Examining the U.S. Constitution, Bill of Rights, and Integrating Research Within Dance Performance

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Abstract
Part I of this Paper outlines the structure of the United States Constitution and explores its origins and influential documents that helped to inspire the political philosophy within the text. Part II and Part III of this Paper both comprehensively examine the history, common interpretation, and landmark supreme court cases that give meaning to the Bill of Rights. Part I centers around the clauses of the First Amendment and Part II focuses on the Second to Tenth Amendment in depth. Finally in Part IV, I contemplate how academic research on freedom of speech can be investigated within a performance creation context, and propose a five-week dance-making model exercising the very liberties of expression. This paper also extends to share documented work from the experiment of applying the model, working directly with dancers over the semester. The process and methods designed in the weekly rehearsal agendas are meant to be shared with like-minded artists who also seek to create and participate in the democratic society in an artistic and inquisitive manner.

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INTRODUCTION

Encircled by what appears to resemble white footprints on a ring-shaped path, a compact assembly of ten black-hooded figures alongside a great host of smaller similar figures stand still for the eyes of an observer. The words of the United States Bill of Rights are imprinted on the larger figures, each body engraved with one of the first ten amendments to the Constitution. This artwork entitled *Bill of Rights* was painted on wood composite and was completed in 2019. The circular illustration is of black-and-white aesthetics and is approximately sixteen inches in diameter. I first encountered the inspiring artist, Ralph Lazar, in 2017 as I nonchalantly explored socially engaged artists residing on the West Coast. Lazar is a South African artist, whose visual artwork is known to be didactic, political, and unfailingly thought-provoking. Shortly after engaging in his newly created art *Bill of Rights* in 2019, I was overwhelmed with curiosity and sought to pursue my own journey in the intersection of art-making and politics. The first step, was to recognize the need to close my personal knowledge gap in this particular arena. This paper is an effort in seeking to develop personal civic literacy, understanding, and skill as a responsible citizen and artist. To intentionally be educated and acquainted with the federal governing documents is to contribute to the larger collective duty of self-governance.

In a recent national survey conducted by the Annenberg Public Policy Center of the University of Pennsylvania found that "37 percent [of those surveyed] couldn't name any of the rights guaranteed under the First Amendment."[1] Among the few respondents that could name other rights from the first amendment, "15 percent said freedom of religion; 14 percent said freedom of the press; 10 percent said the right to assembly; and only 3 percent said the right to petition the government."[2] There is no mystery to the fact that civil ignorance has increased and "lots of people whose lives are directly affected by [the federal government's actions are uninformed] of the basic principles [or tenants of the Constitution]."[3] In fact, higher educational institutions have not adequately equipped students in civic engagement either. An American Council of Trustees and Alumni (ACTA) report showed that "in a survey of over 1,100 liberal-arts colleges and universities, only 18 percent include one course in U.S. history or government as part of their graduation requirements."[4] The democratic republic will pay the price with an intensifying crisis in civic education, literacy, and engagement. In 1822, James Madison wrote a letter to W.T. Barry stating: "A popular Government, without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or, perhaps both. Knowledge will forever govern ignorance: And a people who mean to be their own Governors, must arm themselves with the power which knowledge gives."[5] This paper is a response to that crisis and is a preliminary effort to reclaim history and take up the armor of power which knowledge gives.

Part I of this Paper outlines the structure of the United States Constitution and explores its origins and influential documents that helped to inspire the political philosophy within the text. Part II and Part III of this Paper both comprehensively examine the history, common interpretation, and landmark supreme court cases that give meaning to the Bill of Rights. Part I centers around the

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[1] *"Americans Are Poorly Informed About Basic Constitutional Provisions,"* The Annenberg Public Policy Center of the University of Pennsylvania, Accessed March 2, 2020. https://www.annenbergpublicpolicycenter.org/americans-are-poorly-informed-about-basic-constitutional-provisions/

[2] Ibid.

[3] Cillizza, Chris. *"Americans Know Literally Nothing about the Constitution."* CNN. Cable News Network, September 13, 2017. Accessed March 2, 2020. https://www.cnn.com/2017/09/13/politics/poll-constitution/index.html.

[4] *"A Crisis in Civic Education,"* American Council Trustees and Alumni, January 2016. Accessed March 3, 2020. 1-3 https://www.goacta.org/images/download/A_Crisis_in_Civic_Education.pdf

[5] Barry, W. T, and James Madison. *James Madison to W. T. Barry, August 4*. August 4, 1822. Manuscript/Mixed Material. https://www.loc.gov/item/mjm018999/.

clauses of the First Amendment and Part II focuses on the Second to Tenth Amendment in depth. Finally in Part IV, I contemplate how academic research on freedom of speech can be investigated within a performance creation context, and propose a ten-week dance-making model exercising the very liberties of expression. This section also extends to chronicle the experiment of applying the model, working directly with dancers over the semester. The process and methods designed in the weekly rehearsal agendas are meant to be shared with like-minded artists who also seek to create and participate in the democratic society in an artistic and inquisitive manner.

I. STRUCTURE AND INSPIRATION

On June 21, 1788, the Constitution—the supreme law of the land—went into effect for the ratifying states when New Hampshire became the ninth state to ratify the proposal. Two years later, all thirteen states joined in to ratify. According to Madison, the freedom for individuals to exercise the mind is the most basic human right, and the one from which all other civil rights and liberties are derived. America is an experiment in self-government, in democratic principles, a previously unheard of trust in *we the people*.[6] This experiment began with the central founding document, the Constitution, after taking the place of its predecessor, the Articles of Confederation.

The Constitution opens with The Preamble, the introductory paragraph that states the general purposes and reasons for the following passage. This section elevates the notion of popular sovereignty, the principle that the source of all governmental power and privileges are directly from the people. The rest of the script is separated into seven Articles. Article I is the lengthiest segment that sets forth the duty of the Legislative branch to make all laws "necessary and proper" so to exercise the powers granted. Federal powers granted to Congress involve collecting taxes, borrowing money, regulating commerce, establishing post offices, and declaring war. The Congress consists of a Senate and House of Representative, election and office details are also described. Article II sets forth the duty of the Executive branch and describes the primary responsibility of the President to "take care that the laws be faithfully executed." The process of electoral college is established and presidential powers granted include commanding armed forces, negotiating treaties, and appointing justices of the Supreme Court. Article III is the shortest segment setting forth the duty of the Judicial branch in interpreting the laws. Through the exercising of judicial review, the courts can declare laws or an act of the executive unconstitutional. Article IV speaks to the relationship between the states and their federal government. Article V describes the process to amend the Constitution. Article VI exhorts the Constitution as the supreme law of the land. Finally, Article VII explains the requirements for the Constitution to be ratified.

Prior to the ratification, Antifederalists did not submit without an arduous fight. In fact, it took ten months for the nine states to ratify and an additional two years before all thirteen states joined in. Opponents claimed that a strong central government established under the Constitution has great potential to trample the rights of citizens without a paper Bill of Rights in place. Thomas Jefferson famously wrote to James Madison stating this position plainly: "I will tell you now what I do not like about the Constitution, first, the omission of a bill of rights. A bill of rights is what the people are entitled to against every government on earth, general or particular, and what no just government should refuse." To compromise and rally support, Federalists assured the states that a Bill of Rights will be included and the first ten amendments became the first trial of the process described under Article V. James Madison gathered ideas for the protection of individual liberties in various state constitutions, and referenced the Magna Carta and the English Bill of Rights. What was once two-hundred potential enumerated rights narrowed down to twenty. After hours of

[6] *"A Democratic Experiment."* Explore History At Our House, December 2, 2019. Accessed on March 4, 2020. https://www.montpelier.org/learn/for-us-by-us.

editing, debating, and modifying, the list eventually became twelve, and finally the first ten amendments were ratified on December 15, 1791.

Failure of the Articles of Confederation
Urgent call to improve the Union

The Articles of Confederation went into effect in 1781, yet after eight short years it was replaced by the U.S. Constitution. Despite its service to concluding the Treaty of Paris in 1783 and ceasing the war against Britain, the Articles of Confederation created an inadequate central government that possessed insufficient authority to address the trade and economic turmoil, and other rising challenges. Historian Edmund S. Morgan explained the mindset of early Americans: "When the Articles of Confederation were drafted, Americans had had little experience of what a national government could do for them and bitter experience of what an arbitrary government could do to them. In creating a central government they were therefore more concerned with keeping it under control than with giving it the means to do its job." Though the document established a scaffold with national departments of foreign affairs, war, marine, and treasury, States and Continental Congress alike recognized the call for a new structure. A new centralized government was needed to stabilize a new nation with chaotic wartime economy, problematic diplomatic issues, and to execute a successful westward expansion. With the weak condition of the central government under the Articles of Confederation, the thirteen colonies would remain nothing more than a league of friendship.

The presiding Confederation Congress had the power to make treaties with foreign nations, oversee questions of war, resolve disputes between states, establish a postal service, manage Native American affairs, and coin money. However, Congress was powerless to levy taxes and had no concrete solution to enforce its resolutions or ordinances. States were reluctant to honor funding requests by Congress, and thus regulating trade or imposing taxes on imported goods were not achievable. States were powerfully independent as each of the thirteen states retained "its sovereignty, freedom, and independence, and every power, jurisdiction, and right…not… expressively delegated to the United States in Congress assembled."[7] States could simply threaten to withdraw from the confederation in face of congressional decisions they disapproved. With each state managing its own monetary affairs and militia, maintaining a stable national economy was simply unfeasible. The predicament culminated in insurgencies led by Daniel Shays in 1786 in protest of aggressive tax collection and rising debt. The national government was incapable of leading a combined military force among the States to resist the rebellion. George Washington famously remarked, "from the high grounds we stood upon, to be so fallen! So lost! It is really mortifying." Governor of the Commonwealth of Massachusetts and president of the Second Continental Congress exclaimed: "How to strengthen and improve the Union so as to render it completely adequate, demands the immediate attention to the states."[8]

Natural Right and Social Contract
Protection of natural rights by a constitutionally limited government

An influential and widely read work of political philosophy was published in 1690 by John Locke, whose supposition and ideologies tremendously influenced the framework of the U.S. Constitution and Declaration of Independence. In *Second Treatise of Government*, Locke defended natural law tradition that extended back to ancient Jewish law and proposed a state of equality in which all

[7] U.S. Congress. *United States Code: Articles of Confederation -1952*. 1952. Periodical. https://www.loc.gov/item/uscode1952-001000005/.

[8] Hillstrom, Laurie Collier. *The Constitution and the Bill of Rights.* (Detroit, MI: Omnigraphics, 2017)

humankind are born with equal rights to "life, liberty, and estate [property]." Natural law holds that "the judgments of good and evil are not (or at least should not be) arbitrary judgements based on convenience or political utility, but are in fact located in the very nature of the behaviors themselves."[9] As another puts it, natural law refers to "laws of morality ascertainable through human reason…such laws are antecedent and independent of positive, man-made law."[10] Humankind abide by and submit to discernible, unquestionable, irrefutable moral principles that exist in the inherent order of nature. To this statement, Locke agreed.

Locke describes a pre-political state of nature where mankind are "in a state of perfect freedom to order their actions and dispose of their persons and possessions as they think fit, within the bounds of the law of nature, without asking leave or depending upon the will of any other man."[11] Yet this state of nature is not a desirable or durable condition since "[mankind are] creatures of passion, [who] tend to be biased in their own favor and lack both neutral 'umpire' to decide disputes and an impartial enforcer to carry out natural law."[12] To avoid descending into a state of war, free and equal individuals consent to creating a "social contract" and obey certain "terms" for the commonwealth, prosperity, and wellbeing of a peaceful society where all may securely dwell, co-exist, and flourish. This concept identifies a representative legislature who is given authority and permission by the people to restrict individual liberty, with the end goal of promoting harmony amongst the public. The proper role of government authority, is thus to maintain an environment that guards the natural rights of men. If this purpose shall fail, the laws given by it will be invalid and void. The people retain the right to revolution to overthrow the power of such government. Unlimited sovereignty, according to Locke, is contradictory to natural law.[13] Locke contends this explicit right to revolution in the words:

> "Whenever the *Legislators endeavor to take away, and destroy the Property of the People*, or to reduce them to Slavery under Arbitrary Power, they put themselves into a state of War with the People, who are thereupon absolved from any farther Obedience, and are left to the common Refuge, which God hath provided for all Men, against Force and Violence. Whensoever therefore the *Legislative* shall transgress this fundamental Rule of Society; and either by Ambition, Fear, Folly or Corruption, *endeavor to grasp* themselves, *or put into the hands of any other an Absolute Power* over the Lives, Liberties, and Estates of the People; By this breach of Trust they *forfeit the Power*, the People had put into their hands, for quite contrary ends, and it devolves to the People, who have a Right to resume their original Liberty."[14]

There are two crucial limitations that social-contract theory imposes on governmental power to restrict natural rights. First, natural rights can only be potently restricted when the people consent to, agree to, and abide by such regulation. Locke expresses this by asserting, "Men being by nature all free, equal and independent, no one can be put out of this estate and subjected to the political power of another without his own consent."[15] Secondly, the government is permitted to restrict natural rights on the grounds that such actions promote the public good—that is, the aggregate

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[9] Oakes, Edward T. *"Natural Law in Judaism,"* First Things, May 1, 1999. https://www.firstthings.com/article/1999/05/natural-law-in-judaism.

[10] Mineshema, Dale. *"Natural Law,"* Natural Law. Accessed March 3, 2020. https://www.mtsu.edu/first-amendment/article/788/natural-law.

[11] McDaniel, Robb A. *"John Locke,"* John Locke. Accessed March 3, 2020. https://www.mtsu.edu/first-amendment/article/1257/john-locke.

[12] Ibid.

[13] Elahi, Manzoor. *"Summary of Social Contract Theory by Hobbes, Locke and Rousseau," SSRN Electronic Journal*, 2013. https://doi.org/10.2139/ssrn.2410525.

[14] Powell, Jim. *"John Locke: Natural Rights to Life, Liberty, and Property: Jim Powell."* Foundation for Economic Education, August 1, 1996. https://fee.org/articles/john-locke-natural-rights-to-life-liberty-and-property/#link-5.

[15] Locke, John. *"Of Civil Government; Second Treatise."* Chicago: H. Regnery, 1971.

wellbeing and prosperity of an entire political and societal citizenry. When individuals enter into a social contract, they voluntarily surrender "as much…natural Liberty…as the Good, Prosperity, and Safety of the Society shall require."

Separation of Powers
The judge shall not be both law-maker and enforcer

In a classic treatise on political theory pushed in 1748, *The Spirit of the Laws*, Charles de Montesquieu organized and redefined government categories based on "the motives of political action rather than by the locus of power and authority."[16] Montesquieu reasoned that monarchies and despotism are based on fear, whereas republicans are based on a spirit of patriotism. The concept of separation of powers denotes the division of the political authority of state into legislative, executive, and judicial powers. This theory holds that true liberty can only be promoted and achieved while these three powerful branches are separate and acting independently. In his work, Montesquieu developed this concept in the most complete and systematic manner: "In every government there are three sorts of power: the legislative; the executive in respect to things dependent on the law of nations; and the executive in regards to matters that depends on the civil law…The political liberty of the subject is a tranquility of mind arising from the option each person has of his safety. In order to have this liberty, it is requisite the government be so constituted as one man need not be afraid of another."[17] Montesquieu holds the belief that if the same mind dictating the making and enforcing of the law is also the same mind that judges the subject as to whether the law has been trespassed, there will be no vindication. In fact, it is deemed as nothing less than tyrannical laws executed in a tyrannical manner. In his relentless intolerance of unrestrained and autocratic use of authority, Montesquieu eloquently expressed the danger and threat that concentration of power poses to liberty:

> "When the legislative and executive powers are united in the same person or in the same body of magistrates, there can be no liberty…Again, there is no liberty if the judiciary power be not separated from the legislative and executive. Were it joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control; for the judge would then be the legislator. Were it joined to the executive power, the judge might behave with violence and oppression."[18]

The claims of the political doctrine became one of the most influential pieces of political writing and gave this idea a world-wide impetus. Just like any other theoretical proposition, the philosophy was met with opposition and criticism. Some government insisted that such philosophy would impair proper exercises of governmental functions and is virtually impossible to carry out. For example, The London Journal, in defending the ministerial ruling of their longest-serving prime minister, Sir Robert Walpole, countered "'Tis plain to common sense and the experience of all the world, that this independency is a mere imagination; there never was really any such thing, nor can any business be carried on or government subsist by several powers absolutely distinct and absolutely independent."[19]

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[16] Hazo, Robert G. "Montesquieu and the Separation of Powers." *American Bar Association Journal* 54, no. 7 (1968): 665-68. Accessed March 24, 2020. www.jstor.org/stable/25724465.

[17] Montesquieu, Charles de Secondat. *The Spirit of Laws*. Lexington, KY: Forgotten Books, 2012. 173.

[18] Hazo, Robert G. "Montesquieu and the Separation of Powers." *American Bar Association Journal* 54, no. 7 (1968): 665-68. Accessed March 24, 2020. www.jstor.org/stable/25724465.

[19] Rozenberg, Joshua, Jonathan Meades, and Lionel Shriver. *"Tawdry Roots of a Deeply Damaging Doctrine: David Starkey,"* The Critic Magazine, November 23, 2019. https://thecritic.co.uk/issues/november-2019/tawdry-roots-of-a-deeply-damaging-doctrine/.

Despite such hostile dissent and unbelief, the concept of separation of powers is espoused deeply in the composition of the U.S. Constitution. In fact, in *The Federalist Papers*, James Madison referred to and honored Montesquieu as "the oracle who is always consulted and cited on the subject…if he be not the author of this invaluable precept in the science of politics, he has the merit at least of displaying and recommending it most effectively to the attention of mankind." Arguing for the separation of powers, Madison examined and interpreted the concept of separation of powers to not mean that "these departments ought to have no partial agency in, or no control over, the acts of each other…rather, [Montesquieu meant that] where the whole power of one department is exercised by the same hands which possess the whole power of another department, the fundamental principles of a free constitution are subverted." In his mind, independence and interdependence of the three powers are harmonized in the American system which adapts and integrates the concept as its own.

II. EXAMINING THE FIRST AMENDMENT

First Amendment

Burt Neuborne, the founding legal director of the Brennan Center for Justice at NYU School of law, presented a helpful illustration of the First Amendment in a podcast interview by Radiolab's *More Perfect* program. Neuborne describes the First Amendment as a series of "concentric circles" representing the life cycle of a democratic idea. Conjointly, the establishment and free exercise clauses create a "free space" inside the minds of citizens to think and believe as one desires. This elevates the concept that each individual is entitled to enjoy freedom of thought as sacred property, immune from governmental interference. Naturally, once thoughts and ideas are formed, they are shared audibly, protected by the free speech clause which allows free exchange of ideas with closer acquaintances. Then, to "make a dent in society", massive congregations are reached empowered by freedom of the press, which in essence, is speech amplified. As an influx of people support and believe in the values and thoughts expressed, groups are free to assemble, organize, and move together. Finally, arguments are taken to the government for confrontation, which is protected by the petition clause. Neuborne passionately articulated that "this is the only time in the entire history [of mankind when] the six building blocks of democracy [are formed together] in a single, coherent text."

Even with such an eloquent and lyrical illustration of this "blueprint for democracy,"[20] history indeed shows the brutal, violent, and long-suffering fight for the ideologies of a democratic reality. From the beginning, the United States operated as a republic, a representative government in which elected officials are decision-makers independent of constituents. In time, democracy would make a stronger showing through the arduous and collective fight for freedom.[21]

Establishment Clause

"Congress shall make no law respecting an establishment of religion…"

In the sixteenth and seventeenth century, early settlers in the New World sought to escape from religious prosecutions in Europe. The influx of religious and denominational diversity included puritans, anglicans, quakers, lutherans, roman catholics, baptists, presbyterians, Jewish

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[20] Neuborne, Burt. *Madisons Music: on Reading the First Amendment* (New York: The New York Press, 2015), accessed February 5, 2020.

[21] Raphael, Ray. *The U.S. Constitution, Explained—Clause by Clause—for Every American Today* (New York: Vintage Books, a Division of Penguin Random House LLC, 2017), 116

congregations, and others. Conflicts arose when colonists were required to pay religious taxes and attend church services to support doctrinal beliefs they did not agree with. Many who did not abide by authoritative demands were punished brutally, jailed, and had personal property confiscated.

When Thomas Jefferson ascended to presidency in 1800, he received a letter from the Danbury Baptist Association expressing concern for the insecurity and ambiguity of religious liberty provided by the Constitution. The Association sincerely urged the protection of religious minorities from government interference in asserting that "religion is at all times and places a Matter between God and Individuals—That no man aught to suffer in the Name, person, or effects on account of his religious Opinions—That the legitimate Power of civil Government extends no further than to punish the man who works ill to his neighbor."[22] President Jefferson responded declaring that the establishment clause in fact entailed a separation between Church and State. In the written words of his response, he "[believed] with [the Danbury Baptist Association] that religion is a matter which lies solely between Man and his God, that he owes account to none other for his faith or his worship, that the legitimate powers of government reach actions only, and not opinions…and [the establishment clause builds] a wall of separation between Church and State."[23] This classic interpretation of the first clause in the bill of rights renders many authorities to agree that "freedom of conscience is beyond the control of any civil authority."[24]

The Lemon Test

Three-pronged test established

In 1968, Pennsylvania passed a statute called the "Nonpublic Elementary and Secondary Education Act," which powered the State to "give direct public aid to [catholic institutions] nonpublic schools [in the areas of] teacher's salaries…textbooks and instructional materials in the fields of mathematics, modern foreign languages, physical education, and physical science."[25] The Supreme Court had to decide if statutes of this nature violated the establishment clause in the first amendment. A tripartite test was established to determine violations of the establishment clause, and it derived its name from a landmark Supreme Court case *Lemon v. Kurtzman (1971)*. With an increasingly intense demand on educational costs, parochial schools and church-affiliated schools faced rising budgeting challenges in Pennsylvania and Rhode Island. The states offered to help their financial dilemma by creating financial assistance programs. Many taxpayers however, viewed this action as "respecting" an establishment of religion and filed suits.

Chief Justice Warren E. Burger and his court created a workable doctrine to help determine whether an establishment of religion had indeed take root. The law in question "first…must have a secular legislative purpose; second…must be one that neither advances nor inhibits religion; finally…must not foster an excessive entanglement with religion."[26] The Court held that although the Pennsylvania statue does have secular legislative purposes in seeking to provide secular

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[22] *"From the Danbury Baptist Association,"* The Papers of Thomas Jefferson, Princeton University Press, accessed February 5, 2020, https://jeffersonpapers.princeton.edu/selected-documents/danbury-baptist-association

[23] *"Jefferson's Letter to the Danbury Baptists,"* The Library of Congress, accessed February 5, 2020, http://www.loc.gov/loc/lcib/9806/danpre.html

[24] Dawson, Joseph M. *"The Meaning of Separation of Church and State in the First Amendment,"* Journal of Church and State 1, no. 1 (1959): 37-42. Accessed February 5, 2020. www.jstor.org/stable/23913048.

[25] Kurtzman, David H. *"The Pennsylvania Nonpublic Elementary and Secondary Education Act - Pioneer and Precedent,"* U.S. Department of Education, Institute of Education Sciences, Accessed February 5, 2020. https://eric.ed.gov/?id=ED033473

[26] Hamilton, Marci A., and Michael McConnell. *"The Establishment Clause,"* The National Constitution Center, First Amendment, accessed February 8, 2020. https://constitutioncenter.org/interactive-constitution/interpretation/amendment-i/interps/264

education requirements to students, excessive government financial involvement in such institutions "inevitably leads to an intimate and continuing relationship between church and state."[27] In the late twentieth century, more specific standards were adopted to address further controversy to improve the Lemon test, such as the coercion, endorsement, and neutrality tests.

Endorsement Test

In *Lynch v. Donnelly (1984)*, the Court had to confront the constitutionality of displaying a nativity scene or outdoor Christmas crèche in public city space. For more than forty years, the city of Pawtucket in Rhode Island would annually erect a Christmas display located in the heart of the city's shopping district. The seasonal display traditionally includes a Santa Claus house, a tree, a banner that reads "Seasons Greetings" and a creche or Nativity scene. Plaintiff, Daniel Donnelly filed suit against Dennis Lynch, who was the mayor of Pawtucket, alleging that the creche arrangement violated the establishment clause of the First Amendment.

The endorsement test was proposed by Justice Sandra Day O'Connor in a concurring opinion to refine and expound on the Lemon test. This clarification questions first "whether the government has a purpose to endorse or disapprove of religion; and [two,] whether the effect of the challenged practice is to endorse or disapprove of religion."[28] The Court held that "notwithstanding the religious significance of the creche, [the nativity scene display] has not violated the Establishment Clause."[29] Chief Justice Burger delivered the opinion of the Court and conduced that "the city [of Pawtucket] has a secular purpose for including the crèche in its Christmas display, and has not impermissibly advanced religion or created an excessive entanglement between religion and government. [Moreover,] the display is sponsored by the city to celebrate the Holiday recognized by Congress…and to depict the origins of that Holiday."[30] Burger stated that "[the United States] history is pervaded by official acknowledgment of the role of religion in American life, and equally pervasive is evidence of accommodation of all faiths and all forms of religious expression and hostility toward none." He concluded that the forbidding of the Christmas symbol is "an overreaction contrary to this Nation's history and this Court's ruling, [especially] while hymns and carols are sung and played in public places…and while Congress and state legislatures open public sessions with prayers."[31]

Coercion Test

"At a minimum, the Constitution guarantees that government may not force anyone to support or participate in religion or its exercise."

The new threshold requirement of 'coercion test' was developed after the Lemon and endorsement tests. This standard established that indirect means of coercing anyone to participate in religion or its exercise is equally unconstitutional as blatant state-imposed sanctions for non-preferred religious activities. In *Lee v. Weisman (1992)*, the Court demonstrated this concept by delivering that "the government may no more use social pressure to enforce orthodoxy than it may use more direct means."[32] The middle school invited a rabbi to recite prayers at a graduation ceremony, and

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[27] "Lemon v. Kurtzman." Oyez. Accessed February 8, 2020. https://www.oyez.org/cases/1970/89.

[28] Harpaz, Leora. *"Endorsement Test,"* Western New England University of Law, accessed February 8, 2020, https://www.wneclaw.com/religion/endorsementtest.html

[29] Lynch v. Donnelly, 465 U.S. 672-687 (1984), Justia. Accessed February 8, 2020. https://supreme.justia.com/cases/federal/us/465/668/

[30] Lynch v. Donnelly, 465 U.S. 680-685 (1984), Justia. Accessed February 8, 2020. https://supreme.justia.com/cases/federal/us/465/668/

[31] Lynch v. Donnelly, 465 U.S. 685-686 (1984), Justia. Accessed February 8, 2020. https://supreme.justia.com/cases/federal/us/465/668/

[32] Lee v. Weisman, 505 U.S. 594 (1992), Justia. Accessed February 8, 2020. https://supreme.justia.com/cases/federal/us/505/577/

the Court invalidated the school-sponsored activity based on the "public pressure [and] peer pressure [it places] on attending students to stand as a group or…maintain respectful silence during the invocation and benediction." Justice Kennedy renders pressure in this nature "as real as any overt compulsion [even though it is subtle and indirect]."[33] He referred to psychological research to support "the common assumption that adolescents are often susceptible to pressure from their peers towards conformity, and that the influence is strongest in matters of social convention."[34] Thus, he called for the urgent need to "[garrison that liberty] from subtle coercive pressures in the elementary and secondary pubic schools"[35]

In dissenting against Kennedy's interpretation, Justice Antonin Scalia argued that "the coercion that was a hallmark of historical establishments of religion was coercion of religious orthodoxy and of financial support by *force of law and threat of penalty*"[36] and that indirect coercion is not prohibited by the establishment clause. Though Kennedy's psychological approach was met with strong criticism, it nonetheless formed the ground work and model for decisions held in later controversies, such as *Santa Fe Independent School District v. Doe (2000)* and *Newdow v. United States Congress, Pledge Cases (2000-2004)*.

All controversial issues that involve prayers in public schools rest on the precedent set forth by the Supreme Court thirty years prior to L*ee v. Weisman (1992)*, in the case *Engel v. Vitale (1962)*. In the early twentieth century, the familiar but obsolete prayer still sounded in the Union Free School District in New Hyde Park, New York. The prayer reads: "Almighty God, we acknowledge our dependence upon Thee, and we beg Thy blessings upon us, our parents, our teachers and our Country." Teachers would lead students in reciting the prayer every morning to begin the school days, and students were not forced to participated and could be excused. Though the practice was voluntary, Steve Engel and many parents challenged the officially sponsored prayer as a violation of the Establishment Clause. Though the plaintiffs lost the case at the Court of Appeals of New York, the Supreme Court struck down the prayer in favor of Engel's complaint. Justice Hugo L. Black referenced the history of religious discrimination and abuse, and opined that "the First Amendment was added to the Constitution to stand as a guarantee that neither the power nor the prestige of the Federal Government would be used to control, support or influence the kinds of prayer the American people can say."[37]

Neutrality Test

For many cases surrounding the controversy of government aid to religious entities, neutrality has been instrumental in determining whether government actions were violating the establishment clause. The neutrality test "requires the government to treat religious groups the same as it would any other similarly situated group."[38] The prohibition of the establishment clause as delineated by the Court below expresses this concept of neutrality:

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[33] Ward, Cynthia V., *"Coercion and Choice Under the Establishment Clause,"* (2006) William and Mary Law School Scholarship Repository, Faculty Publications, https://scholarship.law.wm.edu/cgi/viewcontent.cgi?article=1101&context=facpubs

[34] Id. At 593-94

[35] Id. At 592.

[36] Id. At 640-41 (Scalia, J., dissenting).

[37] Judson Jr., David L., *"Engel v. Vitale (1962),"* Middle Tennessee State University, The First Amendment Encyclopedia, Accessed March 30, 2020. https://mtsu.edu/first-amendment/article/665/engel-v-vitale

[38] Ryman, Hana M. And J. Mark Alcorn. *"Establishment Clause (Separation of Church and State),"* Middle Tennessee State University, The First Amendment Encyclopedia, Accessed February 8, 2020. https://www.mtsu.edu/first-amendment/article/885/establishment-clause-separation-of-church-and-state

> Neither a state nor the federal government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force…a person to go to or to remain away from church against his will, or force him to profess a brief or disbelief in any religion.[39]

In *Zelman v. Simmons-Harris (2002)*, the Supreme Court confronted the constitutionality of Ohio's school voucher program in relation to the establishment clause. The state of Ohio created the Pilot Project Scholarship Program that enabled parents to pay tuition for their children at a school of their choice. Many of the families that participated the program enrolled the students in religious schools, and the Court held that this program did not violate the establishment clause "since the vouchers do not promote religious schools alone"[40] and is "neutral with respect to religion and provides assistance directly to a broad class of citizens who, in tern, direct government aid to religious schools wholly as a result of their own genuine and independent private choice."[41]

Free Exercise Clause

"…or prohibiting the free exercise thereof;"

Among 'certain unalienable Rights' as described by the declaration of independence, scholars and professors of law largely agree that the First Amendment protects the individual's right to freedom of conscience in respect to religion. James Madison eloquently expressed his support for freedom of religion provision: "It is the duty of every man to render to the Creator such homage, and such only, as he believes to be acceptable to him. This duty is precedent both in order of time and degree of obligation, to the claims of Civil Society."[42] However, the delicate balance of individual liberties and the rights of others and the needs of the whole nation continues to be a vexing question in this area, with no clear resolution. Yet the Court has delivered landmark decisions since the late 19th century, to assist in wrestling with whether and under what conditions religiously motivated actions should be exempt from generally applicable laws. For this generation and beyond, such interpretations provide a framework for grappling with the debate of limitations on free exercise rights.

Polygamy

The Supreme Court first addressed a free exercise claim in the late 19th century that set the modeling doctrinal understanding until later interpretational shifts in the 20th century. In *Reynolds v. United States (1878)*, the Court ruled that the free exercise clause was not applicable to actions that were "violations of social duties or subversive of good order."[43] George Reynolds, who was a member of the Church of Jesus Christ of Latter-day Saints, violated the Morrill Anti-bigamy Act of 1862 by marrying a second wife under his religion requirement. The Court upheld Reynold's conviction and affirmed that religious duty is not a sufficient defense to a criminal charge. Writing for the unanimous court, Chief Justice Morrison delivered that "a party's religious belief cannot be accepted as a justification for his committing an overt act, made criminal by the law of the land"[44]

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[39] Monk, Linda R., *The Words We Live By: Your Annotated Guide to the Constitution* (New York: A Stonesong Press Book, Hyperion), 130

[40] Zelman v. Simmons-Harris, 536 U.S. 693 (2002), Justia. Accessed February 8, 2020. https://supreme.justia.com/cases/federal/us/536/639/

[41] Id. At 648-653.

[42] Gedicks, Frederick and Michael McConnell, *"The Free Exercise Clause,"* The National Constitution Center, First Amendment, accessed February 10, 2020. https://constitutioncenter.org/interactive-constitution/interpretation/amendment-i/interps/265

[43] Monk, Linda R., *The Words We Live By: Your Annotated Guide to the Constitution* (New York: A Stonesong Press Book, Hyperion), 134

[44] Reynolds v. United States, 98 U.S. 145 (1878), Justia. Accessed February 10, 2020. https://supreme.justia.com/cases/federal/us/98/145/

and further stated that "laws are made for the government of actions, and while they cannot interfere with mere religious belief [or correctness of polygamy] and options, they may [interfere] with practices."[45] Waite famously asserted that "to permit someone to use religious belief as an excuse to ignore legal requirements would in effect…permit every citizen to become a law unto himself."[46] This case set precedent for more than seven decades until later disputes expanded types of activities protected by the free exercise clause.

Compelling Interest Test

As expressed by Justice Harlan Fiske Stone in 1944, "regulation aimed at fundamental rights, the operation of the political process, and disadvantaged minorities must be viewed with more scrutiny and subjected to stricter review."[47] In *Sherbert v. Verner (1963)*, the Supreme Court established an element of the strict scrutiny test by which courts exercise judicial review in free exercise cases. Adele Sherbert was discharged from her job for refusing to work on Saturdays in accordance with her Seventh-day Adventist sabbath belief. In the hardship of finding employment that accommodated her faith requirement day of rest, she applied for unemployment compensations. Yet public officials in South Carolina denied her benefits stating that "she had failed, without good cause, to accept suitable work when offered."[48] In a majority opinion delivered by Justice Brennan, the Court ruled that "the state's eligibility restrictions for unemployment compensation imposed a significant burden on Sherbert's ability to freely exercise her faith. Furthermore, there was no compelling state interest which justified such a substantial burden on this basic First Amendment right."[49] This decision prohibited government from imposing stringent regulation on individuals that interfered with their sincere religious practice, unless the public interest in enforcement was compelling. The compelling interest test requires the government to prove that it is using the "most narrowly tailored, or least restrictive, means to achieve an interest that is compelling…some described it as necessary or crucial, meaning more than an exercise of discretion or preference."[50]

Less than a decade later, in *Wisconsin v. Yoder (1972)*, the principles laid out in *Sherbert* were effectively reinforced. Jonas Yoder and Wallace Miller, who were members of the Older Order Amish religion and the Conservative Amish Mennonite Church, were convicted of violating Wisconsin's school-attendance law that required children to participate in education until age sixteen. Respondents argued that "worldly influences, competitive values, and material concerns"[51] from public schools impeded their children's learning to lead a life in rural Amish community in accordance to their religious beliefs. Amish parents who removed their children from school at the age fourteenth deemed the state law as infringing upon their right to freely exercise religious and cultural traditions. The Court utilized a "balancing of interests" methodology

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[45] *"Limitations on Free Exercise Rights,"* Pew Research Center's Religion and Public Life Project, December 31, 2019. Accessed on February 12, 2020. https://www.pewforum.org/2007/10/24/a-delicate-balance2/

[46] Ibid.

[47] Schultz, David. *"Carolene Products Footnote Four,"* Middle Tennessee State University, The First Amendment Encyclopedia, Accessed February 12, 2020. https://mtsu.edu/first-amendment/article/5/carolene-products-footnote-four

[48] *"A Delicate Balance: The Free Exercise Clause and The Supreme Court,"* Pew Research Center's Religion and Public Life Project, October 24, 2007, Accessed on February 15, 2020. https://www.pewforum.org/2007/10/24/a-delicate-balance4/

[49] "Sherbert v. Verner." Oyez. Accessed February 12, 2020. https://www.oyez.org/cases/1962/526.

[50] Steiner, Ronald. *"Compelling State Interest"* Middle Tennessee State University, The First Amendment Encyclopedia, Accessed February 12, 2020. https://www.mtsu.edu/first-amendment/article/31/compelling-state-interest

[51] *"A Delicate Balance: The Free Exercise Clause and The Supreme Court,"* Pew Research Center's Religion and Public Life Project, October 24, 2007, Accessed on February 15, 2020. https://www.pewforum.org/2007/10/24/a-delicate-balance5/ (5, Burger Court: Expansion and Contraction of Free Exercise Rights)

in this case, and weighed the gains to the state against the costs to the Amish. Justice Burger delivered the opinion of the Court stating that "the State's interest in universal education is not totally free from a balancing process when it impinges on other fundamental rights, such as….the Free Exercise Clause…and the traditional interest of parents with respect to the religious upbringing of their children."[52] The Court reasoned that the Amish possesses "a long history as a successful and self-sufficient segment of American society, [and] have demonstrated the sincerity of their religious beliefs, the interrelationship of belief with their mode of life, the vital role that belief and daily conduct play in the continuing survival of Old Order Amish communities."[53] In addition, the Amish provided strong evidence that "by forgoing one or two additional years of compulsory education [the children] will not [be impaired physically or mentally], or result in an inability to be self-supporting or to discharge the duties and responsibilities of citizenship, or in any other way materially detract from the welfare of society."[54] In light of this, the States could not prove how its "admittedly strong interest in compulsory education would be adversely affected by granting an exemption to the Amish."[55] The Court held that the State's interests for obligatory school attendance of an additional two years could not override individual's interests in the free exercise of religion in this context.

Following the *Yoder* decision, the free exercise landscape appeared more lenient in allowing for exemptions from general applicable laws based on religious motivation. Yet the Court repeatedly rejected a number of first amendment challenges in the areas of tax-exemption status, social security taxes, and military rules regarding headgear.[56] In 1990, the landscape took another dramatic turn and revitalized the "belief-action distinction" first introduced in *Reynolds,* and followed the initial reasoning closely. In *Employment Division v. Smith (1990)*, the Court held that "when a criminal law was at issue, the government did not have to prove a compelling interest, unless the law specifically targeted [and gravely disfavored] certain religious groups."[57] Alfred Smith and Galen Black were discharged from their jobs after engaging in the use of peyote for religious ceremonial purposes, and the Court ruled that Oregon's statute outlawing the use of hallucination drugs is rational and legitimate, outweighing individuals' free exercise infringement claims. Even though this decision lessened the rigid use of the compelling interest test, many justices including Sandra Day O'Connor, Harry Blackmun, William Brennan, and Thurgood Marshall advocated for the test to be diligently retained in protection of religious minorities in future cases.

In the years following the *Smith* decision, religious groups and civil liberty groups advocated together and Congress passed the Religious Freedom Restoration Act (RFRA) and Religious Land Use and Institutionalized Persons Act (RLUIPA) to uphold religious liberty protection. The former did not create any monumental impact as hoped for, and was declared unconstitutional after four years in effect. The latter act produced better results in protecting religious liberties of prisoners.

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[52] Wisconsin v. Yoder, 406 U.S. 213-215 (1972), Justia. Accessed February 15, 2020. https://supreme.justia.com/cases/federal/us/406/205/

[53] Wisconsin v. Yoder, 406 U.S. 219-229, 234-236 (1972), Justia. Accessed February 15, 2020. https://supreme.justia.com/cases/federal/us/406/205/

[54] Wisconsin v. Yoder, 406 U.S. 229-234 (1972), Justia. Accessed February 15, 2020. https://supreme.justia.com/cases/federal/us/406/205/

[55] Wisconsin v. Yoder, 406 U.S. 219-229, 234-236 (1972), Justia. Accessed February 15, 2020. https://supreme.justia.com/cases/federal/us/406/205/

[56] Monk, Linda R., *The Words We Live By: Your Annotated Guide to the Constitution* (New York: A Stonesong Press Book, Hyperion), 136

[57] Ibid.

Alien and Sedition Acts of 1798

Speak and write what they think

Perhaps one of the earliest and most important juncture in First Amendment interpretation is represented by the controversial Alien and Sedition Acts of 1798, only seven years following the ratification of the Bill of Rights. This legislation composed of four bills that were signed into law by President John Adams, all of which were decried by Thomas Jefferson's Democratic-Republicans as "an attempt to silence and disenfranchise [those] who disagreed with the Federalist Party by violating the right of freedom of speech in the First Amendment."[58] The looming and debatable question was where can the government draw the line between 'national security' and freedom of speech without depriving constitutional freedoms from citizens. The first act—the Naturalization Act—extended the U.S. residency requirement period from five to fourteen years for the naturalization process. In Boyd v. Nebraska (1892), the Supreme Court defined naturalization as "the act of adopting a foreigner, and clothing him with the privileges of a native citizen." In seeking to be *clothed,* this act placed a heavier burden on immigrants who already had a difficult time becoming naturalized citizens. The second act—the Alien Friends Act—empowered the President to deport or jail any alien he judged "dangerous to the peace and safety of the United States…[or susceptible to] any treasonable or secret machinations against the government thereof."[59] The third act—the Alien Enemies Act—authorized the President to deport or jail all male immigrants, ages fourteen and up, from any "hostile nation or government" if war was declared. They were subject to be "apprehended, restrained, secured, and removed, as alien enemies."[60]

Finally, the fourth act—the Sedition Act—that engendered the most heated debates and controversy, rendered tremendous power to the federal government. The Democratic-Republican minority argued that this act ignominiously violated the First Amendment's protection of freedom of speech and the press as a direct aim at those who spoke out against the Federalists. Under this law, any persons who "write, print, utter, or publish any false, scandalous and malicious writing against the government…with intent to defame…or bring them into contempt or disrepute"[61] are punishable by fine and imprisonment. A person guilty of sedition is defined as one "with intent to cause the overthrow or destruction of lawful civil authority, [who] creates…revolt, violence, or other disturbance against that authority [who is the government]."[62] During 1798 to 1801, there were numerous editors, publishers, and individuals prosecuted for violating this act who expressed opposing political opinions to the Adams administration.

Federalists opposed the arguments by incorporating British common law and arguing that "seditious acts of libel, slander, and defamation had long been punishable offenses and that freedom of speech should not protect seditious false statements."[63] Federalist state legislators also reasoned that sedition law was "wise and necessary" for the defense of the country against

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[58] Longley, Robert. *"The Alien and Sedition Acts of 1798,"* ThoughtCo. Accessed February 16, https://www.thoughtco.com/the-alien-and-sedition-acts-of-1798-4176452

[59] *Transcript of Alien and Sedition Acts of 1798*, 5th Cong., 2nd sess., Accessed February 16, https://www.ourdocuments.gov/doc.php?flash=false&doc=16&page=transcript

[60] Ibid.

[61] Ibid.

[62] *Section 94: Mutiny or Sedition, Article 94*, 191st General Court of The Commonwealth of Massachusetts, Accessed February 16, https://malegislature.gov/Laws/GeneralLaws/PartI/TitleV/Chapter33A/Section94

[63] Longley, Robert. *"The Alien and Sedition Acts of 1798,"* ThoughtCo. Accessed February 16, https://www.thoughtco.com/the-alien-and-sedition-acts-of-1798-4176452

enemies, especially in light of the tension between U.S. and France. Even with the law in effect, the anti-sedition spirit proved unrelenting still. James Madison argued in a resolution written for the Virginia legislature that that the Sedition Acts oppressed "the right of freely examining public characters and measures, and of free communication among the people." Furthermore, Jefferson also wrote in the 8th resolution, that Adam's Alien and Sedition Acts allowed the government to act in an arbitrary and despotic manner, and that the U.S. government "had become a tyranny which desired to govern with a rod of iron"[64] The reality that revolved around this controversy exposed the U.S. government to look very much like its former oppressor, the King of England. In England, seditious libel "prohibited virtually any criticism of the king or his officials" as the common law held that "any spoken or written words that found fault with the king's government undermined the respect of the people for his authority."[65] In the end, Thomas Jefferson was elected in 1800 and all of the Alien and Sedition Acts except for the Alien Enemies Act had been repealed or limited in effectual period in 1802. In the inaugural address given by the new President in 1801, he encouraged all fellow-citizens to "arrange themselves under the will of the law" as the voice of the nation clarifies the definition of free speech and press as the right of Americans "to think freely and to speak and write what they think."[66]

Defamation

Reckless disregard for truth, deliberate fabrication

Since the U.S. declared independence from Britain in 1776, defamatory law has largely remained unchanged and consistent with English libel law until 1964, when American law eventually forges a new path. This is due in part, to the deeply-rooted principles that both countries share stretching back to the philosophies of the Magna Carta. Growing further from the common law of England, the U.S. defines a separate approach in the area of defamation judgement in the mid-twentieth century.

One of the main differences between English and American defamation law can be clearly understood in where the burden of proof is placed. England prioritizes protecting the untarnished reputation of potential plaintiffs, whereas the U.S. is rigorously committed to free speech as a right and believes that "free expression and vigorous public debate are often more important than compensating plaintiffs for harm caused by defamatory falsehood."[67] This can be seen in article ten of the European Convention on Human Rights (ECHR) where though it acknowledges individual's rights to "the freedom of expression [including] the freedom to hold opinions and to receive and impart information and ideas without interference by public authority," the exercising of these rights are "subject to…restrictions or penalties…for the protection of the reputation or rights of others [and] for preventing the disclosure of information received in confidence." In fact, Lord Nicholls of Birkenhead stated in *Reynolds v. Times Newspapers Ltd. (2001)* that "the plaintiff is not required to prove that the words are false. Nor, in the case of publication in a written or permanent form, is he required to prove he has been damaged…truth is a complete defense. If the defendant proves the substantial truth of the words complained of, he thereby establishes the defense of justification."

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[64] Frohnen, Bruce. *"The American Republic: Primary Sources,"* Online Library of Liberty, Accessed February 17, 2020, https://oll.libertyfund.org/quotes/80

[65] *"BRIA 194b The Alien and Sedition Acts: Defining American Freedom,"* Constitutional Rights Foundation, Accessed February 17, 2020 https://www.crf-usa.org/bill-of-rights-in-action/bria-19-4-b-the-alien-and-sedition-acts-defining-american-freedom.html

[66] "The Avalon Project at Yale Law School: *Thomas Jefferson First Inaugural Address,*" Lillian Goldman Law Library, Accessed February 17, 2020 https://avalon.law.yale.edu/19th_century/jefinau1.asp

[67] Johnson, Vincent R. *"Comparative Defamation Law: England and the United States,"* 24 University of Miami International and Comparative Law Review, August 28, 2017, Accessed on February 17, 2020, https://repository.law.miami.edu/cgi/viewcontent.cgi?article=1287&context=umiclr

In 1964, the landmark Supreme Court case *New York Times Co. v. Sullivan* established a new standard regarding state and national libel law in accordance with the U.S. constitution, contrary to England's law. In 1960, a full-page civil rights fundraising editorial advertisement entitled "Heed Their Rising Voices" aimed to express and communicate the harsh realities faced by civil rights protesters in the South. The advertisement detailed the jarring treatment of Rev. Martin Luther King Jr. by Alabama law enforcement, as well as aggressive police action allegedly directed against students who participate in civil rights demonstrations. L.B. Sullivan, the city commissioner in Montgomery filed a lawsuit against New York Times Co. complaining that he had been libeled by false and exaggerated statements published. Even though the Circuit Court of Montgomery County awarded him damages of $500,000, the Supreme Court unanimously revised the damage award. Justice William J. Brennan Jr. opined that "debate on public issues should be uninhibited, robust and wide-open…and that vehement criticism and even mistakes were part of the price a democratic society must pay for freedom."[68] To be a public official or a celebrity, such persons automatically forfeit a certain amount of liberty and privacy. This decision further encouraged constitutionalizing libel law and advocating for the advancement of the civil rights movement.

The Court held that "a State cannot, under the First and Fourteenth Amendments, award damages to a public official for defamatory falsehood relating to his official conduct unless he proves 'actual malice'—that the statement was made with knowledge of its falsity or with reckless disregard of whether it was true or false."[69] The ruling and requirement to 'prove actual malice' granted stronger protection to the freedom of speech and press for media outlets to report on matters of public interest, without the fear of libel punishment. The Court overturned the decision of Alabama's high court and affirmed that less significant factual errors are "insufficient to warrant an award of damages for false statements."

With the rise of technological advancement and the internet, many defamation cases involve social media, online news, and internet content. On April 19, 1995, the Alfred P. Murrah Federal Building experienced one of the worst terrorist attacks in the United States. The bombing took the lives of one hundred and sixty-eight civilians including children, and violently injured more than five hundred hospital workers. Physicians and volunteers from nine nearby hospitals received bomb threats after admitting an influx of victims. Anguish and vexation flooded the state of Oklahoma as images and news of severe lacerations, fractures, dislocations, and burns were witnessed on screen. Kenneth Zeran, who had his identity, address, and phone number stolen, had carried the weight of false guilt and appealed to the Supreme Court for vindication and protection. His information was falsely published in connection with advertisements for souvenirs that glorified the atrocious bombing. An unknown American Online user published advertisements and listings with items that had the insulting phrases:"Visit Oklahoma It's a Blast" and "Finally a Daycare Center that Keeps the Kids Quiet." Zeran repeatedly received threatening calls and complaints, and suffered brutal harm in his reputation. When Zeran tried to sue the company claiming negligence and inadequate security, the Court ruled that American Online was entitled to immunity based on the Communications Decency Act and cannot be self liable for defamatory statements posted by third parties. This decision engendered debate and asks the question, how will a victim of malicious hoax through the internet be compensated and protected?

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[68] Wermiel, Stephen. "New York Times Co. v. Sullivan (1964)," Middle Tennessee State University, The First Amendment Encyclopedia, Accessed March 30, 2020. https://www.mtsu.edu/first-amendment/article/186/new-york-times-co-v-sullivan

[69] New York Times Co. v. Sullivan (No. 39) 376 U.S. 254, Cornell Law School LII, Accessed on February 18, 2020, https://www.law.cornell.edu/supremecourt/text/376/254#writing-USSC_CR_0376_0254_ZO

Obscenity and Child Pornography

Highly sexually explicit pornography is not protected by First Amendment

Congress, the states, and the people of the U.S. have long wrestled with an agreed upon definition of obscenity. Dating back to the Comstock Act of 1873, this act outlawed the sending of "obscene, lewd or lascivious…immoral or indecent publications through mail" and further made it a "misdemeanor for anyone to sell, give away, or possess an obscene book, pamphlet, picture, drawing, or advertisement."[70] The lack of a clear definition of obscenity did not help to elucidate this term, even though the act is officially titled An Act for the Suppression of Trade In, and Circulation of, Obscene Literature and Articles of Immoral Use.[71] It wasn't until 1973, in a landmark Supreme Court case *Miller v. California*, that an improved test or guideline was structured. Miller was convicted of mailing "unsolicited sexually explicit material in violation of a California statute" that reflected the obscenity test formulated in *Roth v. United States (1957)*. The circulated content was held to be "utterly without redeeming social important"[72] The question is if the dissemination of materials of this nature is protected under the First Amendment freedom of speech. The Supreme Court's ruling is best summarized in this conclusion by Cornell's Legal Information Institute's free law online project, Oyez:

> In a 5-to-4 decision, the Court held that obscene materials did not enjoy First Amendment protection. The Court modified the test for obscenity established in *Roth v. United States* and *Memoirs v. Massachusetts*, holding that "[t]he basic guidelines for the trier of fact must be: (a) whether 'the average person, applying contemporary community standards would find that the work, taken as a whole, appeals to the prurient interest. . . (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value." The Court rejected the "utterly without redeeming social value" test of the Memoirs decision.[73]

Today, there is a shift from obscenity prosecutions to focus more intensely on issues of child pornography, as shared by law professor Kevin Saunders.[74] In the well-known Supreme Court case *New York v. Ferber (1982)*, the ruling established a categorical exception to the First Amendment rights in this perturbing issue. Ferber, an owner of an adult bookstore, having sold a film involving explicit children sexual performances to an undercover officer was convicted of violating a state obscenity ordinance. He was initially acquitted by the state appellate court, but the Supreme Court held that the statute in question is not in violation of the First Amendment. Court ruled that "the prevention of sexual exploitation and abuse of children constitutes a government objective of surpassing importance"[75] and granted States greater authority in regulating child pornographic exhibitions. Today, child pornography is punishable by law as "the use of children as subjects of pornographic materials is harmful to the physiological, emotional, and mental health of the

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[70] Burnette, Brandon R. *"Comstock Act of 1873,"* Middle Tennessee State University, The First Amendment Encyclopedia, Accessed February 18, 2020. https://www.mtsu.edu/first-amendment/article/1038/comstock-act-of-1873

[71] *An Act for the Suppression of Trade in, and Circulation of, obscene Literature and Articles of Immoral Use*. 42 Cong., March 3, 1873, ch. 258, § 2, 17 Stat. 599. https://www.loc.gov/law/help/statutes-at-large/42nd-congress/session-3/c42s3ch258.pdf

[72] Roth v. United States (No. 582) 354 U.S. 476, Cornell Law School LII, Accessed on February 20, 2020 https://www.law.cornell.edu/supremecourt/text/354/476 actual text

[73] "Miller v. California." *Oyez,* www.oyez.org/cases/1971/70-73. Accessed February 15, 2020.

[74] Waxman, Olivia B. *"This is What Americans Used to Consider Obscene,"* TIME, June 21, 2016, Accessed on February 18, 2020, https://time.com/4373765/history-obscenity-united-states-films-miller-ulysses-roth/

[75] *18 USC 2251: Sexual exploitation of children*, Accessed on February 18, 2020, https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title18-section2251&num=0&edition=prelim

child…[and provides] an economic motive for…the production of such materials, an activity illegal throughout the Nation."[76]

Hate Speech and Fighting Words

Clear and present danger test enhanced

In 1942, just outside of the city hall of Rochester in New Hampshire, an inflammatory statement was fired at a city marshal that led up to a landmark Supreme Court case. The ruling would establish the doctrine of fighting words, which is a type of speech unprotected by the First Amendment. Walter Chaplinsky, who was a Jehovah's Witness was distributing religious pamphlets and organizing a restless riot. When Chaplinsky was arrested he directed provoking words at the marshal stating "You are a God damned racketeer" and "a damned Fascist and the whole government of Rochester are Fascists or agents of Fascists."[77] He was charged with violating a New Hampshire law prohibiting "the use of offensive, derisive or annoying words toward others or preventing them from going about their lawful business."[78] On appeal, Chaplinsky stated that this statue limited his First Amendment freedom. The Court upheld his conviction and confirmed that fighting words "by their very utterance inflict injury or tend to incite an immediate breach of peace"[79]are not protected in the First Amendment. Justice Francis W. Murphy delivered the option of a unanimous court concluding that: "It has been well observed that such utterances [such fighting words] are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may derived from them is clearly outweighed by the social interest in order and morality."[80]

Despite the establishing of the fighting words doctrine, the Court has not created a standard for preventing hate speech. Many legal scholars and civil rights activists deem racial and ethnic slurs a type of 'fighting speech' that should be constitutionally limited. On the other hand, critics believe that enforcing "politically correct" remarks will not end hate, bigotry or prejudice. For example, Randall Kennedy, a Harvard Law Professor, concludes that censorship is not the appropriate response. Kennedy wrote that "protecting foul, disgusting, hateful, unpopular speech against government censorship is a great achievement of American political culture…For bad and good [derogatory words are] destined to remain with us for many years to come—a reminder of the ironies and dilemmas, the tragedies and glories, of the American experience."[81] Many colleges and organizations have created codes that prohibit derogatory expressions on the basis of religion, gender, sexual orientation, or race. However, the law stands today that public entities "generally can't bar hate speech unless it's direct, personal, and either truly threatening or violently provocative."[82]

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[76] New York v. Ferber, 458 U.S. 747 (1982), Justia, Accessed February 18, 2020 https://supreme.justia.com/cases/federal/us/458/747/

[77] Bitzer, J. Michael, "Chaplinsky v. New Hampshire (1942)", Middle Tennessee State University, The First Amendment Encyclopedia, Accessed March 30, 2020. https://www.mtsu.edu/first-amendment/article/293/chaplinsky-v-new-hampshire

[78] Ibid.

[79] Ibid.

[80] Chaplinsky v. New Hampshire, 315 U.S. 572 (1942), Justia, Accessed on March 30, 2020. https://supreme.justia.com/cases/federal/us/315/568/

[81] Kennedy, Randall. Nigger: the Strange Career of a Troublesome Word. New York: Vintage Books, 2002.

[82] https://www.lawyers.com/legal-info/criminal/does-the-first-amendment-protect-hate-speech.html

In *R.A.V. v. St. Paul (1992)*, Robert A. Viktora, a juvenile, along with others burned a cross in the fenced yard of the Joneses, an African American family. The Supreme Court stuck down a city ordinance in Minnesota that prohibited the use of symbols that "aroused anger, alarm, or resentment in others on the basis of race, color, creed, religion, or gender." Petitioner argued that the ordinance was "substantially over broad and impermissibly content based and therefore facially invalid under the First Amendment."[83] The Court overturned Viktora's conviction on the grounds that the St. Paul law punished speech based on its content. However, the decision from the prior case is not the final word on hate speech or cross burning. In fact, in *Wisconsin v. Mitchell (1993)*, the court did uphold a law that "increased the penalties for hate crimes committed due to such factors as the victim's race, religion, or sexual orientation."[84] In *Virginia v. Black (2003)*, the Court also ruled the burning of a cross with the intention to intimidate is not constitutionally protected by the First Amendment.

Furthermore, in a conflicting case *Capitol Square Review and Advisory Board v. Pinette (1995),* the story crosses both the free speech clause and establishment clause. In a ten-acre, state-owned plaza in Columbus, Ohio, the advisory board oversaw the issuing of permits to various group for displaying objects at the Capitol Square. Donnie Carr, an officer of the Ku Klux Klan requested to erect a cross on the Capitol Square for the holidays and was denied a permit on the basis of violating the establishment clause. The Klan's leader Vincent Pinette filed suit against the board, stating that alongside nativity scenes, menorah displays, and Christmas trees, the board cannot deny the issuing of a permit in accordance with their First Amendment rights. The Court was in favor of the Klan and stated that "the display was private religious speech that is fully protected under the Free Speech Clause as secular private expression."[85] Yet this cases raises the question of if this act was a simply a religious expression, or a symbol of hate. Justice Clarence Thomas argued that this case "did not present an establishment clause issue because the Klan had a primarily nonreligious purpose in erecting the cross [and had] appropriated one of the most sacred of religious symbols as a symbol of hate."[86]

Speech that Incite Immediate Lawless Action

Clear and present danger test enhanced

In the classic Supreme Court landmark case, *Schenck v. United States (1919)*, an original test was established as the principal standard for discerning if speech is protected by the First Amendment. Charles Schenck had disseminated pamphlets and booklets opposing the draft under the direction of the Executive Committee of the Socialist Party in Philadelphia. This action took place during the first World War, just two years after the Espionage Act of 1917 was in effect. This act "created criminal penalties for anyone obstructing enlistment in the armed forces or causing insubordination or disloyalty in military or naval forces."[87] Schenck was charged with violation of this law and "attempting to cause insubordination in the military and to obstruct recruitment."[88] In

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[83] R.A.V. v. St. Paul, 505 U.S. 380 (1992), Justia, Accessed on March 30, 2020. https://supreme.justia.com/cases/federal/us/505/377/

[84] Monk, Linda R., The Words We live By: Your Annotated Guide to the Constitution (New York: A stonesong Press Book, Hyperion), 144

[85] Capitol Square Review and Advisory Bd. v. Pinette, 515 U.S. 753 (1995), justia, accessed on March 30, 2020. https://supreme.justia.com/cases/federal/us/515/753/

[86] Rainey, Jane G., *"Capitol Square Review and Advisory Board v. Pinette (1995),"* Middle Tennessee State University, The First Amendment Encyclopedia, Accessed March 30, 2020. https://www.mtsu.edu/first-amendment/article/734/capitol-square-review-and-advisory-board-v-pinette

[87] Asp, David. *"Espionage Act of 1917,"* Middle Tennessee State University, The First Amendment Encyclopedia, Accessed February 19, 2020. https://www.mtsu.edu/first-amendment/article/1045/espionage-act-of-1917

[88]"Schenck v. United States." Oyez. Accessed February 18, 2020. https://www.oyez.org/cases/1900-1940/249us47.

the words of Justice Oliver Wendell Holmes Jr., he delivered that "words which, ordinarily and in many places, would be within the freedom of speech protected by the First Amendment may become subject to prohibition when of such a nature and used in such circumstances as to create a clear and present danger that they will bring about the substantive evils which Congress has a right to prevent."[89] Government is entitled to wartime authority, above the privileges of constitutional rights.

In a similar case shortly following *Schenck v. United States* in the same year, the clear and present danger test was enhanced to require an "imminent danger test" by Justice Holmes. In the case of *Abrams v. United States*, all four courts including the Supreme Court charged the defendants with conspiracy "when the United States was at war with the Imperial German Government, unlawfully and willfully, by utterance, writing, printing and publication, to urge, incite and advocate curtailment of production of things and products, to-wit, ordnance and ammunition, necessary and essential to the prosecution of the war."[90] In summary, the authority of the government in times of war was reaffirmed and the imminent danger requirement was stated through the Justice Holmes' delivery:

> The United States constitutionally may punish speech that produces or is intended to produce a clear and imminent danger that will bring about forthwith certain substantive evils that the United States constitutionally may seek to prevent. The power undoubtedly is greater in time of war than in time of peace, because war opens dangers that do not exist at other times. But as against dangers peculiar to war, as against others, the principle of the right to free speech is always the same. It is only the present danger of immediate evil or an intent to bring it about that warrants Congress in setting a limit to the expression of opinion where private rights are not concerned.

Commercial Speech

Concededly truthful information or false and misleading

Historically speaking, speech containing advertisement materials had not always been viewed as protected under the first amendment. Regulations and restrictions were put in place with the purpose of shielding customers from fraudulent promotions and solicitation. In the later twentieth century, Justice Blackmun famously assisted in the extension of first amendment rights to commercial speech. In *Virginia Pharmacy v. Virginia Citizens Council (1976)*, the court confronted the question of the constitutionality of a statutory prohibition on prescription drug prices advertised by licensed pharmacists. Just two years before, the Virginia Citizens Consumer Council (VCCC) asserted that such a regulation by the State Board of Pharmacy in Virginia violated the first amendment. The Court held that speech advertising products or services is constitutionally protected, and the Virginia statute is thus invalid. Justice Blackmun delivered that commercial speech isn't excluded from first amendment protection solely due to its economic motivation, but because "both the individual consumer and society in general may have strong interests in the free flow of commercial information."[91] This entitled access to information by the consumers cannot be barred by state regulation for its fear of the "erosion of professionalism among pharmacists."[92] If

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[89] Schenck v. United States 249 U.S. 47, Cornell Law School LII, Accessed February 19, 2020. https://www.law.cornell.edu/supremecourt/text/249/47

[90] Abrams v. United States, 250 U.S. 616 (1919), Justia, Accessed on February 19, 2020. https://supreme.justia.com/cases/federal/us/250/616/

[91] Ibid.

[92] *"Inc. Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council,"* Law Library—American Law and Legal Information JRank. Accessed on February 19, 2020 https://law.jrank.org/pages/23078/Virginia-State-Board-Pharmacy-v-Virginia-Citizens-Consumer-Council-Inc-Significance.html

the advertisement content is neither "false, misleading, or [proposing] illegal transactions…[then] the dissemination of concededly truthful information about entirely lawful activity [cannot be prohibited]."[93] Although, Blackmun also made a note that commercial speech is not completely immune to or outside of government regulation authority. This nature of speech enjoys less protection than political speech and can be regulated if it reflects falsehood or misleading content.

Freedom of Artistic Expression

According to the United Nations Educational, Scientific and Cultural Organization, artistic freedom is "the freedom to imagine, create and distribute diverse cultural expressions free of governmental censorship, political interference or the pressures of non-state actors. It includes the right of all citizens to have access to these works and is essential for the well-being of societies."[94] Creating legal frameworks for the flourishing of artistic freedom is "not just about the artists' rights to express themselves freely, it is also a question of the rights of citizens to access artistic expressions and take part in culture life—and thus one of the key issues for democracy."[95] Intellectual property is explicitly protected and promoted in Article I of the United States Constitution, and the Supreme Court has buttressed the first amendment protection of all art forms —including plays, posters, television, comic books, music, dance, film, literature, poetry, and visual arts. Beyond oral and written forms of speech, anything that the human creative impulse can produce is still protected by the first amendment. The American Civil Liberties Union explained that "the First Amendment embodies the belief that in a free and democratic society, individual adults must be free to decide for themselves what to read, write, paint, draw, compose, see, and hear….A free society is based on an individual's right to decide what art they want—or do not want—to see."

While America is arguably one of the most committed nations to freedom of expression in the arts and entertainment, citizens still experienced blatant governmental censorship throughout history. For example, the Communications Decency Act (CDA) of 1996 was enacted to regulate access to sexually explicit content on the internet by minors. In *Reno v. ACLU (1997)*, the Supreme Court struck down the statute and held that the CDA's "indecent transmission" and "patently offensive display" provisions violated the first amendment. Justice John Paul Stevens noted that the intensity of suppression was unconstitutional as the provisions were vague and also failed to submit to the three-pronged miller test established. Aside from the internet battle, practitioners in different art mediums and sectors also experienced a substantial amount of challenge to freedom of expression.

In the history of American film industry, first amendment protection for movies was denied for a painfully long time. Prior to the mid-twentieth century, states or municipal governments created their own movie censorship board that regulated motion pictures. The practice of prior restraint, imposing censorship on particular works prior to distribution or publication, was wildly accepted. This reality is demonstrated in *Mutual Film Corp v. Industrial Commission of Ohio (1915)*, where the Mutual Film Corporation of Detroit sought an injunction against the Ohio's censorship board and did not succeed. The corporation argued that the licensing fees imposed by Ohio violated the free speech provisions. In an unanimous decision, the Court upheld the police power of state to grant or withhold licenses for films and compared the works to "the theatre, the circus, and other

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[93] Ibid.

[94] Sara Whyatt, *Promoting the freedom to imagine and create* (Paris, France: Reshaping Cultural Policies—Advancing creativity for development, United Nations Educational, Scientific and Cultural Organization, 2017), 211

[95] "UN Report on the Right to Artistic Expression and Creation." Freemuse, April 29, 2013. https://freemuse.org/news/un-report-on-the-right-to-artistic-expression-and-creation-now-available/.

shows and spectacles."[96] Justice McKenna stated that movies were "a business, pure and simple… not to be regarded, nor intended to be regarded…as part of the press of the country or its origins of public opinion. They are mere representations of events, of ideas and sentiments published or known." It was not until the controversial movie, *The Miracle*, by Roberto Rossellini was created and brought before the Court that the industry landscapes and dynamics shifted. Rossellini was a screenwriter and director who produced this "sacrilegious" movie based on Valle-Inclán's novel, *La flor de santidad.* A delusional homeless woman encountered a man who had intercourse with her in a village. When she discovered the pregnancy, she applauded and praised it as a miracle, knowing she met Saint Joseph. She was then ridiculed for the outrageous claims, and she nonetheless raised the child alone in a straw of goat shed. This movie no doubt provoked the Catholic Church and New York Board of Regents decided to withdraw its license to the film after massive protests. This landmark case, *Matter of Joseph Burstyn, Inc. v. Wilson (1951)*, awarded the long-awaited first amendment protection to the film industry. The Court concluded that movies are a recognized and important vehicle for public opinion despite the its entertaining and informational nature. Justice Tom Campbell Clark noted that: "We do not accede to appellee's suggestion that the constitutional protection for a free press applies only to the exposition of ideas. The line between the informing and the entraining is too elusive for the protection of that basic right. Everyone is familiar with instances of propaganda through diction. What is one man's amusement, teaches another's doctrine."[97]

In the area of government funding to controversial arts, it is known that the government cannot ban, prohibit the circulation of, shut down the exhibition of, or deny funding to a work of artistic expression on the sole grounds of disfavor, offense, or taste. The Museum of Modern Art in New York praised the painting of Chris Ofili, *The Holy Virgin Mary (1996)* with a vivid description: "Depicted on a lush, glittering ground of shimmering orange resin that recalls the gold leaf of religious icons, Ofili's Virgin Mary is resplendent, majestic, and imperious yet also suffused with sexual potency."[98] This painting is known for its use of elephant dung and clips from pornographic magazines. What seemed to be highly regarded by the visual arts community did not translate the same to New York Mayor Rudy Giuliani. In fact, Giuliani was enraged and offended by the work that "desecrated religion" and withdrew $500,000 in funding from the Brooklyn Museum of Arts. The financial resources was initially funded in support of the museum's operating expenses. A preliminary induction was granted to the Museum and the Mayer was prohibited from punishing the Museum for displaying an exhibition that personally trespassed his values. U.S. District Judge Nina Gershon defended the first amendment right of the museum and declared: "There is no Federal constitutional issue more grave than the effort by government officials to censor works of expression and to threaten vitality of a major cultural institution, as punishment for failing to abide by government demand for orthodoxy."[99]

Furthermore, the National Endowment for the Arts (NEA) weathered waves of antagonistic threats in the late twentieth century due to funding of controversial works. Andres Serrano's *Immersions (Piss Christ)* was a burnt orange and bright yellow painting with Christ crucified, submerged in the artist's urine. When the work was on tour in Virginia partly funded by the NEA, an uproar of

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[96] Pondillo, Bob. *"Mutual Film Corp. v. Industrial Commission of Ohio."* Mutual Film Corp. v. Industrial Commission of Ohio. Accessed March 20, 2020. https://www.mtsu.edu/first-amendment/article/358/mutual-film-corp-v-industrial-commission-of-ohio.

[97] "MATTER OF JOSEPH BURSTYN, INC. v. Wilson." Justia Law. Accessed March 20, 2020. https://law.justia.com/cases/new-york/court-of-appeals/1951/303-n-y-242-0.html.

[98] "Chris Ofili. The Holy Virgin Mary. 1996: MoMA." The Museum of Modern Art. Accessed March 20, 2020. https://www.moma.org/collection/works/283373.

[99] *"Arts & First Amendment Overview."* Freedom Forum Institute. Accessed March 20, 2020. https://www.freedomforuminstitute.org/first-amendment-center/topics/freedom-of-speech-2/arts-first-amendment-overview/.

diatribe unleashed at the NEA's funding procedures on the Senate floor. Alphonse D'Amato, a conservative senator called the work "a deplorable, despicable display of vulgarity."[100] On a similar occasion, the photographic works of Robert Mapplethorpe evoked another wave of tumultuous criticism while on tour on partial support by the NEA. This show were shockingly provocative, "one presented a finger inserted into a penis. Another was a self-portrait showing Mapplethorpe graphically inserting a bullwhip into his anus. Two displayed nude prepubescent children."[101] Congress passed a bill that barred the NEA from using funds to "promote, disseminate or produce obscene or indecent materials, including but not limited to depictions of sadomasochism, homoeroticism, the exploitation of children, or individuals engaged in sex acts, or material which denigrates the objects or beliefs of the adherents of a particular religion or non-religion."[102] In 1990, Congress amended the NEA decision criteria by requiring the agency to consider "artistic excellence and artistic merit taking into consideration general standards of decency and respect for the diverse beliefs and values of the American public."[103]

In the context of art and entertainment, fundamental principles aside from the Miller test are considered and evaluated when a case involving freedom of expression is presented. First, the government must discern and make judgement with sound content neutrality. No artistic work can be dismissed and banned simply on the basis of offense, insult, or preferences. Secondly, the expression may only be restricted if it will cause direct and imminent harm as to impede societal interest. Thirdly, a balancing test should be done weighing governmental interest in regulation against the value of a specific expressive work. Maneuvering the ambiguities and inconsistencies of obscenity law will continue to be difficult for artists and creators. As Justice Louis Brandies once advised, the way to respond to works displeasing to one's individual moral conscience is with more speech, not enforced silence.

Assembly and Petition

"…or the right of the people peaceably to assemble,
and to petition the Government for a redress of grievances."

The distinct freedom of assembly is described to be in a "state of hibernation" by university law professors.[104] The right to assemble was acclaimed as one of the "four freedoms" in the popular press in 1939, and exhibited an undebatable glaring presence throughout prominent social movements. Indeed, the freedom of assembly has been central in "antebellum abolitionism, women's suffrage in the nineteenth and twentieth centuries, the labor movement in the Progressive Era and after the New Deal, and the Civil Rights movement."[105] Yet, the salience of this liberty currently stands inconspicuous in comparison to other clauses.

The belief in the freedom of assembly is deeply ingrained in historical roots. Dating back to 1774, the Declaration and Resolves of the First Continental Congress specified that "the inhabitants of the

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[100] Andrews, Travis. "Behind the Right's Loathing of the NEA: Two 'Despicable' Exhibits Almost 30 Years Ago." The Washington Post. WP Company, March 20, 2017. https://www.washingtonpost.com/news/morning-mix/wp/2017/03/20/behind-the-loathing-of-the-national-endowment-for-the-arts-a-pair-of-despicable-exhibits-almost-30-years-ago/.

[101] Ibid.

[102] http://www.artistrights.info/brooklyn-institute-of-arts-and-sciences-v-city-of-new-york

[103] https://www.oyez.org/cases/1997/97-371

[104] Inazu, John and Burt Neuborne, *"Right to Assemble and Petition,"* The National Constitution Center, First Amendment, accessed February 23, 2020. https://constitutioncenter.org/interactive-constitution/interpretation/amendment-i/interps/267

[105] Inazu, John D., *"The Forgotten Freedom of Assembly,"* Duke University School of Law, Tulane Law Review Vol. 84:565, 2010, Accessed February 23, 2020. https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=2739&context=faculty_scholarship

English colonies…by the immutable laws of nature, the principles of the English constitution, and the several charters or compacts…*have a right peaceably to assemble, consider their grievances, and petition the king*; and that all prosecutions [or] prohibitory proclamations…for the same are illegal."[106] This was written in response to the Intolerable Acts passed by British parliament in the same year, to punish the defiance manifested from the Tea Party protest. Two years later, Pennsylvania would pave the way in recognizing this right to peaceful assembly in the Declaration of Rights to its residence.

In the landmark Supreme Court case *DeJonge v. Oregon (1937)*, the Court recognized that the right of peaceable assembly, along with free speech "are fundamental rights which are safeguarded against state interference by the due process clause of the Fourteenth Amendment."[107] Dirk De Jonge assisted in organizing a public meeting held under the Communist Party, and was arrested and charged with violating the State or Oregon's criminal syndicalism statute. Criminal syndicalism was defined as "the doctrine which advocates crime, physical violence, sabotage or any unlawful acts or methods as a means of accomplishing or effecting industrial or political change or revolution."[108] De Jonge argued that the assemblage held was "public and orderly, and was held for a lawful purpose…that, while it was held under the auspices of the Communist Party, neither criminal syndicalism nor any unlawful conduct was taught or advocated…either by appellant or by others."[109] Chief Justice Hughes delivered the opinion of the Court and upheld that "peaceable assembly for lawful discussion cannot be made a crime. The holding of meetings for peaceable political action cannot be proscribed. Those who assist in the conduct of such meetings cannot be banned as criminals on that score."[110] Any such lawful discussions cannot be made a crime, however unpopular or disfavored it might be.

Three years later, the Supreme Court recognized and sanctioned "time, place, and manner restrictions" that do not infringe on civil liberties of speech and assembly. In *Cox v. New Hampshire (1941)*, members of Jehovah's Witnesses peacefully paraded down the sidewalk in Manchester, New Hampshire, advocating for their cause and message by carrying signs and handing out leaflets. A large number of participants were charged with violating a state statute that required the obtaining of special license in preparation for parades, processions, or open-air public gatherings. The Court held that the regulations imposed were to "assure the safety and convenience of the people in the use of public highways"[111] and do not contravene first amendment rights of the defendants. Permit requirements and fees demanded are constitutional as long as regulations do not "deny or unwarrantedly abridge the right of assembly and the opportunities for the communication of thought"[112] and are not "used as pretext to prevent free assemblies"[113] based on content discrimination.

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[106] "The Avalon Project at Yale Law School: *Declaration and Resolves of the First Continental Congress,*" Lillian Goldman Law Library, October 14, 1774, Accessed February 23, 2020, https://avalon.law.yale.edu/18th_century/resolves.asp

[107] Dejonge v. Oregon, 299 U.S. 364 (1937), Justia, Accessed February 23, 2020. https://supreme.justia.com/cases/federal/us/299/353/ (299, 364)

[108] Oregon Code, 1930, §§ 14-3110-3112—as amended by chapter 459, Oregon Laws, 1933, Justia, Accessed February 23, 2020. https://supreme.justia.com/cases/federal/us/299/353/

[109] Id. At 357.

[110] Id. At 365.

[111] Cox v. New Hampshire, 312 U.S. 569 (1941), Justia, Accessed February 23, 2020. https://supreme.justia.com/cases/federal/us/312/569/

[112] Id. At 570.

[113] Monk, Linda R., *The Words We Live By: Your Annotated Guide to the Constitution* (New York: A Stonesong Press Book, Hyperion), 149

Freedom of Association

Even though the term "freedom of association" is not explicitly written in the Constitution, this right has been recognized and honored by the Supreme Court within the ambit of the first amendment. In *NAACP v. Alabama (1958)*, the National Association for the Advancement of Colored People (NAACP) underwent aggressive investigations by Alabama authorities and refused to turn over the names of organization members to guard against potential "repression and economic reprisals attacks."[114] The Court ruled that "compelled disclosure of petitioner's membership lists is likely to constitute an effective restraint on its members' freedom of association,"[115] which is an "inseparable aspect of the 'liberty' assured by the Due Process Clause of the Fourteenth Amendment."[116] This decision expanded the freedom of expressive association, which often manifests for the purposes of furthering political, religious, or cultural beliefs and causes.

Furthermore, a second form of free association emerged and was recognized in *Roberts v. Unites States Jaycees (1984)*. The Court established "freedom of intimate association" that are "certain kinds of highly personal relationships…such as marriage; childbirth; the raising and education of children; and cohabitation with one's relative"[117] that enjoyed full constitutional protection. United States Jaycees' mission was to promote the growth of civic organizations led by young men. The bylaws excluded women and men over the age thirty-five from voting privileges and prominent full membership status. The nonprofit was sued on the grounds of violating the Minnesota Human Rights Act that prohibited discriminatory practice that "[denies] any person the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of a place of public accommodation because of race, color, creed, religion, disability, national origin or sex."[118] The Court held that there is "no basis…for concluding that admission of women as full voting members will impede [the organization's] ability to engage in its constitutionally protected civic, charitable, lobbying, fundraising, and other activities"[119] and doesn't infringe on existing member's freedom of intimate or expressive association. Thus, the state's enforcement of anti-discriminatory law is justified by its compelling interest to eradicate sex discrimination.

As intrinsic or rational the right of free association might sound, court cases in this scope inevitably invite navigational difficulties that challenge anti-discrimination statutes. For example, in *Boy Scouts of America v. Dale (2000)*, James Dale was discharged from an assistant scoutmaster position after the organization was informed of Dale's support of gay rights as a homosexual. Boy Scout was alleged of violating New Jersey's anti-discrimination statute. The Supreme Court held that to force Boy Scouts to reinstate Dale's position is to infringe upon their first amendment right of expressive association. Justice Rehnquist delivered majority opinion that "government actions that unconstitutionally burden [the right of free association] may take many forms, one of which is intrusion into a [private nonprofit] group's internal affairs by forcing it to accept a member it does not desire."[120]

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[114] Sekou, Franklin, *"NAACP v. Alabama (1958),"* Middle Tennessee State University, The First Amendment Encyclopedia, Accessed February 23, 2020. https://www.mtsu.edu/first-amendment/article/68/naacp-v-alabama

[115] NAACP v. Patterson, 357 U.S. 449 (1985), Justia, Accessed February 23, 2020. https://supreme.justia.com/cases/federal/us/357/449/

[116] Id. At 450.

[117] Maddex, Robert L., "*The U.S. Constitution A to Z,"* Washington, DC: CQ Press, 2008, 42

[118] Roberts v. United States Jaycees, 468 U.S. 609 (1984), Justia, Accessed February 23, 2020. https://supreme.justia.com/cases/federal/us/468/609/

[119] Id. At 622-629.

[120] Boy Scouts of America v. Dale, 530 U.S. 640 (2000), Justia, Accessed on February 23, 2020, https://supreme.justia.com/cases/federal/us/530/640/

III. EXAMINING THE SECOND TO TENTH AMENDMENT

Second Amendment

Right to Bear Arms

"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."

This amendment has been long overlooked and ignored with scant debate until the late twentieth century, when the climate dramatically shifted and interpretations of this provision experienced a radioactive explosion. The confusing sentence structure and grammatical arrangement in this amendment renders it indecipherable, if not impossible to grasp. Modern debates about the meaning of the second amendment revolve around whether the right to bear arms is granted to individual people, or the collective militia organizations. The noun confusion and commas incorporated have fueled a national fight over the appropriate application of the second amendment, a fight that might stay with this country for years to come.

Having just won independence from Britain, most early Americans possessed intense inclinations of skepticism and cynicism toward the newly proposed central government. In fact "the Founding generation believed that governments are prone to use soldiers to oppress the people…[and] Anti-Federalists argued that the proposed Constitution would take from the states their principle means of defense against federal usurpation."[121] In response to the States' deeply rooted distrust, the second amendment was drafted and given as a guarantee that the States had the capability to fight back. Thus, the States must have access to firearms to train and raise an army. In twentieth-first century America today, traditional militia systems are inefficient, no longer in operation, and state-based militias are incorporated nationally. Concerns from the eighteenth century have largely dissipated, and the second amendment for a long time was deemed antiquated or outdated. Then, the focus and attention switched to the second clause centered around individual's rights in the 1960s, and the first clause about militia was placed on the back burner as popular interpretation changed too.

In the book G*unfight: The Battle Over the Right to Bear Arms in America*, UCLA law professor Adam Winkler shares the story of the Black Panthers Party for Self-Defense that acted as a catalyst for the gun-rights movement. Dating back to the 1960's, race relations were in dire strain and many colored protestors experienced hostile police animosity. Two students, Huey P. Newton and Bobby Seale founded the revolutionary organization in 1966 "with an ideology of black nationalism, socialism, and armed self-defense."[122] Members of the organization began to engage in "cop-observing" lawfully to push back on discriminatory treatments by white cops. Famous for the audacious act of entering the state Capitol on May 2, 1967, two dozen armed members of the Black Panthers Party marched on the basis of lawful carrying of firearms as long as they were not concealed. In response to the organizations' newly acquired power, Congress worked to pass The Mulford Act that would prohibit any carrying of weapons in public. Bobby Seale's publicly shared statement encapsulates the racist injustice this time in history revealed. It stated: "The Black Panther party for Self-defense calls upon the American people in general and the black people in particular to take careful note of the racist California Legislature which is considering legislation aimed at keeping the black people disarmed and powerless at the very same that that racist police

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[121] *"The Second Amendment."* Second Amendment | The National Constitution Center. Accessed March 30, 2020. https://constitutioncenter.org/interactive-constitution/interpretation/amendment-ii/interps/99.

[122] *"The Black Panther Party."* National Archives and Records Administration. National Archives and Records Administration. Accessed March 30, 2020. https://www.archives.gov/research/african-americans/black-power/black-panthers.

agencies throughout the country are intensifying the terror, brutality, murder, and repression of black people."[123] The very afternoon of the day members of BPP marched in the capitol, Reagan said to the reporters that he saw "no reason why on the street today a citizen should be carrying loaded weapons."[124] From this historical movement onward, gun regulations and gun-control laws became an enormous focus of the country and had many repercussions in the aftermath. The National Rifle Association (NRA) chimed in with its powerful influence and lobbying with a non-negotiable non-compromise for the second amendment rights of citizens to own guns. The organization was known to be an irrepressible force that could effectively mobilize its members at any congressional district with just a computer button.

Even with fierce academic debates and the fact that advocating for gun-rights was an influential factor in the election, the Supreme Court still hesitated to join in the discourse. Even the Bush administration publicly declared its interpretation of the second amendment to align with individual's right to possess firearms, rifles, and pistols. Not until 2008 when a landmark case stepped into the picture was the Supreme Court forced to interpret the perplexing text of the second amendment. This results of this landmark case was so impactful and historic, it is said to have "revived [and] breathed life into the second amendment" by University of Texas law professor, Sanford Levinson. In *District of Columbia v. Heller (2008)*, a D.C. special police offer, Dick Anthony Heller, sued the District of Columbia for infringement upon his second amendment right when his application for a handgun was denied. The Supreme Court had to decide whether the District of Columbia code that restricted the licensing of handguns violate the Second Amendment. Justice Antonin Scalia delivered the majority opinion declaring that "the first clause of the Second Amendment that references a 'militia' is a prefatory clause that does not limit the operative clause of the Amendment. Additionally, the term 'militia' should not be confined to those serving in the military, because at the time the term referred to all able-bodied men who were capable of being called to such service. To read the Amendment as limiting the right to bear arms only to those in governed military force would be to create exactly the type of state-sponsored force against which the Amendment was meant to protect people."[125]

While this groundbreaking decision was a sacred and victorious moment to some citizens, symbolic of protection against an oppressive government, others fervently dissented and saw it as a deep offense. Warren Burger, who was a conservative Chief Justice expressed his avid disagreement in these words: "The Gun Lobby's interpretation of the Second Amendment is one of the greatest pieces of fraud, I repeat the word fraud, on the American People by special interest groups that I have ever seen in my lifetime."[126] Like other freedom that citizens enjoy, there are limitations imposed on this right to bear arms. The Heller case suggested a "presumptively lawful" list of regulations that included "bans on the possession of firearms by felons and the mentally ill [and]…carrying firearms in sensitive places such as schools and government buildings."[127] Now issues of debates revolve around the limitations and restrictions around carrying of firearms.

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[123] Sacramento. *"From the Pages of The Bee, 1967: Armed Black Panthers Invade Capitol."* sacbee. The Sacramento Bee. Accessed March 30, 2020. https://www.sacbee.com/news/local/history/article148667224.html.

[124] Weber, Peter. *"How Ronald Reagan Learned to Love Gun Control."* The Week - All you need to know about everything that matters. The Week, December 3, 2015. https://theweek.com/articles/582926/how-ronald-reagan-learned-love-gun-control.

[125] "District of Columbia v. Heller." Oyez. Accessed March 3, 2020. https://www.oyez.org/cases/2007/07-290

[126] *"Warren Burger and NRA: Gun Lobby's Big Fraud on Second Amendment."* The Milwaukee Independent, August 17, 2018. http://www.milwaukeeindependent.com/syndicated/warren-burger-and-nra-gun-lobbys-big-fraud-on-second-amendment/.

[127] "The Second Amendment." Second Amendment | The National Constitution Center. Accessed March 3, 2020. https://constitutioncenter.org/interactive-constitution/interpretation/amendment-ii/interps/99.

Third Amendment

No Quartering of Soldiers

"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."

Following the boisterous first and second amendments that rally obsessive attention, the third amendment is the least controversial and has not been the subject of litigation for years. In twentieth-first century America, the idea that military troops would storm into personal apartments and occupy homes is a preposterous and seemingly irrelevant thought. Yet going back three centuries earlier, the rancorous history between the colonies and England is tainted with this issue. Indeed, law scholars and professors would agree that the Third Amendment "declared what had become conventional American wisdom"[128] in light of the pertinacious fight for independence. During the French and Indian War in the eighteenth century, it was outrageously common that Americans had soldiers quartered in their homes. Even after the peace treaty of 1763, English Parliament passed a Quartering Act that established regulations for housing British soldiers in the new acquired territories. The colonists were forcefully obligated to provide necessaries, firewood, bedding, and food for the troops even without the consent of provincial legislatures. Resentment and of Parliament military occupation grew stronger and escalated with the Stamp Act, Declaratory Act, Townshend Act and other laws enforced. In 1770, British soldiers opened fire on colonial hostile protestors in Boston culminating in what is known today as the Boston Massacre. Just four years later, new Coercive Acts containing an even more aggressive quartering act were passed, authorizing billeting of soldiers in private housing regardless of refusals to provide other lodging options. In the Declaration of Independence of 1776, two out of twenty-seven grievance charges made against King George III articulated this specific oppression: "He has kept among us, in times of peace, Standing Armies without the Consent of our legislatures…[and quartered] large bodies of armed troops among us."

Even though the third amendment has received scant recognition and is known to be the forgotten amendment, recent stories emerged that might shed some light on violations people have suffered today. Many scholars would agree that this amendment offers modern implications for domestic privacy. Any governmental personnel intruding or barging into a civilian's private home is rendered unconstitutional under third amendment protection. Though as Tom W. Bell, a professor at Dale E. Fowler School of Law, would agree, the enshrined right has not lived up to its promise. In his law journal, *"Property" in the Constitution: The View from the Third Amendment*, Bell discusses a traumatic incident that happened in the Aleutian Islands during World War II, of which he calls "a hitherto unnoted—though, in retrospect quite blatant—violation of the Third Amendment."[129] Bell points out that heartbreaking stories of this unconstitutional quartering should "remind us of the Third Amendment's continuing (if attenuated) relevance."[130] In June of 1942, the U.S. Naval base at Dutch Harbor was attacked by Japanese fighter planes on Unalaska Island in Alaska's Aleutian Island chain. Responding to the aggression of Japan, the U.S. military forcibly evacuated Aleutians from their homes and transported the population to unsanitary southeast camps. These camps were "abandoned canneries, a herring saltery, and old mine camp-rotting facilities with no plumbing, electricity or toilets. There, they had little potable water, no warm winter clothing, and sub-par

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[128] "The Third Amendment." Third Amendment | The National Constitution Center. Accessed March 30, 2020. https://constitutioncenter.org/interactive-constitution/interpretation/amendment-iii/interps/123.

[129] Bell, Tom W., *"Property in the Constitution: The View from the Third Amendment,"* (2011) William and Mary Bill of Rights Journal Vol. 20: 1269. Accessed March 3, 2020 https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1944647

[130] Ibid.

food. Nearly ten percent of the evacuees died in the camps."[131] The harsh and grievous treatments the Aleut people endured is shockingly disturbing and took more than forty years for the Federal Government's Commission on Wartime Relocation and Internment of Civilians to investigate the events.

Even more recently, another story caught the eyes of the public where third amendment protection was denied. On the obscure streets of Gibson Road and Horizon Ridge Parkway in Nevada, the houses of the Mitchell family were entered and searched by Henderson police officers without warrant or permission. The Henderson police officers sought to gain a tactical advantage over the Michell's neighbor who was suspected of domestic violence. Despite the family's refusal to participate, the officers forcibly occupied the property for over nine hours to accomplish their tasks. When the case appeared before the Supreme Court, U.S. District Judge Andrew Gordan held that "municipal police officer is not a soldier for purposes of the Third Amendment…This squares with the purposes of the Third Amendment because this was not a military intrusion in to a private home."[132] The injustice suffered by the Mitchell family once again proves that violations of this particular right continues to have ominous presence in a world that dismisses the forgotten amendment.

Fourth Amendment

Search and Seizure

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

The discernible principle of the fourth amendment is summed up in the well-known notion that "a person's home is their castle, not easily invaded by the government." As Barry Friedman, professor of law at New York University stated: "The fourth amendment is the means of keeping the government out of our lives and our property unless it has good justification."[133] Though this proposition sounds straightforward, its application to modern day controversies have proven to be inconsistent, grueling, and troublingly difficult. In the late twentieth century, New York City had a state statute permitting police officers to enter private homes without warrants to make felony arrests. This issue played out when Theodore Payton was convicted of murder in 1990 and had evidence used against him in court that was obtained from a warrantless search of his private home. In *Payton v. New York (1990)*, the Court held that this was unconstitutional and that the fourth amendment as applied to the states by the fourteenth amendment "prohibits the police from making a warrantless and nonconsensual entry into a suspect's home in order to make a routine felony arrest."[134] Today, in the digital age of technological innovations, a mere interpretation against physical trespassing is insufficient to address cases involving the internet and electronic data. Despite the fact that many scholars admire the original meaning, most would agree that

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[131] Blakemore, Erin. *"The U.S. Forcibly Detained Native Alaskans During World War II."* Smithsonian.com. Smithsonian Institution, February 22, 2017. https://www.smithsonianmag.com/smart-news/us-forcibly-detained-native-alaskans-during-world-war-ii-180962239/.

[132] Thevenot, Carri Geer. *"Judge: Police Takeover of Henderson Homes Not Covered by Third Amendment."* Journal. Las Vegas Review-Journal, March 2, 2017. https://www.reviewjournal.com/local/local-las-vegas/judge-police-takeover-of-henderson-homes-not-covered-by-third-amendment/.

[133] "The Fourth Amendment." Fourth Amendment | The National Constitution Center. Accessed March 3, 2020. https://constitutioncenter.org/interactive-constitution/interpretation/amendment-iv/interps/121#the-basics-of-the-fourth-amendment.

[134] "Payton v. New York." *Oyez*, www.oyez.org/cases/1978/78-5420. Accessed 18 Mar. 2020.

"outside of house searches, the fourth amendment was simply inapplicable"[135] and the provision must be interpreted in light of changing technology.[136] According to Orin Kerr, Research Professor of Law at George Washington University, just as in the physical world there are limitations placed on the government that ensure civil liberties, the Court will have to work to "strike the balance" in the online setting.[137] This will be an extraordinarily important task with high stakes as world-wide technology becomes more robust and unpredictable.

The question of deciding what a lawful search constitutes, two interests are considered that must be delicately and carefully balanced. The first is the infringing upon individual's fourth amendment right, and the second is compelling governmental interests such as public safety and deterrence against crime. This balancing act is controversially wrestled with in a variety of locations, places, and circumstances, including schools, vehicles, the use of drug-detecting dogs, and airplane surveillance. Most recently in 2016, a controversial story emerged from Salt Lake City that engendered heated public debate. A Utah police received an anonymous tip of drug activity at a certain house and watchfully observed the personnel coming in and out of the suspected location. Edward Strieff, who walked out of this house was spotted and illegally stopped by the police and surrendered his identification by force. Upon discovered a small traffic warrant on Strieff's record, the police arrested and searched Strieff and obtained evidence of drugs in his pocket. Supreme Court Justice Thomas called the officer's illegal stop a "good-faith mistake" despite the lack of specific and individual suspicion of Strieff. Justice Sonia Sotomayor dissented powerfully warning the public to "not be soothed by the options technical language" because this case in fact "allows the police to stop you on the street, demand your identification [without probable cause], and check it for outstanding traffic warrants—even if you are doing nothing wrong."[138] Many Americans were startled by this seemingly nullifying of the fourth amendment right, since the government was given power to conduct searches based on little to no evidence.

Fifth Amendment

Criminal Procedure Clauses

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury…nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself…"

Grand Jury Indictment

Sword or Shield?

Unlike a number of constitutional clauses that evoked belligerent debates, this provision elicited no recorded debates or opposition when it was presented in the initial bill of rights. The US jury system traces its roots to the English Magna Carta (1215) in chapter 29: "No freeman shall be taken or imprisoned…nor will we not pass upon him, nor [condemn him] but by lawful judgement of his peers."[139] The function of the grand jury is to investigate and protect citizens against unfounded

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[135] Steinberg David E., *"The Uses and Misuses of Fourth Amendment History,"* Journal of Constitutional Law, Vol. 10:3 March 2008. https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=1212&context=jcl

[136] *"A 21st Century Test: What's a 'Search'?"* Los Angeles Times. Los Angeles Times, August 20, 2012. https://www.latimes.com/opinion/editorials/la-xpm-2012-aug-20-la-ed-surveillance-gps-cincinnati-20120820-story.html.

[137] "The Fourth Amendment." Fourth Amendment | The National Constitution Center. Accessed March 30, 2020. https://constitutioncenter.org/interactive-constitution/interpretation/amendment-iv/interps/121#the-biggest-challenges-facing-the-fourth-amendment.

[138] Board, The Editorial. *"Another Hit to the Fourth Amendment."* The New York Times. The New York Times, June 21, 2016. https://www.nytimes.com/2016/06/21/opinion/another-hit-to-the-fourth-amendment.html.

[139] Maddex, Robert L. "The U.S. Constitution A to Z," (Washington, DC: CQ Press, 2008) 280

criminal prosecutions. A grand jury usually consists of twelve to twenty-three citizens of equal social status that together examine evidence to constitute probable cause that places an accused on trial. According to Paul Cassell and Kate Stith, both professors of Law, the grand jury indictment requirement is perceived "not only [as] a 'sword' (accusing individuals of crimes) but also a 'shield' (against oppressive or arbitrary authority)."[140] They asserted that in England, the grand jury traditionally was waged as an "instrument of the crown" of which citizens were compelled to help enforce the King's law—merely an extended accusatory body. Today in the United States, the grand jury is espoused as "the sole method for preferring charges in serious criminal cases…[and holds a] high place…as an instrument of justice."[141] In *United States v. Mandujano (1976)*, this view was emphasized by the plurality opinion stating that "the grand jury continues to function as a barrier to reckless or unfounded charges…its historic office has been to provide a shield against arbitrary or oppressive action, by insuring that serious criminal accusations will be brought only upon the considered judgement of a representative body of citizens acting under oath and under judicial instruction and guidance."[142]

The well-known opinion delivered by the Court in *Costello v. United States (1956)* attempts to clarify the purpose and authority of the grand jury. Frank Costello and his wife were indicted for consciously and intentionally evading income tax payments for three consecutive years. The government displayed forth evidence designed to prove the inconsistencies of Costello's net worth and tax payment and three government agents introduced computations showing to summarize the evidence collected before the grand jury. The defendant argued that the indictment violated his fifth amendment rights and cannot be valid as it is based on "hearsay" evidence that have no substantial proof. The Court upheld his conviction, granted certiorari, and affirmed that the indictment was admissible even though the sole evidence before the grand jury was hearsay. Justice Black delivered the opinion of the Court addressing this decision:

> Neither the Fifth Amendment nor any other constitutional provision prescribes the kind of evidence upon which grand juries must act. The grand jury is an English institution, brought to this country by the early colonists and incorporated in the Constitution by the Founders. There is every reason to believe that our constitutional grand jury was intended to operate substantially like its English progenitor. The basic purpose of the English grand jury was to provide a fair method for instituting criminal proceedings against persons believed to have committed crimes. Grand jurors were selected from the body of the people, and their work was not hampered by rigid procedural or evidential rules. In fact, grand jurors could act on their own knowledge, and were free to make their presentments or indictments on such information as they deemed satisfactory. Despite its broad power to institute criminal proceedings, the grand jury grew in popular favor with the years. It acquired an independence in England free from control by the Crown or judges. Its adoption in our Constitution as the sole method for preferring charges in serious criminal cases shows the high place it held as an instrument of justice. And, in this country, as in England of old, the grand jury has convened as a body of laymen, free from technical rules, acting in secret, pledged to indict no one because of prejudice and to free no one because of special favor.[143]

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[140] "The Fifth Amendment Criminal Procedure Clauses." Fifth Amendment | The National Constitution Center. Accessed March 10, 2020. https://constitutioncenter.org/interactive-constitution/interpretation/amendment-v/clauses/632.

[141] "Amendment 5—Rights of Persons," Authenticated U.S. Government Information, GPO. Accessed March 10, 2020. https://www.govinfo.gov/content/pkg/GPO-CONAN-1992/pdf/GPO-CONAN-1992-10-6.pdf

[142] "United States v. Mandujano." 425 U.S. 564, 571 (1976) Oyez. Accessed March 11, 2020. https://www.oyez.org/cases/1975/74-754.

[143] Costello v. United States, 350 U.S. 350-362 (1956) Justia, accessed March 11, 2020 https://supreme.justia.com/cases/federal/us/350/359/

Though the concept and idealism of an impartial grand jury determining probable causes sound promising, modern thinkers are raising questions. The grand jury that is "under judicial instruction and guidance" is exposed to evidence and content entirely compiled by prosecutors. Justice William O. Douglas expressed that "any experienced prosecutor will admit he can indict anybody at any time for almost anything before any grand jury."[144] Further, the former New York Court of Appeals Judge Sol Wachtler said that a prosecutor can easily cause a grand jury to "indict a ham sandwich."

Double Jeopardy

For the Same Offense?

The double jeopardy clause articulates a simple principle at first glance: to prohibit and estop the action of placing a person on trial twice for the same crime. The preservation of "the finality of judgement" is embodied in this clause.[145] Implicitly, it also forbids the government from "imposing multiple punishments upon a person for the same offense in successive proceedings."[146] Justice Hugo L. Black delivered the opinion of the Court in *Green v. United States (1957)*, expressing the idea of the double jeopardy clause that serves as a classic reference today:

> The constitutional prohibition against "double jeopardy" was designed to protect an individual from being subjected to the hazards of trial and possible conviction more than once for an alleged offense.... The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.[147]

This seemingly comprehensible and unambiguous concept still unfolds with complexity and perplexing jurisprudence throughout the history of America. One such conundrum is deciding when and in what context re-prosecutions are constitutional as to not infringe upon the rights of the accused persons. In *United States v. Martin Linen Supply Co. (1977)*, the Court held that "a defendant may not be retried following an acquittal, no matter how egregiously erroneous the first trial was."[148] However, a retrial may be held in the case of a hung jury—situations where jurors cannot reach an unanimous verdict of guilty or innocent. But the in the case of re-prosecution following conviction, a defendant may still be retried after having his or her conviction overturned. However, he or she are not subject to be convicted of a greater offense on retrial. Another mystifying concept is the "dual sovereignty doctrine," under which "a defendant can be prosecuted twice for what appears to be the same crime—once by federal authorities and once by state authorities, or even by two different states."[149] For example, in *United States v. Felix (1992)*, an illegal drug manufacturer was tried twice in different states due to the separate impact caused by unlawful operations and violations. This fundamental right was not widely venerated until the

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[144] "What, Exactly, Is a Grand Jury?" MoloLamken LLP (ML). Accessed March 30, 2020. http://www.mololamken.com/news-knowledge-11.html.

[145] "DOUBLE JEOPARDY." Legal Information Institute. Accessed March 30, 2020. https://www.law.cornell.edu/constitution-conan/amendment-5/double-jeopardy.

[146] Rudstein, David S., *"A Brief History of the Fifth Amendment Guarantee Against Double Jeopardy,"* 14 Wm. & Mary Bill Rts. J. 193 (2005) https://scholarship.law.wm.edu/wmborj/vol14/iss1/8

[147] Green v. United States, 355 U.S. 184-188 (1957) id. 187-88. Justia, Accessed March 11, 2020. https://supreme.justia.com/cases/federal/us/355/184/

[148] Maddex, Robert L. "The U.S. Constitution A to Z," (Washington, DC: CQ Press, 2008) 141

[149] "The Fifth Amendment Criminal Procedure Clauses." Fifth Amendment | The National Constitution Center. Accessed March 11, 2020. https://constitutioncenter.org/interactive-constitution/interpretation/amendment-v/clauses/632.

landmark court case *Benton v. Maryland (1969)*, the Court declared that "the fundamental nature of the guarantee against double jeopardy can hardly be doubted" and is all-pervasive in "[representing] a fundamental ideal in our constitutional heritage."[150] Since then, this clause has been applicable on both national and state levels.

Right Against Compelled Self-Incrimination
Taking the Fifth

In *Law-Latin: A Treatise in Latin, with Legal Maxims and Phrases as a Basis of Instruction*, it writes "*nemo tenetur seipsum accusare*" which translates "no one is bound to accuse himself except in the presence of God." This principle can be traced back to the competing systems of criminal justice—the accusatorial and the inquisitorial. In the sixteenth and seventeenth centuries, the Star Chamber proceedings utilized the latter system and fearfully created disquietude and dread. This operation interrogates and compels an alleged wrongdoer to testify his culpability. Indeed, "a person [must] take an oath to tell the truth to the full extend of his knowledge as to all matters about which he would be questioned…the person [would not be] advised the nature of the charges against him, or whether he was accused crime, and was also not informed of the nature of the questions to be asked."[151] The accused will not know if they themselves are the subject of inquisition, much less be equipped with defense. On the other hand, the accusatorial method is "based on the presumption of innocence and the prosecution's burden to prove its case independently of the accused."[152] The US today adopts the accusatorial method and the Supreme Court has interpreted this clause by aiming at a moral law that stirs the conscience. In *Murphy v. Waterfront Commission (1964)*, Justice Goldberg delivered the option of the Court that appeals to the heart:

> It reflects many of our fundamental values and most noble aspirations: our unwillingness to subject those suspected of crime to the cruel trilemma of self-accusation, perjury or contempt; our preference for an accusatorial rather than an inquisitorial system of criminal justice; our fear that self-incriminating statements will be elicited by inhumane treatment and abuses; our sense of fair play which dictates a fair state-individual balance by requiring the government to leave the individual alone until good cause is shown for disturbing him and by requiring the government in its contest with the individual to shoulder the entire load; our respect for the inviolability of the human personality and of the right of each individual to a private enclave where he may lead a private life; our distrust of self-deprecatory statements; and our realization that the privilege, while sometimes a shelter to the guilty, is often a protection to the innocent.[153]

The Court has continually sustained and extended this right over the years. For example, in *Griffin v. California (1965)*, California exercised a state statute that demands denial or explanation by the defendant as to any evidence or facts against him. If the defendant fails to testify or remains silent, the jury may take this action as indicating the truth of the evidence and convict on the basis of evidence of guilt. The Court held that "the Fifth Amendment, in its direct application to the Federal Government and in its bearing on the States by reason of the Fourteenth Amendment, forbids

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[150] Rudstein, David S., *"A Brief History of the Fifth Amendment Guarantee Against Double Jeopardy,"* 14 Wm. & Mary Bill Rts. J. 193 (2005) https://scholarship.law.wm.edu/wmborj/vol14/iss1/8

[151] "Self-Incrimination." Justia Law. Accessed March 11, 2020. https://law.justia.com/constitution/us/amendment-05/07-self-incrimination.html.

[152] Maddex, Robert L. "The U.S. Constitution A to Z," (Washington, DC: CQ Press, 2008) 423

[153] Murphy v. Waterfront Commission, 378 U.S. 52, 55 (1964) (internal quotations omitted), *quoted in* Arenella, *supra* note 2, at 36-37.

either comment by the prosecution on the accused's silence or instructions by the court that such silence is evidence of guilt."[154] Thus, reversing the decision and striking down the statute. The Court has also protected employees of the government to invoke their fifth amendment right in police corruption investigations.[155]

In the arena of fifth amendment rights, one particular decision reached by the Court in *Miranda v. Arizona (1966*) remains highly controversial today. Ernesto Miranda was arrested and vigorously questioned by police authorities without advisement of his right to have legal counsel. A written confession to kidnapping and rape was acquired and used to convict Miranda guilty. Though he was still convicted and sentenced to twenty to thirty years in prison, the Court established "procedural safeguards" known as the Miranda Rule that is entrenched in American police practice today. This rule required "a defendant…to be warned before questions that he had the right to remain silence, and that anything he said can be used against him in a court of law. A defendant was also required to be told that he had the right to an attorney, and if [it's unaffordable] one was to be appointed for him prior to any questioning."[156] Any statements made by defendant in custodial interrogation are admissible as evidence only if they were informed of their rights and exercised in voluntary or intelligent manner. Even though the standards were "designed to assure protection of the…privilege against self-incrimination under 'inherently coercive' [or physical and spiritual coercion] circumstances,"[157] critics have pointed out that this practice reduces confessions and places unnecessary strict burden that hinders police from carrying out duties. It is more widely debated that the Miranda rule is not constitutionally mandated based on its prophylactic nature and purpose.

Due Process of Law

"…nor be deprived of life, liberty, or property, without due process of law…"

The purpose and content of the due process clause can be referenced back to chapter thirty-nine of the Magna Carta, and the expounded version in the Third Reissue of Henry III in 1225. In chapter twenty-nine, it reads: "No free man shall be taken or imprisoned or deprived of his freehold [land or property] or his liberties or free customs, or outlawed or exiled, or in any manner destroyed, nor shall we come upon him or send against him, except by a legal judgement of his peers or by the law of the land."[158] Most sources and scholars will agree that in essence, the due process clause strives to embody actions that "[comport] with the deepest notions of what is fair and right and just."[159] The law of the land and due process of law are widely embraced as interchangeable terms providing safeguards against arbitrary or capricious judgement of rulers. Two areas within the right to due process include the more explicit "procedural due process," as well as "substantive due process." The latter has to do with legislation, regulations, or rules that unfairly affect citizens. Interpretations revolve around procedures and processes in trials, as well as a limitation on substantive powers of legislatives to pass laws that unreasonably infringe on fundamental liberty. At the most basic understanding in the context of trials, procedural due process encompasses the rights of an accused to be informed, heard, and represented by an

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[154] Griffin v. California, 380 U.S. 615 (1965), Justia, accessed February 25, 2020. https://supreme.justia.com/cases/federal/us/380/609/#F6

[155] Gardner v. Broderick, 392 U.S. 273 (1968), Justia, accessed February 25, 2020. https://supreme.justia.com/cases/federal/us/392/273/)

[156] "Miranda v. Arizona." Oyez. Accessed March 1, 2020. https://www.oyez.org/cases/1965/759.

[157] People v. Sims (1993), 5 Cal. 4th 405, 440. https://www.sdsheriff.net/legalupdates/docs/miranda-2016.pdf

[158] The National Archives. "Magna Carta, 1225." (Chapter 29) The National Archives. The National Archives, October 7, 2015. https://www.nationalarchives.gov.uk/education/resources/magna-carta/magna-carta-1225-westminster/.

[159] "Due Process." Justia Law. Accessed March 1, 2020. https://law.justia.com/constitution/us/amendment-05/11-due-process.html.

attorney. The accused is also entitled to calling and cross-examining witnesses, be provided with written decisions based on evidence, provided with transcripts, and guaranteed the option to appeal. The substantive due process gives voice to citizens who've experienced unfair deprivation of individual rights from laws enacted based on arbitrary, irrational, or inequitable motives.

Takings Clause

"…nor shall private property be taken for public use, without just compensation."

The takings clause limits the government's power to expropriate private property for public use under eminent domain, and mandates fair compensation to property owners. Such "property" is not limited to physical land but to all forms of private property, including easements, leases, mortgages, life estates, remainders, and intellectual property such as patents, copyrights, trademarks and trade secrets. The Supreme Court further clarified that if a government regulation leaves an owners with no economically viable use of his or her property, it will also constitute a taking. In *Lucas v. South Carolina Coastal Council (1992)*, petitioner Lucas brought charges against the state's Beachfront Management Act that prohibited Lucas from building residential homes. He demanded a fair payment according to the fifth amendment. The Supreme Court ruled in his favor and affirmed that "regulations that deny property owner all 'economically viable use of his land' constitute one of the discrete categories of regulatory deprivations that require compensation."[160]

In discerning what context and usage constitute "public use", the Supreme Court has accepted broad interpretations "equating it with any legitimate public purpose, whether property is literally used by the public or not, and trusting to political officials to decide what serves public purposes."[161] If governmental takings are rationally related to any public purpose, there is little interference or resistance from the Court. In *Berman v. Parker (1954)*, the Court upheld the District of Columbia's exercise of eminent domain that condemned entire neighborhoods for redevelopment purposes. In Hawaii Housing Authority v. Midkiff (1984), the Court also deemed eminent domain constitutional in redistributing property in Hawaii to avoid a group of privileged landowners to own all the land. This transfer of property from one individual to another raised controversy as more cases of similar nature sprung up. Lastly, just compensation is now widely agreed upon to mean that "the government must pay fair market value" for the property confiscated. The government may also pay a higher rate if there is evidence from landowners that a buyer would pay more for future uses for the land.

Sixth Amendment

Speedy and Public Trial

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial…"

The right to a speedy trial guaranteed by the sixth amendment intends to protect an accused person from languishing in jail for an indefinite time. A person is assumed by law to be innocent until proven guilty, thus waiting endlessly in jail and to be denied bail until the case is tried robs defendants of life, liberty, and happiness. The well-known legal maxim states, "justice delayed is justice denied"— the failure to handle the administration of justice in a timely manner is "thwarting the principles of finality and certainty [that causes] real harm..to the American

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[160] Lucas v. South Carolina Coastal Council, 505 U.S. 1014-1019 (1992), Justia, Accessed February 25, 2020. https://supreme.justia.com/cases/federal/us/505/1003/

[161] "Takings Clause: Fifth Amendment." Takings Clause: Fifth Amendment - Federalism in America. Accessed March 3, 2020. http://encyclopedia.federalism.org/index.php/Takings_Clause:_Fifth_Amendment.

people."[162] Moreover, the threat of witnesses' memories fading with the passage of time can cause harm to the strength of defense. Though the Court has held that "if the prosecution does not bring the case to trial in a speedy manner, then it must drop the charges against the defendant,"[163] the Court nonetheless has allowed a torpid pace of federal lawsuits. The interpretation of the word 'speedy' has disturbingly meant several years in some cases. Since the enactment of the Speedy Trial Act of 1974, more structured time limits were established for completing the stages of a federal criminal prosecution. The statute reads, "The information or indictment must be filed within 30 days from the date of arrest or services of the summons. Trials must commence within 70 days from the date the information or indictment was filed, or from the date the defendant appears before an officer of the court in which the charge is pending, whichever is later."[164] If nothing is happening with trial in one hundred days, the case must be dismissed. Some States have also passed laws to limit the limbo of waiting for trial.

This right is described to have an 'amorphous' and 'slippery'[165] quality that renders consistent legal standards extremely difficult to define, apply, or establish. In *Barker v. Wingo (1972)*, the Supreme Court attempted to formulate guidelines that apply to state and federal cases and clarify the chaotic speedy trial jurisprudence. The Barker test was articulated to "[require] courts to balance four factors—namely, the length of the delay, the reason for the delay, when the defendant asserted his right to speedy trial, and the prejudice suffered by the defendant as a result of the delay."[166] On July 20, 1958, an elderly couple was found brutally beaten to death in Christian County, Kentucky. The offenders were named Silas Manning and Willie Barker, who were both arrested for the crime. Barker was not brought to trial until more than five years after the arrest, after his accomplice was tried six times and convicted. Barker asserted that the long trial delay infringed upon his sixth amendment right to a speedy trial and sought relief and dismissal. When the case arrived at the Supreme Court, the Court held that "a defendant's constitutional right to a speedy trial cannot be established by any inflexible rule, but can be determined only on an ad hoc balancing basis"[167] and ruled according to the new Barker test. Justice Powell delivered the opinion of the Court concluding that "the lack of any serious prejudice to petitioner and the fact, as disclosed by the record, that he did not want a speedy trial outweighs opposing considerations, and compel the conclusion that petitioner was not deprived of his due process right to a speedy trial."[168] This case was an important progress, yet much work remains to be done to ensure justice to accused individuals who may be innocent.

This aspect of the right to a public trial has been enforced more efficiently by the court in comparison to the prior clause. From a case in 1948, *In re Oliver*, petitioner testified in compliance with subpoena and was sentenced with contempt by a secret "one-man grand jury" investigation. Petitioner had no access to a lawyer, or the opportunity to prepare defense or to cross-examine other witnesses. Court held that "the secrecy of petitioner's trial for criminal contempt violated the

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[162] 140. "Justice Delayed, Justice Denied: The High Price of Judicial Vacancies." Brennan Center for Justice. Accessed March 15, 2020. https://www.brennancenter.org/our-work/research-reports/justice-delayed-justice-denied-high-price-judicial-vacancies.

[163] Monk, Linda R., *The Words We Live By: Your Annotated Guide to the Constitution* (New York: A Stonesong Press Book, Hyperion) 174.

[164] "628. Speedy Trial Act of 1974." The United States Department of Justice, January 22, 2020. https://www.justice.gov/archives/jm/criminal-resource-manual-628-speedy-trial-act-1974.

[165] Barker v. Wingo, 407 US 514, 522 (1972), Justia, Accessed on March 15, 2020. https://supreme.justia.com/cases/federal/us/407/514/

[166] Brooks, Brian P., "A New Speedy Trial Standard for *Barker v. Wingo*: Reviving a Constitutional Remedy in an Age of Statutes," The University of Chicago Law Review. Accessed March 15, 2020. https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=4822&context=uclrev

[167] Barker v. Wingo, 407 US 514, 522 (1972), Justia, Accessed on March 15, 2020. https://supreme.justia.com/cases/federal/us/407/514/

[168] Ibid.

due process clause of the Fourteenth Amendment"[169] and articulated the vision of American Court to stand opposite to the tyrannical court of the Star Chambers:

> The traditional Anglo-American distrust for secret trials has been variously ascribed to the notorious use of this practice by the Spanish Inquisition, to the excesses of the English Court of Star Chamber, and to the French monarchy's abuse of the letter de cachet. All of these institutions obviously symbolized a menace to liberty…Whatever other benefits the guarantee to an accused that his trial be conducted in public may confer upon our society, the guarantee has always been recognized as a safeguard against any attempt to employ our courts as instruments of persecution.[170]

It is known that the Sixth Amendment right to a fair trial can on occasion conflict with the general pubic's First Amendment right to attend and speak about criminal proceedings. There are "overriding reasons, such as national security, public safety, or a victim's serious privacy interests"[171] that prevent the public and media to participate in trials. A large concern is that "excessive pretrial publicity can prejudice the jury and deny the defendant a fair trial"[172] which defeats the purpose of the accused's sixth amendment rights. In *Sheppard v. Maxwell (1966)*, Dr. Samuel Sheppard was accused of second-degree murder for the death of his pregnant wife in Cleveland. The story had such widespread and prejudicial publicity throughout the trial in radio, print media, and news that his reputation was demolished. He appealed and argued that he received an unfair trial due to the deliberate framing of his guilt by mass media and that the Court failed to protect him from the monstrous publicity. Justice Clark who delivered the opinion of the Court concluded that defendant was in fact denied fair trial as juror's minds were positioned against Sheppard as a result from the hostile trial coverage by media. The Court noted that "although freedom of expression should be given great latitude…it must not be so broad as to divert the trial away from its primary purpose [of] adjudicating [criminal] matters in an objective, clam, and solemn courtroom setting."[173] Judges are thus responsible to conduct sequestering of jurors or transfer the case to a different venue or location in the wake of such eruption.

Impartial Jury

"…by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been preciously ascertained by law…"

The concept of of trial by jury is universally revered and articulated beautifully from Blackstone: "The truth of every accusation…[must] be confirmed by the unanimous suffrage of twelve of his equals and neighbors indifferently chosen and superior to all suspicion."[174] The sixth amendment echos this precious right spelled out previously in Article III of the Constitution, and later reinforced by the Seventh Amendment. The Declaration of Independence also lists the deprivation of this right as two strong offenses against the King: "He has combined with others to subject us to a jurisdiction foreign to our constitution, and unacknowledged by our laws…for depriving us in many cases, of the benefits of Trial by Jury [and] for transporting us beyond Seas to be tried for

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[169] In re Oliver, 333 U.S. 257 (1948), Justia, Accessed on March 15, 2020, https://supreme.justia.com/cases/federal/us/333/257/

[170] Ibid at, 268-270

[171] "The Sixth Amendment." Sixth Amendment | The National Constitution Center. Accessed March 3, 2020. https://constitutioncenter.org/interactive-constitution/interpretation/amendment-vi/interps/127.

[172] Monk, Linda R., The Words We Live By: Your Annotated Guide to the Constitution (New York: A Stonesong Press Book, Hyperion), 174

[173] "Sheppard v. Maxwell." Oyez. Accessed March 15, 2020. https://www.oyez.org/cases/1965/490.

[174] W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 349–350 (T. Cooley, 4th ed. 1896).

pretended offenses."[175] In any cases where the accused faces more than six months' imprisonment, a jury trial is mandated. Trial by jury in criminal prosecution does apply to states, but the standards are not the same as federal cases. States can have smaller juries, consisting as few as six jurors and not deliver unanimous verdicts in noncapital trials. The federal government, however, must have twelve jurors that deliver unanimous verdicts. The standard for prosecution is to prove "every element of the crime beyond a reasonable doubt."[176] Juries have been known as "circuit-breaker in the State's machinery of justice"[177] since a jury holds the tremendous power to acquit. Juries traditionally are not informed of this power of the consequences of charges, thus they operate and exercise this power "largely in the dark."[178] The jury explicitly must be 'impartial', coming from a pool representing a fair cross-section of the local community. Prosecuting and defense attorneys will engage in a process known as voir dire, where they question potential jurors to uncover previously held biases or knowledge of the case. They may also exercise peremptory challenge and remove a certain juror without giving reasons.

According to the Administrative Office of the U.S. Courts, there were nearly 80,000 defendants in federal criminal cases, and only two percent of them went to trial in fiscal year 2018. Only eight percent had their cases dismissed and the shocking majority of ninety percent pleaded guilty. Data shows that the number of federal criminal defendants opting for a trial has fallen sixty percent in two decades since the late twentieth century.[179] This symptom is known as plea bargains—to save trial costs and time for the federal government, defendants will plea guilty in exchange for a reduced and lighter sentence negotiated.

Confrontation and Compulsory Process Clauses

"…and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor…"

The purpose of the confrontation clause is to prevent any testimonials from witnesses obtained outside the courtroom to be "used against the prisoner in lieu of a personal examination and cross-examination of the witness in which the accused has an opportunity not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of brief."[180] This particular right extends back to English history. Back in the 1600's, it was commonplace and practice to collect evidence outside of the court and use them during trial. This put defendants at an enormous disadvantage. Defendants were not equipped to prepare a proper defense, nor did they have the opportunity to challenge the sincerity or truthfulness of statements made against them in the absence of their presence. The American court upholds that "evidence given at a preliminary hearing could not be used at the trial if the absence of the witness was attributable to the negligence of the prosecution."[181]

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[175] *Thomas Jefferson, et al, July 4, Copy of Declaration of Independence*. -07-04, 1776. Manuscript/Mixed Material. https://www.loc.gov/item/mtjbib000159/.

[176] "The Sixth Amendment." Sixth Amendment | The National Constitution Center. Accessed March 15, 2020. https://constitutioncenter.org/interactive-constitution/interpretation/amendment-vi/interps/127.

[177] Ibid.

[178] Ibid.

[179] Gramlich, John. *"Only 2% of Federal Criminal Defendants Go to Trial, and Most Who Do Are Found Guilty."* Pew Research Center. Pew Research Center, June 11, 2019. https://www.pewresearch.org/fact-tank/2019/06/11/only-2-of-federal-criminal-defendants-go-to-trial-and-most-who-do-are-found-guilty/.

[180] Mattox v. United States, 156 U.S. 237, 242–43 (1895). Justia, Accessed March 15, 2020. https://supreme.justia.com/cases/federal/us/156/237/

[181] Motes v. United States, 178 U.S. 458 (1900). Justia, Accessed March 17, 2020. https://supreme.justia.com/cases/federal/us/178/458/

The compulsory process clause secures the right of defendants in criminal cases to present witnesses for defense. Witnesses are obligated to testify through the issuance of a court-ordered subpoena. In *Washington v. Texas (1967)*, petitioner and a co-participant were charged with shooting and murder in Texas. Petitioner was denied privileges of obtaining testimonials from the co-participant in his defense, and the Supreme Court concurred that he was deprived of sixth amendment right to have compulsory process for obtaining witnesses in his favor. Chief Justice Warren delivered the option of the Court and reiterated this fundamental right:

> The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury, so it may decide where the truth lies. Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law.[182]

Assistance of Counsel

"…and to have the Assistance of Counsel for his defense."

This right is said to be the most important in the entire sixth amendment, benefiting the defendant and leveling the playing field against the tremendous power of state, police investigation, and prosecutors. The labyrinth of the legal system cannot be sufficiently navigated alone by the accused person. In *Gideon v. Wainwright (1963)*, the Court held that "the right of an indigent defendant in a criminal trial to have the assistance of counsel is a fundamental right essential to a fair trial, and petitioner's trial and conviction without the [such aid] violated the Fourteenth Amendment."[183] This assistance is further mandated to be 'effective' with competent representation , aid in preparation and trial with adequate defense. However, history shows that in many capital cases, these defense lawyers have proved to be "inept, ineffectual, underfunded, and overmatched by the State's attorneys. Some…have even been drunk or asleep at trial."[184] Even today, "defense lawyering for the poor is a [hot] mess"[185] as stated by Stephanos Bibas, a U.S. Circuit Judge for the Third Circuit. A working structure doesn't exist to support resources needed to prepare vigorous defenses by public defense or appointed lawyers. Instead of advising the accused to plead guilty from the start, Bibas argues that appointed lawyers need to have proper time and investigators required to build relationships with clients and present effective defense.

Seventh Amendment

Trial by Jury in Civil Cases

"In Suits at common law, where the value in controversy shall exceed twenty dollars,
The right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise
re-examined in any Court of the United States, than according to the rules of the common law."

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[182] Washinton v. Texas, 388 U.S. 14, 19 (1967). Justia, Accessed March 17, 2020. https://supreme.justia.com/cases/federal/us/388/14/

[183] Gideon v. Wainwright, 372 U.S. 335, 336-345 (1963). Justia, Accessed March 17, 2020. https://supreme.justia.com/cases/federal/us/372/335/

[184] Stull, Brian. "The Importance of the Sixth Amendment Right to Counsel in Capital Cases." American Civil Liberties Union. American Civil Liberties Union, July 9, 2018. https://www.aclu.org/blog/smart-justice/mass-incarceration/importance-sixth-amendment-right-counsel-capital-cases.

[185] "The Sixth Amendment." Sixth Amendment | The National Constitution Center. Accessed March 17, 2020. https://constitutioncenter.org/interactive-constitution/interpretation/amendment-vi/interps/127.

The Seventh Amendment accentuates the significance of the right to a jury trial for the third time in the Constitution. Yet unlike the rest of the amendments enumerated in the bill of rights, the Court has not required states to protect this right. However, many states have spelled out this right in their own constitutions. To early Americans, jury was always a symbol and way of independent governing apart from British laws. Today, some scholars still believe it to be a solemn task of self-government, and other scholars believe this process produces erratic verdicts that easily violate the due process of law. Yale Law professor Akhil Reed states that "in the jury box, we meet citizen to citizen, face to face, not just to exchange greetings or currency, but to listen to, learn from, and work with one another in the solemn task of self-government. Nowhere else…must Americans come together in person to deliberate collectively about fundamental matters in our shared public life. Democracy is well served by the dialogue that takes place in the jury room."[186]

Challenging that viewpoint, Renée Lerner, a law professor at the George Washington University Law School, argued that civil trials has always had inevitable shortcomings which render civil juries today almost extinct.[187] She believes that the main problem is the inability of jurors to understand or explicate complicated and confusing evidence, and yield a reasonable verdict all at once. These decisions are also hard to reverse since "jurors gave no official reasons for their decisions"[188] in the first place. Moreover, she reasoned that jury trials have become longer and more expensive, and parties much rather negotiate a settlement or have a judge decide the case.

The second provision of the seventh amendment prohibits a judge from disregarding and overturning decisions made by jurors. In *Baltimore and California Line v. Redman (1935)*, the Court upheld that "issues of law are to be resolved by the court, and issues of fact are to be determined by the jury under appropriate instructions by the court."[189] In other words, the judges responsibility is to provide legal instructions to the jury before it deliberates as final triers of facts. The judge only has the power to determine what law is relevant and applicable, but the ultimate decision-maker should be the jurors.

Eight Amendment

Excessive Fines, Cruel and Unusual Punishment

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

The predecessor of this amendment dates back to 1689, in the English Bill of Rights that also forbids cruel and unusual punishments. A human-sized iron cage, intended solely for the purposes of encasing a criminal body on display for all to see, was such grotesque judgement that was practiced in the mid-eighteenth and mid-nineteenth century. A metal device that is no longer than 6 inches wide, the thumbscrews was a nauseating torture instrument that slowly crushed the fingers to prompt prisoners to confess. Wooden pillories and racks were also not uncommon methods employed to punish criminals. Less than two decades ago in *Hope v. Pelzer (2002)*, petitioner Hope had experienced being handcuffed to a hitching post for an abnormally long time while guards taunted his thirst. He was also subdued, handcuffed, and restricted in leg irons, and exposed to the sun with few water or bathroom breaks. The Court held that this inhumane

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[186] Monk, Linda R., The Words We Live By: Your Annotated Guide to the Constitution (New York: A Stonesong Press Book, Hyperion), 182

[187] "The Seventh Amendment." Seventh Amendment | The National Constitution Center. Accessed March 17, 2020. https://constitutioncenter.org/interactive-constitution/interpretation/amendment-vii/interps/125#the-seventh-amendment-today-suja-a-thomas.

[188] Ibid.

[189] Baltimore & California Line, Inc. v. Redman, 295 U.S. 654, 657 (1935). Justia, Accessed March 17, 2020. https://supreme.justia.com/cases/federal/us/295/654/

treatment "established an Eighth Amendment violation [and is] among the unnecessary and wanton inflictions of pain…that are totally without penological justification."[190] The use of the hitching post under these circumstances, the Court confirmed is a transgression against the "basic concept…that is nothing less than dignity of man."[191]

Such barbaric and bestial punishments described would very explicitly violate the eighth amendment, and are largely agreed to be revoltingly unconstitutional. But beyond the more black and white spheres, Americans have raged with disagreements and debates concerning meaning and interpretation. Does the amendment prohibit the death penalty? Does the amendment bar punishments disproportionate to an offense? What is the standard that qualifies modern methods of punishment 'cruel and unusual'? For example, to what extent is the three-drug execution cocktail, use of firing squad, or use of solitary confinement unconstitutional?

Not Bound

A more expansive and vital character or original meaning

A disbursing officer of the Bureau of Coast Guard and Transportation of the U.S. government of the Philippines challenged the punishment inflicted on him as cruel and unusual. Paul Weems, who deceived and defrauded the U.S. government of the Philippines Island and its officials, falsified an official document—a cash book—that entered paid outs "as wages of employees of the lighthouse service." He received a grave sentence of "fifteen years of hard and painful labor, with chains worn at all times, civil penalties extending beyond his imprisonment, and a fine [of 4,000 pesetas]…and loss of the right to hold office and to vote, and to be under surveillance for life."[192] The Supreme Court overturned Weems's conviction and declared the punishment inflicted by a specific philippine statue was indeed cruel in its disproportion for the crime of falsification.

This case, *Weems v. United States (1910)* "[allowed] courts [to] freely decide what is cruel and unusual as the eight amendment's adopters intended, without the scope of review being bound by narrow historical constraints."[193] Justice McKenna delivered the opinion of the court stating that "while legislation…is enacted to remedy existing evils, its general language is not necessarily so confined, and it may be capable of wider application than to the mischief giving it birth. The Eighth Amendment is progressive, and does not prohibit merely the cruel and unusual punishments known in 1689 and 1787, but may acquire a wider meaning as public opinion becomes enlightened by humane justice."[194]

Half of a century later, the Court also ruled on a famous case that further argued that the meaning of the Constitution should change as societal values change. In *Trop v. Dulles (1958)*, Albert Trop who was a private in the United States Army escaped from a military stockade at Casablanca for a day before willingly returning to the base. Upon returning, a general court-martial convicted Trop of wartime desertion and Trop received punishment of three years at hard labor with no pay or allowances, and a dishonorable discharge. Years later, he was denied a passport on the grounds that his citizenship was lost and forfeited due to his conviction. The Supreme Court held that the

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[190] Hope v. Pelzer, 536 U.S. 736-748 (2002). Justia, Accessed on March 17, 2020. https://supreme.justia.com/cases/federal/us/536/730/

[191] Ibid at, 738

[192] "Weems v. United States, 217 U.S. 349 (1910)." Civil Liberties and Civil Rights in the United States. Accessed March 17, 2020. https://uscivilliberties.org/cases/4698-weems-v-united-states-217-us-349-1910.html.

[193] "Interpretation of the Eighth Amendment—Rummel, Solem, and the Venerable Case of Weems v. United States. Duke Law Journal Vol. 1984:789. Accessed March 17, 2020 "https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=2886&context=dlj

[194] Weems v. United States, 217 U.S. 349 (1910). Justia, Accessed on March 17, 2020. https://supreme.justia.com/cases/federal/us/217/349/

divesting someone of citizenship violates the eighth amendment and constitutes cruel and unusual punishment. Chief Justice Earl Warren stated that "the Court recognized in that case that the words of the Amendment are not precise, and that their scope is not static. The [Eighth Amendment] must draw its meaning from the evolving standards of decency that mark the progress of a maturing society."[195] Despite a popular contemporary perspective, many originalists object to this approach stating that it is "inconsistent with democratic principles [to give] unelected judges the authority to overturn laws enacted by democratically elected legislatures, based on judge's own subjective ideas of what current 'standards of decency' require."[196]

When Cruelty is Hidden

It is widely held and in effect today that capital punishment is constitutional, thereby arousing most debates around how the death penalty is applied and the appropriate scope of federal review. The system has been broken and problematic since the formation of this country with discriminatory and arbitrary imposition. Specific and narrowing guidelines and factors for jury consideration have been somewhat established, and setting limitation on criminal punishment is still a difficult work today. The Court has upheld the use of firing squad and electrocution, and the use of lethal injections in the States of Kentucky and Oklahoma. In *Baze v. Rees (2008)*, inmates challenged the state's lethal injection protocol and the Court held that this did not violate the Eighth Amendment. Today, the formula and ingredients used to make these injections are disturbing, controversial, and engendered heated debates. Dr. Mark Edgar, a professor of pathology at Emory University had done numerous autopsies and discovered patterns of pulmonary edema in the lungs of executed persons, who died from the three-drug formula adopted since 2017. It is described as "bloody froth that oozed from the lungs…evidence that the buildup had been sudden, severe, and harrowing…like drowning."[197] His studies showed that the executed persons experienced the terror of asphyxiation. Furthermore, the first ingredient, midazlolam, in the injection, had no guarantee to immune the person from pain and rendered an ineffective anesthetic. The problem is the second and third drug that paralyzes the person before the potassium chloride stops the heart beat. "Experts likened the effect to being buried alive while feeling fire in one's veins."[198] To the general public, what looks like a peaceful departure is so cruel and abominable, it silences the cries and hides the symptoms of severe pain executed persons experience.

Ninth Amendment

Non-Enumerated Rights, Retained by People

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

Lead by the Anti-Federalist party, many Americans emphatically resisted the ratification of the newly proposed Constitution and a centralized government. Among other strong arguments opposing the new governing document, the omission of a bill of right to protect individual citizens resonated the most with the public. Responding to the complaints, proponents of the Constitution

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[195] Trop v. Dulles, 356 U.S. 86 (1958), Justia. Accessed March 17, 2020. https://supreme.justia.com/cases/federal/us/356/86/

[196] "The Eighth Amendment." Eighth Amendment | The National Constitution Center. Accessed March 17, 2020. https://constitutioncenter.org/interactive-constitution/interpretation/amendment-viii/clauses/103.

[197] Segura, Liliana. "Ohio's Governor Stopped an Execution Over Fears It Would Feel Like Waterboarding." The Intercept, February 7, 2019. https://theintercept.com/2019/02/07/death-penalty-lethal-injection-midazolam-ohio/.

[198] Ibid.

argued that the enumeration of any rights has the potential to counter-intuitively, surrender the rights that are not listed. Since it is not feasible to list all rights of the people, a bill of rights thereby creates opportunity for the government to limit liberties not explicitly articulated. Nevertheless, Federalists pledged to offer amendments in light of the public's distrust and demand for the bill of rights. The ninth amendment thus, was proposed and ratified as a protection of the unenumerated rights as deserving full constitutional protection as other rights.

The ninth amendment is known to be open-ended and extremely difficult to interpret, even to the point of "leaving the argument about unenumerated rights unresolved" as Louis Seidman would argue.[199] In episode three of the More perfect podcast by WNYC Studios, a metaphor and series of interviews help to demystify what this amendment entails. They begin with a case *Griswold v. Connecticut (1965)* where the constitutionality of a Connecticut state statue was challenged and struck down. The state law banned the use of contraceptives by married couples and banned the counseling from physicians on how to use it. C. Lee Buxton and Estelle Griswold ran a birth control clinic in New Haven and they were convicted of violating this law. The Supreme Court ruled that "a right to privacy can be inferred from several amendments in the bill of rights, and this right prevents states from making the use of contraception by married couples illegal."[200] Justice Douglas delivered the opinion of the Court using the imagery of a penumbra: "The foregoing cases suggest that specific guarantees in the bill of rights have penumbras, formed by emanations from those guarantees that help give them life and substance…[For example,] the right of association contained in the penumbra of the First Amendment is one, as we have seen."[201] In other words, though not explicitly enumerated, the right to choose to use contraceptives is a private issues, and the right to that privacy is implied and validated. The ninth amendment exists to safeguard implicit rights that are not in the constitution, but nonetheless deserve full recognition and protection.

Tenth Amendment

State's Rights

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

The push and pull between the interest and authority of the federal government against that of the States has been the subject of debate for centuries. In fact, conflicts over federalism is so entrenched in American history and present times that Chief Justice John Marshall plainly said that this issue "will probably continue to arise, as long as our system shall exist." The tenth amendment accentuates the fact that the federal government is limited to the enumerated powers delegated by the Constitution and "evokes themes of popular sovereignty, highlighting the foundational role of the people in the constitutional republic."[202] The main question involving federal commands becomes less about "whether it violates someone's rights, but whether it exceeds the national government's enumerated powers."[203]

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[199] "The Ninth Amendment." Ninth Amendment | The National Constitution Center. Accessed March 20, 2020. https://constitutioncenter.org/interactive-constitution/interpretation/amendment-ix/interps/131.

[200] "Griswold v. Connecticut." Oyez. Accessed March 20, 2020. https://www.oyez.org/cases/1964/496.

[201] Griswold v. Connecticut, 381 U.S. 484 (1965), Justia, Accessed March 20, 2020. https://supreme.justia.com/cases/federal/us/381/479/

[202] "The Tenth Amendment." 10th Amendment | The National Constitution Center. Accessed March 20, 2020. https://constitutioncenter.org/interactive-constitution/interpretation/amendment-x/interps/129.

[203] Ibid.

Following Chief Justice John Marshall's lead in the early nineteenth century, the Court constructed this amendment narrowly, lifting up nationalism and the "implied powers" of Congress from the Necessary and Proper Clause for many rulings. Years later under the leadership of Roger Taney, the "dual sovereignty" doctrine was more widely advocated on the other hand. In times of enraging disputes, states threatened and took steps to secede from the United States. This heated conflict between federal and state power escalated and culminated in the epicenter of the nation's heartbreaking past—the civil war. It was only after the death of half a million Americans that the Supreme Court ruled in *Texas v. White (1869)* that "all [of the Constitution's] provision, looks to an indestructible Union, composed of indestructible states." Jad Abumrad, the host of the Most Perfect podcast, explained and offered a poetic analogy of an architectural and design concept that helps to grasp the overall notion of the tenth amendment—Tensegrity. This means that the integrity of a building is adorned directly by the forces of tension that push against each other. A set of elements are stabilized by the network of continuous tension that hold up the structure. The tension between federal and state powers is ingrained in the designs of the Constitution, and perhaps is a reason the nation goes on, however ghastly the narratives must be.

IV. DANCE-MAKING MODEL INTEGRATING RESEARCH WITHIN PERFORMANCE

The overarching goal of this 5-week dance-making model is to attentively cultivate curiosity and desire for civic education and literacy among participants. During the course of ten weeks, dancers will engage in weekly rehearsals following methodology designed to engender dialogue and movement that are informed by research from this paper. The workshops will culminate in a multi-media staged performance that exercises the very liberties of artistic expression. Utilizing the performative tools of movement, lighting, sound scores, original songs, costume design, video projection, text and visual illustration, the final performance is a composition of these elements that communicate collective findings and interpretation of the First Amendment. The creation process will be rigorously driven by research, discourse, reflection, writing, sharing, and responding. Research involves a retrospective contemplation of history and supreme court cases that give meaning to the First Amendment. Personal pieces of reflective writings will be produced after discussions. As an intimate community, sharing and responding will take place both verbally and physically through dance. Below are the weekly agendas designed to push this curatorial concept forward into a tangible expression.

Week I

What does Freedom of Speech Mean to You?

The first rehearsal begins with inviting participants to broadly introduce themselves to each other, sharing their backgrounds, journeys as dancers and thinkers, and why they might be interested in this Constitution-themed work. Assembling into groups of two or three, dancers will interview each other with pre-fixed questions and create individual movement vignettes that describes who the other person is. These "vignettes" will be danced before the larger community—this acts as an artistic kind of ice-breaker that fosters connection, humor, and a comfortable shared space. After the introductory exercise, the main activity map will start. Dancers will explore the question, "what does freedom of speech mean to me?" and engage in an improvisational activity that calls for intentional choice-making that eventually forms duets.

Activity Map: 3 hour rehearsal

<u>6:00-7:00pm Introduction and Vignettes Sharing</u>

The opening activity allows room for relationship-building within a group of dancers. After conversing their peers, each will create a short "movement vignette" that is inspired and informed by the person they met. The dancers will show their vignettes and talk to the rest of the group about the person they interviewed.

7:00-8:20pm Writing Response, Improvisation, and Duet Creation

Taking twenty minutes, dancers will individually engage in a writing exercise, answering the question: "What does freedom of speech mean to you?" This should be a candid answer prior to any deeper research and independent from knowledge not yet acquired. The writing will then be shared to the group as a starting place for discourse. The writing can be however poetic, straight-forward, simple, or complicated the author wishes to compose. Dancers are encouraged to ask questions and comment on each other's writings, contributing to an organic flow of dialogue.

The improvisational portion allows each dancer to make intentional choices as either a listener or a speaker while moving and interacting through space. Dancers will take turns, two at a time, occupying the main floor space to dance. A third dancer will be on the "outside" reading aloud a piece of writing from one of the dancers on the main floor. The person whose writing is being recited will dance as the speaker and the other will dance as the listener, and vice versa. As the words are being spoken, dancers will improvise with their natural rhythm and natural movement vocabulary. They can choose to be in proximity or distant to the other person in relation to where they are spatially. They can choose to acknowledge each other with eye contact, or remain inaccessible. They can choose to lead or initiate movements and physical contact, and when the other does so they may choose to follow or not follow. The collaborative movement threads are then combined, memorized, reorganized, and refined into a duet phrases.

8:20pm-8:30pm Take a Break

8:30-9:00pm Refining of Duet and Recording

After a short break, dancers will regroup and review and refine the duets created. The work will be recorded and documented for future reference.

Week II
A Supreme Court Case that Resonates

The rehearsal agenda for the second week is two-pronged—the first portion is heavily research and writing-based, while the second portion focuses on movement creation. Each dancer will choose an area or topic about the First Amendment that they are interested in researching deeper. They will then choose a Supreme Court Case that resonates with each of them. The topics of choice are the categories explored in Part II of this paper, including sedition act controversy, defamation, hate speech and fighting words, commercial speech, obscenity, child pornography, speech that incite illegal action, or speech in schools. For example, a participant may choose to research deeper about Defamation, which is unprotected by the First Amendment, and choose *New York Times Company v. Sullivan (1964)*.

Activity Map: 2 hour rehearsal

6:00-7:00pm Research Focused

Dancers will conduct research and answer the following questions and share the findings:

- What are the facts of the case? What happened? What is the story?
- What does the law say in regards to this?
- What was the Supreme Court's ruling on this?
- Pull quotes from justices, press, or other sources that resonate with you and made an impression.

Dancers will then engage in personal reflections on the findings and write responses however poetically they see fit. Some questions to ask them are: how does this make you feel? What do you think about the stories? Do you agree with the court's decision, or do you not agree? What are repercussions, implications, or consequences of the incidents?

7:00-8:00pm Movement Creation

Lastly, informed by the findings and personal reflections, dancers will compose a short movement phrase that travels or stays in place. Questions to ask are: How does your feelings or thoughts about this case translate into movement? How does it effect the speed and texture of your movement? Once created and refined, the work will be video taped and documented.

Week III
Listening and Responding Verbally and Physically

The third rehearsal invites the dancers to review each other's movement creations from the previous week, read about their cases, and respond. This creates not just a verbal dialogue, but also a physical representation of mutual understanding and exchange.

Activity Map: 2 hour rehearsal

6:00-7:00pm Sharing and Discussion

Regrouping from the previous week, dancers will take turns sharing their movement creation and discuss the mechanics and reasoning behind their composition in relating to their research. Once again, all participants are encouraged to ask questions, critically comment, and engage in a rich discussion around research content and movement translation.

6:00-7:00pm Response Dance Threads

Dancers will engage in reflection writing after immersing themselves into the movement vocabulary and case study their peers worked on. Informed by their own narrative, they will create response dance threads that adds another layer of contemplation, incorporating some of their peer's original composed movement language.

Week IV
Refining Movement Vocabulary and Audio Selection

The fourth rehearsal agenda focuses on refining each dancer's movement vocabulary and selecting audio files that support and help communicate the court cases. Dancers are asked to creatively discover audio files that they might wish to include in the sound composition, these will didactically communicate to the audience the main story of each court case. Dancers will assemble such audio recordings and reorganize the dance phrase from the second rehearsal to adequately complement it.

Activity Map: 2 hour rehearsal

6:00-7:00pm Searching for Audio Clips and Editing Sounds

Reflecting back on the court case explored and selected in the second rehearsal, dancers will look for audio clips, news clips, videos, interviews, or podcasts that speak to the story of the court case. Dancers are encouraged to be creative with their sources. Once the selection is finalized, dancers will use an audio editing program, such as Pro Tools or Audacity, and organize the files in the order they want. They are encouraged to play with plug-in features, repeat certain phrases, or overlaying files—they have complete artistic freedom to explore this area. They are also encouraged to find instrumental scores that communicate their written response, but this is optional.

7:00-8:00pm Refining Movement Vocabulary

Dancers will refine and reorganize their movements to complement the new audio creation. Playing with a difference in speed, in texture, and complicating layers. For example, they may choose to repeat the phrase dancing a different direction, or slowly build the phrase to culminate to completion…etc.) The work will be shared with the group, and documented for reference.

Week V
Last Reflections on Constitutional Empowerment for Dance-makers

The dancers are asked to take the time and think about how the Constitution enhances or prohibits ones' right to freely speak and express through the medium of dance. This week focuses on discussions, discourse, writing, and personal application. Movement phrases will be created off of this rehearsal too.

Activity Map: 2 hour rehearsal

6:00-7:00pm Writing and Reflection

Take time to think about, and respond to this question in writing. "What do you think the Constitution does to enhance or take away your right to freedom of speech through dance?" I encourage some research to help inspire your thoughts & reflection. How do you think the U.S. Constitution encourages freedom of speech in dance or how does it limit this liberty? To you personally, what does this mean for dance-making?

7:00-8:00pm Movement Phrases and Sharing

Dancers will compose new movement phrase to go along with their writing. They are encouraged to choose to incorporate any movement from previous phrases, but that is not required. This portion will be documented and recorded for future references.

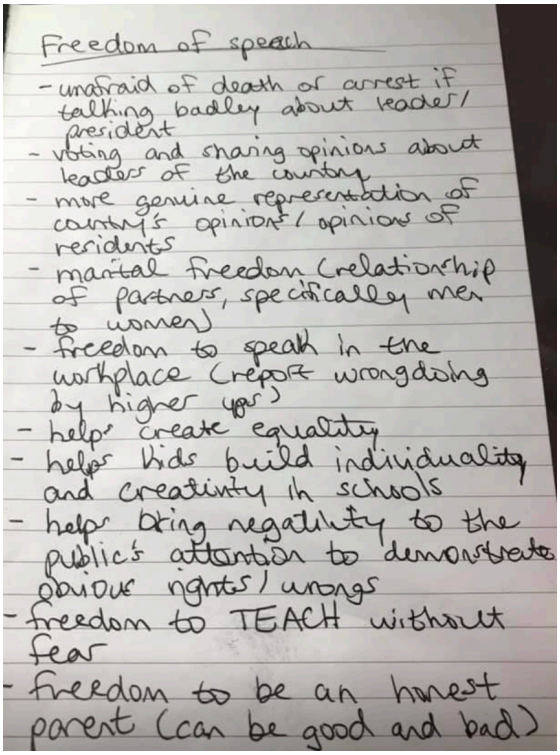
Putting Materials Together
The artistic director or facilitator of this project is encouraged to combine, re-order, repeat, and organize all rehearsal materials to tell a cohesive story as a staged performance. This is that wondrous part for any choreographer or director to utilize the performative tools and elements and present the journey in a delightful, engaging, educational, and thought-provoking final product.

APPENDIX

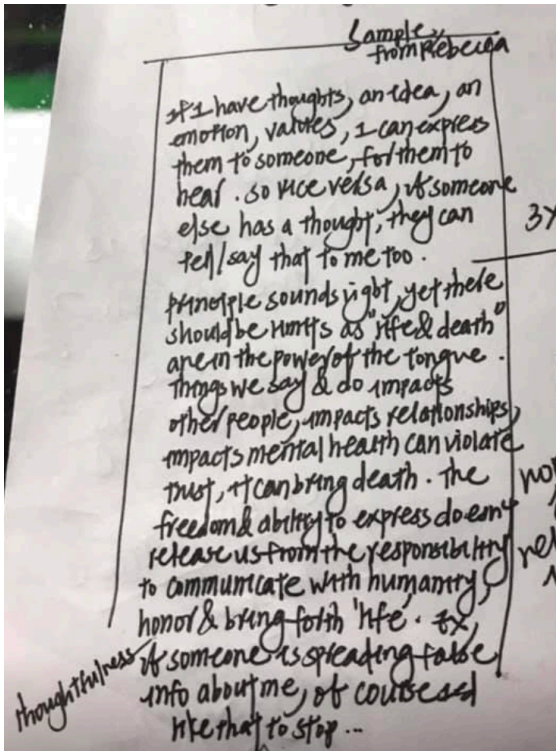
Week I Rehearsal Agenda Application

What does Freedom of Speech Mean to You?

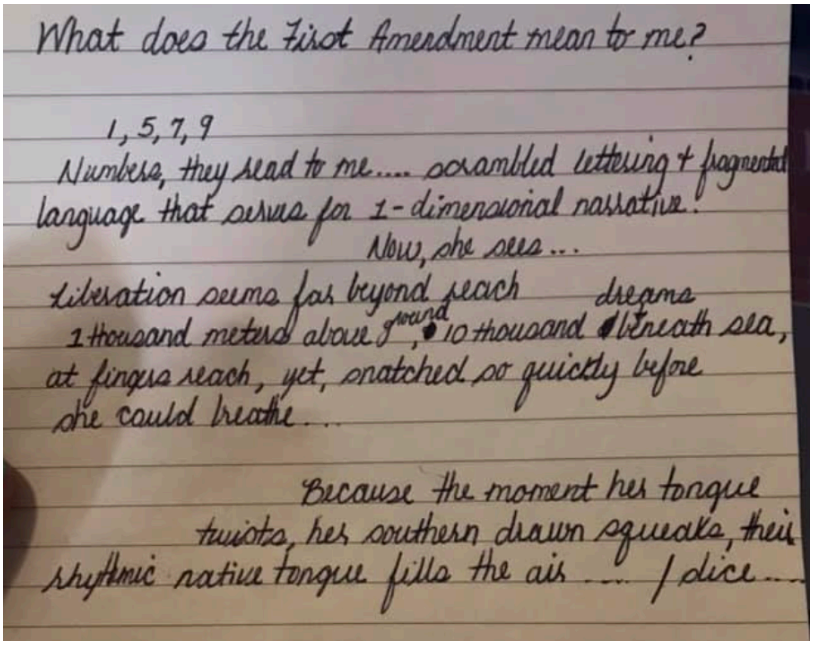
These are samples of dancer's written responses to the question, "What does Freedom of Speech mean to you?" during rehearsal. The writings are shared and utilized to create text-based call and response duet movements.



Written by Hillary Mason



Written by Rebecca Huang



Written by Marceia L. Scruggs

Week II Rehearsal Agenda Application
A Supreme Court Case that Resonates

These are samples of each dancer's writing in response to the prompt—research and reflections. The writings are shared and utilized to create dance movement, exploring the relationship between written text and movement quality.

Hillary chose to explore the topic of prayers in schools, and selected the court case Engel v. Vitale (1962) to base her research, writing, and dance creation on.

Engel v. Vitale (1962)

Facts

- A New York law required public schools to start each day with the Pledge of Allegiance AND a nondenominational prayer
- Students were allowed to object to participation
- Parent sued school on behalf of child
- Violated the Establishment Clause of the First Amendment
- Rules prayer in public schools is unconstitutional

Quotes

- "Children are particularly impressionable, and school-sponsored prayers may lead such children to embrace a religion that neither their parents nor they would otherwise choose."
- "It is simply not the government's job to become involved in religious affairs."

Reflection

I was raised agnostic, have never attended church, and was unaware of "organized religion" until I went into elementary school. I attended a small **public** school, but I remember religious (mostly Christian and Catholic) topics being brought up by some teachers. This always bothered me because it would raise faith-based questions and I'd always end up having to explain my "Godless" upbringing. I was judged for that (by both teachers and students), but I'm grateful for having the opportunity to observe the world organically as a child. In this case, I can image students who chose not to participate in the school prayer were judged by their peers. That is why I firmly agree that religious topics should only be brought up in public schools classes when appropriate or in classes about religion. I believe religious beliefs are personal and shouldn't be generalized for large groups of people. This topic rides a line when talking about freedom of speech in schools…**freedom of speech when appropriate?**

Written by Hillary Mason

Marceia chose to explore the topic of hate speech and establishment clause and selected the court case Capitol Square Review and Advisory Board v. Pinette (1995) to base her research, writing, and dance creation on.

Capitol Square Review and Advisory Board v. Pinette (1995)

During the Christmas season of 1993, Donnie Carr of the Ku Klux Klan requested to display a cross at Capitol Square (Columbus, Ohio). After being denied permission, its Ohio leader, Vincent Pinette filed a suit where the KKK was permitted to display the cross, saying that permission was granted due to the KKK's private expression of religious display.

- After given permission for the winter season of 1993 and 1994, the Supreme Court granted the case Centiorari.
- Whether a court order allowing display of a cross, but demanding a sturdier disclaimer, could withstand Establishment Clause analysis is a question more difficult than the one this case poses."
- "This case does not serve to abrogate the Establishment Clause, but it does hold that it may be secondary to the First Amendment rights of a group seeking to exercise its own expression in a public forum" -INTERESTING!
- "Klan had a primarily nonreligious purpose in erecting the cross" and had "appropriated one of the most sacred of religious symbols as a symbol of hate."

Reflection

Recurring images. Past and present flashes within the same existence; Immune to pain we feel no drain.

Yet, the clock seems to somehow tock as though… time frames

Yet, the same pre-judged disgust still exists and yet hope still remains

And the micro-aggressions in which what used to be a cross and a hate filled heart, now a glance and a quick shoot, a systemic reroute only to serve me more doubt, the latest edition of FAKE NEWS: A book on Blackness, stamped in total whiteness.

In other news, isn't it funny how the cross seems to be multi-used, misused!?

Written by Marceia L. Scruggs

Rebecca chose to explore the topic of defamation selected the court case Zeran v. American Online (1996) to base her research, writing, and dance creation on.

Weight of False Guilt

On April 19, 1995, just four days before I was born, the Alfred P. Murrah Federal Building experienced one of the worst terrorist attacks in the United States. Taking the lives of 168 civilians (including children) and violently injuring more than 500 hospital workers, physicians and volunteers from nine nearby hospitals were receiving bomb threats after admitting the influx of victims. Severe lacerations, fractures, dislocations, and burns…can you not witness such broken society, injuries, and tragedies without anguish and vexation?

Then comes *Zeran vs. American Online (1996)*, following up on the cruelty above. Plaintiff Kenneth Zeran had his address and phone number posted in connection with advertisements for souvenirs that glorified the atrocious bombing. An unknown American Online user was posting with Zeran's identity. Zeran then received complaints and threats from the community as a result. When Zeran tried to sue the company claiming negligence and poor security, the Courts ruled that American Online was entitled to immunity based on the Communications Decency Act & cannot be held liable for defamatory statement posted by 3rd parties.

Carrying the name and weight of a perpetrator, when you have done no wrong. Carrying the burden of murder when your tongue has not lied and hands have not taken blood. An indescribable depth of misunderstanding, of tarnished reputation, and have not the will or power to reverse, undo, reclaim your innocence. Where does vindication come from? How is anyone supposed to be protected from this kind of crime in the digital space? Anyways, my mother and I, in her womb, were 2.5 miles away from the bombing location. I'm thankful that I am alive.

Written by Rebecca Huang

Week V Rehearsal Agenda Application
Last Reflections on Constitutional Empowerment for Dance-makers

These are samples of each dancer's writing in response to the question and prompt: "How does the Constitution either empower or prohibit you as a dance-maker?"

Marceia L. Scruggs Sauntering, Breath...
Stillness, Collapse..
Breath, Recycled Thinking.. ... Again, Before, and After,

Reminiscing upon my journey ----of movement,
I visualize altars: spaces where both polluted and pure life rest
Like clean linen on a Spring day, I-we are swathed in fullness
Like home girl's hangout or fam-bam's BBQ, I am seeing familiarity
Like holding onto mom's arms, I begin to breathe truth again
Breath,

No place like knowing but not knowing in all the knowing
That in the end, this creation is seen, felt, living...
That in the end, this Black body was enough
In the end, the vocalization of her occasionally twisted tongue-
Left them numb,
Yet, halfway on the edge of terror and longing for more,
This deep sea, this Midnight Black hardback was able to shift
Causing ricocheting waves upon its bank
We went there, they trusted, we dove headfirst—though,
Somehow seems, the only ounce of recoil----
Are from the perception of those unwilling or opposed.
Its receipt and receival checked
stamped, thrown loosely back into the pit of the Black sea
Far from arms reach yet, close enough to find latch.

Love · Reply · 2w · Edited 1

Rebecca Diane Huang Marceia L. Scruggs - girl you are fire & on top of it!

Like · Reply · 2w · Edited 1

Hillary Mason I love that dance provides the opportunity to fully express ourselves without our observers/viewers knowing that we are. We can be as honest and blunt as possible with our movement, but share as little as we'd like of the intention behind it. I feel that freedom of speech allows artists to create work that crosses lines and creates conversations. When viewers prepare to see dance performances or visit art museums, I feel that they expect to witness thought-provoking material. Freedom of speech in the Constitution enables artists to take political, environmental, etc. issues and present them in a way that engages society. Personally, I like to keep the true intentions of my professional work to myself, but I like to play with obvious gestures that act as clues to the nature of my work.

Love · Reply · 1w 1

Rebecca Diane Huang I think for this phrase, I kinda just wanted to embody the sense of timidity, then a building bravery that results from realizing that there shouldn't be structures or a government to hold you back from expression. When I contemplate how the Constitution might hinder or empower my freedom of speech through dance, I think of the fact that the entire Circular 52 in the Copyright Act section 102(a)(4) is dedicated the choreography and pantomime. "A series of dance movements or patterns organized into an integrated, coherent, and expressive compositional whole" is recognized as one's property worthy of protection. That makes me feel encouraged to speak through dance, and I think of when Congress made the NEA and how there are resources, though scarce, are available through the dance sector. It isn't perfect, but we have a ground to stand on for daring to create.

Like · Reply · 1w