some take more time. As noted in the article, sitting on a GRAND jury requires a longer commitment. Would being on a grand jury interest you? Why or why not?
2. If you were on a jury, what would you think if a witness invoked his or her Fifth Amendment right not to answer a question?
3. How do you feel about eminent domain? Do you think the government should be able to seize private property, even if they offer just compensation?

Protecting the Rights of the Accused

The Sixth Amendment to the U.S. Constitution is all about criminal prosecution. The amendment contains seven rights afforded to the accused, including the right to a speedy trial; the right to a pubic trial; the right to an impartial jury; the right to be informed of the charges against you; the right to confront the witnesses against you; the right to compel witnesses to testify on your behalf; and the right to legal counsel.

"These rights play a crucial role in the American criminal justice system," says Paul Marcus, a professor at William & Mary Law School and an expert on the Sixth Amendment.

"The reasons for the rights in the Sixth Amendment stem mostly from what the Framers saw as problems in the traditional legal system. European justice was an inquisitorial system with a **magistrate** doing the fact finding, asking the questions, and putting the issue to the jury," Professor Marcus says. "The Framers liked the adversarial approach but wanted to strengthen it. They envisioned a system with rights that would provide fairness in criminal matters where the government sought to restrict the liberty of citizens."

Define "Speedy"

In the 1972 case of *Barker v. Wingo*, the U.S. Supreme Court ruled that determinations of whether a **defendant's** right to a speedy trial have been violated should be made on a case-by-case basis. While it was brought before the Court in 1972, the case dates back to the 1958 murders of an elderly couple in Kentucky. Willie Barker and Silas Manning were charged with the crimes and the prosecution tried them separately. Wanting to secure Manning's

conviction first so that he would be more likely to testify against Barker, the prosecution, beginning in October 1958, sought 16 **continuances** in Barker's trial.

Manning was convicted in 1962. With Manning's testimony, Barker was convicted in October 1963. Barker's attorney **appealed** his conviction on speedy trial grounds.

In the *Barker* ruling, the Court came up with four factors to consider in determining whether a defendant has been **prejudiced** by the lack of a speedy trial. Those factors include: the length of the delay, the reason for the delay, the time and manner in which the defendant asserted the right and the degree of prejudice that the delay caused the defendant.

As for Barker, his conviction was **upheld**. While the Court agreed that the more than five-year time period between arrest and trial was "extraordinary," it ruled that Barker was ultimately not prejudiced by the delay. In addition, the Court pointed out that Barker did not want a speedy trial, noting that his attorney only objected to two of the 16 continuances (the 12th and 15th). It seemed Barker was counting on Manning's **acquittal** so there would be no reason for him to testify against him.

What Punishment?

You may be surprised to learn that, for the most part, juries are not told what potential punishment a defendant faces if convicted before they enter into **deliberations**. The exception is in death penalty cases. Professor Marcus says that it is most common for judges, not jurors, to determine the punishment a defendant will face.

"Jurors decide punishment sentences in only a handful of states," Professor Marcus says. "In fact, it is common for a **mistrial** to be declared when it can be proven that a jury was considering punishment while determining guilt."

So, why aren't juries told what sentence a defendant might face if convicted? Professor Marcus says it is because jurors have one very important job—determining whether the prosecution has proven guilt **beyond a reasonable doubt**.

"To focus on this job, the idea is to take out the temptation to make the decision based on potential punishment, or perhaps, even empathy," Professor Marcus says. "Additional reasons may include the fact that juries aren't privy to the other information that goes into sentencing decisions, such as drug use, past criminal history, and employment; and that judges are believed to be better at weighing the various sentencing factors due to their experience with sentencing over time."

Professor Marcus notes that there is one federal judge who argues, "A jury has the constitutional right to know the sentencing impact of its decision," but that view is not the view of the majority.

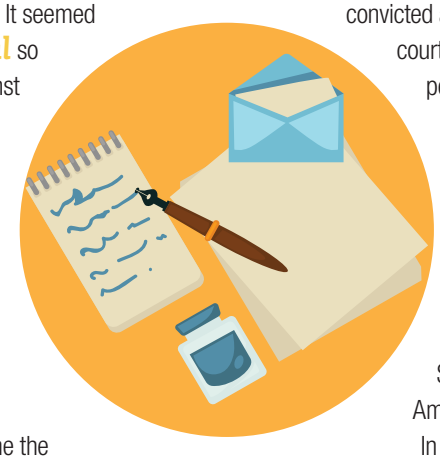
"The rule throughout the nation is that jurors may not hear about potential sentences and may not consider possible punishment in determining guilt or innocence," he says.

Right to Counsel and a Man Named Gideon

The Sixth Amendment's right to "the assistance of counsel" in criminal prosecutions only applied to federal cases, not to the states. That changed with the 1963 landmark U.S. Supreme Court decision in *Gideon v. Wainright*.

The case involved Clarence Earl Gideon, who was charged in 1961 with the break-in of a Florida poolroom. Faced with charges of breaking and entering with the intent to commit petty **larceny**, Mr. Gideon requested an attorney be appointed by the state to represent him, as he was too poor to afford a lawyer. His request was denied because Florida law only required the appointment of counsel for a **capital offense**.

Mr. Gideon was forced to represent himself at trial. He was convicted and sentenced to five years in prison. His lower court **appeals** were denied, but his handwritten petition to the U.S. Supreme Court was granted a hearing.



The Court assigned Washington, D.C. attorney Abe Fortas, a future U.S. Supreme Court justice, to represent Gideon. At issue was whether the Sixth Amendment applies to defendants in state courts. In a unanimous decision, the Court ruled that it did and so the Sixth Amendment was incorporated by the 14th Amendment to apply to the states.

In the Court's **majority opinion**, Justice Hugo Black wrote that "reason and reflection require us to recognize that in our adversary system of criminal justice, any person hauled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him." Justice Black further stated that the "noble ideal" of "fair trials before impartial tribunals in which every defendant stands equal before the law…cannot be realized if the poor man charged with a crime has to face his accusers without a lawyer to assist him."

As a result of the Supreme Court's decision, Clarence Gideon received a new trial, this time with representation, and was **acquitted**.

"If an obscure Florida convict named Clarence Earl Gideon had not sat down in prison with a pencil and paper to write a letter to the Supreme Court; and if the Supreme Court had not taken the trouble to look at the merits in that one crude petition among all the bundles of mail it must receive every day, the vast machinery of American law would have gone on functioning undisturbed," Robert F. Kennedy, a former U.S. Attorney General, said after the Court issued its decision. "But Gideon did write that letter; the court did look into his case; he was re-tried with the help of competent defense counsel; found not guilty and released from prison after two years of punishment for a

crime he did not commit. And the whole course of legal history has been changed."

Clarence Gideon died in 1972 at the age of 61. Engraved on his headstone is a quote from a letter he wrote to Abe Fortas while he was in prison: "Each era finds an improvement in law for the benefit of mankind," enforcing his belief that he was involved in something bigger than himself.

Gideon's Impact

Professor Marcus says that with the *Gideon* ruling, "The Court acknowledged that there are many criminal justice matters that cannot be argued properly without the assistance of an attorney, no matter how intelligent or capable the criminal defendant is, and the opportunity to be represented by effective lawyers gives defendants a fairer chance to fight their prosecution against government paid prosecutors with extensive resources."

While Professor Marcus regards the *Gideon* decision as remarkable, he says there are numerous problems with the way it has been interpreted and applied.

"The most concerning relates to an overburdened group of lawyers, chiefly **public defenders**. With enormous caseloads, these attorneys simply do not have the time to meet at length with their clients, investigate the facts in the case, research the law, and prepare for trial," he says. "This problem of underfunding has existed for more than half a century, with few states providing adequate resources to solve the problem."

Regarding the importance of the Sixth Amendment, Professor Marcus says, "Our Framers believed then, and we as a nation today agree, that in order to deprive one of liberty, that person should have the right to be represented by a lawyer, before a jury, in front of a judge, and be given the opportunity to present evidence and see who is serving as witnesses for the government. Those rights remain vital to our criminal justice system today."

Sixth Amendment Discussion Questions

1. As the article states, juries are generally not told what punishment a defendant faces. What do you think of that? What are the advantages and/or disadvantages to the jury not knowing the potential punishments? Do you agree or disagree? Explain your answer.
2. What do you think of the rights outlined in the Sixth Amendment? Do they give criminal defendants an even playing field when facing the power of the government?
3. How have socioeconomic factors played into the rights of defendants in the United States? Do you think poor people have equal opportunities to defend themselves as those with more money? Explain.

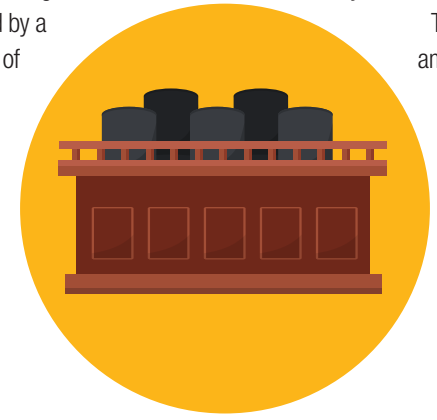
Everyone Equal When Seeking Civil Justice

The principle of the Seventh Amendment is that, under America's civil justice system, everyone has equal access to a civil jury trial.

The amendment states: "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of a 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."

According to Jay M. Feinman, a professor at Rutgers Law School—Camden, the colonists saw the jury as a defense against unjust laws and actions by their British rulers. King George III had actually abolished trial by jury within the Colonies, which was one of many grievances outlined in the Declaration of Independence.

"The right to a civil jury trial was included in the Seventh Amendment as a continued form of citizen participation in government and protection against government overreach," Professor Feinman says.



The Seventh Amendment is one of the few amendments in the Bill of Rights that wasn't incorporated by the 14th Amendment to apply to the states. However, 48 state constitutions also contain provisions for the right to a civil jury trial. The two states that don't specifically have language in their constitutions—Louisiana and Colorado—regarding civil jury trials have provided for it through **statute** or court rule.

Shedding Light on a Wrong

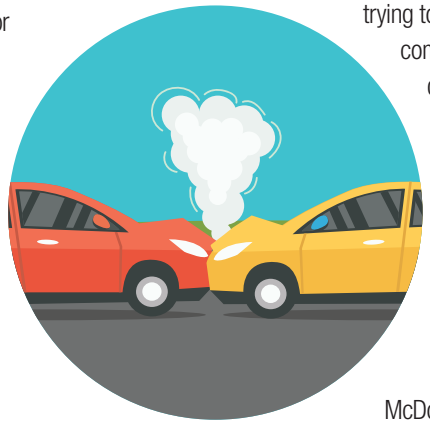
Tort law governs civil jury claims. A tort is just a legal term used in civil law that describes the wrong or injury committed. **Plaintiffs** in a civil trial file tort claims against an entity that has wronged them in some way and in some instances the lawsuit can provide a public good.

For example, recently there have been numerous lawsuits against Johnson & Johnson claiming that its talc-based baby powder contains traces of asbestos, a **carcinogen** known to cause cancer. The lawsuits forced the company to suspend sales of its baby powder made with talc and to switch to a corn starch-based product.

Although personal injury lawsuits like the ones against Johnson & Johnson garner the headlines, Professor Feinman says that most civil cases in state courts are pretty "run-of-the-mill contract disputes" and are usually brought by businesses, including debt collection cases and landlord-tenant disputes.

Too Many Lawsuits?

According to the Rand Institute for Civil Justice, approximately 10 percent of those who have been injured seek compensation and only two percent file a lawsuit. Still, the United States has the reputation of being a "**litigious** society" and many have pushed for tort reform. Tort reform refers to proposed laws that would change the civil justice system, making it harder for victims to file lawsuits.



Advocates of tort reform include large corporations and chambers of commerce. Their argument is that frivolous lawsuits and the fear of large settlements or jury awards scare corporations and stifle innovation in product development.

Professor Feinman, who is an expert in insurance law, torts and contract law, says that America is actually not so litigious.

"Claims of frivolous lawsuits and too much litigation are used by big business interests as a ploy to cut back on the rights of consumers and injury victims," Professor Feinman says. "The amount of civil litigation has been relatively stable for years. And, most lawsuits don't arise from personal-injury claims, the usual subject of charges of frivolous litigation."

In fact, Professor Feinman says that only seven percent of lawsuits involve tort claims, which mainly arise from routine automobile accidents.

In a 1986 speech about the need for tort reform, President Ronald Reagan used the misfortune of Charles Bigbee to make his case. Here's how President Reagan portrayed it: "In California, a man was using a public telephone booth to place a call. An alleged drunk driver careened down the street, lost control of his car, and crashed into a phone booth. Now, it's no surprise that the injured man sued. But you might be startled to hear whom he sued: the telephone company and associated firms!"

According to the Center for Justice and Democracy at New York Law School, President Reagan left a lot out of the story, including that Bigbee tried to get out of the phone booth when he saw the car coming at him, but the door jammed, trapping him inside. During the trial, it came out that Pacific Telephone & Telegraph had received multiple complaints about the door of that booth sticking. In addition, the phone company knew that corner was dangerous as a previous phone booth placed on the corner had been destroyed by a car hitting it two years prior to the incident with Bigbee. As a result of the accident, Bigbee lost his leg, was unable to work and suffered from depression for the rest of his life. He only received $25,000 from his lawsuit, and the payment was split between the phone company and the driver of the car.

Making Headlines

One of the most famous so-called "frivolous lawsuit" is the 1992 case of Stella Liebeck, who purchased a cup of coffee from a McDonald's drive-thru, spilled it in her lap and ended up with an almost $3 million dollar judgment. Tort reform advocates call it "the poster child" for tort reform. Critics of tort reform, however, hold the case up as the civil justice system working as it was intended.

According to *Hot Coffee*, a 2011 documentary that highlighted the case against McDonald's, the media got the case wrong from the beginning, reporting that Liebeck was driving the car while trying to put sugar in her coffee and then sued the company for millions of dollars. She wasn't in the driver's seat, her grandson was. He had parked the car so that Liebeck could put sugar in her coffee. Placing the cup between her knees in order to get the top off, she spilled the liquid in her lap. Because the coffee was so hot, Liebeck suffered third-degree burns and required a seven-day hospital stay, skin grafts and a long two-year recovery period.

The 79-year-old Liebeck initially only asked McDonald's to pay $20,000 to cover her medical bills. The company offered her $800. During the trial it was discovered that McDonald's holding temperature for its coffee was 180 degrees, which was higher than the industry standard. In addition, it was revealed that McDonald's had more than 700 complaints from customers who had been burned by its coffee.

During the deliberations in the case, the jury determined that Liebeck was 20 percent at fault for what happened and McDonald's was 80 percent responsible. They came up with a figure of $200,000 in ***compensatory damages***, which they calculated from a percentage of a day's worth of coffee sales. The jury also awarded Liebeck $2.7 million in punitive damages. ***Punitive damages*** are awarded to punish the wrongdoer, in this case McDonald's, as incentive to change the behavior or conditions that led to the judgment.

What the media also didn't report at the time was that the judge in the case, who said that McDonald's had engaged in "willful, wanton and reckless behavior," ended up reducing the compensatory

damages to $160,000 and the punitive damages to $480,000, according to the *Hot Coffee* documentary. Eventually, Liebeck and McDonald's settled for an undisclosed amount.

Capping Damages and Reducing Judgments

According to the Center for Justice and Democracy, caps on damages vary from state-to-state. For example, in medical malpractice cases, 23 states allow for caps on damages, while 22 states, including New Jersey, have no caps on medical malpractice damages.

Does capping the damages that a plaintiff can recover violate the Seventh Amendment? Professor Feinman points out that the Seventh Amendment doesn't apply to the states, so state laws that limit tort causes of action or that cap the damages a jury can award don't violate the federal Constitution.

"Many state constitutions, however, include provisions ensuring the right to a jury trial or guaranteeing a legal remedy for every right," Professor Feinman says. "Courts have held that those constitutional provisions invalidate damage caps or other tort reform measures."

According to Professor Feinman, the Seventh Amendment states in part that jury verdicts cannot be re-examined other than "according to the rules of the common law." In common law, which is the law in place at the time of the adoption of the U.S. Constitution, a judge could set aside a jury verdict for legal errors made during the trial or when the verdict was unreasonable because it was so contrary to the evidence presented at trial that it shocks the conscience, Professor Feinman notes.

"Judges still have that power, but the remedy is to have the case tried before another jury, so the jury right is preserved," Professor Feinman says.

At the urging of consumer groups, Charles Bigbee testified before Congress in 1986 in an attempt to set the record straight about seeking compensation. "I believe it would be very helpful if I could talk briefly about my case and show how it has been distorted not only by the President, but by the media as well," Bigbee said. "That is probably the best way to show that people who are injured due to the fault of others should be justly compensated for the damages they have to live with the rest of their lives."

Seventh Amendment Discussion Questions

1. What do you think about the right to a civil jury trial? Is it a fair system?
2. What do you think about the compensation awarded to Charles Bigbee and Stella Liebeck? Was it fair compensation for what they suffered?
3. Do you think that a judge should have the ability to reduce the judgment that a jury awards? Explain your answer.
4. The Seventh Amendment states that everyone should have equal access to civil justice. Do you think that is true? Do you agree? Explain your answer.

Defining What is Cruel and Unusual

At just 16 words, the Eighth Amendment to the U.S. Constitution is the shortest. It states: "Excessive **bail** shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

Adopted as one of the 10 amendments included in the U.S. Constitution's Bill of Rights, which was **ratified** in 1791, the Eighth Amendment is almost identical to a clause from the English Bill of Rights of 1689. The only difference is that the English version contained the words "ought not" instead of "shall not." The rest is the same.

So, does a punishment have to be both cruel and unusual to violate the Eighth Amendment? Kay L. Levine, a professor at Emory University School of Law, who teaches courses on constitutional criminal procedure and criminal law, says that based on Supreme Court rulings, a punishment violates the clause if it is either cruel or unusual.

"While it's pretty safe to say that extremely cruel punishments are unusual," Professor Levine says, "an unusual punishment (something that is **arbitrary**) could violate the Eight Amendment even if it is not independently cruel."

No Money, No Bail

According to the Prison Policy Initiative, a non-profit and non-partisan organization that researches mass incarceration, more than 555,000 people are confined in local jails because they can't afford to pay their bail. These people have not been convicted of a crime; they are simply too poor to pay the bail amount set for them.

Bail is considered excessive, Professor Levine says, if it is higher than is reasonably calculated to achieve the purpose for which it is imposed. There are two acceptable purposes for bail, she says, "preventing the defendant's flight before trial and ensuring community safety (preventing the defendant from committing a dangerous act) while the trial is pending."

Professor Levine says that the judge at a bail hearing will listen to arguments from counsel to help determine the proper bail amount, although she also notes that for every crime in a jurisdiction's **penal code**, there is a default amount already set in a document called a "bail schedule."

"So, when there is a bail hearing, it's because one side or the other wants a deviation from the default amount in the bail schedule," says Professor Levine. "Bail can be re-litigated multiple times throughout the case, because circumstances sometimes change as the case is ongoing."

Proponents of bail reform point out that there are many people who are not a danger to the public that are stuck in local jails until their trial commences simply because they can't afford their bail. The Prison Policy Initiative states: "The median bail amount for **felonies** is $10,000, which represents eight months' income for a typical person detained because they can't pay bail."

Court Outlaws Death Penalty, Then Brings It Back

According to the National Conference of State Legislatures, 28 states currently allow for the death penalty. The federal government and the U.S. military also have the power to authorize it. In fact, in July 2020, the federal government carried out an execution, its first in more than 17 years. New Jersey is one of the 22 states that don't allow the death penalty, having abolished it in 2007. The most recent state to abolish the death penalty was Colorado in March 2020.

The death penalty has always been controversial and the U.S. Supreme Court has taken both sides. In 1972, with a 5-4 ruling in *Furman v. Georgia*, the Court decided that Georgia's death penalty law was unconstitutional and violated the Eighth Amendment's cruel and unusual punishment clause because of its "arbitrary and **capricious** sentences."

In his opinion, Justice Potter Stewart wrote, "These death sentences are cruel and unusual in the same way that being struck by lightning is cruel and unusual…I simply conclude that the Eighth and 14th Amendments cannot tolerate the infliction of a sentence of death under legal systems that permit this unique penalty to be so wantonly and so freakishly imposed."

The decision in *Furman* essentially put the death penalty on hold in the United States. State legislatures passed new death penalty laws attempting to eliminate the issues noted in *Furman*, specifically the arbitrariness of death sentences.

In 1976, with the case of *Gregg v. Georgia*, the U.S Supreme Court reversed itself, declaring the death penalty constitutional. Georgia had revised its death penalty law to incorporate a two-step trial process. The first trial determined a defendant's guilt or innocence and the second determined the actual sentence. In the second phase, **aggravating factors**, circumstances that would increase the harshness of a crime, and **mitigating factors**, circumstances that may lessen the accountability of the defendant, would be considered. A jury would then decide whether to issue a sentence of death or life in prison. It is important to note that in order for a prosecutor to request the death penalty, an aggravating factor in the case must be stated.

Randomness and the Death Penalty

Evan J. Mandery, a professor at John Jay College of Criminal Justice in New York, says it's not possible for death penalty sentences to be carried out in a non-racist and non-arbitrary way. According to statistics from the Equal Justice Initiative, a non-profit organization devoted to ending excessive punishment and mass incarceration, African Americans represent 42 percent of those on death row and 34 percent of those executed, despite being only 13 percent of the population.

Professor Mandery, an expert on the death penalty and the author of the book, *A Wild Justice: The Death and Resurrection of Capital Punishment in America*, points out that **federalism**, our system of government, creates arbitrariness. For example, laws vary by state (some have the death penalty, some don't); there is the randomness of what prosecutor is assigned to a case (i.e., one that favors the death penalty); and then the selection of jurors at random. All of this contributes to the arbitrariness of the process, he says.

To make the process less arbitrary, Professor Mandery says that in states that have the death penalty, there should be a statewide standard for approval of capital charges, which should be overseen by a neutral panel, not left up to the discretion of a prosecutor. In addition, Professor Mandery suggests adding a new standard—proof to a near certainty—that would have to be met in death penalty cases. This new **standard of proof** would be higher than **beyond a reasonable doubt**, which is currently the highest standard.

When it comes to how juries interpret beyond a reasonable doubt, meaning how sure do they think they need to be of a defendant's guilt, Professor Mandery says that juries are somewhere in the 83 to 90 percent range. He also notes that the more severe the crime, the lower that number goes down.

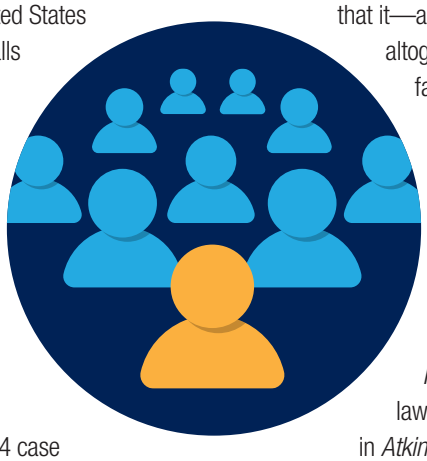
If the standard was raised to proof to a near certainty, Professor Mandery says, "There would be very few death penalty cases."

Proving Innocence

According to the American Civil Liberties Union (ACLU), across the nation, at least one person is **exonerated** for every 10 people that are executed. According to the Death Penalty Information

Center, since 1973, there have been 167 exonerations of prisoners from death row.

So, has anyone been put to death in the United States who later turned out to be innocent? The ACLU calls a number of cases into question, including the executions of Carlos DeLuna, where there is a reasonable suspicion that he was framed by another man named Carlos; Todd Cameron Willingham, where later scientific evidence showed no proof the fire that killed his three daughters was set intentionally; and Troy Davis, who was executed in Georgia, despite the withdrawal of the eyewitness testimony that convicted him.



In a **dissenting opinion** in the 1994 case of *Callins v. Collins*, which denied review in a Texas death penalty case, U.S. Supreme Court Justice Harry Blackmun wrote, "Perhaps one day this Court will develop procedural rules or verbal formulas that actually will provide consistency, fairness, and reliability in a capital sentencing scheme. I am not optimistic that such a day will come. I am more optimistic, though, that this Court eventually will conclude that the effort to eliminate arbitrariness while preserving fairness 'in the infliction of [death] is so plainly doomed to failure that it—and the death penalty—must be abandoned altogether.' I may not live to see that day, but I have faith that eventually it will arrive."

According to the Death Penalty Information Center, 22 prisoners were executed in 2019, which is down from the yearly average of about 46. Over the years, the U.S. Supreme Court has put restrictions on the death penalty.

In 1976, the Court ruled in *Woodson v. North Carolina* that mandatory death penalty laws were unconstitutional. With the 2002 ruling in *Atkins v. Virginia*, the Court ruled that executions of the mentally disabled constitute cruel and unusual punishment and therefore are unconstitutional. Similarly, with its 2005 decision in *Roper v. Simmons*, the Court ruled that juveniles under the age of 18 should not be subject to the death penalty. That ruling resulted in 72 convicted juvenile murderers in 12 states having their sentences converted to life in prison.

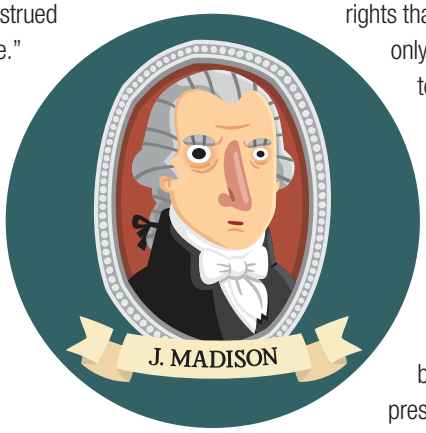
Eighth Amendment Discussion Questions

1. More than 555,000 people are in jail because they can't afford to pay bail. Our legal system states a person is "innocent until proven guilty." If these 555,000 people are considered "innocent," do you think our bail system is reasonable? If you think it needs improving, what could be done to improve the system? If you think it is a fair system, explain your reasoning.
2. There is much controversy about the death penalty. Some believe it is constitutional, while others believe it is cruel and unusual punishment. What do you think about the death penalty?
3. Professor Mandery says that juries interpret "beyond a reasonable doubt" to be 83 to 90 percent certain. What would your interpretation of the standard be? Explain your answer.

Invoking the Ninth Amendment

The meaning and importance of the Ninth Amendment has literally been debated since its inception when it was included in the Bill of Rights. The amendment states: "The **enumeration** in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."

Back in 1791, during the debates over ratification of the U.S Constitution, the two factions—Federalists and anti-Federalists—argued over the inclusion of a bill of rights. The Federalists supported ratification of the U.S. Constitution and were against the inclusion of a bill of rights. The anti-Federalists were against the ratification of the Constitution unless it contained a bill of rights.



At issue was whether by outlining rights in the U.S. Constitution, it would be thought that those were the only rights protected. The Federalists contended that it would be impossible to list all the rights that U.S. citizens possessed and dangerous to list only some, fearing the government might attempt to limit liberties enjoyed by the citizenry. James Madison, the Father of the Constitution, who wrote all 10 amendments in the Bill of Rights, saw both sides of the issue.

In a letter to Thomas Jefferson, Madison wrote, "My own opinion has always been in favor of a bill of rights; provided it be so framed as not to imply powers not meant to be included in the enumeration…" When he presented his 12 proposed amendments (only 10

eventually got through) to Congress, he stated, "It has been objected against a bill of rights, that, by enumerating particular exceptions to the grant of power, it would disparage those rights which were not placed in that enumeration; and it might follow by implication, that those rights which were singled out, were intended to be assigned into the hands of the General Government, and were consequently insecure. This is one of the most plausible arguments I have ever heard against the admission of a bill of rights into this system; but, I conceive, that it may be guarded against."

Some have determined that the guard Madison talked about was the Ninth Amendment. It was a compromise, which suggests that the list of rights, enumerated in amendments one through eight, is not complete. During the debates over the Bill of Rights, the chief justice of the Virginia Supreme Court reportedly said, "May we not in the progress of things, discover some great and important [right], which we don't now think of?"

Madison also suggested that it would be left to the court system to interpret the Bill of Rights as society evolved, calling the judiciary "the guardians of those rights; they will be an impenetrable **bulwark** against every assumption of power in the legislative or executive; they will be naturally led to resist every encroachment upon rights expressly stipulated for in the constitution by the declaration of rights."

174 Years Later

The courts did not consider a substantial Ninth Amendment case until 1965 when the U.S. Supreme Court decided the case of *Griswold v. Connecticut*. The case dealt with the constitutionality of Connecticut's **statute** prohibiting the use of contraceptives, specifically by married couples. In a 7-2 decision, the Court ruled the statute was unconstitutional and violated the First, Third, Fourth, Fifth, Ninth and 14th Amendments to the U.S. Constitution.

In a **concurring opinion**, Justice Arthur Goldberg wrote: "The language and history of the Ninth Amendment reveal that the Framers of the Constitution believed that there are additional fundamental rights, protected from governmental infringement, which exist alongside those fundamental rights specifically mentioned in the first eight constitutional amendments…To hold that a right so basic and fundamental and so deep-rooted in our society as the right of privacy in marriage may be infringed because that right is not guaranteed in so many words by the first eight amendments to the Constitution is to ignore the Ninth Amendment and to give it no effect whatsoever. Moreover, a judicial construction that this fundamental right is not protected by the Constitution because it is not mentioned in explicit terms by one of the first eight amendments or elsewhere in the Constitution would violate the Ninth Amendment….Nor do I mean to state that the Ninth Amendment constitutes an independent source of right protected from infringement by either the States or the Federal Government. Rather, the Ninth Amendment shows a belief of the Constitution's authors that fundamental rights exist that are not expressly enumerated in the first eight amendments and an intent that the list of rights included there not be deemed exhaustive."

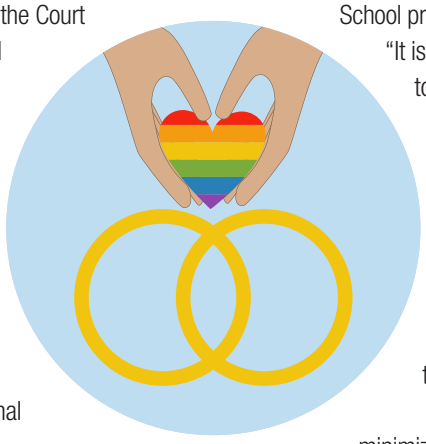
According to *The Know Your Bill of Rights Book*, within 15 years of the *Griswold* decision, the Ninth Amendment was invoked in more than 1,200 lawsuits at the state and federal level. "Litigants found its [the Ninth Amendment] utter lack of specificity as to rights protected irresistible, and everyone from schoolboys to police officers relied upon it, seeking to void regulations that governed length of hair, to require the regulation of the purity of water and air, and to claim a right to legal marriage between two people of the same sex."

Debate Today

Today, historians and legal scholars are still divided on the Ninth Amendment's meaning.

"The Ninth Amendment was meant, at minimum, to protect residual rights not spelled out in the Constitution in order to limit government power," says Jonathan Hafetz, a professor at Seton Hall Law School. "The Constitution was always meant to be a living document—one that evolves over time and is interpreted in light of changing norms. Its success is due to its flexibility and not to any orthodox rigidity or fixed construction."

Laurence Tribe, a constitutional law scholar and Harvard Law School professor, wrote in *American Constitutional Law*, "It is a common error, but an error nonetheless, to talk of 'Ninth Amendment rights.' The Ninth Amendment is not a source of rights as such; it is simply a rule about how to read the Constitution."



So could the U.S. Constitution be amended to clarify the meaning of the Ninth Amendment? Professor Hafetz notes that the U.S. Constitution has been amended rarely in the more than 200 years of its existence.

"While the high bar to amendments may minimize instability and uncertainty, it also places greater stress on other avenues of constitutional change, such as the courts," he says. "In light of the nation's increasing **polarization**, I anticipate growing pressure to amend the Constitution."

At the same time, Professor Hafetz recognizes that same polarization will make amending the Constitution even more difficult.

Ninth Amendment Discussion Questions

1. What do you think the ninth amendment means? "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."
2. What are the rights listed in the Bill of Rights? Which rights do you agree or disagree with? Why?
3. Are there any rights that you believe are missing from the Bill of Rights? Explain your reasoning.
4. Think of a right not outlined in the U.S. Constitution. Would the Ninth Amendment uphold that right as constitutional? Why or why not?

Sharing the Power of a Nation

The 10th Amendment to the U.S. Constitution is the last amendment that makes up what is known as the Bill of Rights. The amendment states: "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." Many believe that the 10th Amendment protects states' rights; however, what the amendment is really about is **federalism**.

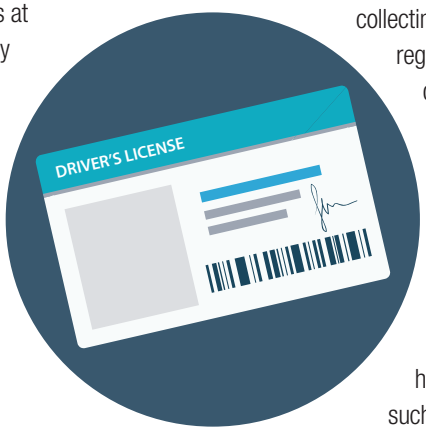
The United Kingdom has a **unitary** system of government where all the power is centralized in Parliament. When America won its independence from England, the Founders wanted a government as far removed as possible from England's system of government, according to History.com. Originally the Founders formed a **confederation**, where the power originates at the local level with the individual states. That's why America's first constitution was called the Articles of Confederation.

It wasn't long before the Founders realized that the system of government they had chosen was inadequate. It had a weak central government that had little or no power and the country was in chaos. The states were each minting their own money, they were squabbling over borders and there was no one with the authority to mediate disagreements. The compromise that was struck at the 1787 Constitutional Convention was federalism, where power would be shared between the states and the federal government.

Robert A. Schapiro, a professor at Emory University School of Law and co-director of its Center on Federalism and Intersystemic Governance, says that federalism is the constitutional allocation of power between a national government and, in America's case, states, but it can also mean territories or provinces.

"A central purpose of the Constitution was to create a more cohesive nation and a stronger national government," Professor Schapiro says. "At the same time, the Framers wanted to acknowledge the continuing importance of states and to counteract fears that the new national government would attempt to reproduce the **tyranny** of a distant government in Britain, from which the country had recently achieved independence."

Professor Schapiro says that the 10th Amendment is a constitutional reminder that the national government is one of defined and limited power, with all other power remaining with the states.



Dividing Power

The powers referred to in the 10th Amendment are the **enumerated** powers listed in Article I, Section 8 of the U.S. Constitution, which outlines all the powers that the federal government maintains. The list is pretty long and includes collecting taxes, borrowing money, coining money, regulating national and international trade and declaring war, among many other powers.

So, what are powers that a state retains? Anything not mentioned in Article I, Section 8. For example, laws regulating education are left to the individual states, as well as the responsibility of maintaining state justice systems, setting up local governments, counties and municipalities, maintaining state highways and implementing benefits programs, such as welfare. Each state also has its own Department of Motor Vehicles, so another example of a power that a state has is issuing driver's licenses.

Federalism and the Supreme Court

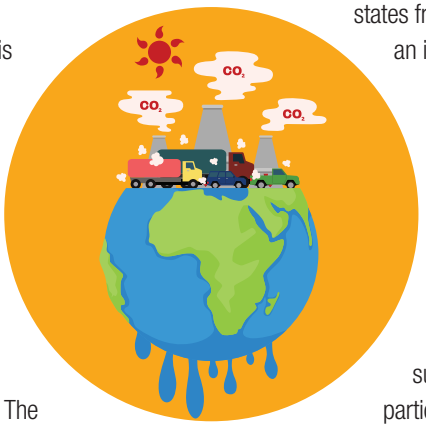
In the 1941 case of *United States v. Darby Lumber Co.*, the U.S. Supreme Court said the 10th Amendment "states but a truism that all is retained which has not been surrendered."

Professor Schapiro says the Court was just reinforcing the "true" principle that the national government is one that is defined with limited powers. The Court called it a "truism," Professor Schapiro says, because the principle would be true even if it weren't stated in the 10th Amendment.

"The Amendment serves to emphasize the continuing importance of states," he says, "which is a structural principle established by other parts of the Constitution."

A recent U.S. Supreme Court case dealing with federalism and the 10th Amendment is the 2018 case of *Murphy v. NCAA*, which concerned sports betting in New Jersey. Specifically, New Jersey sought to have the Professional and Amateur Sports Protection Act (PASPA), a federal law, overturned because it was preventing sports betting in the Garden State. The Court sided with New Jersey stating that PASPA violated the anti-commandeering principle of the U.S. Constitution and was therefore unconstitutional. The anti-commandeering principle says that it is not the responsibility of the states to enforce federal law and the government cannot make states do so.

In the Court's majority opinion, Justice Samuel Alito wrote, "Conspicuously absent from the list of powers given to Congress is the power to issue direct orders to the governments of the States. The anti-commandeering doctrine simply represents the recognition of this limit on congressional authority."



States' Rights

The notion of states' rights has been used throughout history as an excuse for persecution. For example, the states' rights argument was cited as an excuse for the continuation of slavery in the 19th Century and the promotion of segregation in the 20th Century.

Federalism involves some emphasis on the powers of states, Professor Schapiro notes, and it has been used to justify oppressive state practices. However, he points out that federalism is not the same thing as states' rights.

"Federalism is about allocating power between the national government and the states and includes denying certain powers to the states," he says. "For example, the 14th Amendment's prohibiting states from denying equal protection or due process is an important principle of federalism."

Professor Schapiro maintains that people will always focus on whether empowering the states or the national government supports a particular result in a particular instance.

"However, many recognize the value of allocating power between the national government and the states, not to advance particular goals, but to advance general values, such as responsive governance, democratic participation, and protecting liberty by creating alternate centers of powers."

There are times when states have paved the way in advancing change, Professor Schapiro says, including fighting climate change, supporting immigrants, or protecting against discrimination based on sexual orientation or gender identity.

"These policies might not have been adopted on a national level," Professor Schapiro says, "but federalism allowed states to model alternative solutions."

At the same time, he says, there is a general recognition of the need to have certain guarantees of national citizenship, covering matters such as protection against discrimination and the protection of voting, which is where federal legislation comes in.

"National legislation, such as the Civil Rights Act of 1964 and the Voting Rights Act of 1965, has been essential in protecting rights throughout the nation without regard to the preferences of the people or governments of individual states." Professor Schapiro says.

So, is America one entity or a combination of independent nations? Professor Schapiro says the United States is one entity, in which the states retain important authority.

"It is clear that the states do not have the status of independent nations," Professor Schapiro notes, pointing to the Preamble of the U.S. Constitution, which states that "We the People of the United States" established the Constitution. "The Constitution is not a treaty among independent nations," he says.

Tenth Amendment Discussion Questions

1. Imagine each classroom in your school determined its own rules, procedures, class length, grading system, etc. Our country was originally set up this way and was called a confederation. What are the potential problems with this model? What are some benefits of this model?
2. The current system we use is called federalism. This means there is a central form of government (like the principal in the school) that controls certain features, while other decisions are left up to the states (or the teachers). What are the potential problems with this system? What might be the benefits?
3. What are some issues the national government has power over? What are some issues the states have power over? Do you think the power has been correctly placed in either the government's hands or the state's hands? What needs to be changed?

Glossary

abolitionist: someone who opposes slavery.

acquitted: cleared from a charge.

aggravating factors: any circumstance that increases the harshness of a crime. An example, of an aggravating factor is killing a child under the age of 14.

appealed: apply to a higher court for a reversal of a lower court's decision.

arbitrary: random.

atheist: someone who does not believe in the existence of God.

autonomy: the right of self-government.

bail: a thing of value (money, deed to a house, etc.) given to a court to ensure a defendant's appearance in court.

barracks: a building used to house soldiers.

benign: not harmful.

beyond a reasonable doubt: when a jury is completely convinced of a person's guilt.

blighted: decayed or ruined.

bulwark: a defensive wall.

capital offense: a crime, such as murder, where death may be considered as punishment.

capricious: unpredictable.

carcinogen: a substance that can cause cancer in living tissue.

compensatory damages: money awarded in a civil court to a plaintiff in order to compensate for damages, injury or an incurred loss.

concurring opinion: a separate opinion delivered by one or more justices or judges that agrees with the decision of the court but not for the same reasons.

confederation: a union of independent states.

conscientious objector: an individual who claims the right to refuse military service for religious reasons.

continuance: a postponement.

convicted: declared guilty by the verdict of a jury or decision of a judge.

defendant: in a legal case, the person accused of civil wrongdoing or a criminal act.

deliberations: discussions that take place by a jury after it has heard all the evidence in a case.

dissent: disagreement in opinion.

dissenting opinion: a statement written by a judge or justice that disagrees with the opinion reached by the majority of his or her colleagues.

draft: compulsory recruitment for military service.

eminent domain: the right of the government to take private property for public use with just compensation.

enumerate: establish the number of.

enumeration: the action of mentioning a number of things one by one.

exonerate: to acquit or free from blame.

federalism: a mixed form of government combining a federal government with state governments in one political system.

felony: a serious criminal offense usually punished by imprisonment of more than one year.

gag rule: a regulation or directive prohibiting public discussion of a certain matter.

indicted: charged with a criminal act.

indictment: an official, written accusation charging someone with a crime. An indictment is handed down by a grand jury.

injunction: an order of the court that compels someone to do something or stops them from doing something.

larceny: theft of personal property.

libel: a false defamatory statement that is published, which damages a person's reputation.

litigious: unreasonably prone to go to law to settle disputes.

looting: stealing goods from a place, usually during a riot.

magistrate: a civil officer that administers the law.

majority opinion: a statement written by a judge or justice that reflects the opinion reached by the majority of his or her colleagues.

malice: a deliberate wrongful act with the intention of causing an injury.

mistrial: a trial that has been ended before its conclusion because of an error in procedure.

mitigating factors: circumstances that may lessen accountability, but do not excuse a defendant from guilt. Examples of mitigating factors could be the age of the defendant or the state of the defendant's mental health.

monarch: a king or queen that rules a country.

non-adherents: non-followers of religion.

nonpartisan: not adhering to any established political group or party.

orthodoxy: generally accepted theory, doctrine or practice.

overturn: to void a prior legal precedent.

papal: relating to the Pope.

penal code: a code of laws that outlines crimes and offenses and the punishments for them.

plaintiff: person or persons bringing a civil lawsuit against another person or entity.

polarization: the division into two sharply contrasting groups or sets of opinions.

prejudice: harm or injury that may result from an action or judgment.

prejudices: makes someone, in this case a potential juror, biased.

probable cause: a reasonable belief in certain facts.

public defender: a lawyer employed at public expense in a criminal trial to represent a defendant who is unable to afford legal counsel.

Thank you to members of the Review Panel for

the NJSBF's civics blog for reviewing the articles in

The Bill of Rights: Up Close

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Individual articles from *The Bill of Rights: Up Close* may be found on our civics blog. You may access and subscribe to the blog by clicking "Blogs" from the navigation bar on our website's homepage (njsbf.org).

punitive damages: damages that exceed simple compensation and usually awarded to punish a defendant.

ratification: the action of formally signing a contract or agreement to make it official.

ratified: approved or endorsed.

redress of grievances: a resolution to problems or complaints.

rescind: revoke, cancel or repeal.

scurrilous: insulting.

secular: denotes attitudes that have no religious or spiritual basis.

sedition: conduct or speech inciting rebellion against authority.

sequester: isolating a jury to keep them away from the public or media coverage of the trial.

standard of proof: the burden of proof required to prove a particular type of case.

statute: legislation that has been signed into law.

subpoena: a summons to appear in court or produce documents.

substantive: important, meaningful or considerable.

syndicalism: a revolutionary doctrine where workers seize control of the economy and the government.

syntax: the arrangement of words to create well-formed sentences.

tort: a wrongful act or infringement of a right that leads to civil legal liability.

tyranny: power used in a cruel or unfair manner; oppression.

unitary: forming a single or uniform entity.

upheld: supported; kept the same.

verdict: the outcome of a trial; the decision of a jury.

warrant: a written document from a judge authorizing anything from a search to an arrest to the obligation to pay a fine.