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THE U.S. BILL OF RIGHTS OF 1791:

A study of the process and evolution of Madison's work

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Abstract

On June 8th, 1789, a proposal for the U.S. Bill of Rights was put before the House of Representatives by a Mr. James Madison. On September 25th, the House and the Senate accepted the conference report that laid out the emended proposed amendments to the U.S. Constitution. On October 2nd, the president at the time, a Mr. George Washington, proceeded to send out copies of the 12 amendments adopted by the U.S. Congress to each State for its ratification. Then, on December 15th, 1791, the document entered into effect after Virginia finally conceded its ratification. The U.S. Bill of Rights refers to the first ten amendments to the U.S. Constitution. Although James Madison is its acclaimed author, he fiercely opposed it in the beginning. In fact, it was a Mr. George Mason who initially proposed the inclusion of a bill of rights during the Constitutional Convention in 1787. Unfortunately, this motion did not succeed, and the proposed preparation committee was subsequently never created. Eventually, the Federalists conceded, as many States refused to ratify the Constitution were it not for the promise of the inclusion of rights. It was in 1971 that the bill was finally ratified and enacted. It is safe to say that this far-reaching document has changed the course of history. For instance, in 1868, the 14th Amendment made it illegal for States to deny black people their rights and, in *Brown v. Board of Education*, the Supreme Court banned segregation on the same premise. It has also been used to impede certain decisions. This begs the question: is it a useful tool for protecting the rights of the people or has it become an outdated obstacle to change?

Chapter 1) Introduction

The aim of this academic paper is to research and understand the U.S. Bill of Rights, from its inception to its present day interpretations. Going back to its origins, the Bill contains ten amendments to the U.S. Constitution, made possible by the Amendment Clause contained in Article V of the charter. This precept sets forth the process required of an amendment for it to come to fruition constitutionally. Thus, this Clause enables the U.S. Constitution to remain pertinent and applicable in present day society. These ten amendments are a product of their day and the men that decided upon them, which brings us to the second aim of this paper: to better understand the author of the U.S. Bill of Rights, a Mr. James Madison. Though initially opposed to amending the Constitution, he soon came to realise that a Bill of Rights held the key to unlocking the future of this young nation.

Much has been discussed about the Bill of Rights throughout the centuries that separate us from its origination, but that is not to say that it does not remain a significant topic of discussion in today's society. These amendments are as pertinent in the present day as they have ever been, inciting constant analysis due to their ever evolving nature. Though still a product of its time and its authors, the Bill remains a live document, under constant scrutiny and review on behalf of the judiciary. Here lies the third aim of this paper, for in order to truly comprehend the process and evolution of Mr. Madison's work throughout the years, one must be familiar with the concept of judicial review. You see, judicial decisions are responsible for shaping American society and the most consequential sort are the constitutional interpretations. The United States is founded upon the notion of a division of powers, which allows for the doctrine of judicial review. According to this doctrine, courts are required to determine the constitutionality of statutes and executive actions, bound by the federal Constitution itself.[1] In deciding, the courts must interpret the charter, thus making it malleable to the specific time and context of application. These acts, should they be determined unconstitutional, are not technically nullified. Instead, the U.S. system requires that subsequent cases of a similar nature adhere to precedent, thus the act in question becomes dormant for all intents and purposes, as it is henceforth rendered unenforceable.[2]

[1] Rubin, Alvin B. Judicial Review in the United States. United States: Louisiana Law Review, 1979.
[2] Ginsburg, Tom. Comparative Constitutional Review. United States: University of Chicago, 2008.

The Founding Fathers could not foresee the reality of modern day society and, as such, constitutional interpretation is necessary in order to ensure the charter's supremacy and applicability. That said, judicial review was not provided for in the U.S. Constitution, but rather resulted from the landmark decision U.S. Supreme Court case *Marbury v. Madison*, whereby Chief Justice John Marshall stated: "It is emphatically the duty of the Judicial Department to say what the law is. Those who apply the rule to particular cases must, of necessity, expound and interpret the rule. If two laws conflict with each other, the Court must decide on the operation of each."[3] Therefore, in my analysis of the ten amendments, I include excerpts of the judiciary's interpretations of each article, as they reflect the evolution of James Madison's ever relevant work.

The structure of this paper consists of four chapters, including the introduction and the conclusion. The second chapter is dedicated to the process of Mr. Madison's work, going as far back as the drafting of the Declaration of Independence, adopted on July 4th, 1776. Shortly after, the Continental Congress adopted the Articles of Confederation, the U.S. Constitution's predecessor. Then, after almost a decade of armed conflict, the American Revolutionary war came to an end when King George III of Great Britain signed the Treaty of Paris on September 3rd, 1783. In doing so, he recognised the independence of the United States. The new nation soon found itself in need of a Constitution, as the Articles of Confederation became ineffectual. Thus, the U.S. Constitution came to be, after much deliberation, in 1787. In its Article V, the Founding Fathers included an Amendment Clause and so as to ensure ratification of all states, said Clause was soon put to use to create the U.S. Bill of Rights, contrary to the will of the Federalist Faction of Congress. In this chapter I not only provide the reader with some much needed context, but I also explain the contents of the Constitution and the Clause that made amending it possible.

The third, and most substantial, chapter focuses on the ten amendments that make up the U.S. Bill of Rights. I include a section specifically for each amendment, including the article itself, Madison's proposal and its evolution over time. Not only do I describe the changes made to each amendment in the congressional discussions, but I also incorporate a brief history of the articles' application and subsequent interpretation, focusing on jurisprudence and academic commentary. And, finally, I conclude this academic paper by presenting my thoughts on this

[3] Marbury v. Madison, 5 U.S. 137, 1803.

subject matter resulting from the research and analysis conducted of the amendments. That said, this piece is a mere historical approximation of an all-encompassing and poignant legal document that is the U.S. Bill of Rights.

The method used in my research is the hermeneutic approach. The research itself is historical-juridical and I approached it in three phases: I searched for sources, determined their reliability and usefulness, and summarised, structured and justified the outcome of my analysis. In this case, the types of sources used are both documentary and bibliographic. The primary documentary sources I refer to are the U.S. Constitution and the U.S. Bill of Rights to discuss the process behind the construction of the amendments and their contents. Furthermore, to present the evolution of the Bill over time, I refer to secondary documentary sources in the form of Supreme Court jurisprudence, as it contains the changing interpretations of its contents. The bibliographic sources consist of academic opinions and research papers, as sometimes the jurisprudence can be just as ambiguous as the Founding Fathers' formulation of the ten amendments. Academic experts in the field supply further insight into the history, meaning and future manifestation of the rights contained in the Bill.

Furthermore, I also include excerpts from records kept by those present in the discussion and elaboration of these key documents in U.S. history and modern day society. Yale Law School's Lillian Goldman Law Library holds the 'Documents Illustrative of the Formation of the Union of the American States' and 'The debates in the Federal Convention of 1787, which framed the Constitution of the United States of America, reported by James Madison, a delegate from the state of Virginia' that grant the reader a glimpse into the origination of the U.S. Constitution. Then, for the proposal and formation of the U.S. Bill of Rights, I refer to the Library of Congress, as it holds the Annals of Congress, formally known as 'The Debates and Proceedings in the Congress of the Unites States'. These compilations enabled my research, affording me a glance into the deliberations of the Founding Fathers in building the United States, as it was and as it has come to be.

Chapter 2) The U.S. Constitution: the Amendment Clause

Around the same time that the Second Continental Congress formed a committee to compose the Declaration of Independence, a second committee came into existence. Said committee had been commissioned to study the form of federation that the colonies could adopt should they succeeded in seceding. The actions of the Continental Congress had already far surpassed the limit of their competences. The delegates there present had only been legitimised to negotiate reconciliation but, on June 11th, 1776, the Continental Congress created another committee to draft the Articles of Confederation. One member from each colony took part in the selection of a form of confederation that could regulate the common dealings of the States. They completed the initial draft of the Articles of Confederation in November of 1777 and the official document entered into effect in March of 1781, once the entire Perpetual Union had ratified it. On March 2nd, 1781, the first United States Congress came to pass and John Hanson, its first president, took his position as head of this assembly. It didn't take long for the deficiencies of the Articles of Confederation to come to light. Their inability to enforce rules enacted by Congress and to settle disputes that should arise among people of different States proved problematic. The pinnacle, however, was the lack of a confederation tax, relying solely on discretional state contributions. Said contributions turned out to be few and far between, especially once the War of Independence came to an end. The lack of judicial security reached an indisputable point of no return and influential actors of the time commenced their push for change, suggesting either reform or radical change.[4]

Within the many volumes of the Journals of the Continental Congress, number 38 reports on the proceedings of February 21st, 1787, wherein a letter from John Dickinson found itself under consideration. The letter in question was written in September 1786, at the request of the Commissioners from the States assembled at the City of Annapolis that same year. John Dickinson, chairman of the Commissioners, referred to the inefficiencies of the federal government in this letter. Congress agreed that the needs of the Union had not been met and promptly recommended that the different State legislatures send delegates to Philadelphia on the second Monday in May so as to ensure its success. The aforementioned Journal of the Continental Congress reads: "Resolved that in the opinion of Congress it is expedient that on the second Monday in May next a Convention of delegates who shall have been appointed by

[4] Grau, Luis. El constitucionalismo americano. Spain: Universidad Carlos III de Madrid, 2011.

the several states be held at Philadelphia for the sole and express purpose of revising the Articles of Confederation and reporting to Congress and the several legislatures such alterations and provisions therein as shall when agreed to in Congress and confirmed by the states render the federal constitution adequate to the exigencies of Government & the preservation of the Union."[5] Today, the assembly in question is referred to as the Constitutional Convention.

The proposed date set forth in the resolution of Congress was May 14th, 1787, but only a small number of deputies assembled to revise the federal system on said date. [6] Instead, the majority of members assembled on May 25th and the sessions commenced on May 28th. One of the representatives, Mr. Wythe, announced the rules of the deliberations in accordance to a report created by the Rules Committee for this very purpose. He encountered backlash from Mr. King and Col. Mason in reference to the clause that authorised any member to call for the yeas and nays and that they be included in the minutes. The reason for their opposition was that the acts of the Convention were non-binding and, as such, keeping record of opinions of members would only serve as an obstacle to potential changes on convention. Not to mention, that the Convention itself is characterised by secrecy, to enable those present to speak freely.[7] The remaining rules were accepted and more were established. In order for the House to do business, for instance, deputies of no less than seven States had to be present and questions had to be decided by the greater number of those that are fully represented. Mr. Butler motioned to avoid interruption of business due to absence of members and publication of proceedings. Mr. Spaight added to that a motion to prevent votes from precluding the House from going back on a subject matter if they should see cause to do so, very much in line with Mr. King and Col. Mason's objections. The members in attendance then proceeded to adjourn for the day.[8]

From this day on, until September 17th, James Madison proceeded to take in depth notes of the discussions held at the Constitutional Convention. The end result of these meetings being

[5] Tansill, Charles C. Documents Illustrative of the Formation of the Union of the American States. United States: Government Printing Office, 1927. Retrieved from Yale Law School Lillian Goldman Law Library (View the page cited)
[6] Hunt, Gaillard & Scott, James B. The debates in the Federal Convention of 1787, which framed the Constitution of the United States of America, reported by James Madison, a delegate from the state of Virginia. United Kingdom: Oxford University Press, 1920. Retrieved from Yale Law School Lillian Goldman Law Library (View the page cited)
[7] Idem. (View the page cited)
[8] Idem. (View the page cited)

the U.S. Constitution. On May 29th, Mr. Randolph proposed the so-called Virginia Plan, a series of fifteen resolutions to rectify the deficiencies of the Articles of Confederation. Mr. Pickney of South Carolina then proceeded to propose another plan, known as the Pickney Plan.[9] Once the proposals had been put forth before the Convention, the subsequent focus of the deliberations revolved around these plans for the next 15 days. Then, on June 15th, the New Jersey plan was introduced by Mr. Patterson as an alternative to the then preferred Virginia Plan.[10] During the remaining days in the month of June, the delegates compared the plans put before them. On the one hand, the Virginia Plan provided for a centralised government wherein representation be based on the population of the States. On the other hand, the New Jersey Plan constituted a small-state substitute to its counterpart and provided for equal representation of the States, regardless of its population. Finally, on July 5th, Mr. Sherman proposes the Connecticut Compromise, that combines aspects of both plans by agreeing to proportional representation in Congress and equal representation in the Senate.[11] The Great Compromise, as it is also known, was then adopted on July 16th.[12] The compromise also settles the debate on the counting of slaves for the purpose of representation and taxation. These plans for the Union far surpassed the initial expectations of many delegates, as they merely expected to revise the Articles of Confederation. It became apparent throughout the course of the Convention that the aforementioned articles did not provide for the proposed forms of government and, as such, its revision turned into its replacement. On July 24th, the so-called Committee of Detail came into existence to draft the new U.S. Constitution.[13]

On August 6th, the Committee of Detail presented the first formal draft of the Constitution. One month later, the Committee on Style and Arrangement was established to integrate the different drafts into one consistent document.[14] On September 12th, the final draft of the Constitution was complete and, after four months of deliberations, was adopted by the Convention.[15] Forty-two delegates remained in Philadelphia. Three of them, Mr. Gerry from Massachusetts, and Mr. Randolph and Mr. Mason, both from Virginia, decided at the last

[9] Hunt, Gaillard & Scott, James B. The debates in the Federal Convention of 1787, which framed the Constitution of the United States of America, reported by James Madison, a delegate from the state of Virginia. United Kingdom: Oxford University Press, 1920. Retrieved from Yale Law School Lillian Goldman Law Library (View the page cited)
[10] Idem. (View the page cited)
[11] Idem. (View the page cited)
[12] Idem. (View the page cited)
[13] Idem. (View the page cited)
[14] Idem. (View the page cited)
[15] Idem. (View the page cited)

minute not to sign the aforementioned document. Therefore, the scroll shows the signatures of the remaining thirty-nine.[16] By the end of September, Congress formally submitted the document for ratification. In mid-October, Mr. Madison, Mr. Jay and Mr. Hamilton came together to author the Federalist Papers to defend said document to the public. The papers consist of a collection of 85 essays published over the course of the next seven months under a collective pseudonym of 'Publius' to promote the ratification of the Constitution. They opposed amending the Constitution and adding a Bill of Rights initially for fear that it could undermine the document.[17] Hamilton goes as far as to say that it is "in every rational sense, and to every useful purpose a Bill of Rights."[18]

The U.S. Constitution's Article VII contemplates the procedure for its adoption, requiring ratification by at least nine states.[19] Said condition was met when New Hampshire did so on 21st June 1788, a mere nine months after the close of the Constitutional Convention. The Congress established by the Articles of Confederation adjourned on 2nd November 1788 and, on 4th March 1789, the Constitution's Congress was inaugurated by representatives from eleven States, leaving North Carolina and Rhode Island out of the Union for almost two years. Not all of the ratifications were unanimous and unconditional. For instance, when Massachusetts ratified the Constitution in early February of 1788, it was on the condition that the first matter of business of the new Congress be to amend said document. New Hampshire's ratification in June of that same year achieved the adoption and entry into effect of the Constitution, but it was also on the condition that the text be amended in the first federal Congress meeting.[20]

Though Federalist supporters opposed the inclusion of a Bill of Rights as they held that the Constitution offered sufficient protection to individual rights, Madison eventually recognised the political need for one. So, on 8th June, 1789, Madison introduced a list of amendments to the U.S. Constitution in Congress and relentlessly pushed for their ratification. He realised that adding a Bill of Rights could preclude the Constitution's opponents from making more substantial changes to it. He also came to appreciate the importance that electors

[16] Grau, Luis. El constitucionalismo americano. Spain: Universidad Carlos III de Madrid, 2011.
[17] Idem.
[18] Hamilton, Alexander. Federalist Papers: Primary Documents in American History. Federalist Paper No. 84: Concerning the Militia. United States: Library of Congress, 1788.
[19] The U.S. Constitution. United States: Library of Congress, 1788.
[20] Grau, Luis. El constitucionalismo americano. Spain: Universidad Carlos III de Madrid, 2011.

placed on the protections offered to them by the proposed amendments. The House composed a joint resolution of seventeen amendments, based on Madison's original proposal. The Senate then reduced the number of amendments back down to twelve, as Madison had originally intended. Then, a joint Conference Committee settled the remaining disputes before President George Washington sent out copies of the adopted amendments to the States for their ratification. [21] The outcome resulted in the ratification of the U.S. Bill of Rights but, before one can begin to analyse its contents, it is crucial to understand the procedure required by the legislature to bring it into existence.

One of the main shortcomings of the Articles of Confederation was its inflexibility, as unanimity of the States was required for any significant change. Said requirement proved counterproductive. Hence why the drafters of the Constitution clearly understood the need to correct this defect. That said, they also knew from the experience of some States and their Constitutions that other, much more flexible methods of constitutional reform were also undesirable. They finally opted for a novel and exceptionally effective method of amendment, which makes the US Constitution a rigid constitution, but at the same time has allowed it to survive for more than two hundred and thirty years through appropriate changes.[22] The article in question stipulates:

> *The Congress, whenever two thirds of both houses shall deem it necessary, shall propose amendments to this Constitution, or, on the application of the legislatures of two thirds of the several states, shall call a convention for proposing amendments, which, in either case, shall be valid to all intents and purposes, as part of this Constitution, when ratified by the legislatures of three fourths of the several states, or by conventions in three fourths thereof, as the one or the other mode of ratification may be proposed by the Congress; provided that no amendment which may be made prior to the year one thousand eight hundred and eight shall in any manner affect the first and fourth clauses in the ninth section of the first article; and that no state, without its consent, shall be deprived of its equal suffrage in the Senate.*
>
> - The U.S. Constitution, Article V

[21] Amar, Akhil R. The Bill of Rights: Creation and Reconstruction. United States: Yale University Press, 1998.
[22] Grau, Luis. El constitucionalismo americano. Spain: Universidad Carlos III de Madrid, 2011.

The amendment process clearly has two phases and each phase has two possible paths one can take. The first step is the proposal of an amendment to the States, which requires a minimum qualified majority of at least two-thirds in the House. The second step is ratification by the States, which requires a minimum majority of at least three-quarters of all States. Unanimity is not required in any case, but the majorities required have meant that in the two hundred and thirty four years of the Constitution's existence, only thirty-three amendments have been proposed to the States as opposed to the thousands upon thousands proposed in Congress. Of those thirty three proposals, only twenty-seven have been adopted, that is, ratified by three-quarters of the States.

Thus, there are two ways to propose an amendment: either two-thirds of both Houses of Congress propose a specific text to be ratified, or two-thirds of the state legislatures call for a constitutional convention. So far, only the first method has been used, as the constitutional convention has been considered too dangerous considering that, once convened, nothing could prevent it from changing the entire Constitution if its members considered it appropriate to do so.

Once the phase of amendment proposal has been surpassed, three quarters of the States must ratify the amendment for it to be adopted and become part of the Constitution itself. As in the previous phase, there are two ways for this ratification to occur. Congress may choose either option in submitting the proposed amendment: one is for the ratification to be done by the State legislatures, and the other is for special conventions to meet in each and every State to evaluate and ratify the amendment. Regardless of the chosen route, if three-fourths minimum of the States ratification are reached, the amendment in question is adopted and becomes part of the Constitution.

Chapter 3) The U.S. Bill Of Rights: the Amendments

James Madison rose on June 8th, 1789, to remind the House that the day had come for him to present the amendments to the Constitution, as per the Code's fifth article. He addressed the Speaker and said: "This day, Mr. Speaker, is the day assigned for taking into consideration the subject of amendments to the constitution. As I considered myself bound in honour and in duty to do what I have done on this subject, I shall proceed to bring the amendments before you as soon as possible, and advocate them until they shall be finally adopted or rejected by a constitutional majority of this House."[23]

Mr. Madison proposed the House enter a Committee of the whole[24] on the state of the Union, so as to enable the men to discuss any propositions that may arise. Thus, he proclaimed, the articles may obtain the unanimous approbation of the Chamber required, "after the fullest discussion and most serious regard." A Mr. Smith opposed this motion, and proposed that this business be introduced to the House by the appointment of a select committee to consider the amendments put forth. Alternatively, he recommended that the propositions be printed and distributed, to be taken up for discussion at a later date once the members had had time to consider them. Mr. Smith held that either mode enabled the House to better prepare for this business, as opposed to a sudden transition from other important concerns. "For, said he, it must appear extremely impolitic to go into the consideration of amending the Government, before it is organized, before it has begun to operate."[25]

Mr. Smith's proposal to postpone the discussion acquired support from other members of the House, such as Mr. Jackson, Mr. Goodhue and Mr. Burke. Mr. Madison duly interjected to remind the Chamber that the discussion had already been postponed and, should it continue to happen, the minds of the public may become suspicious. The application for amendments had been backed by a respectable number of constituents, and Mr. Madison insisted that they may think them insincere in their promise to incorporate such amendments so as to secure the freedoms they considered insufficiently protected in the Constitution.[26] After further push back

[23] Annals of Congress, House of Representatives, 1st Cong., 1st sess., Pages 441 & 442 of 1274. (View the page cited)
[24] A Committee of the whole is a procedural tool used to expedite debates in the U.S. House of Representatives.
[25] Annals of Congress, House of Representatives, 1st Cong., 1st sess., Pages 441 & 442 of 1274. (View the page cited)
[26] Idem., Pages 443 & 444 of 1274. (View the page cited)

from the members of the House, he proceeded to rescind his prior motion and propose that a committee be appointed to consider the amendments for Congress before engaging the State's Legislatures, as per the fifth article of the Constitution. He ends his speech as to the importance of proposing and stating the amendments on this day by concluding: "The amendments which have occurred to me, proper to be recommended by Congress to the State Legislatures, are these."[27]

3.1. First Amendment

> *Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.*
>
> - The U.S. Bill of Rights, First Amendment

James Madison introduced the freedom of religion, speech, press, assembly and petition clause to Congress on June 8th, 1789. He declared, fourthly in a long list of propositions, three separate ideations:

1) "The civil rights of none shall be abridged on account of religious belief or worship, nor shall any national religion be established, nor shall the full and equal rights of conscience be in any manner, or on any pretext, infringed."[28]
2) "The people shall not be deprived or abridged of their right to speak, to write, or to publish their sentiments; and the freedom of the press, as one of the great bulwarks of liberty, shall be inviolable."[29]
3) "The people shall not be restrained from peaceable assembling and consulting for their common good; nor from applying to the Legislature by petitions, or remonstrances, for redress of their grievances"[30]

On August 15th, 1789, the men of the House adjourned into a Committee of the whole on the proposed amendments to the Constitution. On this day, the members discussed Mr.

[27] Annals of Congress, House of Representatives, 1st Cong., 1st sess., Pages 449 & 450 of 1274. (View the page cited)
[28] Idem., Pages 451 & 452 of 1274. (View the page cited)
[29] Idem.
[30] Idem.

Madison's fourth proposition, the precursor of the First Amendment. They debated the first ideation, contending the reference to a 'national religion'. Finally, they agreed on Mr. Livermore's motion to alter the amendment and make it read that "Congress shall make no laws touching religion, or infringing the rights of conscience."[31] The men then proceeded to discuss the second clause contained in the fourth proposition. The committee appointed by Congress to report on the amendments, as per Mr. Smith's initial request and Mr. Madison's reluctance, had taken the second and third ideations from Mr. Madison's initial draft and joined them to read: "The freedom of speech and of the press, and the right of the people peaceably to assemble and consult for their common good, and to apply to the government for redress of grievances, shall not be infringed."[32] After much discussion, the House adjourned and the second clause of the fourth proposition remained as the committee had intended for it to, that is, until the Senate.

In September of that same year, the Senate took the latter clause and made it read: "That Congress shall make no law abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble and consult for their common good, and to petition the government for a redress of grievances."[33] The men of the Senate then decided to combine the clauses to form one sole amendment that read on the Senate Pamphlet: "Congress shall make no law establishing articles of faith, or mode of worship, or prohibiting the free exercise of religion, or abridging the freedom of speech, or of the press, or of the right of the people peaceably to assemble, and to petition to the government for a redress of grievances."[34] Once a resolution on the subject matter of the amendments had been reached in the Senate, they proposed a conference to be held featuring members of Congress to discuss any disagreements. On September 24th, 1789, the Conference Committee Report records the final form agreed upon of the third Article, as it had been considered at the time. Thus, the First Amendment came to exist as it does today.

This amendment is currently forcefully protected by the courts, but this has not always been the case. In the early 19th Century, blasphemy could be punished, as could speech tending

[31] Annals of Congress, House of Representatives, 1st Cong., 1st sess., Pages 759 & 760 of 1274. (View the page cited)
[32] Idem.
[33] Cogan, Neil H. The Complete Bill of Rights: The Drafts, Debates, Sources, and Origins. Second Edition. Oxford: Oxford University Press, 2015.
[34] Annals of Congress, House of Representatives, 1st Cong., 1st sess., Pages 759 & 760 of 1274. (View the page cited)

to promote crime. In fact, it took until 1925 before the Supreme Court ruled that the First Amendment limited local and state authorities in *Gitlow v. New York*. Freedom of speech is currently interpreted broadly by the courts, and is applicable to symbolic expression also. This freedom can only be restricted under extremely specific circumstances. There are three possible groupings that include, but are not limited to, speech of so-called inferior protection, speech that encroaches on or is related to federal relationships, and speech in content-neutral terms.[35] In fact, this freedom is one of the most protected in present day America. A perfect example of this is the fact that the U.S. goes as far as to lack hate speech regulation.

3.2. Second Amendment

> *A well-regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.*
>
> - The U.S. Bill of Rights, Second Amendment

James Madison introduced the right to keep and bear arms clause to Congress on June 8th, 1789. He declared, fourthly in a long list of propositions, one simple ideation: "The right of people to keep and bear arms shall not be infringed; a well-armed and well-regulated militia being the best security of a free country: but no person religiously scrupulous of bearing arms shall be compelled to render military service in person."[36] The second amendment suffered small alterations before reaching its final form, as stipulated at the start of this section. The most notable change is the placement of phrases. In Madison's initial formulation, he placed the right of the people to keep and bear arms before the need for a well-armed and well-regulated militia. The House adjusted his phrasing, placing the need for a well-regulated Militia before the right of the people to keep and bear Arms. In doing so, they henceforth changed the meaning of the amendment put forth.[37]

In the 18th Century, preambles had been used to unlock the true meaning of a law. By placing the right of the people to keep and bear Arms after the need for a well-regulated Militia,

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[35] Stone, Geoffrey R. & Volokh, Eugene. Freedom of Speech and the Press. United States: National Constitutional Center, 2022.
[36] Annals of Congress, House of Representatives, 1st Cong., 1st sess., Pages 451 & 452 of 1274. (View the page cited)
[37] Cornell, Saul. A Well-Regulated Militia: The Founding Fathers and the Origins of Gun Control in America. Oxford: Oxford University Press, 2008.

it becomes apparent that the intention of the Founding Fathers had been to arm and protect the militia, not the people per se.[38] This is undoubtedly one of the most disputed amendments in today's society, for it builds the constitutional foundation for one of the United States' most discordant topics of discussion: gun legislation. On November 4th, 2021, the University of Southern California's Annenberg School for Communication and Journalism, alongside Golin and Zignal labs, released the first data science-based tool used to track political-in-nature conflicts on a national scale. The so-called Polarisation Index uses discussions held on social media platforms to carry out an analysis of the political schism in the United States. In doing so, they found the fourth most polarising topic to be gun legislation[39].

Once again, the Founding Fathers' intentions had not been as focused on the right of the people to keep and bear Arms, per se, but rather on ensuring the existence of a well-regulated Militia. Alexander Hamilton spoke of the Militia in Federalist No. 29, titled 'Concerning the Militia', referring to it as "the most natural defence of a free country".[40] In Anti-federalist No. 28, titled 'The Use of Coercion by The New Government. (Part 3)', Brutus[41] referred to it as "the bulwark of a free people".[42] Thus, both Federalists and anti-Federalists alike concurred on the need for a Militia as opposed to a professional army. They considered the latter a threat to the ideas of their modern nation, founded upon the notion of the freedom of its people. Professional armies had, in the past, been used to strike the nationals of countries they had been created to defend. These people, unarmed and disorderly, often lacked the necessary structure and tools to fight back and had, consequently, seen their rights and freedoms stripped. The security of a free state and its people was therefore considered to be intrinsically linked to a well-regulated Militia, capable of making a stand in the face of standing armies and corrupted generals, of potential federal despotism.[43]

The shift in focus from a well-regulated Militia to a person's singular right to bear Arms occurred in 2008. Before the landmark Supreme Court case of *District of Columbia v. Heller*,

[38] Idem.
[39] USC Staff. Political divide remains critically high and immigration is most divisive issue, according to new USC polarization index. United States: USC News, 2021.
[40] Hamilton, Alexander. Federalist Papers: Primary Documents in American History. Federalist Paper No. 29: Concerning the Militia. United States: Library of Congress, 1788.
[41] Brutus is one of a number of pseudonyms used by the anti-Federalists in their published papers.
[42] Brutus. Anti-federalist Papers: Primary Documents in American History. Anti-federalist Paper No. 28: The Use of Coercion by The New Government III. United States: Library of Congress, 1788.
[43] Cornell, Saul. A Well-Regulated Militia: The Founding Fathers and the Origins of Gun Control in America. Oxford: Oxford University Press, 2008.

the right to bear Arms was limited to a person's participation in the Militia. However, the court set a new precedent, claiming to return the meaning of the Second Amendment to its original understanding, according to Justice Scalia. The majority held that the Second Amendment "protects an individual right to possess a firearm unconnected with service in a militia, and to use that arm for traditionally lawful purposes, such as self-defence within the home."[44] This shines a light on the people's right to bear Arms, as opposed to the need of a well-regulated Militia, thus changing the course of discussion and purpose of this amendment.

3.3. Third Amendment

> *No Soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law.*
>
> - The U.S. Bill of Rights, Third Amendment

James Madison introduced the no quartering[45] of soldiers clause to Congress on June 8th, 1789. He declared, fourthly in a long list of propositions, one simple ideation: "No soldier shall in time of peace be quartered in any house without the consent of the owner; not at any time, but in a manner warranted by law."[46] This amendment suffered little-to-no changes, other than those grammatical in nature, from Madison's initial formulation to its subsequent final form. It has since been referred to on a many number of occasions as the amendment no one has any interest in remembering.[47] "Pity the Third Amendment" says Tom W. Bell, "lawyers twist it to fit absurd claims, the popular press subjects it to ridicule, and academics relegate it to footnotes. Is this any way to treat a member of the Bill of Rights?"[48] It has, for quite some time, lacked the befitting legal analysis to convey its relevance in the minds of the Founding Fathers, and in the context of the U.S. Bill of Rights.

The Third Amendment takes inspiration from the colonial abuse on behalf of British soldiers around the time of the Revolutionary War. The quartering of soldiers had long since

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[44] District of Columbia et al. v. Heller, 554 U.S. 570, 2008.
[45] The provision of accommodation or lodgings, especially for troops.
[46] Annals of Congress, House of Representatives, 1st Cong., 1st sess., Pages 451 & 452 of 1274. (View the page cited)
[47] Horwitz, Morton J. Is the Third Amendment Obsolete. United States: Valparaiso University Law Review, 1991.
[48] Bell, Tom W. The Third Amendment: Forgotten but Not Gone. United States: William & Mary Bill of Rights Journal, 1993.

been a problem, dating back to King Philip's War in the 17th Century. When the infamous Glorious Revolution took place in 1688, the quartering of troops became especially unbearable in New York, leading to the enactment of legal protections against it.[49] The first appeared in the 1683 Charter of Libertyes and Priviledges, stating "that Noe ffreeman shall be compelled to receive any Marriners or Souldiers into his house and there suffer them to Sojourne, against their willes provided Alwayes it be not in time of Actuall Warr within this province."[50] Said Charter came from the New York Assembly and barred forced quartering, unless during times of armed conflict. This is the first case of a legal protection against quartering enabling it on specific occasions, as all other instances banned its practice under any and all circumstances. From this moment on, American lawmakers incorporated this dual standard for quartering in subsequent protections, including in the U.S. Bill of Rights.[51]

Madison's proposal for the Third Amendment differed from that of the states' ideations during their conferences. One proposal banned non-consensual quartering in times of peace, but made no reference to times of armed conflict. Another forbade the practice of forced quartering in times of peace and, in reference to times of armed conflict, stated that it be subject to legal controls. The latter is the most proximate to the current redaction, and differs from Madison's proposed language in that he bans quartering in times of peace, suggesting that at any other time it be subject to law. The House considered this much too ambiguous, preferring to opt for the specific reference to times of war, as opposed to that of no peace.[52]

The Third Amendment has yet to be directly interpreted by the Supreme Court. In the past, attempts to use it to call attention to the constitutional checks placed on the military or their role in the people's private lives have proven futile. Those more focused on the reach of the government into private property and conduct were also found to be unsuccessful in their attempts to invoke the Third.[53] That said, a federal court case did address it first-hand in *Engblom v. Carey*.[54] The case in point was brought against the State of New York by a couple of Corrections Officers for infringing their Third Amendment rights. The State in question had

[49] Idem.
[50] Lutz, Donald S. Colonial Origins of the American Constitution: A Documentary History. United States: Liberty Fund Inc., 1998.
[51] Bell, Tom W. The Third Amendment: Forgotten but Not Gone. United States: William & Mary Bill of Rights Journal, 1993.
[52] Idem.
[53] Coon, Mark E. Penumbras Reconsidered: Interpreting the Bill of Rights through Intratextual Analysis with the Third Amendment. United States: Oklahoma City University Law Review, 2019.
[54] Engblom v. Carey, 572 F. Supp. 44, 1983.

quartered a couple of National Guardsmen in their dormitory of residence during a period of strike so as to maintain order at the State's correctional facilities. The court ruled that the 'Owner' of the dormitories was, in fact, the State which had allowed them access in the first place. Though the court conceded on the status of the Guardsmen as 'Soldiers', it took the court of appeals to repeal this decision and acknowledge a breach in the Corrections Officers' rights. The court of appeals ultimately rejected the court's literal interpretation of 'Owner', as it argued the protection of the Third Amendment should be afforded to the person that has a legitimate expectation of privacy in a property-based interest and a legal right to exclude others. To back up its argument, the court of appeals referred to the Supreme Court's Fourth Amendment jurisprudence, in addition to New York property law.[55]

The Third Amendment may seem to perish in comparison to the remaining amendments, yet it plays an important part in the larger constitutional scheme, according to Mark E. Coon. In fact, it touches on the importance of the limitation of military influence and the protection of privacy and solitude of an individual's property, thus setting the foundation for a more in-depth interpretation of the meaning behind the Second and Fourth Amendments.[56]

3.4. Fourth Amendment

> *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 U.S. Bill of Rights, Fourth Amendment

James Madison introduced the freedom from unreasonable searches and seizures clause to Congress on June 8th, 1789. He declared, fourthly in a long list of propositions, one simple ideation: "The rights of people to be secured in their persons; their houses, their papers, and their other property, from all unreasonable searches and seizures, shall not be violated by warrants issued without probably cause, supported by oath or affirmation, or not particularly

[55] Coon, Mark E. Penumbras Reconsidered: Interpreting the Bill of Rights through Intratextual Analysis with the Third Amendment. United States: Oklahoma City University Law Review, 2019.
[56] Idem.

describing the places to be searched, or the persons or things to be seized."[57] The aim of this amendment was to guarantee the people's rights "to be free from unreasonable searches and seizures", introduces Tracey Maclin, and yet it "presents a quandary for society."[58] Some rely on the Fourth for the right to be free from government intrusion in one's own home. Others, however, find comfort in the Constitution's intolerance of police state tactics, depicted in the adoption of this amendment, thus protecting them from police excess.[59]

The Fourth Amendment found its origin not merely from the American Revolution, but also from the philosophy that a man's home is his castle[60], according to the English judge and jurist, Sir Edward Coke, in the ruling known as Semayne's Case[61]. In the past, British policy had paid little-to-no consideration to the privacy of people's homes, particularly in relation to the enforcement of taxes. The Revolutionary War was caused, in part, due to American outrage at English taxation being enforced in the absence of the former's representation in Parliament. The amendment looks to ensure that people are secured in their persons, houses, papers and effects. Furthermore, any permission to execute a reasonable search must be issued on the basis of probable cause and is required to specify the place, persons and things subject to subsequent seizure.[62]

The phrasing leads us to distinguish the right to be secure against unreasonable searches and seizures from the specificity of permissions issued upon probable cause and supported by oath or affirmation. The latter half merely describes the standard of reasonableness once the search and seizure has been deemed as such.[63] The issue is that there is no definition for the term 'unreasonable' and the Supreme Court has, time and again, referred to the rationality of police in their undertaking of a search and seizure to determine the infringement of a person's rights.[64] This goes against the reasoning behind the amendments to the U.S. Constitution. The Founding Fathers created the U.S. Bill of Rights to provide security to the people in relation to

[57] Annals of Congress, House of Representatives, 1st Cong., 1st sess., Pages 451 & 452 of 1274. (View the page cited)
[58] Maclin, Tracey. The Central Meaning of the Fourth Amendment. United States: William & Mary Law Review, 1993.
[59] Idem.
[60] Levy, Leonard W. Origins of the Fourth Amendment. United States: The Academy of Political Science, 1999.
[61] Semayne v. Gresham, 5 Coke Rep 91, 1604.
[62] Levy, Leonard W. Origins of the Fourth Amendment. United States: The Academy of Political Science, 1999.
[63] Idem.
[64] Maclin, Tracey. The Central Meaning of the Fourth Amendment. United States: William & Mary Law Review, 1993.

their government which, as we know today, is more akin to a person's freedom.[65] These men valued, above all else, "intellectual freedom, physical liberty, and personal property," states Andrew Ferguson.[66] For the first century, few opinions were shared on this amendment. Then, in 1886, the Supreme Court decided its first Fourth Amendment case in *Boyd v. Unites States*. The Court referred to a person's right to "personal security, personal liberty and private property"[67] thus broadening the meaning of the amendment to include nonphysical searches of information deemed somewhat public.[68]

More recently, the amendment has come to be applied in a more laxed manner. The Supreme Court often finds police searches and seizures to be reasonable as they benefit legitimate State interests.[69] This is precisely what the Founding Fathers were aiming to avoid, government abuse and infringement of individual rights.

3.5. Fifth Amendment

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

James Madison introduced the right to due process, freedom from self-incrimination and freedom from double jeopardy clause to Congress on June 8th, 1789. He declared, fourthly in a long list of propositions, one simple ideation: "No person shall be subject, except in cases of impeachment, to more than one punishment or one trial for the same offence; nor shall be

[65] Idem.
[66] Ferguson, Andrew G. Personal Curtilage: Fourth Amendment Security in Public. United States: William & Mary Law Review, 2014.
[67] Boyd v. Unites States, 116 U.S. 630, 1886.
[68] Ferguson, Andrew G. Personal Curtilage: Fourth Amendment Security in Public. United States: William & Mary Law Review, 2014.
[69] Maclin, Tracey. The Central Meaning of the Fourth Amendment. United States: William & Mary Law Review, 1993.

compelled to be a witness against himself; nor be deprived of life; liberty, or property, without due process of law; nor be obliged to relinquish his property, where it may be necessary for public use, without a just compensation."[70] This amendment, most famous for defending a person's freedom from self-incrimination, contains an array of rights that protect a person in the face of an accusation of misconduct. The Founding Fathers aimed to codify a pre-existing notion that no person be forced to partake in the inquiry into criminal matters that they may or not have been involved in. Nor that their silence be used to determine their innocence, or lack thereof, in the conviction of said crime.[71]

The historical origins of this right date back to 1213 and the Fourth Lateran Council. The Council featured an oath de *veritate dicenda*[72], that over time evolved into *tortura spiritualis*[73] and has come to be known as the cruel trilemma. Any person brought before the Council found themselves being forced to choose between self-incrimination, perjury or contempt. It was John Lilburne who, upon returning to England and finding himself standing trial in 1637, postulated the injustice of forcing someone to respond to incriminating questions against oneself. In Colonial America, the manifestation of this right is best displayed in trial of Samuel Hemphill in 1735, a Presbyterian minister that refused to share copies of his sermons in an ecclesiastical inquiry to which he was subject. In spite of this, the specially formed commission, acting on behalf of the Presbyterian synod that initiated the inquiry, found his sermons treacherous.[74] Benjamin Franklin came to his aid, stating that "it was contrary to the common Rights of Mankind, no man being obliged to furnish Matter of Accusation against himself."[75] The commission then proceeded to recognise Mr. Hemphill's right, but considered his refusal an admission of guilt. Mr. Franklin took pen to paper once more to refute their acumen, further promoting the understanding that this right goes far beyond the confines of a courtroom. The freedom from self-incrimination not only means that a person shall not be forced to share

[70] Annals of Congress, House of Representatives, 1st Cong., 1st sess., Pages 451 & 452 of 1274. (View the page cited)
[71] Bentz, Andrew J. M. The Original Public Meaning of the Fifth Amendment and Pre-Miranda Silence. United States: Virginia Law Review, 2012.
[72] To tell the truth.
[73] Spiritual torture.
[74] Bentz, Andrew J. M. The Original Public Meaning of the Fifth Amendment and Pre-Miranda Silence. United States: Virginia Law Review, 2012.
[75] Franklin, Benjamin. Some Observations on the Proceedings against The Rev. Mr. Hemphill; with a Vindication of his Sermons. United States: Yale University Library, 1735.

incriminating information against oneself, but also that no judge or jury shall infer guilt from this silence.[76]

Over the years, the scope of this freedom broadened until its inclusion in the Fifth Amendment. Much has been said about the use of 'No person shall' as opposed to 'the accused', as per the Sixth Amendment. This implies that the right against self-incrimination shall inure in any situation wherein a person's statement could potentially be used against. Furthermore, its breadth was reduced when John Laurence pointed out that the right should be confined to criminal cases. He argued that it contradicted laws passed, such as Section 15 of the Judiciary Act of 1789 whereby federal courts could compel parties in a civil matter to produce relevant evidence. Since then, this argument has been discredited as the evidence need not be criminally inculpatory, hence why the confinement to criminal cases is deemed a mere misunderstanding.[77]

Though not as quoted in popular culture, the Fifth Amendment also includes the right to a grand jury and the freedom from double jeopardy. Additionally, it requires due process of law in any proceeding denying a person life, liberty or property, and just compensation should private property be taken for public use.

3.6. Sixth Amendment

> *In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.*
>
> - The U.S. Bill of Rights, Sixth Amendment

[76] Bentz, Andrew J. M. The Original Public Meaning of the Fifth Amendment and Pre-Miranda Silence. United States: Virginia Law Review, 2012.
[77] Bentz, Andrew J. M. The Original Public Meaning of the Fifth Amendment and Pre-Miranda Silence. United States: Virginia Law Review, 2012.

James Madison introduced the rights of accused persons, that is, the right to a speedy and public trial clause to Congress on June 8th, 1789. He declared, fourthly in a long list of propositions, one simple ideation: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, to be informed of the cause and nature of the accusation, to be confronted with his accusers, and the witnesses against him; to have a compulsory process for obtaining witnesses in his favor; and to have the assistance of counsel for his defence."[78] The U.S. Bill of Rights, as can be ascertained from the previous amendments, stems from a deep mistrust of government abuse. For this reason, the Founding Fathers deemed the inclusion of principles limiting federal powers and safeguarding personal freedoms necessary. The Sixth Amendment is another example of this intention, as it provides seven procedural protections for so-called accused persons in the face of criminal prosecutions.[79]

Supreme Court jurisprudence has been inconsistent in its interpretation of the Sixth Amendment and this causes judicial insecurity. In order to understand why the Court has produced contradictory analyses of this amendment, it is crucial to understand the procedural protections conceded. They are as follows: "the right to a speedy trial; the right to a public trial; the right to a trial before an impartial jury drawn in a prescribed manner; the right to notice; the right of confrontation; the right to compulsory process; and the right to assistance of counsel."[80] The Court initially had little to say of this amendment, until the late 19th Century. It merely limited the scope of the right to trial before an impartial jury, finding that it did not apply to petty crimes. During this time, a defendant's access to federal courts was limited quite substantially and, as such, their access to the Supreme Court was also constrained. Then came the Reconstruction Era, and defendants acquired easier access to federal courts. That said, the Court only ruled on the right to assistance of counsel until mid-20th Century. In these decisions, the Court concluded that the poverty-stricken be appointed counsel by the federal government and included the obligation that the counsel be effective.[81]

Then came the so-called Warren Court, which referred to the period of time in Supreme Court history where Earl Warren was Chief Justice. Morton J. Horowitz writes that the Court "represented a unique period in American constitutional history," as it embodied two clear

[78] Annals of Congress, House of Representatives, 1st Cong., 1st sess., Pages 451 & 452 of 1274. (View the page cited)
[79] Chhablani, Sanjay. Disentangling the Sixth Amendment. United States: University of Pennsylvania, 2009.
[80] Chhablani, Sanjay. Disentangling the Sixth Amendment. United States: University of Pennsylvania, 2009.
[81] Idem.

principles: “the idea of a living constitution: a constitution that evolves according to changing values and circumstances” and “the re-emergence of the discourse of rights as a dominant constitutional mode.”[82] In this era, Sixth Amendment jurisprudence flourished, as did that of most amendments, for it was the Warren Court that incorporated the seven provisions into the Fourteenth Amendment’s Due Process Clause. This amendment, one that came after the U.S. Bill of Rights had been ratified and in practice for just shy of a century, ensured defendants in state courts had the same procedural protections as the Founding Fathers had conceded in federal courts. From here on out, defendants in all courts had their Sixth Amendment rights recognised though this also brought about great confusion as to the many meaning of this amendment, as can be contemplated in contemporary jurisprudence on the matter.

3.7. Seventh Amendment

> *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.*
>
> - The U.S. Bill of Rights, Seventh Amendment

James Madison introduced the right of trial by jury in civil cases clause to Congress on June 8th, 1789. He declared, seventhly in a long list of propositions, one simple ideation: “In suits at common law, between man and man, the trial by jury, as one of the best securities to the rights of the people, ought to remain inviolate.”[83] This statement evolved into the Seventh Amendment as it stands today, whereby the importance placed upon a trial by jury by the Founding Fathers derives in the inclusion of the right of trial by jury in civil cases. That said, the formulation of this amendment causes much confusion, specifically the use of the word ‘preserved’ in reference to the right in question. Prior to the U.S. Bill of Rights, there had been no federal courts, nor a right of trial by jury in those court to preserve.[84] According to Akhil Amar, “the best reading of the amendment is probably as follows: if a state court entertaining

[82] Horwitz, Morton J. The Warren Court and The Pursuit of Justice. United States: Washington and Lee Law Review, 1993.
[83] Annals of Congress, House of Representatives, 1st Cong., 1st sess., Pages 453 & 454 of 1274. (View the page cited)
[84] Krauss, Stanton D. The Original Understanding of the Seventh Amendment Right to Jury Trial. United States: University of Richmond Law Review, 1999.

a given common-law case would use a civil jury, a federal court hearing the same case must follow that state-law jury right."[85] According to this reading, this clause constitutes a federal delegation to the states of the determination of the scope of the right of trial by jury in civil cases.[86]

The Supreme Court's interpretation of the Seventh Amendment differs from that of Mr. Amar. In *Markman v. Westview Instruments, Inc.*, the Court held that this amendment's right of trial by jury is the right "which existed under the English common law when the Amendment was adopted."[87] Therefore, under this interpretation, the cause of action must either be the same as one "tried at law at the time of the founding" or "at least analogous to the cause of action that was."[88] In other words, it preserves the right under English common law and for it to be applicable, the case must have been tried at the time of the so-called founding or akin to one that was.[89] However, a third option of interpretation comes from Stanton Krauss, who believes it responds to anti-Federalist criticism at the time of the Constitution's apathy for civil jury trials, first and foremost. He then proceeds to refer to it as a matter of 'general principle' that upholds the tradition of civil jury trials, as per the request of George Mason. Not only that, but he believes it appeases Alexander Hamilton's views in that it leaves the determination of the extent of this right to Congress. Thus promising protection to the people, in the form of a right of trial by jury, in cases deemed 'in Suits at common law' by Congress. This particular theory respects and is substantiated by the subsequent Judiciary Act of 1789, among others.[90]

3.8. Eighth Amendment

> *Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.*
>
> - The U.S. Bill of Rights, Eighth Amendment

[85] Amar, Akhil R. The Bill of Rights: Creation and Reconstruction. United States: Yale University Press, 1998.
[86] Krauss, Stanton D. The Original Understanding of the Seventh Amendment Right to Jury Trial. United States: University of Richmond Law Review, 1999.
[87] Markman v. Westview Instruments, Inc., 517 U.S. 370, 1996.
[88] Idem.
[89] Krauss, Stanton D. The Original Understanding of the Seventh Amendment Right to Jury Trial. United States: University of Richmond Law Review, 1999.
[90] Idem.

James Madison introduced the freedom from excessive bail and the freedom from cruel and unusual punishments clause to Congress on June 8th, 1789. He declared, fourthly in a long list of propositions, one simple ideation: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."[91] Thus, his proposal remained consistent through to the ratification of the U.S. Bill of Rights. This amendment has its roots in the Glorious Revolution of 1688. In fact, the formulation is practically identical to that of the English Bill of Rights of 1689, that uses the phrase 'cruel and unusual punishment' in response to the Stuart dynasty's draconian punishments.[92] This amendment's problem is the use of ambiguous language such as 'excessive' and 'cruel and unusual'. The Supreme Court has had to persistently interpret this precept, sustaining throughout the 18th Century that the clause intended to ban "inhuman and barbarous" forms of punishment, such as "burning at the stake, crucifixion, breaking on the wheel, or the like."[93] Then, in *Weems v. United States*, in 1910, the Court pointed out that the clause could contain a proportionality principle. By the late 1970s, it consistently upheld the notion that the Eighth Amendment aims to ban disproportionate punishments, according to the original meaning of 'cruel and unusual'.[94]

Then, in *Harmelin v. Michigan*, the Court questioned the proportionality principle.[95] It claimed the English Bill of Rights does not refer to disproportionality as much as it does to "the arbitrary use of the sentencing power by the King's Bench in particular cases and at the illegality […] of punishments thereby imposed."[96] Therefore, the ruling declares the Eighth Amendment lacks a proportionality principle and instead refers to the mode of punishment, as opposed to disproportionate sentencing. The Court henceforth requires a punishment not be "regularly or customarily employed" for it to constitute a breach of the amendment in question rather than disproportionate in nature.[97] Thus, it cannot be used to nullify prison sentences, as this does not constitute a barbaric form of punishment.[98]

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[91] Annals of Congress, House of Representatives, 1st Cong., 1st sess., Pages 451 & 452 of 1274. (View the page cited)
[92] Bessler, John D. A Century in the Making: the Glorious Revolution, the American Revolution and the Origins of the U.S. Constitution's Eighth Amendment. United States: William & Mary Bill of Rights Journal, 2019.
[93] In re Kemmler, 136 U.S. 436, 1890.
[94] The Eighth Amendment, Proportionality, and the Changing Meaning of "Punishments." United States: Harvard Law Review, 2009.
[95] Idem.
[96] Harmelin v. Michigan, 501 U.S. 957, 1991.
[97] Idem.
[98] The Eighth Amendment, Proportionality, and the Changing Meaning of "Punishments." United States: Harvard Law Review, 2009.

3.9. Ninth Amendment

> *The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.*
>
> - The U.S. Bill of Rights, Ninth Amendment

James Madison introduced the other rights of the people clause to Congress on June 8th, 1789. He declared, fourthly in a long list of propositions, one simple ideation: "The exceptions here or elsewhere in the constitution, made in favor of particular rights, shall not be so construed as to diminish the just importance of other rights retained by the people, or as to enlarge the powers delegated by the constitution; but either as actual limitations of such powers, or as inserted merely for greater caution."[99] This amendment is intrinsically linked to the initial debate on the need of a Bill of Rights. Those in favour of its creation believed the Constitution did little to protect the individual, neglecting to recognise their liberties. The Federalists, who vehemently opposed its conception believed a Bill of Rights would only worsen their protection as it would be impossible to express each and every right belonging to a person in one single document, thus leading to an incomplete enumeration of rights. This would then lead to the presumption that those left unspecified would be obscured and, ultimately, ignored. Mr. James Wilson, a former Supreme Court Justice, stated that the incomplete enumeration would imply the rights had been granted, rendering the people's true rights incomplete and powerless against government abuse. Alexander Hamilton claimed, in Federalist No 83, that rights that had gone unspecified remained determinable by state courts in a manner prescribed by law. In Federalist No 84, he worried they would run the risk of granting powers by imposing restrictions where powers had not yet been granted in the first place. Though the Bill eventually came to be, Mr. Hamilton's concerns were somewhat mitigated by the inclusion of the Ninth Amendment.[100]

This amendment maintains that unenumerated rights are to remain in force, and those included in this Bill shall not be used to undermine or deny others. For Federalists, the inclusion of a Bill of Rights merely meant implicit rights became explicit, risking the sanctity of those that remained unenumerated. James Madison, aware of the concern surrounding the potential

[99] Annals of Congress, House of Representatives, 1st Cong., 1st sess., Pages 451 & 452 of 1274. (View the page cited)
[100] Caplan, Russel L. The History and Meaning of the Ninth Amendment. United States: Virginia Law Review, 1983.

supplantation of federal law over state law, included the Ninth Amendment so as to ensure that any and all rights excluded from the enumeration were not to be relinquished, thus remaining intact. This amendment does not circumscribe, but rather protect the rights recognised by states, and aims to ensure the federal government does not encroach on state prerogatives, much like the Tenth, and final, Amendment in the U.S. Bill of Rights.[101]

Then, in *Griswold v. Connecticut*, the Supreme Court found the Ninth Amendment to be a source of substantive rights.[102] Justice Goldberg considered the intent of the Founding Fathers to ensure that other fundamental rights not be denied protection merely because they remain unenumerated in the first eight amendments.[103] Some Jurists defined its contents through the theory of natural rights, those that inhere in 'men as men'. Critics' of this approach considered it much to indeterminate and therefore susceptible to corruption, contrary to the intention of the creators of the U.S. Bill of Rights. They preferred an empirical approach, basing the right on a system of moral beliefs present in contemporary society. This also led to similar criticism as there is no societal standard of morality agreed upon by all members of a contemporary society and, as such, people can only be expected to rely on their personal moral beliefs. This is not unlike the consequence of the naturalists' approach, susceptible to abuse in the pursuance of individual interests.[104]

3.10. Tenth Amendment

> *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 U.S. Bill of Rights, Tenth Amendment

James Madison introduced the powers reserved to the states clause to Congress on June 8th, 1789. He declared, eighthly in a long list of propositions, one simple ideation: "The powers not delegated by this constitution, nor prohibited by it to the States, are reserved to the States respectively."[105] Not unlike the Ninth Amendment, its aim is to ensure the sanctity of the States.

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[101] Caplan, Russel L. The History and Meaning of the Ninth Amendment. United States: Virginia Law Review, 1983.
[102] Abrams, Kathryn. On Reading and Using the Tenth Amendment. United States: The Yale Law Journal, 1984.
[103] Griswold v. Connecticut, 381 U.S. 479, 1965.
[104] Abrams, Kathryn. On Reading and Using the Tenth Amendment. United States: The Yale Law Journal, 1984.
[105] Annals of Congress, House of Representatives, 1st Cong., 1st sess., Pages 453 & 454 of 1274. (View the page cited)

On the one hand, the Ninth protects the rights recognised by the States. And, on the other hand, the Tenth Amendment protects the powers granted to the States by stating those that are not strictly delegated to the federal government, nor prohibited by it, belong to the States and to its people. These amendments address residual rights and powers that remain unenumerated in the U.S. Constitution and its subsequent Bill of Rights.

Once a central constitutional principle in the 19th Century, the Tenth Amendment lost this prominent position in 1941. That year, in *United States v. Darby*, the Supreme Court considered that "the amendment states but a truism that all is retained which has not been surrendered."[106] Thus, it deemed the Tenth Amendment a mere declaration of the state and scope of national and state authority. Then, in 1976, the Supreme Court referred to the amendment for the first time after an extended period of dormancy in *National League of Cities v. Usery*. The Court used this case as a reminder that federal interference in the scope of states' jurisdiction is prohibited by the U.S. Constitution. That said, it failed to delineate the aforementioned scope, thus causing constitutional commentators to question the doctrinal stance adopted since *United States v. Darby* that had all but rendered the amendment idle. Since then, a number of Supreme Court decisions pursued the concept of state authority, but failed to clearly define its boundaries.[107]

This lack of boundaries renders the Tenth Amendment useless. In order for it to adequately prohibit federal interference in the scope of states' jurisdiction, said scope must be accurately determined. According to Donald L. Beschle, Professor of Law, "an examination of the nature of states' rights and of the overall governmental structure established by the Constitution indicates that the states' essential role is to act as representatives of their people by participating in the processes of enacting federal legislation and in amending the Constitution." Thus, federal interference is limited by the states' ability to represent its people. Should it obstruct this function, it shall constitute a breach of the states' rights conceded by the Tenth Amendment. Remember, this precept was included to appease the Anti-Federalists and the people concerned with abuse of power, thus ensuring the states' retained their sovereignty.

[106] United States v. Darby, 312 U.S. 100, 1941.
[107] Beschle, Donald L. Defining the Scope of State Sovereignty under the Tenth Amendment: A Structural Approach. United States: DePaul Law Review, 1984.

Chapter 4) Conclusion

There is more to the Bill of Rights than the original understandings of the Founding Fathers and their modern-day applications. In this work we look back on their intentions, focusing primarily on the catalyst of the creation of these ten amendments. In some cases, they are simply a 'freedom from' conceded to the people of this youthful country as a protection of sorts against the Federal State, triggered by the abuse suffered on behalf of the English during the Colonial Era. This fear manifested itself prior to the Bill's proposal, during the origination of the Constitution, leading to the inclusion of the Amendment Clause. Article V not only enabled the Founding Fathers to pass the ten amendments subject to analysis in this work, but also authorised Congress to propose additional amendments if it so desires, in accordance to a series of procedural requirements. There has since been an additional twenty three amendments proposed, of which seventeen have been ratified. One of the aims of this academic paper consisted of offering insight into the amendment process and this has been done through an analysis of the fifth constitutional article containing the aforementioned clause.

After introducing the amendments to Congress, James Madison concluded his address by recognising that he "never considered this provision so essential to the federal constitution, as to make it improper to ratify it" but that "the people of many States […] thought it necessary to raise barriers against power in all forms and departments of Government."[108] Thus, he came around to the idea of a Bill of Rights. Not only that, but he became its reluctant father. The path he took to earn himself a prominent place in U.S. history did not start out with his intention to write a Bill of Rights. He found himself forced into reconsidering his stance on the subject matter as the political realities of the time became undeniable. His purpose for supporting the amendments consisted of a need "to fulfil the promises made to his constituents during his campaign for Congress and to undermine the opposition to the Constitution."[109] He henceforth occupied a central role in the proposal, discussion and ultimate acceptance of the amendments. The second aim of this academic paper consisted of understanding Mr. Madison's role in the process of adopting a Bill of Rights and this has been demonstrated by the very fact that he proposed each and every amendment before deliberation in Congress and the Senate. Upon

[108] Annals of Congress, House of Representatives, 1st Cong., 1st sess., Pages 453 & 454 of 1274. (View the page cited)
[109] Finkelman, Paul. James Madison and the Bill of Rights: A Reluctant Paternity. United States: Supreme Court Review, 1990.

further research, it is clear that although he initially opposed its inclusion, he will forever be known as the reluctant father of the Bill of Rights.

The third and final aim of this academic paper consisted of studying the evolving nature of the amendments. As discussed, the doctrine of judicial review is what allowed for this to happen, for the Bill of Rights to remain relevant in modern day society. That said, constitutional interpretation can be considered detrimental to its authority and supremacy, but without it, it would eventually become obsolete, reflecting a time that no longer is. In the analysis of each amendment, we can see an evolution from James Madison's initial proposal to the final product approved by the Senate. Though a Mr. Robert Sherman suggested the amendments be introduced at the end of the Constitution as opposed to Mr. Madison's motion to include them in the pertinent sections of the charter, the final product did not stray far from the proposition. Beyond its ratification, the Bill of Rights has continued to change, not its phrasing, but its meaning. *Marbury v. Madison* set an important precedent, encouraging courts to interpret the Constitution and its amendments so as to set the standard. As mentioned before, this has made these key documents malleable to the transformation of society and its needs. But in doing my research and reading the judiciary's comments, I realised a couple of things. On the one hand, entire books could be based on the judicial decisions pertaining to each amendment, let along one academic paper. On the other hand, these interpretations tread a fine line. They sometimes fall under the umbrella of respecting the original meaning to a fault. Other times they diverge so as to provide a more relevant signification of the precept in question. Add a third dimension, and they fail to do either, not only digressing from the Founding Fathers intentions but also from the needs of modern day society.

The United States Supreme Court is the ultimate interpreter of the Constitution. And it has once again come to my attention, though it is a thought that has occupied my mind many a time in the past, that the Court's decisions are all too political. In taking a look at past eras of the Supreme Court, I notice partisanship that I no longer appreciate in the current Court. Take the Warren Court, for instance, considered one of the most liberal in U.S. history. Chief Justice Earl Warren was a Republican through and through, and yet his Court was responsible for landmark decisions like *Brown v. Board of Education*, which was unanimous in banning racial segregation in public schools. His successor, Chief Justice Warren Burger, also a Republican, led the Court responsible for *Roe v. Wade*, which extended the right to privacy to a woman's decision to have an abortion. Nowadays, the Court's rulings are more influenced than ever by

its composition, particularly pertaining to the political affiliation of its judges. For instance, a first draft of a majority opinion leaked earlier this year displays the Court's intention to overturn *Roe v. Wade*, thus restricting abortion rights and setting back women's rights. So while it is a wonderful tool that ensures modern day beliefs are reflected in the Constitution's present day application, judicial interpretation also puts people's rights at risk. You see, it allows the courts more power than the Bill of Rights proponents' would have been comfortable with.

Infinite words can be, and have been, written about the Bill of Rights and its many subsequent tangents. Though may I briefly add that few of authors I found were women, or so my research was able to uncover. I hold the belief that academia is still a male dominated space, especially in regards to published work. Women's efforts have been neglected for far too long. In fact, the U.S. Constitution, in addition to a number of other historical documents, fails to include the word 'woman' in its text. These instruments that determine the very fabric of our society, in addition to shaping our understanding of it, continuously exclude women. We are just as much a part of history and society so, as is lyricised in Hamilton: An American Musical, we must "compel [them] to include women in the sequel" as we "want to be in the room where it happens."[110]

In any case, I originally set out to describe the process and study the evolution of James Madison's work, and yet I found myself drawn into entire universes of discussion and deliberation for each amendment that I researched. Not only did these ten articles shape past and present day America, but they have sparked international debate on matters ranging from freedom of speech and press, to the right to bear arms. While a young nation indeed, the United States has managed to position itself as a leader, an example to follow if you will, on the global stage. I may digress in considering it a refined country, but its Constitution, Bill of Rights and subsequent infrastructure establishment are a sight to behold and continuously studied.

[110] Miranda, Lin-Manuel. Hamilton: An American Musical. United States: Grand Central Publishing, 2016.

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For Blanca. Mr. Madison is quoted as saying: “as a friend to what is attainable” in discussing the U.S. Bill of Rights and it reminded me of you, as something you often said to me during the drafting of this thesis. Thank you for your support.