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"Shall Be Bound Thereby": Structural Incorporation via Article VI

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"Shall Be Bound Thereby": Structural Incorporation via Article VI

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I. Introduction

This paper argues that certain provisions of the Bill of Rights, those that pertain to the administration of justice, were incorporated in 1791 against the States via the provision in Article VI binding State judges to the Constitution.¹

The focus of this thesis of Incorporation is based on examining the plain text of the United States Constitution ("Constitution") that was ratified by the States in 1788 and again ratified to become the amended Constitution of 1791.² Article VI, section 1, clause 2, of the U.S. Constitution³ reads as follows:

"This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States,

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* I thank Professor Jason Mazzone of Brooklyn Law School for encouragement and feedback on earlier drafts of this Article, as well as the professional staff of Librarians at Brooklyn Law School.
¹ U.S. CONST. amends. I-X. U.S. CONST. art. VI, § 1, cl. 2. U.S. CONST.
² Dates obtained from THE U.S. CONSTITUTION AND FASCINATING FACTS ABOUT IT 30 (7th ed. 2001).
³ U.S. CONST. U.S. CONST. art. VI, § 1, cl. 2.
shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any 

Thing in the Constitution or Laws of any State to the Contrary notwithstanding."\(^5\)

The thesis for Incorporation this note proposes is that the provision for incorporation was in place at the inception of the U.S. Constitution in 1789. The U.S. Constitution, through the language of Article VI, section 1, clause 2,\(^6\) expressly bound the Judges of the States to the Constitution and as a consequence also bound the Judges of every State\(^7\) to the Constitution's Amendments, the first ten of which were added in 1791.

Although Article VI, section 1, clause 2,\(^8\) is best known for the "Supremacy clause\(^9\), the remainder of the statement is frequently overlooked. Following the "Supremacy clause\(^10\) the statement continues, "and the Judges in every State shall be bound thereby, any Thing in the

\(^4\) "Per Legem Terrae. By the law of the land; by due process of law." BLACK'S LAW DICTIONARY 1293 (4th ed. 1951). "Coke says, the words, ‘per legem terrae’ in magna carta, and the words ‘due process of law’... in the statute of... mean the same thing... And we have no doubt that the phrase by the law of the land in our constitution [New Hampshire], means the same thing as by due process of law." MAYO v. WILSON, 1 N.H. 53, 55 (1817). (emphasis retained.) In 1787, the year the Constitution was being drafted, in a case in Maryland, Counsel for the appellee argued, "Irish Nell was an English subject, and as such entitled to all the privileges of an English subject in an equal degree with any other English subject, however possessed with wealth, and exalted in station or rank. If she committed the crime of marrying a negro slave, she would by law be subject to no punishment before conviction, in some mode, and she was entitled to the common law mode of trial by Jury, as no other mode was prescribed by law. By magna charta,... nullus liber homo disseisietur de libertatibus, nisi per legem terrae. Libertatibus signifies the laws of the realm. Nisi per legem terrae, without due process of law." Butler v. Craig, 2 H. & McH. 214, 231 (1787). (emphasis added.)

\(^5\) "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. CONST. art. VI, § 1, cl. 2. From the opinion of Chief Justice JAY. “It is remarkable that in establishing it, the people exercised their own rights, and their own proper sovereignty, and conscious of the plentitude of it, they declared with becoming dignity, "We the people of the United States, do ordain and establish this "Constitution." Here we see the people acting as sovereigns of the whole country; and in the language of sovereignty, establishing a Constitution by which it was their will, that the State Governments should be bound, and to which the State Constitutions should be made to conform. CHISHOLM v. GEORGIA, 2 U.S. 419 at 470-71 (1793). (emphasis added.)

\(^6\) "...and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." (emphasis added.) U.S. CONST. art. VI, § 1, cl. 2.

\(^7\) U.S. CONST. art. VI, § 1, cl. 2.

\(^8\) Id. art. VI, § 1, cl. 2.

\(^9\) "shall be the supreme Law of the Land", U.S. CONST. art. VI, § 1, cl. 2.

\(^10\) "shall be the supreme Law of the Land", Id. art. VI, § 1, cl. 2.
Constitution or Laws of any State to the Contrary notwithstanding.  " However, just which Judges are being bound here? The use of term 'State' here is distinctly different in meaning from the term United States, which appears twice in the same clause, and throughout the Constitution. Moreover, the statement does not say that the Judges of the United States shall be bound thereby, and it does not say that the United States Judges in every State shall be bound thereby. Article VI is written in clear terms, and speaks with great strength that the Judges in the States, in fact every State, shall be bound to uphold the Constitution and the laws of the United States. Although the Judges are the ones bound by and thereby administering the provisions, other branches of State government are impacted, just as the New York State regulation was impacted and pre-empted by Federal legislation in *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824). It is clear from the plain meaning of the text that the Constitution binds the Judges of the States.

This thesis for Incorporating the U.S. Constitution as binding against the State Judges is simply that; it is expressly limited to the Judges of the States and is a more limited type of Incorporation than is normally studied via the examination of jurisprudence within opinions over

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11 U.S. CONST. art. VI, § 1, cl. 2.
12 In fact, it is interesting to note a complete omission of the binding clause in the 2004 SUPPLEMENT TO TENTH EDITIONS: MODERN CRIMINAL PROCEDURE, ADVANCED CRIMINAL PROCEDURE 221 (2004); on page 221, within Appendix A, which is entitled "Selected Provisions of the United States Constitution," fails to state the binding clause completely, since it terminates its reprinting of Article VI at: "shall be the supreme Law," and does not include the remainder of the clause. YALE KAMISAR ET AL., 2004 SUPPLEMENT TO TENTH EDITIONS: MODERN CRIMINAL PROCEDURE, ADVANCED CRIMINAL PROCEDURE 221 (2004).
13 U.S. CONST. art. VI, § 1, cl. 2.
15 U.S. CONST. art. VI.
16 U.S. CONST. art. VI, § 1, cl. 2. "...the power must be exclusive; it can reside but in one potentate; and hence, the grant of this power carries with it the whole subject, leaving nothing for the State to act upon..." GIBBONS v. OGDEN, 22 U.S. (9 Wheat.) 1, 227 (1824).
17 GIBBONS v. OGDEN, 22 U.S. (9 Wheat.) 1, 227 (1824).
an extended period of time. Although there will be an impact on other branches of State
governments and State administrative agencies, the Judges are the ones explicitly restrained and
restricted in the Constitution. 18 Under this thesis, there is examination of a complete document,
adopted at one time, by many people acting in their elected capacity as representatives of
significantly more people, who were the people of the thirteen States. Hence, this thesis does not
create incorporation over time, step by step through individual decisions, but rather provides for
Incorporation of the U.S. Constitution as binding against the State Judges right along with the
ratification of the Constitution by the ninth State. 19

Section II provides an overview of existing theories of incorporation. Section III
introduces the theory of Article VI incorporation. The analysis begins with judges and juries. The
examination of judges and juries will look at the importance of trial by jury as a means of
restraining judges and ensuring local rule and participation in government. Section IV then turns
to the text of the administration of justice amendments and begins with those amendments
explicitly providing for juries and involving judgment, to include Amendments V, VI, VII, and
VIII, in that sequence. Section IV continues with additional administration of judgment
amendments that do not necessarily involve courtroom proceedings or a judgment, to include
Amendments III, IV, and V. Section IV ends by addressing remaining relevant Amendments in
the Bill of Rights, which were adopted and ratified at the same time, and by the same Congress
as the administration of justice amendments, these consist of Amendments I, IX, and X, in that
sequence. Section V provides a conclusion to the analysis to include some specific examples of
cases, and discusses implications for the method with which the current accepted theory is being
employed by the Court.

18 U.S. CONST. art. VI, § 1, cl. 2.
19 U.S. CONST. art. VII.
II. Theories of Incorporation

Currently, the impact of Incorporation of the Amendments to the Constitution against the States has evolved over time through cases that have found their basis in select clauses of the Fourteenth Amendment, depending upon the particular theory or provision involved. To date, as a result of prior jurisprudence, four rights within Amendments I-VIII have remained outside the actual application of incorporation against the States. Among those four rights are two rights, which apply directly to the administration of justice, and involve the use of juries to intervene in legal proceedings so as to protect society from the action of judges. These are the rights to a grand jury and the right to a civil jury. Within Amendment XIV, section 1, it provides, "No State shall make or enforce any law…", which clearly addresses the States, and echoes the "No State shall…" language of Article I, section 10. Another clause with striking similarities is, "the privileges or immunities of citizens of the United States;" which echoes the "Privileges and Immunities" clause of Article IV, section 2. Another fundamental clause used as a mechanism for incorporation is, "nor shall any State deprive any person of life, liberty, or property, without due process of law;" which explicitly echoes an important portion of Amendment V. And, Amendment XIV, section 1 closes with, "nor deny any person within its

21 U.S. CONST. amend. XIV, § 1.
26 U.S. CONST. amend. XIV, § 1. U.S. CONST. amend. V.
jurisdiction the equal protection of the laws," which adds the element of equal protection, and yet uses the term "person" rather the "citizen," and so is all inclusive just as with the use of the term "person" within Amendment V, rather than limiting the provisions to citizens.\(^\text{27}\)

From the similarity in language between the Fourteenth Amendment and prior statements within the Constitution, it may be inferred there were no great revelations in the rights presumed to be held by Americans and provided for in the Constitution, there was simply a need to decide who to apply them to in light of the Reconstruction following the tragedy of the Civil War.\(^\text{28}\)

Three of the well studied theories of incorporation based upon the Fourteenth Amendment, may be labeled the total or complete\(^\text{29}\) model, the selective\(^\text{30}\) model, and an anti-incorporationist approach of fundamental fairness\(^\text{31}\). Each of the approaches is workable in a world limited to jurisprudence, but there are Constitutional limits and restraints even to jurisprudence. The idea of fundamental fairness sounds pleasant, but it leaves too much power in the hands of the judges, which is the concern of the Colonists, Article VI, and of the right to have juries.\(^\text{32}\) In a legal context any all or nothing approach will undoubtedly run into trouble, since there is always an exception or a limitation in the legal environment, and just as a total or complete model would bind one hundred percent of the content, it would no doubt succumb to weaknesses. In the event

\(^{27}\) U.S. Const. amend. XIV, § 1. U.S. Const. amend. V.

\(^{28}\) U.S. Const. amend. XIV, § 1.

\(^{29}\) U.S. Const. amend. XIV, § 1. Justice Stone in footnote 4: "There may be a narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten Amendments,…" United States v. CaroLeNe Products Co., 304 U.S. 144, 152 (1938). Justice Black's dissent. Adamson v. California, 332 U.S. 46, 68-123 (1947). These cases present a "total or complete" model.

\(^{30}\) U.S. Const. amend. XIV, § 1. Justice Brennan for the Majority. Malloy v. Hogan, 378 U.S. 1 (1964). Justice REED for the Majority, “There is suggested merely a selective incorporation of the first eight Amendments into the Fourteenth Amendment. Some are in and some are out, but we are left in the dark as to which are in and which are out.” Adamson v. California, 332 U.S. 46, 64-65 (1947). (emphasis added.) These cases present a selective model approach, and such model is admittedly 'in the dark.'


\(^{32}\) U.S. Const. art. VI, § 1, cl. 2. U.S. Const. amends. V, VI, VII.
some of the Amendments are simply not applicable to bind the States in any way, and even if there is in actual practice no genuine conflict for a proposed model labeled total incorporation, nonetheless, critics tend to find the inapplicability of just one Amendment as cause to discredit a total incorporation model.\textsuperscript{33} The selective model is the closest to the result existing today that is practiced in the courts, however it finds its roots in the Fourteenth Amendment, proposed in 1866 and ratified in 1868.\textsuperscript{34}

### III. Article VI Incorporation

In contrast, Article VI Incorporation binds the State Judges to the Amendments, especially the administration of justice Amendments in 1791, which were proposed in 1789, and Article VI even provides for binding the Judges in the States at the inception of the Constitution.\textsuperscript{35} Article VI Incorporation is also narrower, since it is expressly limited to the State Judges and does not require the broad prohibitions required by the "No State shall make or enforce…" language of the Fourteenth Amendment, which acts, perhaps too heavily, upon the legislative, and executive branches of State governments.\textsuperscript{36}

How might this mechanism of incorporation have been overlooked? Recent events have taught accountants and lawyers that being deficient in self-regulation leads to unpleasant corrective measures, such as the passing of the Sarbanes-Oxley Act by Congress to regulate their

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\item \textsuperscript{33} U.S. CONST. amends. I-X.
\item \textsuperscript{34} U.S. CONST. amend. XIV, § 1.
\item \textsuperscript{35} U.S. CONST. art. VI, § 1, cl. 2. U.S. CONST. amends. I-X.
\item \textsuperscript{36} U.S. CONST. art. VI, § 1, cl. 2. U.S. CONST. amends. I-X. "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." (emphasis added.) U.S. CONST. amend. XIV, § 1. e.g. BROWN v. BOARD OF EDUCATION OF TOPEKA, 347 U.S. 483 (1954). CITY OF CLEBURNE v. CLEBURNE LIVING CENTER, 473 U.S. 432 (1985).
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respective professions. The lesson is that when self-regulation fails, action will be taken.

Accountants now must comply with the new Public Company Accounting Oversight Board (PCAOB) and the accountants and lawyers both must comply with regulatory enforcement measures imposed by the Securities and Exchange Commission in accordance with the new realm of federal regulation of their professions. For most workers, colleagues are averse to regulate colleagues, and similarly judges are loathe to regulate judges. It is quite possible that for that simple reason, federal jurisprudence has chosen to overlook, and not discuss the explicit binding provision of Article VI upon State judges, as well as the Article VI provision for an oath by State officials to support the Constitution. Although pain may be endured by the people for quite a long time, eventually necessity forces the people to take desperate measures, as when the Colonists could stand no more abuses by the Crown in the eighteenth century. The Colonists deep seeded lack of trust in Judges, was articulated in the Constitution, and in spite of that explicit expression, the federal judges have continued to show deference to their brethren. It is high time the Judges and the Justices begin to properly self-regulate their own profession before pushing the people to impose unpleasant measures or take other actions as history has proven will happen. Be aware that a Constitutional requirement binds and limits even those who are

38 "There is established the Public Company Accounting Oversight Board, to oversee the audit of public companies that are subject to the securities laws, and related matters, …" Sarbanes-Oxley Act of 2002, 15 USCA § 7211 sec. 101 (a).
39 For example, one such case where a federal judge was convicted on articles of impeachment by a vote of the full U.S. Senate and the United States District Court for the District of Columbia acknowledges that the Supreme Court previously held the power to try impeachments is granted by the Constitution to the Senate, and the Senate's use of that power presents nonjusticiable political questions, and yet continues, in a memorandum opinion by Judge SPORKIN, to write, "Even though this court is powerless to afford Judge Hastings any relief his case will have considerable historical significance and perhaps some day, after a dispassionate and nonpolitical review of the case, this nation will reconsider the error perpetrated and provide Judge Hastings with the vindication he deserves…"
40 U.S. CONST. art. VI, § 1, cls. 2, 3.
41 "Necessity has not yet driven us (the Colonies in America) into that desparate measure, or induced us to excite any other nation to war against them (England)." DECLARATION OF THE CAUSES AND NECESSITY OF TAKING UP ARMS para. 12 (U.S. 1775).
tasked with interpreting the Constitution, and therefore only "deference" to the Constitution shall control. The Constitution directs its restraints upon Judges through Article VI, and Article VI existed even before the Bill of Rights were ratified, hence, examination of that situation follows next. 42

The direct targets of Article VI Incorporation are the Judges in every State. 43 The Colonists had their own opinions of Judges and the problems Judges presented to the community. Restraining Judges was a primary concern for the Colonists, who charged, "judges, …have been made dependent on the crown alone for their salaries…." 44 One year later in 1775, the Colonists declared intolerances to include, ". . .; statutes have been passed for extending the jurisdiction of courts of admiralty 45 and vice-admiralty beyond their ancient limits;" 46 and the courts of admiralty sat without juries, so judges were in total control. 47 Leonard W. Levy explains some abuses imposed by judges as, "A wrong verdict could result in punishment of the

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42 U.S. CONST. U.S. CONST. art. VI, § 1, cl. 2. U.S. CONST. amends. I-X.
43 U.S. CONST. art. VI, § 1, cl. 2.
44 DECLARATION AND RESOLVES OF THE FIRST CONTINENTAL CONGRESS para. 2 (U.S. 1774).
45 The concern for courts of admiralty and its impact upon the Colonists is articulated in the provision, "That the jurisdiction of the court of admiralty be confined to maritime causes." S.C. CONST. of 1778, art. XVII. S.C. CONST. of 1778, art. XXV. Notice also the Colonists affinity to the phrase "the law(s) of the land." S.C. CONST. of 1778, art. XLI. VT. CONST. of 1786, chap. I § XI. U.S. CONST. art. VI, § 1, cl. 2. Justice HARLAN's statement on the phrase in a dissent, "It is my opinion, also, that the right to immunity from self-incrimination cannot be taken away by any state consistently with the clause of the 14th Amendment that relates to the deprivation by the state of life or liberty without due process of law. This view is supported by what Mr. Justice Miller said for the court in Davidson v. New Orleans, 96 U.S. 97, 101, 102. That great judge, [Justice MILLER] delivering the opinion in that case said: The prohibition against depriving the citizen or subject of his life, liberty, or property without due process of law, is not new in the constitutional history of the English race. It is not new in the constitutional history of this country, and it was not new in the Constitution of the United States when it became a part of the 14th Amendment, in the year 1866.' After observing that the equivalent of the phrase 'due process of law,' according to Lord Coke, is found in the words, 'law of the land;' in the Great Charter, in connection with the guarantees of the rights of the subject against the oppression of the Crown…" TWINING v. NEW JERSEY, 211 U.S. 78, 125, 126 (1908). (emphasis added.) Extensive powers were vested in the Admiralty Courts (which operated without juries) and oppressive restraints upon commerce were created by the Navigation Acts. THE NAVIGATION ACT (Eng. 1651). QUALIFICATION OF THE NAVIGATION ACT (Eng. 1660). THE NAVIGATION ACT (Eng. 1663). THE NAVIGATION ACT (Eng. 1696). THE STAMP ACT (Eng. 1765). THE QUARTERING ACT (Eng. 1765). THE TOWNSHEND ACT (Eng. 1767). THE QUARTERING ACT (Eng. 1774). NEW ENGLAND RESTRAINING ACT (Eng. 1775). THE AMERICAN PROHIBITORY ACT (Eng. 1775). THE ARTICLES OF ASSOCIATION (U.S. 1774).
46 DECLARATION OF THE CAUSES AND NECESSITY OF TAKING UP ARMS para. 3 (U.S. 1775).
47 "John Adams voiced the American reaction when he wrote: 'But the most grievous innovation of all, is the alarming extension of the power of courts of admiralty. In these courts, one judge presides alone! No juries have any concern there!'" LEONARD W. LEVY, THE PALLADIUM OF JUSTICE: ORIGINS OF TRIAL BY JURY 86 (1999).
jurors. They could be fined, imprisoned, and subjected to forfeiture of property for verdicts proved to be wrong.\textsuperscript{48} They [jurors] could also be punished when judges, appointees of the crown and still its lackeys, disagreed with a verdict that conflicted with the crown's wishes."\textsuperscript{49} And, "Without juries to check 'the arbitrary power of judges,' judges would become 'increasingly despotic or corrupt.' Without juries, 'the liberties of people were soon lost.'\textsuperscript{50} To Colonial Americans all Judges were a force to be contended with, and a body of power that threatened their values, and needed to be restrained.\textsuperscript{51}

The most effective instrument for controlling judges is juries. The jury was provided for in Article III of the Constitution, and it was a valued tool that permitted participation of the community in the administration of justice.\textsuperscript{52} One high profile case that was always in the minds of the Colonists, was the case of John Peter Zenger, who was represented by the original "Philadelphia Lawyer," Andrew Hamilton.\textsuperscript{53} The jury exonerated John Peter Zenger, and the case stood for the power of jury nullification as a voice of the community.\textsuperscript{54} When considering the role of the jury, one should step back and look at the U.S. Constitution as a whole document, there is a Legislative branch, consisting of Representatives and Senators who make up the Congress; an Executive branch, which is led by the President, and both of these branches consist of elected officials, who are subject to political accountability.\textsuperscript{55} There is also a Judicial branch,

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\item[\textsuperscript{49}] Id. at 63.
\item[\textsuperscript{51}] The State constitutions of both Maryland and Virginia made express provisions to restrain judges. Md. Const. of 1776. Va. Const. of 1776. e.g. "That the independency and uprightness of Judges are essential to the impartial administration of Justice, and a great security to the rights and liberties of the people; wherefore the Chancellor and Judges ought to hold commissions during good behavior; and the said Chancellor and Judges shall be removed for misbehavior, on conviction in a court of law, and may be removed by the Governor, upon the address of the General Assembly..." Md. Const. of 1776 art. XXX. (emphasis added.)
\item[\textsuperscript{52}] U.S. Const. art. III, § 2, cl. 3.
\item[\textsuperscript{54}] Id. at 79-81.
\item[\textsuperscript{55}] U.S. Const. arts. I, II.
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whose officials are appointed and confirmed, but are not subject to political accountability, however, if we view the jury as the political element of the Judicial branch, then the document is even more complete in distributing community participation in the name of self-rule.  

The Bill of Rights was ratified after Article VI. The meaning of Article VI before the Bill of Rights was ratified is limited to the contents of the Constitution during that period of time between June 21, 1788 and December 15, 1791, from the date the Constitution was ratified and effective until the date the Bill of Rights was ratified. The time period between the ninth State ratifying the Constitution on June 21, 1788, and the convening of the First Congress to meet under the Constitution on March 4, 1789, was eight and a half months. In comparison, only six and a half months passed between Congress meeting until Congress passed the Act establishing the judicial courts of the United States, on September 24, 1789, and Congress approving the first twelve proposed amendments (ten were ratified by the States and became the Bill of Rights) and sending them to the States for ratification on September 25, 1789. The time period between the Constitution becoming effective and Congress meeting was actually longer than that required by Congress to produce two of the most significant instruments of legislation it has ever produced. And, the Judiciary Act and the Bill of Rights went through the legislative process concurrently, which is evident by their Congressional approval dates following one day after the other. The Framers made provisions in Article IV which provided Constitutionally assured rights

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56 U.S. CONST. arts. I, III.
57 U.S. CONST. amends. I-X. U.S. CONST. art. VI, § 1, cl. 2.
63 U.S. CONST. amends. I-X.
via the "Privileges and Immunities" of Citizens in the several States. The language of Article IV may be read as covering a broad body of rights and protections that also include the concepts of due process and fundamental fairness, especially when read in the light of being written by people who up until the Declaration of Independence had considered themselves entitled to the rights of Englishmen. "When we turn to Blackstone, we find the words

64 U.S. CONST. art. IV, § 2, cl. 1. “That these, his Majesty's colonies, are likewise entitled to all the immunities and privileges granted and confirmed to them by royal charters, or secured by their several codes of provincial laws.” DECLARATION AND RESOLVES OF THE FIRST CONTINENTAL CONGRESS para. 13 (U.S. 1774). (emphasis added.) Here, it is important to note the use of the word ‘nevertheless’ in the Constitution, which provides “Judgment in Cases of Impeachment shall not extend further than removal from Office, and disqualification to hold and enjoy any Office of honor, Trust or Profit under the United States: but the Party convicted shall nevertheless be liable and subject to Indictment, Trial, Judgment and Punishment, according to Law.” U.S. CONST. art. I, § 3, cl. 7. (emphasis added.) Here, within Article I of the main unamended 1787 Constitution, it is implied that absent this ‘nevertheless’ phrase there would be protection from being tried twice, which is an expression of an understanding of protection from double jeopardy, which of course was restated in the Fifth Amendment in 1789. U.S. CONST. art. I, § 3, cl. 7. U.S. CONST. amend. V.

65 “The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.” U.S. CONST. art. IV, § 2, cl. 1.

66 U.S. CONST. art. VI, § 2, cl. 1.

67 “…do in the first place (as their ancestors in like case have usually done) for the vindicating and asserting their ancient rights and liberties declare…” thereafter declaring many rights, privileges, and protections until "All which their Majesties are contented and pleased shall be declared, enacted and established by authority of this present Parliament, and shall stand, remain and be law of this realm for ever;” ENGLISH BILL OF RIGHTS § I para. 18 - 36 (Eng. 1689). “Resolved, N.C.D. 2. That our ancestors, who first settled these colonies, were at the time of their emigration from the mother country, entitled to all the rights, liberties, and immunities of free and natural-born subjects, within the realm of England.” DECLARATION AND RESOLVES OF THE FIRST CONTINENTAL CONGRESS para. 8 (U.S. 1774). The clearly understood value of Birth rights were expressed in the first Naturalization Act as well. An Act to establish an uniform Rule of Naturalization. SECTION 1. Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That any alien, being a free white person, who shall have resided within the limits and under the jurisdiction of the United States for the term of two years, may be admitted to become a citizen thereof, on application to any common law court of record, in any one of the states wherein he shall have resided for the term of one year at least, and making proof to the satisfaction of such court, that he is a person of good character, and taking the oath or affirmation prescribed by law, to support the constitution of the United States, which oath or affirmation such court shall administer; and the clerk of such court shall record such application, and the proceedings thereon; and thereupon such person shall be considered as a citizen of the United States. And the children of such persons so naturalized, dwelling within the United States, being under the age of twenty-one years at the time of such naturalization, shall also be considered as citizens of the United States. And the children of citizens of the United States, that may be born beyond the sea, or out of the limits of the United States, shall be considered as natural born citizens: Provided, That the right of citizenship shall not descend to persons whose fathers have never been resident in the United States: Provided also, That no person heretofore proscribed by any state, shall be admitted a citizen as aforesaid, except by an act of the legislature of the state in which such person was proscribed. An Act to establish an uniform Rule of Naturalization. Act of March 26, 1790. 1 Stat. 103, sess. II, ch. 3. (1790). (emphasis added.)

68 “…we most devoutly implore His divine goodness to protect us happily through this great conflict, to dispose our adversaries to reconciliation on reasonable terms, and thereby to relieve the empire from the calamities of civil war.” DECLARATION OF THE CAUSES AND NECESSITY OF TAKING UP ARMS para. 14 (U.S. 1775). (emphasis added.) "Nor have We been wanting in attentions to our British brethren." THE DECLARATION OF INDEPENDENCE para. 31 (U.S. 1776). (emphasis added.)
privileges and immunities used to describe various entitlements embodied in the landmark English charters of liberty of Magna Charta, the Petition of Right, the Habeas Corpus Act, the English Bill of Rights of 1689, and the Act of Settlement of 1701. These English documents were the fountainhead of the common law and the acknowledged forebears of many particular rights that later appeared in the federal Bill, sometimes in identical language. These privileges and immunities were the already well-established rights of Englishmen at the time of adopting the Constitution, which were to become the Constitutional rights for the United States upon ratifying the Constitution.

This understanding of a uniform body of protections is a prerequisite for any reasonable application of Article IV, section 1 to be valid. It provides, "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof." The section requires "Full Faith and Credit shall be given in each State…to the judicial Proceedings of every other State." This

69 Although discussed in a post Fourteenth Amendment environment, Justice MURPHY expanded beyond the enumerated rights in the Bill of Rights, which would take into account the elements of due process, and fundamental fairness, and rights covered in the gap filling provision known as the Ninth Amendment. "Mr. Justice MURPHY, with whom Mr. Justice RUTLEDGE concurs, dissenting. While in substantial agreement with the views of Mr. Justice BLACK, I have one reservation and one addition to make. I agree that the specific guarantees of the Bill of Rights should be carried over intact into the first section of the Fourteenth Amendment. But I am not prepared to say that the latter is entirely and necessarily limited by the Bill of Rights. Occasions may arise where a proceeding falls so far short of conforming to fundamental standards of procedure as to warrant constitutional condemnation in terms of a lack of due process despite the absence of a specific provision in the Bill of Rights." ADAMSON v. CALIFORNIA, 332 U.S. 46, 67, 68 (1947). (emphasis added.) Mr. Justice BLACK expresses a total incorporation concept with respect to all of the first ten Amendments and includes them to be held within the phrase privileges and immunities when citing from The Anarchists' Case, 123 U.S. 131, 151 (1887). "the rights declared in the first ten amendments are to be regarded as privileges and immunities of citizens of the United States, which, as I insist, are protected as such by the Fourteenth Amendment." ADAMSON v. CALIFORNIA, 332 U.S. 46, 122 (1947).


71 Id. at 169.

72 U.S. CONST. art. IV, § 1.

73 Id. art. IV, § 1.

74 U.S. CONST. art. IV, § 1, cl. 1.
respect across State lines\textsuperscript{75} for the judicial proceedings of other States requires a common foundation\textsuperscript{76} of fundamental protections and acceptable practices.\textsuperscript{77} Otherwise the clause in the Constitution would be eviscerated of its meaning by evasion of actual practice, especially if people perceived injustice being done, even if only in another State.\textsuperscript{78} Upon ratification in 1788, Article VI provided the Constitution with a mechanism for enforcing itself against the State judges and requiring the State judges to respect the common foundation of rights.\textsuperscript{79}

Additionally, the Article VI mechanism of enforcing the Constitution against the States was approved by Congress\textsuperscript{80} and ratified by the States, with both groups knowing full well that

\textsuperscript{75} Id. art. IV, § 1, cl. 1.
\textsuperscript{76} The construction of clauses of the constitution by State courts is specifically addressed in the Judiciary Act of 1789, which was contemporaneously drafted with the Bill of Rights and approved by the same Congress one day prior. "And be it further enacted, That a final judgment or decree in any suit, in the highest court of law or equity of a State in which a decision could be had, where is drawn in question the validity of a treaty or statute of, or an authority exercised under the United States, and the decision is against their validity; or where is drawn in question the validity of a statute of, or an authority exercised under any State, on the ground of their being repugnant to the constitution, treaties or laws of the United States, and the decision is in favour of such their validity, or where is drawn in question the construction of any clause of the constitution, or of a treaty, or statute of, or commission held under the United States, and the decision is against the title, right, privilege or exemption specially set up or claimed by either party, under such clause of the said Constitution, treaty, statute or commission, may be re-examined and reversed or affirmed in the Supreme Court of the United States upon a writ of error,…except that the Supreme Court, instead of remanding the cause for a final decision as before provided, may at their discretion, if the cause shall have been once remanded before, proceed to a final decision of the same, and award execution. But no other error shall be assigned or regarded as a ground of reversal in any such case as aforesaid, than such as appears on the face of the record, and immediately respects the before mentioned questions of validity or construction of the said constitution, treaties, statutes, commissions, or authorities in dispute." An Act to establish the Judicial Courts of the United States, 1 Stat. 73 § 25 (1789).
\textsuperscript{77} "THE Conventions of a number of the States, having at the time of their adopting the Constitution, expressed a desire, in order to prevent misconstruction or abuse of its powers, that further declaratory and restrictive clauses should be added: And as extending the ground of public confidence in the Government, will best ensure the beneficent ends of its institution:" Resolution of the First Congress Submitting Twelve Amendments to the Constitution (U.S. 1789). (emphasis added.)
\textsuperscript{78} The force of legislation enacted by Congress, or even stronger, the ratification of Amendments by the States provides an area of law for common reference, so as to permit at the same time, other variations between the States on subjects where no national action has been taken. "…the nature of the provision and the objects to be attained by it, require that it should be controlled by one and the same will, and act uniformly by the same system of regulations throughout the Union. If, then, the states have a right, in the absence of legislation by congress, to act upon the subject, each state is at liberty to prescribe just such regulations as suit its own policy, local convenience and local feelings. The legislation of one state may not only be different from, but utterly repugnant to and incompatible with, that of another…" PRIGG v. PENNSYLVANIA, 41 U.S. (16 Pet.) 539, 623 (1842). (emphasis added.)
\textsuperscript{79} U.S. CONST. art. VI, § 1, cl. 2.
\textsuperscript{80} U.S. CONST. arts. VI, VII. An Amendment is not only approved by Congressional action, but also brought to life and made effective when ratified by the States themselves. U.S. CONST. art. V. It is important to recall these words from the Court, "…the power must be exclusive; it can reside but in one potentate; and hence, the grant of this
the Constitution included procedural provisions for "Amendments\textsuperscript{81} to this Constitution," and that the document was designed to accommodate future change, (in addition to being able to accommodate future changes in geography by adding new Territory and new States.)\textsuperscript{82} Moreover, the Article VI provision specifically refers to future "Laws of the United States which \textit{shall be made}," indicating an acknowledgement that the binding condition of the Judges in every State will change in the future and those changes shall be binding.\textsuperscript{83}

The Constitutional Convention has a record of intending Article VI to bind the State judges to the Constitution.\textsuperscript{84} During the drafting of the Constitution the Article VI clause was proposed by Luther Martin as "the supreme law of the respective States…& that the Judiciaries of the several States shall be bound thereby in their decisions, any thing in the respective laws of the individual States to the contrary notwithstanding."\textsuperscript{85} "The committee of detail changed the phraseology from the 'Judiciaries of the several States' (which would have included juries) to the 'judges of the several States,' which excluded juries but can be read as including national as well as state judges; it retained however, the wording 'supreme law of the several States' clearly implying that the judges were to apply the test of constitutionality to state legislation."\textsuperscript{86} "The

\textsuperscript{81} Amendments to the Constitution are provided for in Article V, which requires first, a supermajority (two-thirds) in both Houses (or on application of the Legislatures of the several States) and second, ratification by yet an even stronger supermajority (three-fourths) of the Legislatures (or by Conventions) in the several States. U.S. CONST. art. V. Here, the process is not simply the exercise of the will of the national legislature, but it is required that three-fourths of the States act separately to ratify the proposed Amendments that will become part of the Constitution. This is a high standard to meet, and requires active participation and agreement by the States themselves (three-fourths of the States to become effective).

\textsuperscript{82} U.S. CONST. art. VI, § 1, cl. 2. U.S. CONST. art. V, § 1. U.S. CONST. art. IV, § 3, cls. 1, 2.

\textsuperscript{83} U.S. CONST. art. VI, § 1, cl. 2. (emphasis added.)

\textsuperscript{84} \textit{Id.} art. VI, § 1, cl. 2.


committee of style radically altered the import of the clause by changing 'supreme law of the several States' to 'supreme law of the land', the revised phraseology clearly implying that judges were to apply the test of constitutionality to national as well as state legislation.

Although the practice of judicial review of legislation is not expressly provided for in the Constitution, it was established early on by the Supreme Court. Even if the Supreme Court or a State court never went so far as to strike down a statute, the courts could prevent unconstitutional enforcement of a statute that would violate the rights, or privileges, or immunities of people. Moreover, if the courts act in concert with the body of the people and allow the decision of the community by way of the jury to control, even by acts of jury nullification, the community is protected from the application of inappropriate legislative acts, and the court need not exercise excessive power over other branches of government.

The Continental Congress knew full well that it was controlling the Judges. Just as it placed itself in an intervening role within the Judicial branch in the first sentence of Article III which provides, "The judicial Power of the United States, shall be vested in one supreme Court,

87 The "law of the land" finds its roots in the Latin phrase of "Per Legem Terrae." BLACK'S LAW DICTIONARY 1293 (4th ed. 1951). Other Latin phrases that could have been used included: "Per Legem Angliae. By the law of England." BLACK'S LAW DICTIONARY 1293 (4th ed. 1951), "Leges Barbarorum. A class name for the codes of mediaeval European law." BLACK'S LAW DICTIONARY 1044 (4th ed. 1951), "Jus Gentium. The law of nations. That law which natural reason has established among all men is equally observed among all nations, and is called 'the law of nations,' as being the law which all nations use." BLACK'S LAW DICTIONARY 997 (4th ed. 1951). Note how "law of the land" was chosen and how Terrae stands in direct opposition to Mare (Latin for the Sea), and maritime law was controlled by the courts of admiralty, which were feared since judges in admiralty acted without juries. "Even so, in the Townshend Acts of 1767 Parliament made offenses triable by admiralty courts sitting without juries, with the result that the colonists, vehemently protesting, indulged in statements decrying tyranny and extolling trial by jury." LEONARD W. LEVY, THE PALLADIUM OF JUSTICE: ORIGINS OF TRIAL BY JURY 86 (1999).


89 Forrest McDonald does not press the point of Article VI Incorporation any further and adds, "Yet ambiguity remained." FORREST MCDONALD, NOVUS ORDO SECLOREM: THE INTELLECTUAL ORIGINS OF THE CONSTITUTION 255 (1985).

90 MARBURY v. MADISON, 5 U.S. 137 (1803).

and in such inferior Courts as the Congress may from time to time ordain and establish." The Congress preserved itself total control of establishing the inferior Courts, which create the requisite vehicle and allow the Supreme Court to serve in its appellate role, and provide the resources required to dilute the workload of the Supreme Court. Additionally, the Congress was well aware the State courts were already established, and there would be many more State Judges than federal judges to implement the administration of justice. Without the support of the pre-existing State courts, and any inferior courts that may be established by Congress, the Supreme Court would become powerless simply by being overloaded with work and deprived of resources at the discretion of Congress. And again later, appearing in Article VI, as just mentioned for Article III, the Congress created restraints upon the Judges, for Article VI bound the judges of the States to the Constitution.

Article VI presents another requirement to be imposed upon the judges of the States. Article VI further requires, "The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution; but no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States." In detail the statement is clear. "The…judicial Officers…of the several States…shall be bound by Oath or Affirmation to support this Constitution." The development of the clause at the convention for drafting the Constitution, accompanied by the requirement of an Oath to be bound to it, shows the State judges were to be

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92 U.S. CONST. art. III, § 1, cl. 1. (emphasis added.)
94 U.S. CONST. art. III, § 1, cl. 1.
95 U.S. CONST. art. VI, § 1, cl. 2. U.S. CONST. art. III, § 1, cl. 1.
96 U.S. CONST. art. VI, § 1, cl. 3.
97 Id. art. VI, § 1, cl. 3. (emphasis added.)
98 Id. art. VI, § 1, cl. 3.
bound to the Constitution.\textsuperscript{99} The Article VI oath requirement further applies to the State executives and the State Legislatures, which is clear evidence the Constitution is binding against the States with all the intent of the Congress.\textsuperscript{100} This across the board oath-bound requirement for all three branches of State government, is a clear indication there is Congressional intent\textsuperscript{101} in the Constitution to bind even litigation involving the State\textsuperscript{102} as a party.\textsuperscript{103}

\begin{footnotes}
\item[99] U.S. CONST. art. VI, § 1, cls. 2, 3.
\item[100] U.S. CONST. art. VI, § 1, cl. 3.
\item[101] U.S. CONST. art. VI, § 1, cls. 2, 3. "...the power must be exclusive; it can reside but in one potentate; and hence, the grant of this power carries with it the whole subject, leaving nothing for the State to act upon..." GIBBONS v. OGDEN, 22 U.S. (9 Wheat.) 1, 227 (1824). (emphasis added.)
\item[102] U.S. CONST. art. VI, § 1, cl. 3. PRIGG v. PENNSYLVANIA, 41 U.S. (16 Pet.) 539 (1842).
\item[103] Note that even the limitations on jurisdiction created by the Eleventh Amendment, which restrict jurisdiction to exclude cases involving the States named as a party in certain circumstances, act upon the "Judicial power of the United States" and do not restrict the jurisdiction of States courts. U.S. CONST. amend. XI. The State courts are still bound by the Constitution, if the State or the State courts permit a case of this type to proceed within the State court system. The Eleventh Amendment is credited as a response to the decision of Chisholm v. Georgia in 1793. The directive of Article VI provides “All Debts contracted and Engagements entered into, before the Adoption of this Constitution, shall be as valid against the United States under this Constitution, as under the Confederation.” U.S. CONST. art. VI, § 1, cl. 3. (emphasis added.) This substitutes the United States as a liable party. Consequently, by the Constitutional directive of Article VI, the United States should have been substituted as the proper party defendant (as the Article VI directed substitute for the State of Georgia) in the case of Chisholm v. Georgia in 1793. The soon following public dissatisfaction and revolt that lead to the Eleventh Amendment might have been avoided, had the Court observed its oath to support and adhere to the Constitution. Following are excerpts from Chisholm v. Georgia with opinions of the Majority from Justice WILSON, Justice BLAIR, and Chief Justice JAY. First in the sequence is the opinion by Justice WILSON, the only person in American history to have signed the Declaration of Independence and the Constitution and served as a Justice on the Supreme Court of the United States of America. Chisholm v. Georgia had opinions written by Justice BLAIR and Justice WILSON who both signed the Constitution as well as by Chief Justice JOHN JAY, one of three authors of the Federalist Papers (which included Jay John, James Madison and Alexander Hamilton). It is also worth noting that Mr. Edmund Randolph, of the Virginia delegation of the 1787 Constitutional Convention, served as Attorney General for the United States and represented the plaintiff in Chisholm. At [453] “WILSON, Justice. This is a case of uncommon magnitude. One of the parties to it is a STATE; certainly respectable, claiming to be Sovereign.... [454] To the Constitution of the United States the term SOVEREIGN, is totally unknown. There is but one place where it could have been used with propriety. But, even in that place it would not, perhaps, have comported with the delicacy of those, who ordained and established that Constitution. They might have announced themselves "SOVEREIGN" people of the United States: But serenely conscious of the fact, they avoided the ostentatious declaration. Having thus avowed by disapprobation of the purposes, for which the terms, State and Sovereign, are frequently used, and of the object, to which the application of the last of them is almost universally made; it is now proper that I should disclose the meaning, which I assign to both, and the application, [455] which I make of the latter. In doing this, I shall have occasion incidently to evince, how true it is, that States and Governments were made for man; and, at the same time, how true it is, that his creatures and servants have first deceived, next vilised, and, at last oppressed their master and maker. MAN, fearfully and wonderfully made, is the workmanship of his all perfect CREATOR: A State; useful and valuable as the contrivance is, is the inferior contrivance of man; and from his native dignity derives all its acquired importance. When I speak of a State as an inferior contrivance, I mean that it is a contrivance inferior only to that, which is divine: Of all human contrivances, it is certainly most transcendantly excellent. It is concerning this contrivance that Cicero says so sublimely, "Nothing, which is exhibited upon our globe, is more acceptable to that divinity, which governs the whole universe, than those communities and assemblages of men, which, lawfully associated, are denominated STATES." Let a State be considered as subordinate to the PEOPLE: But let every
\end{footnotes}
thing else be subordinate to the State. The latter part of this position is equally necessary with the former. For in the practice, and even at length, in the science of politics there has very frequently been a strong current against the natural order of things, and an inconsiderate or an interested disposition to sacrifice the end to the means. As the State has claimed precedence of the people; so, in the same inverted course of things, the Government has often claimed precedence of the State; and to this perversion in the Second degree, many of the volumes of confusion concerning sovereignty owe their existence. The ministers, dignified very properly by the appellation of the magistrates, have wished, and have succeeded in their wish, to be considered as the Sovereigns of the State. This Second degree of perversion is confined to the old world, and begins to diminish even there: but the first degree is still too prevalent, even in the several States, of which our union is composed. By a State I mean, a complete body of free persons united together for their common benefit, to enjoy peaceably what is their own, and to do justice others. It is an artificial person. It has its affairs and its interests: It has its rules: It has its rights: And it has its obligations. It may acquire property distinct from that if its members: It may incur debts to be discharged out of the public flock, not out of the private fortunes of individuals. It may be bound by contracts; and for damages arising from the breach of those contracts. In all our contemplations, however, concerning this feigned and artificial person, we should never forget, that, is truth and nature, those, who think and speak, and act, are men. … [465] Whoever considers, in a combined and comprehensive view, the general texture of the Constitution, will be satisfied, that the people of the United States intended to form themselves into a nation for national purposes. They instituted, for Such purposes, a national Government, complete in all its parts, with powers Legislative, Executive and Judiciary; and, in all those powers, extending over the whole nation. Is it congruous, that, with regard to such purposes, any man or body of men, any person natural or artificial, should be permitted to claim successfully an entire exemption from the jurisdiction of the national Government? Would not such claims, crowned with success, be repugnant to our very existence as a nation? When [466] so many trains of deduction, coming from different quarters, converge and unite, at last, in the same point; we may safely conclude, as the legitimate result of this Constitution, that the State of Georgia is amenable to the jurisdiction of this Court. … [466] But, in my opinion, this doctrine rests not upon the legitimate result of fair and conclusive deduction from the Constitution: It is confirmed, beyond all doubt, by the direct and explicit declaration of the Constitution itself. "The judicial power of the United States shall extend, to controversies between two States." Two States are supposed to have a controversy between them: This controversy is supposed to be brought before those vested with the judicial power of the United States: Can the most consummate degree of professional ingenuity devise a mode by which this "controversy between two States" can be brought before a Court of law; and yet neither of those States be a Defendant? "The judicial power of the United States shall extend to controversies, between a State and citizens of another State." Could the strictest legal language; could even that language, which is peculiarly appropriated to an art, deemed, by a great master, to be one of the most honorable, laudable, and profitable things in our law; could this strict and appropriated language, describe, with more precise accuracy, the cause now depending before the tribunal? Causes, and not parties to causes, are weighed by justice, in her equal scales: On the former solely, her attention is fixed: To the latter, she is, as she is painted, blind. I have now tried this question by all the touchstones, to which I proposed to apply it. I have examined it by the principles of general jurisprudence; by the laws and practice of States and Kingdoms; and by the Constitution of the United States. From all, the combined inference is; that the action lies.” CHISHOLM v. GEORGIA, 2 U.S. 419 at 453-66 (1793). (emphasis added.) (see U.S. Const. amend. XI.) “[451] From the opinion of Justice BLAIR, which predicts the limits of judicial power announced in an altogether different manner in Marbury v. Madison. Justice BLAIR. [451]...if, at the end of the business, notwithstanding the powers given us in the 14th section [452] of the judicial law, we meet difficulties insurmountable to us, we must leave it to those departments of Government which have higher powers; to which, however, there may be no necessity to have recourse: Is it altogether a vain expectation, that a State may have other motives than such as arise from the apprehension of coercion, to carry into execution a judgment of the Supreme Court of the United States, though not conformable to their own ideas of justice? At [450] What then do we find there requiring the submission of individual States to the judicial authority of the United States? This is expressly extended, among other things, to controversies between a State and citizens of another State. Is then the case before us one of that description? Undoubtedly it is, unless it may be a sufficient denial to say, that it is a controversy between a citizen of one State and another State. Can this change of order be an essential change in the thing intended? And is this alone a sufficient ground from which to conclude, that the jurisdiction of this Court reaches the case where a State is Plaintiff, but not where it is Defendant? In this latter case, should any man be asked, whether it was not a controversy between a State and citizen of another State, must not answer be in the affirmative? A dispute between A. and B. assuredly a dispute between B. and A. Both cases, I have no doubt, were intended; and probably the State was first named, [451] in respect to the dignity of a State. But that very dignity seems to have been thought a
Use of the term "several States" appeared in the draft version of Article VI, section 1, clause 2 above, and actually appeared in the final version of clause 3. The simultaneous legislative release by the First Congress of the Judiciary Act of 1789 and of the Bill of Rights sufficient reason for confining the fence to the case where a State is plaintiff. It is, however, a sufficient answer to say, that our Constitution most certainly contemplates, in another bunch of the cases enumerated, the maintaining a jurisdiction against a State, as Defendant; this is unequivocally asserted when the judicial power of the United States is extended to controversies between two or more States; for there, a State must, of necessity, be a Defendant.” CHISHOLM v. GEORGIA, 2 U.S. 419 at 450-52 (1793). (emphasis added.) From the opinion of Chief Justice JAY. At 470, “It is remarkable [471] that in establishing it, the people exercised their own rights, and their own proper sovereignty, and conscious of the plenitude of it, they declared with becoming dignity, "We the people of the United States, do ordain and establish this "Constitution." Here we see the people acting as sovereigns of the whole country; and in the language of sovereignty, establishing a Constitution by which it was their will, that the State Governments should be bound, and to which the State Constitutions should be made to conform. … [472] It is agreed, that one free citizen may sue any number on whom process can be conveniently executed; nay, in certain cases one citizen may sue forty thousand; for where a corporation is sued, all the members of it are actually sued, though not personally, sued. In this city [Philadelphia] there are forty odd thousand free citizens, all of whom may be collectively sued by any individual citizen. In the State of Delaware, there are fifty odd thousand free citizens, and what reason can be assigned why a free citizen who has demands against them should not prosecute them? Can the difference between forty odd thousand, and fifty odd thousand make any distinction as to right? Is it not as easy, and as convenient to the public and parties, to serve a summons on the Governor and Attorney General of Delaware, as on the Mayor or other Officers of the Corporation of Philadelphia? Will it be said, that the fifty odd thousand citizens in Delaware being associated under a State Government, stand in a rank so superior to the forty odd thousand of Philadelphia, associated under their charter, that although it may become the latter to meet an individual on an equal footing in a Court of Justice, yet that such a procedure would not comport with the dignity of the former? -- In this land of equal liberty, shall forty odd thousand in one place be compellable to do justice, and yet fifty odd thousand in [473] another place be privileged to do justice only as they may think proper? Such objections would not correspond with the equal rights we claim; with the equality we profess to admire and maintain, and with that popular sovereignty in which every citizen partakes. Grant that the Governor of Delaware holds an office of superior rank to the Mayor of Philadelphia, they are both nevertheless the officers of the people; and however more exalted the one may be than the other, yet in the opinion of those who dislike aristocracy, that circumstance cannot be a good reason for impeding the course of justice. If there be any such incompatibility as is pretended, whence does it arise? In what does it consist? There is at least one strong undeniable fact against this incompatibility, and that is this, any one State in the Union may sue another State, in this Court, that is, all the people of one State may sue all the people of another State. It is plain then, that a State may be sued, and hence it plainly follows, that suability and State sovereignty are not incompatible. As one State may sue another State in this Court, it is plain that no degradation to a State is thought to accompany her appearance in this Court. It is not therefore to an appearance in this Court that the objection points. To what does it point? It points to an appearance at the suit of one or more citizens. But why it should be more incompatible, that all the people of a State should be sued by one citizen, than by one hundred thousand, I cannot perceive, the process in both cases being alike; and the consequences of a judgment alike. Nor can I observe any greater inconveniencies in the one case than in the other, except what may arise from the feelings of those who may regard a lesser number of an inferior light. But if any reliance be made on this inferiority as an objection, at least one half of its force is done away by this fact, viz. that it is conceded that a State may appear in this Court as Plaintiff against a single citizen as Defendant; and the truth is, that the State of Georgia is at this moment prosecuting an action in this Court against two citizens of South Carolina. The only remnant of objection therefore that remains is, that the State is not bound to appear and answer as a Defendant at the suit of an individual: but why it is unreasonable that she should be so bound, is hard to conjecture: That rule is said to be a bad one, which does not work both ways; the citizens of Georgia are content with a right of suing citizens of other States; but are not content that citizens of other States should have a right to sue them.” CHISHOLM v. GEORGIA, 2 U.S. 419 at 470-73 (1793). (emphasis added.)

104. U.S. CONST. art. VI, § 1, cls. 2, 3.
makes clear the same Congress, made up of the same people, who had convened just eight and a half months after the Constitution became effective, were working on these key documents contemporaneously.\(^{105}\) Within the Judiciary Act of 1789 is a related statement in Section 34.\(^{106}\) Section 34 states, "And it be further enacted, That the laws of the several states, except where the constitution, treaties or statutes of the United States shall otherwise require or provide, shall be regarded as rules of decision in trials at common law in the courts of the United States in cases where they apply."\(^{107}\) Although the statute is written to control the actions of federal courts, it expressly provides that even when State law is to provide the rule of decision, the State law must yield to the federal Constitution, treaties or statutes. Note the exact phrase "several states" appears again from the same Congress, which approved and sent forward to the States the proposed Bill of Rights.\(^{108}\) By providing the "except where the constitution" language, this section is a direct reflection of the Article VI expression, which binds State judges to the Constitution.\(^{109}\) The same Congress, made up of the same people, at the same time in history, which approved the Bill of Rights were clearly in tune with the implications of Article VI as binding the Constitution against the States, and knew that these Amendments\(^{110}\) would, upon


\(^{106}\) "And it be further enacted, That the laws of the several states, except where the constitution, treaties or statutes of the United States shall otherwise require or provide, shall be regarded as rules of decision in trials at common law in the courts of the United States in cases where they apply." An Act to establish the Judicial Courts of the United States, 1 Stat. 73 § 34 (1789). (emphasis added.)

\(^{107}\) An Act to establish the Judicial Courts of the United States, 1 Stat. 73 § 34 (1789). (emphasis added.)


\(^{109}\) An Act to establish the Judicial Courts of the United States, 1 Stat. 73 § 34 (1789). U.S. CONST. art. VI, § 1, cl. 2.

\(^{110}\) Amendments to the Constitution are provided for in Article V, which requires first, a supermajority (two-thirds) in both Houses (or on application of the Legislatures of the several States) and second, ratification by yet an even stronger supermajority (three-fourths) of the Legislatures (or by Conventions) in the several States. U.S. CONST. art. V. Here, the process is not simply the exercise of the will of the national legislature, but it is required that three-fourths of the States act separately to ratify the proposed Amendments that will become part of the Constitution. This is a high standard to meet, and requires agreement by the States themselves.
ratification, become part of the Constitution\textsuperscript{111}, and would accordingly also be held against the States.\textsuperscript{112} The incorporation power via Article VI existed prior to ratification of the Bill of Rights, and was openly acknowledged in the Judiciary Act of 1789, and the Congress knew that as the Bill became a part of, and embodied within the Constitution itself, the Bill of Rights would be incorporated against the State judges.\textsuperscript{113}

What more important protections to require judges to enforce, than those involved in the administration of justice, specifically the "Privileges and Immunities of Citizens in the several States," and upon ratification, the provisions of the administration of justice Amendments, III through VIII.\textsuperscript{114} Some of these provisions appear in both State Constitutions and the United States Constitution, in fact "Six of the state constitutions codified fundamental or inalienable rights as fully as the Ten Amendments of the U.S. Constitution did in 1791."\textsuperscript{115} This state and federal apparent duplicity resulted from the adoption of State constitutions at different times\textsuperscript{116}

\textsuperscript{111} The ability to amend the Constitution does require a high standard (ratification by three-fourths of the several States) but this was the method selected for in contrast with the Colonists prior experience with the one hundred percent requirement of the ARTICLES OF CONFEDERATION § XIII (U.S. 1781), which provided, "nor shall any alteration at any time hereafter be made in any of them; unless such alteration be agreed to in a Congress of the United States, and be afterwards confirmed by the legislatures of every State." (emphasis added.)

\textsuperscript{112} U.S. CONST. art. VI, § 1, cl. 2. U.S. CONST. amends. I-X.

\textsuperscript{113} U.S. CONST. art. VI, § 1, cl. 2. U.S. CONST. amends. I-X. An Act to establish the Judicial Courts of the United States, 1 Stat. 73 § 34 (1789).

\textsuperscript{114} U.S. CONST. art. IV, § 2, cl. 1. U.S. CONST. amends. III-VIII.


\textsuperscript{116} For example, the Constitution of South Carolina of 1776 was a document consisting of a preamble and 34 articles, and similarly two years later the Constitution of South Carolina of 1778, provisions had been made beginning with article 38 that enumerated some of the rights of individuals. S.C. CONST. of 1776. S.C. CONST. of 1778. Another State with two constitutions prior to 1789 is Vermont. In contrast to South Carolina, both Vermont versions explicitly provide, "CHAPTER I A DECLARATION OF THE RIGHTS OF THE INHABITANTS OF THE STATE OF VERMONT" prior to a "CHAPTER II PLAN OR FRAME OF GOVERNMENT" which grants powers and allocates responsibilities. VT. CONST. of 1777. VT. CONST. of 1786. Variation in the articulation of administration of justice provisions were broad in language and possible interpretations and constructions. Compare the following provision, "That no Freeman of this State be taken or imprisoned, or disseized of his Freehold, liberties, or privileges, or outlawed, exiled or in any manner destroyed or deprived of his life, liberty, or property, but by the judgment of his peers or by the law of the land," S.C. CONST. of 1778, art. XLI, with the Vermont Constitution which provided at least five articles: X, XI, XII, XIII, XIV, which all pertained to the administration of justice. An example of one such provision states, "That in all prosecutions for criminal offences, a man hath a right to be heard by himself and his counsel - to demand the cause and nature of his accusation - to be confronted with the witnesses - to call for
by independently acting legislatures combined with the need for a uniform standard of judicial
proceedings so that the proper respect would be given to other States' judicial proceedings as
provided for in Article IV. The adoption of similar or equivalent Bill of Rights' provisions in
State constitutions after the adoption and ratification of the Bill of Rights was encouraged by the
States paying close attention to federal proceedings and decisions, which interpreted
constructions narrowly and demonstrated that omissions would be regarded by the judges as
showing intent to omit by legislative bodies. The federal level apparently repeating these
protective provisions served three purposes. One was to provide their constituents a plain
language reaffirmation of their protections, even though they likely were already included in the
Article IV "Privileges and Immunities" clause. This was not merely political capital, it is a
Constitution, and would be read by many more of the people than the numerous statutes
produced by a legislative body, such as the Judiciary Act of 1789. This would ameliorate
constituents, and possibly fuel political support for seated Congressmen, since, "During the
ratification debates of 1787-1788, lack of a bill of rights turned out to be a powerful argument
against the proposed Constitution." Second, the federal provisions would provide a common
foundation, although States could add to the protections, and any States that were deficient
would need to observe the national Constitutional provisions, and this would enhance the
strength of the "Full Faith and Credit shall be given in each State to the judicial Proceedings of

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117 U.S. CONST, art. IV, § 1, cl. 1.
118 But as the jurisdiction of the court has been described, it has been regulated by congress, and an affirmative
description of its powers must be understood as a regulation, under the constitution, prohibiting the exercise of other
powers than those described." UNITED STATES v. MORE, 7 U.S. 159, 173 (1805). (emphasis added.)
119 U.S. CONST. art. IV, § 1, cl. 2.
STATE CONSTITUTIONS IN THE REVOLUTIONARY ERA (Rita Kimber & Robert Kimber trans., Rowman & Littlefield
every other State\textsuperscript{122}," provision in Article IV.\textsuperscript{123} And third, although only States were permitted to ratify the Constitution and its Amendments, Constitutional provisions had already been made for a District to serve as the seat of government, and for Territory and Property (none of which would be part of any State) to belong to the United States and to be under the control of the Congress, and such Territory(ies) and District would require the administration of legal proceedings and would be included within the phrase "shall be the supreme Law of the Land."\textsuperscript{124}

State constitutions held similar and overlapping provisions that appear to make the national Bill of Rights redundant\textsuperscript{125}, but the Bill of Rights provided a common framework and verbiage to work from. Duplicate provisions in State constitutions would also serve as a tool of

\textsuperscript{122} An example of concern for out of State proceedings is articulated as follows, "XIX. That no person shall be liable to be transported out of this State for trial, for any offence committed within this State." VT. CONST. of 1777, chap. I, art. XIX. And also as, "XXIII. That no person shall be liable to be transported out of this State, for trial for any offence committed within this State." VT. CONST. of 1786, chap. I, art. XXIII.

\textsuperscript{123} U.S. CONST. art. IV, § 1, cl. 1.

\textsuperscript{124} U.S. CONST. art. I, § 8, cl. 17. U.S. CONST. art. IV, § 3, cl. 2. U.S. CONST. art. VI, § 1, cl. 2.

\textsuperscript{125} At least nine States proclaimed rights for the people, but each in a different manner. There were five State constitutions with an explicit declaration of rights that preceded the framework of powers section of the State constitutions. MD. CONST. of 1776. N.C. CONST. of 1776. PA. CONST. of 1776. VT. CONST. of 1777. VT. CONST. of 1786. VA. CONST. of 1776. Two additional State constitutions included a list of specifically enumerated rights that followed the framework of government. S.C. CONST. of 1778. GA. CONST. of 1777. And two other States simply made a brief statement in one article of the State constitution that claimed the common law of England. N.J. CONST. of 1776, art. XXII. DEL. CONST. of 1776, art. XXV. Nine of the States explicitly mentioned the right of trial by jury in the State constitution, either within a forward section enumerating a declaration of rights, or within the body of the articles. At least six of these expressly state both civil and criminal jury rights, and the balance are general in terms and may be constructed to encompass both civil and criminal jury rights. The former six: GA. CONST. of 1777. MD. CONST. of 1776. N.C. CONST. of 1776. PA. CONST. of 1776. VT. CONST. of 1776. VA. CONST. of 1776. The latter three: N.J. CONST. of 1776. N.Y. CONST. of 1777. S.C. CONST. of 1778. The right of freedom of religion is addressed in constitutions of nine of the States, to include a provision for State establishment of religion in two State constitutions, (Maryland and South Carolina.) DEL. CONST. of 1776. GA. CONST. of 1777. MD. CONST. of 1776. N.J. CONST. of 1776. N.C. CONST. of 1776. PA. CONST. of 1776. S.C. CONST. of 1778. VT. CONST. of 1786. VA. CONST. of 1776. The variation within the State constitutions providing for the rights of the people was extremely broad. Maryland listed "A Declaration of Rights" that went on for 42 articles, while New Hampshire limited its constitution to creating a framework of government and just briefly stating, "but felt ourselves happy under her (Great Britain) protection, while we could enjoy our constitutional rights and privileges." MD. CONST. of 1776. N.H. CONST. of 1776. Some provisions that were designed to provide the exact same protections were phrased quite differently. A simple example is the provision concerning the Eighth Amendment prohibitions and protections as in the Georgia and Maryland constitutions. "Excessive fines shall not be levied, not excessive bail demanded." GA. CONST. of 1777, art. LIX. "That sanguinary laws ought to be avoided, as far as is Consistent with the safety of the State; and no law, to inflict cruel and unusual pains and penalties, ought to be made in any case, or at any time hereafter." MD. CONST. of 1776, art. XIV. U.S. CONST. amend. VIII. The variation in the expression of these provisions was broad and a Bill of Rights that became part of the Constitution would be able to address the need for uniformity, the needs of the people and for the fair and efficient administration of justice.
State legislators to demonstrate their own commitment to their constituents' interests and needs, as well as to provide the basic foundation upon which could be built on to increase the protections in particular areas of interest to that state.\textsuperscript{126} Of course, if a State constitution already made provisions, which were duplicated in the Bill of Rights, it would have the benefit of a court record regarding those issues and in that verbiage, and there would be no legal value and certainly no political value in removing provisions solely because they also happened to be in the United States Constitution.\textsuperscript{127} Simple pride in one's own State\textsuperscript{128} and being able to claim self-government in one's own state would provide impetus to repeat the same provisions in a State constitution as well. Moreover, in addition to enriching local legislative input, restatement in State constitutions would accelerate State courts putting forth their own interpretations in State court systems that had developed within their own localities before the intervention of federal jurisprudence. Waiting for federal jurisprudence would probably also require more time, in order to arrive at the issues that confront States much more often, especially with regards to trial by jury, and the administration of justice provisions. If mere duplicity\textsuperscript{129} across State and national constitutional principles were a fatal problem for Article VI Incorporation, then the duplicity of

\textsuperscript{126} U.S. CONST. amends. I-X.
\textsuperscript{127} Id. amends. I-X.
\textsuperscript{128} “It is the opinion of the undersigned, that this right is vested in the commanders in chief of the militia of the several states.” To his Excellency the Governor, and the Honorable Council of the Commonwealth of Massachusetts 8 Mass. 548 (1812).
\textsuperscript{129} If the mere presence of duplicity does prove anything, then it is critical to take note and compare the broad provision for right of civil trial by jury in the Judiciary Act of 1789 as well as the Seventh Amendment, for it is made all the more clear that the Bill of Rights acts beyond the national government for it would be unnecessary to proceed with ratification by the several States if the right is fully covered within the Judiciary Act of 1789. It is clear the statute acts upon the federal government, and the Amendment must act upon something much more, that being the States, which of course also requires ratification by a supermajority of the several States. “…And the trial of issues of fact, in the district courts, in all causes except civil causes of admiralty and maritime jurisdiction, shall be by jury.” An Act to establish the Judicial Courts of the United States, 1 Stat. 73 § 9 (1789). "And when the sum for which judgment should be rendered is uncertain, the same shall, if either of the parties request it, be assessed by a jury." An Act to establish the Judicial Courts of the United States, 1 Stat. 73 § 26 (1789). "…and the trial of issues in fact in the circuit courts shall, in all suits, except those of equity, and of admiralty, and maritime jurisdiction, be by jury." An Act to establish the Judicial Courts of the United States, 1 Stat. 73 § 12 (1789). "In suits at common law…the right of trial by jury shall be preserved…” U.S. CONST. amend. VII.
key Constitutional phrases between the Fourteenth Amendment and the Constitution and other Amendments would also present fatal impediments to it and its basis for incorporation models.\(^\text{130}\)

One would expect States within a nation, and the nation itself to share common foundations in the principles of law and justice, especially when founded upon a common legal ancestry. This common legal history taught the people that Judges must be restrained; and the discussion below addresses some methods of restraint.

Is it possible the Constitution binds the Judges of the States, only in the appellate role, since the Supreme Court reviews State highest court decisions. First, Article VI\(^\text{131}\) of the Constitution expressly provides that the document itself binds the Judges of the States, which means they must comply with the Constitution on their own, and do not have to wait, and cannot choose to wait, to be reviewed by the U.S. Supreme Court and be ordered to comply with the Constitution. Second, if the Judges were intended to only be bound by the Constitution only after appellate review, or with respect to the U.S. Supreme Court's special areas of original jurisdiction, (especially for cases between two or more States), any such limited binding language would be located in Article III, section 2, clause 2,\(^\text{132}\) which states the jurisdiction of the "supreme Court" as follows, "In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be a Party, the supreme Court shall have original Jurisdiction. In all other Cases before mentioned, the supreme Court shall have appellate

\(^{130}\) U.S. CONST. art. VI, § 1, cl. 2. U.S. CONST. amend. XIV, § 1. U.S. CONST. art. IV, § 2, cl. 1. U.S. CONST. amend. V.

\(^{131}\) U.S. CONST. art. VI, § 1, cl. 2.

\(^{132}\) "In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be a Party, the supreme Court shall have original Jurisdiction. In all other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make." U.S. CONST. art. III, § 2, cl. 2.
Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations\textsuperscript{133} as the Congress shall make.\textsuperscript{134} Note also that the Congress retained the power to make the judicial regulations.\textsuperscript{135} Here would have been the place to include the language so as to provide specific clarity that they were binding the State Judges only to U.S. Supreme Court appellate review decisions. It is also important to note how carefully this section was drafted. Look at the phrase "before mentioned"\textsuperscript{136}, which refers to the types of cases and controversies that are within the power of the United States Judiciary, and are described in Article III, section 2, clause 1.\textsuperscript{137} The

\textsuperscript{133} "and under such regulations, as the congress shall make." UNITED STATES v. MORE, 7 U.S. 159, 169 (1805). U.S. CONST. art. III, § 2, cl. 2. An Act to establish the Judicial Courts of the United States. Act of Sept. 24, 1789, 1 Stat. 73 (1789).

\textsuperscript{134} U.S. CONST. art. III, § 2, cl. 2.

\textsuperscript{135} Id. art. III, § 2, cl. 2.

\textsuperscript{136} Id. art. III, § 2, cl. 2.

\textsuperscript{137} "The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; - to all Cases affecting Ambassadors, other public Ministers and Consuls, - to all Cases of admiralty and maritime Jurisdiction; - to Controversies to which the United States shall be a Party; - to Controversies between two or more States, -between a State and Citizens of another State; - between Citizens of different States; - between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens, or Subjects." U.S. CONST. art. III, § 2, cl. 1. It is helpful to see how narrowly jurisdiction has been interpreted by the Court by reviewing \textit{The Cherokee Nation v. Georgia} of 1831. Chief Justice MARSHALL, "The court has bestowed its best attention on this question, and, after mature deliberation, the majority is of opinion that an Indian tribe or nation within the United States is not a foreign state in the sense of the constitution, and cannot maintain an action in the courts of the United States."… THE CHEROKEE NATION v. GEORGIA, 30 US 1, 20 (1831). (emphasis added.) The holding in Cherokee Nation cannot be reversed and requires an amendment of the Constitution in order to obtain such jurisdiction. In contrast, the Court fails to cite its Constitutional lack of jurisdiction over Indian Tribes or Nations whenever convenient, and even cites mere Congressional power to overcome this conundrum, "We believe that the question of ownership, both past and present, was decided in favor of the Indians by the Supreme Court and may not now be relitigated. … The problem is the jurisdiction of the federal courts to determine a boundary dispute between Indian tribes without congressional action waiving immunity and consenting to suit." THE CHEROKEE NATION v. OKLAHOMA, 461 F.2d 674, 678, 680 (1972). Returning to MARSHALL in 1830, "The objects, to which the power of \textit{regulating commerce} might be directed, are divided into three distinct classes -- foreign nations, the several states, and Indian tribes. When forming this article, the convention considered them as entirely distinct. We cannot assume that the distinction was lost in framing a subsequent article, unless there be something in its language to authorize the assumption. The counsel for the plaintiffs contend that the words "Indian [19] tribes" were introduced into the article, empowering congress to \textit{regulate commerce}, for the purpose of removing those doubts in which the management of Indian affairs was involved by the language of the ninth article of the confederation. Intending to give the whole power of managing those affairs to the government about to be instituted, the convention conferred it explicitly; and omitted those qualifications which embarrassed the exercise of it as granted in the confederation. This may be admitted without weakening the construction which has been intimated: Had the Indian tribes been foreign nations, in the view of the convention; this exclusive power of regulating intercourse with them might have been, and most probably would have been, specifically given, in language indicating that idea, not in language contradistinguishing them from foreign nations. Congress might have been empowered \textit{to regulate commerce with foreign nations, including the Indian tribes, and among the several states.}" This language would have suggested itself to statesmen who
phrase "before mentioned"\textsuperscript{138} serves as a special limitation on jurisdiction so that the phrase "In all other Cases"\textsuperscript{139} cannot be misinterpreted to extend the powers of the United States Judiciary beyond that granted in the Constitution. These clear expressions of limitations on Judges and the judicial power were of great concern to the American Colonists who were exposed to the abuses of Judges in their exercise of control over kangaroo courts that operated without juries acting under the British Crown.\textsuperscript{140}

When examining the Judges and Article VI Incorporation, take note of the parallels in language between Article III\textsuperscript{141} and Article VI.\textsuperscript{142} Article III, section 2, clause 1 states, "The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; - to

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\textit{considered the Indian tribes as foreign nations, and were yet desirous of mentioning them particularly. It has been also said, that the same words have not necessarily the same meaning attached to them when found in different parts of the same instrument: their meaning is controlled by the context. This is undoubtedly true. In common language the same word has various meanings, and the peculiar sense in which it is used in any sentence is to be determined by the context. This may not be equally true with respect to proper names. Foreign nations is a general term, the application of which to Indian tribes, when used in the American constitution, is at best extremely questionable. In one article in which a power is given to be exercised in regard to foreign nations generally, and to the Indian tribes particularly, they are mentioned as separate in terms clearly contradistinguishing them from each other. We perceive plainly that the constitution in this article does not comprehend Indian tribes in the general term "foreign nations;" not we presume because a tribe may not be a nation, but because it is not foreign to the United States. When, afterwards, the term "foreign state" is introduced, we cannot impute to the convention the intention to desert its former meaning, and to comprehend Indian tribes within it, unless the context force that [20] construction on us. We find nothing in the context, and nothing in the subject of the article, which leads to it." THE CHEROKEE NATION v. GEORGIA, 30 US 1, 18-20 (1831). (emphasis added.)
\end{quote}

\\textsuperscript{138} U.S. CONST. art. III, § 2, cl. 2.
\\textsuperscript{139} Id. art. III, § 2, cl. 2.
\\textsuperscript{140} …or by any other act of parliament relating to the trade or revenues of the said colonies or plantations, in any court of admiralty in the respective colony or plantation where the offence shall be committed, either party, who shall think himself aggrieved by such determination, may appeal from such determination to any court of law…" THE STAMP ACT § LX (Eng. 1765). "And be it further enacted by the authority aforesaid, That all the offences which are by this act made felony, and shall be committed within any part of his Majesty's dominions, shall and may be heard, tried, and determined, before any court of law…" THE STAMP ACT § LXI (Eng. 1765). THE TOWNSHEND ACT (Eng. 1767). "Even so, in the Townshend Acts of 1767 Parliament made offenses triable by admiralty courts sitting without juries, with the result that the colonists, vehemently protesting, indulged in statements decrying tyranny and extolling trial by jury." LEONARD W. LEVY, THE PALLADIUM OF JUSTICE: ORIGINS OF TRIAL BY JURY 86 (1999).
\\textsuperscript{141} U.S. CONST. art. III.
\\textsuperscript{142} U.S. CONST. art. VI.
all Cases affecting Ambassadors, other public Ministers and Consuls;...\textsuperscript{143} The language used herein reflects very closely the language quoted above from Article VI\textsuperscript{144} as well as the opening language quoted above from Article III.\textsuperscript{145} The text is so similar, that it is clear the document was written for the reader to see that the different Articles, sections, and clauses relate to each other in meaning and purpose, and it would be improper not to acknowledge this. The educated reader can not assume that only Article III, section 2, clauses 1 and 2 are related because they reside within the same Article and section, or since they happen to be in sequence; it must be recognized and acknowledged that both clauses also interrelate with Article VI, section 1 when reading the Constitution as a complete document, adopted at one time, by representatives all living at the same time.\textsuperscript{146} Therefore, although it is important to look at each clause, it is just as important, if not more so, to look at the document as a whole when studying the U.S. Constitution.\textsuperscript{147}

Comparing the language of Article III\textsuperscript{148}, which articulates and provides limits upon the authority and jurisdiction of the judicial power of the United States, one should bear in mind the similarity in phrasing used in Article VI\textsuperscript{149}, which binds the Judges in every State\textsuperscript{150} to this Constitution. One result of this attempt to restrain Judges was based on a problem experienced by the Colonists due to The Stamp Act of 1765, which permitted admiralty courts to try cases without juries.\textsuperscript{151} This problem resulted in the former Colonists writing the Constitution so as to control admiralty jurisdiction, and hence admiralty jurisdiction is explicitly within the

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\textsuperscript{143} U.S. CONST. art. III, § 2, cl. 1. (emphasis added.)
\textsuperscript{144} U.S. CONST. art. VI, § 1, cl. 2.
\textsuperscript{145} U.S. CONST. art. III, § 2, cl. 2.
\textsuperscript{146} U.S. CONST. art. III. U.S. CONST. art. VI.
\textsuperscript{147} U.S. CONST.
\textsuperscript{148} U.S. CONST. art. III, § 2, cl. 2.
\textsuperscript{149} U.S. CONST. art. VI, § 1, cl. 2.
\textsuperscript{150} \textit{Id.} art. VI, § 1, cl. 2.
\end{flushleft}
jurisdiction of the judicial power of the United States. And as early as the First Session of Congress, within the Judiciary Act of 1789 Congress provided, "exclusive original jurisdiction of all civil cases of admiralty and maritime jurisdiction...within their respective districts as well as upon the high seas; saving to suitors, in all cases, the right of a common law remedy." The right of a common law remedy is best defined by the Colonial Bill of Rights, which "Resolved,...That the respective colonies are entitled to the common law of England, and more especially to the great and inestimable privilege of being tried by their peers of the vicinage, according to the course of the law." The result is that even in the area of admiralty, which was one of the very limited areas where courts hear cases without a jury, the right to a common law remedy was explicitly preserved. This is an example of how the Colonists were proactive in restraining Judges to the fullest extent possible.

Article VI is a clear, powerful, and explicit expression by the U.S. Constitution, which acts to bind the Judges in every State to comply with the U.S. Constitution and thereby serves as the first mechanism of 'Incorporation against the State Judges.' This model for incorporation, although limited to the Judges, acts by the plain text, to protect both individual and community rights.

Textual examination of the Constitution requires simultaneously referring to other historical documents written by the English authorities and documents adopted by the American Colonists themselves. The documents actually written and adopted by the Colonists provide the

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152 An Act to establish the Judicial Courts of the United States, 1 Stat. 73 § 9 (1789).
154 U.S. CONST. art. VI.
155 Id. art. VI, § 1, cl. 2.
156 This dual application of both individual and community protections and prohibitions is in direct contrast with alternative models providing either community or individual provisions, such as described here: "...the grand idea of the original Bill of Rights - the rights of the people - meets the grand idea of the Fourteenth Amendment: the privileges and immunities of citizens of the United States. The phrases are similar, yet different. The first was centrally directed at the federal government; the second, at the states." AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION 133 (1998).
most accurate view of the issues they collectively agreed upon as issues of sufficient concern and impact on their lives worthy of Constitutional provisions. Of the first ten Amendments\textsuperscript{157} of the Constitution, several consist of what are sometimes known as criminal procedure protections. Since the nature of Incorporation provided for in Article VI\textsuperscript{158} addresses the Judges of the States, detailed examination of the Bill of Rights begins with Article III and Amendments III, IV, V, VI, VII, and VIII.\textsuperscript{159} This paper refers to these as the 'administration of justice' Amendments. The next section considers the administration of justice Amendments.

\textbf{IV. Administration of Justice Amendments}

Article III of the U.S. Constitution creates the judicial power of the United States, and Article III, section 2, clause 3 states, "The Trial of all Crimes, except in Cases of Impeachment shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed;…"\textsuperscript{160} Article III continues on to section 3, which addresses treason, which was of concern to the ratifying several States, and will be discussed in detail later.\textsuperscript{161} The power of greatest impact in the courtroom is that of deciding the outcome of the case, and any power exercised in the courtroom by a jury reduces the power of and serves to control judges. Article III is the first place to articulate trial by jury in the Constitution, and trail by jury is further articulated within the Bill of Rights, which serves to restrain the power exercised by judges through the mechanism of Article VI Incorporation. The above quote provides for trial by jury, but even more strongly, it \textit{mandates} that \textit{all} criminal trials shall be by jury, thereby effectively

\textsuperscript{157} U.S. CONST. amends. I-X.
\textsuperscript{158} U.S. CONST. art. VI, § 1, cl. 2.
\textsuperscript{159} U.S. CONST. art. III. U.S. CONST. amends. III, IV, V, VI, VII, VIII.
\textsuperscript{160} U.S. CONST. art. III, § 2, cl. 3.
\textsuperscript{161} U.S. CONST. art. III, § 3.
prohibiting judges from exercising exclusive control over criminal trials. The clause goes on to provide for requirements of geographically where the trial must be located. Both of these issues, trial by jury and the location of the trial, were of concern to the Americans, in addition to the handling and treatment of treason. Amendments V, VI, and VII all explicitly include provisions for a jury. Amendment IV covers searches and seizures, which may be used as mechanisms to perform arrests or obtain evidence, possibly of criminal activity. Amendment III provides a prohibition on quartering soldiers, and addresses the 'takings' portion of Amendment V, as well as the specific "houses" portion of Amendment IV. And, Amendment VIII covers the consequences and remedies, such as fines and punishments, resulting from the enforcement of judgments, as well as remedies for simply being arrested, such as bails, which are all elements in the administration of justice, especially criminal justice. As discussed above, it is important to keep all of these elements in mind as we examine each individual element. Specific concerns of the Colonists regarding the judicial authority of the United States not included within Article III of the original U.S. Constitution of 1789, were soon thereafter added in 1791 (although proposed as early as 1789) by the administration of justice Amendments to provide additional clarity with respect to the Constitutional protections.

Trial by jury was a critical issue for the Colonists, and the Colonists were operating under the authority of England and regarded themselves as Englishmen entitled to the rights of

163 U.S. CONST. amends. V, VI, VII.
164 U.S. CONST. amend. IV.
165 U.S. CONST. amends. III, IV, V.
166 U.S. CONST. amend. VIII.
167 U.S. CONST. amends. III, IV, V, VI, VII, VIII.
168 "THE Conventions of a number of the States, having at the time of their adopting the Constitution, expressed a desire, in order to prevent misconstruction or abuse of its powers, that further declaratory and restrictive clauses should be added: And as extending the ground of public confidence in the Government, will best ensure the beneficent ends of its institution:" Resolution of the First Congress Submitting Twelve Amendments to the Constitution (U.S. 1789). (emphasis added.)
Englishmen. This is explicitly expressed in the Declaration and Resolves of the First Continental Congress, of October 14, 1774, ("Colonial Bill of Rights, 1774") which states, "the inhabitants of the English colonies in North-America, by the immutable laws of nature, the principles of the English constitution, and the several charters or compacts, have the following RIGHTS…"\(^{169}\) This introduction to the rights they demanded, shows their collective understanding that they were Englishmen, and were entitled to the rights of Englishmen. The idea of trial by jury, and specifically of being tried by one's peers, reaches back in English history prior to Colonial America. The Petition of Right, 1628, specifically provided, "that no freeman may be taken or imprisoned or be disseized of his freehold or liberties, or his free customs, or be outlawed or exiled, or in any manner destroyed, but by the lawful judgment of his peers, or by the law of the land."\(^{170}\) Later in the Colonial Bill of Rights of 1774, the Colonists specifically resolved, "That the respective colonies are entitled to the common law of England, and more especially to the great and inestimable privilege of being tried by their peers of the vicinage, according to the course of that law."\(^{171}\)

The concerns of the Colonists for a right of trial by jury continued to be voiced in the Declaration of the Causes and Necessity of Taking Up Arms of July 6, 1775, ("Declaration of Arms, 1775"), which was another declaration adopted by the Colonies as a group.\(^{172}\) The Declaration of Arms of 1775 explicitly stated, "statutes have been passed for extending the jurisdiction of courts of admiralty and vice admiralty beyond their ancient limits; for depriving us of the accustomed and inestimable privilege of trial by jury, in cases affecting both life and

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\(^{169}\) Declaration and Resolves of the First Continental Congress para. 6 (U.S. 1774). (also known as "Colonial Bill of Rights, 1774").  
\(^{170}\) Petition of Right § III (Eng. 1628).  
\(^{171}\) Declaration and Resolves of the First Continental Congress para. 11 (U.S. 1774).  
\(^{172}\) Declaration of the Causes and Necessity of Taking Up Arms para. 3 (U.S. 1775).
property;...”\textsuperscript{173} The Colonial Bill of Rights of 1774 also cited having, "extended the jurisdiction of courts of admiralty."\textsuperscript{174} This referred directly to authorizing courts of admiralty and vice-admiralty to hear cases without a jury. The Stamp Act of March 22, 1765, explicitly states additional admiralty powers added by Parliament in section LVII, "and for offences committed against any other act or acts of parliament relating to the trade or revenues of the said colonies or plantations; shall and may be prosecuted, sued for, and recovered, in any court of record, or in any court of admiralty,...or in any court of vice admiralty...”\textsuperscript{175} The Stamp Act of 1765 also expanded admiralty jurisdiction in section LVIII.\textsuperscript{176} The Stamp Act of 1765 and The Townshend Act of 1767 both created commercial duties for the Colonies and The Stamp Act permitted admiralty courts, which sat without juries, to determine cases.\textsuperscript{177} Although some measures were later repealed, the experience remained in the Colonists minds, and resulted in demanding their rights and protections through their pronouncements, and eventually later on, in the Constitution.

The duty of the people to monitor the courts and prosecutorial conduct is also a critical aspect of trial by jury. The right to trial by jury is often viewed as a right of the accused. However, the right to trial by jury belongs to the people as well as the accused, and is in fact a duty as well as a right of the people. The mandate in Article III\textsuperscript{178}, indicates this collective right and duty aspect, and the reasons for this are clearly articulated in the Declaration of Arms of 1775 which charges the English, "for exempting the 'murderers' of colonists from legal trial, and in effect, from punishment...”\textsuperscript{179} The final statement as Colonists, and the first statement as Free

\textsuperscript{173} Id. para. 3.
\textsuperscript{174} DECLARATION AND RESOLVES OF THE FIRST CONTINENTAL CONGRESS para. 1 (U.S. 1774).
\textsuperscript{175} THE STAMP ACT § LVII (Eng. 1765).
\textsuperscript{176} THE STAMP ACT § LVIII (Eng. 1765).
\textsuperscript{178} U.S. CONST. art. III, § 2, cl. 3.
\textsuperscript{179} DECLARATION OF THE CAUSES AND NECESSITY OF TAKING UP ARMS para. 3 (U.S. 1775).
and Independent States\textsuperscript{180}, the Declaration of Independence of July 4, 1776, addressed both aspects, (that is the \textit{right} of the defendant in addition to the \textit{right and duty} of the people), of a trial by jury by submitting the facts as, "For depriving us, in many cases, of the benefits of Trial by Jury:" and the \textit{right and duty} of the community to monitor the courts and prosecutors by charging them with, "For protecting them, by a mock Trial, from punishment for any Murders which they should commit on the Inhabitants of these States…”\textsuperscript{181} Although it used different phrasing, the Colonial Bill of Rights of 1774 also addressed trial by jury and the locale where the jurors were to come from.\textsuperscript{182} The Colonial Bill of Rights expresses the need for peers of the vicinage, which would allow the people to monitor alleged mock trials and to take action with respect to the defendant accordingly.\textsuperscript{183}

While jury trials may be rare today, the Constitutional mandate for criminal trial by jury, which was a concern to the Framers of the Constitution; is an aspect of Article III\textsuperscript{184} that is still with us today, and it \textit{may} be implemented at any time. The administration of justice Amendments, which correspond to judicial powers and proceedings, as mentioned above, are Amendments III, IV, V, VI, VII, and VIII\textsuperscript{185} of the Constitution. Amendment V\textsuperscript{186} is complex and ensures certain protections exist under the Constitution, and the analysis herein will be limited to just some of its provisions.

i. Fifth Amendment

\textsuperscript{180} \textsc{The Declaration of Independence} para. 32 (U.S. 1776).
\textsuperscript{181} \textit{Id.} paras. 17, 20.
\textsuperscript{182} "That the respective colonies are entitled to the common law of England, and more especially to the great and inestimable privilege of being tried by their peers of the vicinage, according to the course of that law." \textsc{Declaration and Resolves of the First Continental Congress} para. 11 (U.S. 1774).
\textsuperscript{183} \textit{Id.} para. 11.
\textsuperscript{184} “The Trial of all Crimes, except in Cases of Impeachment shall be by Jury:" \textsc{U.S. Const.} art. III, § 2, cl. 3.
\textsuperscript{185} \textsc{U.S. Const.} amends. III, IV, V, VI, VII, VIII.
\textsuperscript{186} \textsc{U.S. Const.} amend. V.
Amendment V begins: "No person shall be..." and among its provisions are procedural protections and due process protections. The phrasing here is carefully chosen, so as to include more than just citizens, more than inhabitants, and more than residents, via use of the term *person*, it is all inclusive in its protections. However, the phrasing utilizes the negative with the expression "No person..." which makes it a series of prohibitions, and as a prohibition, it opens the door to give every member of the community standing as a plaintiff in the event of a violation of this Constitutional provision. In that light, the Amendment is very powerful and provides a cause of action not just to an individual whose rights were violated, but also to the community as a whole. This is of critical importance, when one considers crimes could be and

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187 Id. amend. V.
188 U.S. CONST. amend. V. Among the provisions within the Fifth Amendment is, "nor shall be compelled in any criminal case to be a witness against himself," otherwise known as the provision against self-incrimination. As recently as 1908 the Supreme Court denied this protection when it ruled, "We think it manifest, from this review of the origin, growth, extent, and limits of the exemption from compulsory self-incrimination in the English law, that it is not regarded as a part of the *law of the land* of Magna Charta or the *due process of law*, which has been deemed an equivalent expression, but, on the contrary, is regarded as separate from and independent of due process. It came into existence not as an essential part of due process, but as a wise and beneficial rule of evidence developed in the course of judicial decision. This is a potent argument when it is remembered that the phrase was *borrowed from English law*, and that to that law we must look at least for its primary meaning. *** There seems to be no reason whatever, however, for straining the meaning of due process of law to include this privilege within it, because, perhaps, we may think it of great value." TWIWIN G v. NEW JERSEY, 211 U.S. 78, 105-106, 113 (1908). (emphasis added.) Therefore, in the Court's own words, the English history and root meanings are important to determining the meaning under the U.S. Constitution, and yet it claimed elements of admittedly great value may simply be dismissed. (And perhaps judicial decisions and rules should be discarded in some circumstances.)
189 U.S. CONST. amend. V.
190 Id. amend. V.
191 The private attorney general doctrine existed early on when the attorneys for the State or Commonwealth were expected to be advocates for the people and would proceed with an action on behalf of the people (Res publica), even if against an agent of the State. The plaintiff in such a case might be "Commonwealth" or "Res publica." "The purpose of the Act was to protect the public interest....Congress gave the right of appeal to persons 'aggrieved or whose interests are adversely affected' by Commission action...But these private litigants have standing only as representatives of the public interest...That a court is called upon to enforce public rights and not the interests of private property does not diminish its power to protect such rights....Unless Congress explicitly discloses such an intention we should not lightly attribute to it a desire to withhold from a reviewing court the power to save the public interest from injury or destruction while an appeal is being heard. To do so would stultify the purpose of Congress to utilize the courts as a means for vindicating the public interest....Courts are no less than administrative bodies are agencies of government. Both are instruments for realizing public purposes." SCRIPPS-HOWARD RADIO, INC. v. FEDERAL COMMUNICATIONS COMM'N, 316 U.S. 4, 14-15 (1942). "we suggested that those who come within the class of persons who may seek review, under provisions like that here, may be considered 'private Attorney Generals.'" W. R. GRACE & CO. v. CIVIL AERONAUTICS BOARD, 154 F.2d 271, 286 n.2 (1946). For example, a cause of action taken on behalf of the people (Res publica), where the State, or the Commonwealth, acting on behalf of the public, pursued a cause of action against an official, such as the sheriff, for improperly executing
often were punished with death, as they were in Colonial times, so the community, or its members, need standing to be able to act to prevent future violations and future unjustified executions by intervening and seeking redress for past violations. Besides the existence of at least two types of rights here, which create protections belonging to both the community and the individual, Amendment V explicitly provides for a Grand Jury proceeding, which is a powerful
tool for the community to monitor the courts and prosecutors alike.\textsuperscript{193} The provision for a Grand Jury provides restraints directly related to Article III criminal actions to be implemented against the States via the mechanism of Article VI Incorporation.\textsuperscript{194} And in Colonial times, Grand Juries examined and investigated other aspects of government.\textsuperscript{195} As discussed above, the jury was an institution respected by the Colonists, and in Colonial times grand jurors did more than restrain the prosecutor by requiring a prima facie case and an indictment before going to trial. Grand juries acted as local representatives by criticizing government abuses, proposing new laws, and administering statutes.\textsuperscript{196} Some early American grand juries served for a year and were free to investigate abuses or omissions of government power.\textsuperscript{197} Use of the Grand Jury\textsuperscript{198} for these additional purposes, is a most effective mechanism for providing local community rule within any government structure. How the jury shall be composed was of concern to the Framers and is addressed in the discussion immediately following.

ii. Sixth Amendment

Amendment VI requires an impartial jury of the State and district wherein the crime shall have been committed, to enhance and strengthen the Article III provision for trial by jury.\textsuperscript{199} Amendment VI begins: "In all criminal prosecutions, the accused shall…" and clearly states that the accused, (the defendant), must be provided with these protections.\textsuperscript{200} Use of the term "the accused" broadly includes all individuals within the community, regardless of sex, race, or other

\textsuperscript{193} U.S. Const. amend. V.
\textsuperscript{194} U.S. Const. amend. V. U.S. Const. art. III, § 2, cl. 3. U.S. Const. art. VI, § 1, cl. 2.
\textsuperscript{195} "They (grand juries) were free to investigate any abuses of government powers and any laxity in town governance." Leonard W. Levy, The Palladium of Justice: Origins of Trial by Jury 65, 66 (1999).
\textsuperscript{196} Id. at 64, 65 (1999). Levy is citing from Henry Care, English Liberties or Free Born Subject's Inheritance, (1698).
\textsuperscript{198} U.S. Const. amend. V.
\textsuperscript{199} U.S. Const. amend. VI.
\textsuperscript{200} Id. amend. VI.
status. Textually, Amendment VI provides at the least a protection that belongs to the individual. However, if Amendment V, (which is written as prohibitions), are protections that also belong to the community, then by the Amendment V no person shall "be deprived of life, liberty, or property, without due process of law;" provision, Amendment VI, (if defined as an element of due process), could easily provide standing to the community, and permit the community to proceed with a cause of action in the event of an Amendment VI violation. The absence of a jury would be a violation of Article III, section 2, clause 3, but the selection of jurors from an improper location would be a violation of Amendment VI, which is enforceable by Article VI Incorporation, so as to provide the protections of local juries, local standards, and local rule in judicial proceedings.

Amendment VI explicitly states criminal prosecutions shall provide an "impartial jury of the State and district wherein the crime shall have been committed." As discussed above, the Petition of Right of 1628, and the Declaration of Resolves of the First Continental Congress of 1774, both claim the right of "judgment of his peers" and "tried by their peers of the vicinage." The location the jurors were selected from was of particular importance to the Colonists so as to avoid being "transported to England, and tried there upon accusations for treasons and misprisnings, or concealments of treasons committed"

\[201\] Id. amend. VI.
\[202\] Id. amend. VI.
\[203\] U.S. CONST. amend. V.
\[204\] U.S. CONST. amend. VI. For jury rights especially, the right of the individual to a jury trial (as well as a grand jury) has correlative duties, besides the right of the individual to receive a jury trial if called as a defendant, there are duties for the individual to serve as a juror when called, and for the people as a community to serve as jurors and ensure all parties receive fair and open trials, and all the privileges and immunities of due process are fulfilled. The right of the individual is further protected by the duty of the community to preserve the right. "A duty or a legal obligation is that which one ought or ought not to do. 'Duty' and 'right' are correlative terms. When a right is invaded, a duty is violated." Lake Shore & Mich. S. Ry. Co. v. Kurtz, 37 N.E. 303, 304 (1894). (emphasis added.) "Jural Correlatives... right duty... privilege no-right... power liability... immunity disability... Rights and Duties." Wesley Newcomb Hohfeld, Fundamental Legal Conceptions 35-64 (Walter Wheeler Cook ed., 1946) (1919). (emphasis added.)
\[206\] U.S. CONST. amend. VI.
\[207\] PETITION OF RIGHT § III (Eng. 1628).
\[208\] DECLARATION AND RESOLVES OF THE FIRST CONTINENTAL CONGRESS para. 11 (U.S. 1774).
in the colonies…” The Declaration of Arms of 1775, complained, "that colonists charged with committing certain offences, shall be transported to England to be tried." The Declaration of Independence also charged that the English authorities had violated their rights as Englishmen, "For transporting us beyond Seas to be tried for pretended offences." The location of the trial and the locale the jurors were selected from are critical rights to ensure the proper administration of justice, and further permit the community to intervene to prevent the miscarriage of justice. As Blackstone wrote, "Here, therefore, a competent number of sensible and upright jurymen, chosen by lot from among those of the middle rank, will be found the best investigators of truth, and the surest guardians of public justice."

The detailed protections provided for in Amendment VI were, like the other Amendments, based upon direct experience of the Colonists, and the Colonists added these administration of justice Amendments to not only provide protections but also articulate restraints upon the administration of justice. The actual past injustices were continually documented in England and America from at least the Petition of Right of 1628 until the ratification of the first ten Amendments of the U.S. Constitution in 1791, and therefore one cannot overlook their direct experiences when reading the protections they agreed upon and ratified. The Colonists also had considerable experience with civil actions, and provisions were also made for them.

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209 Id. para. 2.
210 DECLARATION OF THE CAUSES AND NECESSITY OF TAKING UP ARMS para. 3 (U.S. 1775).
211 THE DECLARATION OF INDEPENDENCE para. 21 (U.S. 1776).
213 U.S. CONST. amend. VI.
214 U.S. CONST. amends. III, IV, V, VI, VII, VIII.
215 “THE Conventions of a number of the States, having at the time of their adopting the Constitution, expressed a desire, in order to prevent misconstruction …that further declaratory and restrictive clauses should be added: And as extending the ground of public confidence in the Government,…” Resolution of the First Congress Submitting Twelve Amendments to the Constitution (U.S. 1789). (emphasis added.)
216 U.S. CONST. amends. I-X.
iii. Seventh Amendment

Amendment VII provides for a jury, although at first it may appear to lie outside the general criminal procedural protections that Amendments IV, V, VI, and VIII all clearly address, one must consider that suits-at-common-law often have the government as a Party, as well as the use of civil action suits to seek a tort law remedy for criminal and near criminal behavior so as to make the victim whole with respect to injury and or damages. When a judge acts alone, he must assume all of the power that would be held by both a judge and a jury, and since he is paid by the government, it is plausible if not likely, for one to perceive a conflict of interest, especially when the State is acting as prosecutor, even though there may be no improper use of power. However, a jury requirement for civil actions, which was omitted in the original Constitution, would act to enhance public confidence and provide additional protections, and was provided by Amendment VII to protect the people from all government action, by the mechanism of Article VI Incorporation.

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217 U.S. CONST. amend. VII.
218 Contrary to the proposition of this thesis, the Supreme Court held otherwise by defining the law of the land to be the law of the State, in Walker v. Sauvinet, 92 U.S. 90 (1875). "The States, so far as this amendment is concerned, are left to regulate trials in their own courts in their own way.***Due process of law is process due according to the law of the land. This process in the States is regulated by the law of the State." Walker v. Sauvinet, 92 U.S. 90 at 92, 93 (1875). (emphasis added.) This opinion does not conform with section 25 of the requirements of the Judiciary Act of 1789, nor with Article VI. An Act to establish the Judicial Courts of the United States, 1 Stat. 73 § 25 (1789).
219 U.S. CONST. amends. IV, V, VI, VIII.
220 For jury rights especially, the right of the individual to a civil jury trial has correlative duties, besides the right of the individual to receive a jury trial if one is a party to the litigation, there are duties for the individual to serve as a juror when called, and for the people as a community to serve as jurors and ensure all parties receive fair and open trials, due process, and just remedies. The right of the individual is further protected by the duty of the community to preserve the right. “A duty or a legal obligation is that which one ought or ought not to do. ‘Duty’ and ‘right’ are correlative terms. When a right is invaded, a duty is violated.” Lake Shore & Mich. S. Ry. Co. v. Kurtz, 37 N.E. 303, 304 (1894). (emphasis added.) "Jural Correlatives… right duty… privilege no-right… power liability… immunity disability… Rights and Duties." Wesley Newcomb Hohfeld, Fundamental Legal Conceptions 35-64 (Walter Wheeler Cook ed., 1946) (1919). (emphasis added.)
A specific example of civil damages for a physical attack is the New York Forcey and Cunningham case, which ran from 1764 until 1766. The trial by jury resulted in steep fines against the defendant, Cunningham, who "expected the New York Supreme Court to grant him relief from the excessive award of civil damages made by the jury," but the court refused for it would "threaten the right to trial by jury." Furthermore, the government prosecution aspect is significant when we consider the much greater number of civil actions (when compared to criminal actions) taken by the government "for penalties, forfeitures, and public debts, …the government is a party and the whole weight of the government is thrown into the scale of the prosecution." The Amendment VII use of the phrase, "In suits at common law…” provides for the right of trial by jury to be preserved by either party to the litigation, not just the defendant, and either the plaintiff or the defendant may demand trial by jury in this instance. After a judgment comes the remedy, and the Colonists had a long history that prompted them to address the remedy, which is covered in Amendment VIII.

iv. Eighth Amendment

Like Amendment V, Amendment VIII describes behavior that is prohibited. The Amendment reads as follows: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." There is a remarkably similar provision in the
English Bill of Rights of 1689, which further punctuates the Framers' belief in their own status as Englishmen, and it reads: "That excessive bail ought not to be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." The result of a criminal case provided for in Article III, could easily be the imposition of punishment upon a convicted defendant. In Amendment VIII, the States have ratified a provision that links the criminal justice system with crime in other circumstances. The Framers were aware of many crimes other than counterfeiting, piracy and crime on the high seas, and treason, so it is plausible to infer that Amendment VIII was in fact contemplated to be incorporated directly against the States, which retained plenary police powers, and the States would be the primary agent(s) defining and prosecuting crime as well as inflicting punishment for crimes, whether defined by State statute or the common law within the State. U.S. CONST. amend. VIII. 

Congressional Action: The Death penalty was provided for by the Punishment for Crimes Act of 1790 enacted by the First Congress, yet maiming was prohibited here Congress provides explicit statements as to the constraints placed upon government action upon the individual, which helps further articulate the restraints and prohibitions provided by the Eighth Amendment. U.S. CONST. amend. VIII. The Punishment for Crimes Act of 1790 was principally for crimes in locations upon the high seas and in areas under the sole and exclusive jurisdiction of the United States. Select excerpts from the Statute: “An Act for the Punishment of certain Crimes against the United States. SECTION 1. Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That if any person or persons, owing allegiance to the United States of America, shall levy war against them, or shall adhere to their enemies, giving them aid and comfort within the United States or elsewhere, and shall be thereof convicted, on confession in open court, or on the testimony of two witnesses to the same overt act of the treason whereof he or they shall stand indicted, such person or persons shall be adjudged guilty of treason against the United States, and shall suffer death.” … “Sec. 3. And be it [further] enacted. That if any person or persons shall, within any fort, arsenal, dock-yard, magazine, or in any other place or district of country, under the sole and exclusive jurisdiction of the United States, commit the crime of wilful murder, such person or persons on being thereof convicted shall suffer death.” … “Sec. 6. And be it [further] enacted, That if any person or persons having knowledge of the actual commission of the crime of wilful murder or other felony, upon the high seas, or within any fort, arsenal, dock-yard, magazine, or other place or district of country, under the sole and exclusive jurisdiction of the United States, shall conceal, and not as soon as may be disclose and make known the same to some one of the judges or other persons in civil or military authority under the United States, on conviction thereof, such person or persons shall be adjudged guilty of misprision of felony, and shall be imprisoned not exceeding three years, and fined not exceeding five hundred dollars.” … “Sec. 13. And be it [further] enacted, That if any person or persons, within any of the places upon the land under the sole and exclusive jurisdiction of the United States, or upon the high seas, in any vessel belonging to the United States, or to any citizen or citizens thereof, on purpose and of malice aforethought, shall unlawfully cut off the ear or ears, or cut out or disable the tongue, put out an eye, slit the nose, cut off a lip, or cut off or disable any limb or member of any person, with intention in so doing to maim or disfigure such person in any the manners before mentioned, then and in every such case the person or persons so offending, their counselors, aiders and abettors (knowing of and privy to the offence aforesaid) shall on conviction, be imprisoned not exceeding seven years, and fined not exceeding one thousand dollars.” … “Sec. 33. And be it further enacted, That the manner of inflicting the punishment of death, shall be by hanging the person convicted by the neck until dead. APPROVED, April 30, 1790.” An Act for the Punishment of certain Crimes against the United States. Act of April 30, 1790, 2 Stat., ch. 9, (1790). (italics retained.) (emphasis added.)
restraints on the remedy or punishment imposed.\textsuperscript{232} The linkages begin with the criminal process first articulated in Article III, which may result in conviction, which may be punished, which is restrained by Amendment VIII, and binds the States to provide protections from all governments, and explicitly binds the acts of judges, by the mechanism of Article VI Incorporation.\textsuperscript{233} This provision is clearly a strict restraint designed to terminate certain enforcement actions and to prohibit certain kinds of actions and behaviors.\textsuperscript{234} Although subjective standards may be applied to define the specific behaviors, this provision is very broad and could easily be invoked to apply to the national government, all State governments, and as a strict prohibition, could even be interpreted to apply to private behavior.\textsuperscript{235}

An example of the type of punishment that was feared most in Colonial times was that given for Treason. In New York in 1691, even after the 1689 English Bill of Rights, Jacob Leisler and his son-in-law were charged with treason and convicted.\textsuperscript{236} The punishment imposed upon them was recorded as, "They were hanged, cut down when still alive, their sex organs were

\begin{itemize}
\item \textsuperscript{232} U.S. CONST. amend. VIII.
\item \textsuperscript{233} U.S. CONST. art. III, § 2, cl. 3. U.S. CONST. amend. VIII. U.S. CONST. art. VI, § 1, cl. 2.
\item \textsuperscript{234} The Supreme Court held contrary to the proposition of this thesis in \textit{In re Kemmler}, 136 U.S. 436, where it simply declared inapplicability without providing any reasoning. "It is not contended, as it could not be, that the eighth amendment was intended to apply to the states, but it is urged that the provision of the fourteenth amendment, which forbids a state to make or enforce any law which shall abridge the privileges and immunities of citizens of the United States, is a prohibition on the state from the imposition of cruel and unusual punishments, and that such punishments are also prohibited by inclusion in the term 'due process of law.' The provision in reference to cruel and unusual punishments was taken from the well-known act of parliament of 1688...*** Undoubtedly the amendment forbids any arbitrary deprivation of life, liberty, or property, and secures equal protection to all under like circumstances in the enjoyment of their rights; and, in the administration of criminal justice, requires that no different or higher punishment shall be imposed upon one than is imposed upon all for like offenses. \textit{But it was not designed} to interfere with the power of the state to protect the lives, liberties, and property of its citizens, and to promote their health, peace, morals, education, and good order." \textit{In re Kemmler}, 136 U.S. 436, 446, 448-49 (1890). (emphasis added.)
\item \textsuperscript{235} Note that the Thirteenth Amendment, which is a strict prohibition, applies to private behavior. U.S. CONST. amend. XIII. "Thus, the fact that s 1982 operates upon the unofficial acts of private individuals, whether or not sanctioned by state law, presents no constitutional problem." JONES v. ALFRED H. MAYER CO., 392 U.S. 409, 438 (1968). The \textit{right} of the individual is further protected by the \textit{duty} of the community to preserve the right. “A duty or a legal obligation is that which one ought or ought not to do. ‘Duty’ and ‘right’ are correlative terms. When a right is invaded, a duty is violated.” Lake Shore & Mich. S. Ry. Co. v. Kurtz, 37 N.E. 303, 304 (1894). (emphasis added.) “\textit{Jural Correlatives... right duty... privilege no-right... power liability... immunity disability... Rights and Duties.}” Wesley Newcomb Hohfeld, Fundamental Legal Conceptions 35-64 (Walter Wheeler Cook ed., 1946) (1919). (emphasis added.)
\item \textsuperscript{236} LEONARD W. LEVY, THE PALLADIUM OF JUSTICE: ORIGINS OF TRIAL BY JURY 74 (1999).
\end{itemize}
cut off, they were disemboweled, the excised body parts were burned before their eyes, they were beheaded and cut into quarters, and their heads displayed upon spikes.”

From the documentation of these punishments, we may infer the Colonists had good reason to be concerned about the punishments for treason and punishments in general. For the Colonists, who were exposed to this type of punishment, it is quite plausible, if not logical, that they had every reason to bind the State Judges to the limits of the U.S. Constitution, so as to prohibit this type behavior by any level of government. Since Amendment VIII acts as a strict prohibition on certain types of remedies, Amendment VIII provides either the individual or any member of the community standing as a plaintiff in order to seek remedy and redress in the event of a violation. Moreover, if Amendment VIII were defined so as to fall within those Amendment V elements of "due process" it would also provide grounds as a right belonging to both individual and community.

While examining Amendment VIII and punishments, to include punishments for Treason, this is a good point to refer to Article III and look at section 3. Article III, section 3, clause 1 explicitly addresses Treason by defining what it is, and providing strict limiting

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237 LEONARD W. LEVY, THE PALLADIUM OF JUSTICE: ORIGINS OF TRIAL BY JURY 74 (1999). “SEC. 13. And be it [further] enacted. That if any person or persons, within any of the places upon the land under the sole and exclusive jurisdiction of the United States, or upon the high seas, in any vessel belonging to the United States, or to any citizen or citizens thereof, on purpose and of malice aforethought, shall unlawfully cut off the ear or ears, or cut out or disable the tongue, put out an eye, slit the nose, cut off the nose or a lip, or cut off or disable any limb or member of any person, with intention in so doing to maim or disfigure such person in any the manners before mentioned, then and in every such case the person or persons so offending, their counselors, aids and abettors (knowing of and privy to the offence aforesaid) shall on conviction, be imprisoned not exceeding seven years, and fined not exceeding one thousand dollars.” ... “SEC. 33. And be it further enacted. That the manner of inflicting the punishment of death, shall be by hanging the person convicted by the neck until dead. APPROVED, April 30, 1790.” An Act for the Punishment of certain Crimes against the United States. Act of April 30, 1790, 2 Stat., ch. 9, (1790). (italics retained.) (emphasis added.)

238 U.S. CONST. art. VI, § 1, cl. 2.
239 U.S. CONST. amend. VIII.
240 Id. amend. VIII.
241 U.S. CONST. amend. V.
242 U.S. CONST. amend. VIII.
243 U.S. CONST. art. III, § 3, cl. 1.
requirements for a conviction of the charge of Treason. Additional punishment limitations restricting Congress are spelled out in clause 2. Fortunately, the Colonists documented their extensive experience with the charge of Treason. In the Colonial Bill of Rights of 1774, recall the phrase, "colonists may be transported to England, and tried there upon accusations for treason and misprisions…" The Declaration of Arms of 1775, denounced the "12th of June" proclamation with hostility, which proceeds to "declare them all, either by name or description, to be rebels and traitors, to supercede the course of the common law, and instead thereof to publish and order the use and exercise of the law martial." The Declaration of Independence of July 4, 1776, charges the English with false prosecutions, "For transporting us beyond Seas to be tried for pretended offences."

Prosecution for Treason by the States was actually contemplated by the writers of the Constitution. Treason is primarily associated with "the offense of attempting by overt acts to overthrow the government of the state to which the offender owes allegiance; or of betraying the state into the hands of a foreign power." However, from Black's Law Dictionary, "in England, treason is an offense particularly directed against the person of the sovereign, and consists (1) in compassing or imagining the death of the king or queen, or their eldest son and heir; (2) in violating the king's companion, or the king's eldest daughter unmarried, or the wife of the king's eldest son and heir; (3) in levying war against the king in his realm; (4) in adhering to the king's enemies in his realm, giving to them aid and comfort in the realm or elsewhere, and (5) slaying the chancellor, treasurer, or the king's justices of the one bench or the other, justices in eyre, or

244 Id. art. III, § 3, cl. 1.
245 Id. art. III, § 3, cl. 2.
246 DECLARATION AND RESOLVES OF THE FIRST CONTINENTAL CONGRESS para. 2 (U.S. 1774).
247 DECLARATION OF THE CAUSES AND NECESSITY OF TAKING UP ARMS para. 9 (U.S. 1775). (emphasis added.)
248 THE DECLARATION OF INDEPENDENCE para. 21 (U.S. 1776).
justices of assize, and all other justices assigned to hear and determine, being in their places doing their offices. 4 William Blackstone, Commentaries 76-84 (1795).” 250 The Colonial Bill of Rights mentions "treasons and misprisions" among its charges, which includes both misprision and misprision of treason. 251 Black's defined Misprision as, “more particularly and properly, the term denotes (1) a contempt against the sovereign, the government, or the courts of justice, including not only contempts of court, properly so called, but also all forms of seditious or disloyal conduct and leze-majesty;…” and misprision of treason is defined as, "The bare knowledge and concealment of an act of treason or treasonable plot, that is, without any assent or participation therein, for if the latter elements be present the party becomes a principal. 4 William Blackstone, Commentaries 120 (1795).” 252 The English experience of the Colonists indicates that Judges are highlighted in both treason and misprision of treason, and in Colonial times the punishment was of the highest order for Treason.

In order to prevent any abuse of the term Treason within the United States, the Constitution specifically addresses Treason in several areas. So, "Treason against the United States" is Constitutionally defined, and the requirements for conviction are stated. 253 “Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort. No Person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court.” 254

250 Id. at 1672. (emphasis added.)
251 Declaration and Resolves of the First Continental Congress para. 2 (U.S. 1774).
253 U.S. Const. art. III, § 3, cl. 1.
254 U.S. Const. art. III, § 3, cl. 1. It is important to note the direct relationships articulated by explicit textual connections and functional protections among the Constitutional provisions (in Article III and Amendment V) and in the Punishment for Crimes Act of 1790. “Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort. No Person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court.” U.S. Const. art. III, § 3, cl. 1. “nor [No person] shall be compelled in any criminal case to be a witness against himself,” U.S. Const. amend. V. When placed side by side the Constitutional requirement of a “Confession in open
The States involvement in allegations of Treason is explicitly spelled out and in fact provides for the "demand of the executive Authority of the State." By this plain text of Article IV, prosecution of Treason by the States is addressed explicitly in the Constitution. "A Person charged in any State with Treason, Felony, or other Crime, who shall flee from Justice, and be found in another State, shall on demand of the executive Authority of the State from which he fled, be delivered up, to be removed to the State having Jurisdiction of the Crime." Here, the Constitution describes being charged in a State, and being delivered up on demand of the executive Authority of the State, not on demand of any federal authority. And "Treason" is named by itself, so as to include any charges brought on by the States, and note that it is not called "Treason against the United States" as in Article III. Note the linkages which begin with Court" becomes a great restraint upon the government to protect the individual from being a witness against himself, and demonstrates the Powers yielding to Rights, as with Taxation and Arms bearing discussed above (see 47 n.267). The language is repeated in the Punishment for Crimes Act of 1790: "SECTION 1. Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That if any person or persons, owing allegiance to the United States of America, shall levy war against them, or shall adhere to their enemies, giving them aid and comfort within the United States or elsewhere, and shall be thereof convicted, on confession in open court, or on the testimony of two witnesses to the same overt act of the treason whereof he or they shall stand indicted, such person or persons shall be adjudged guilty of treason against the United States, and shall suffer death." An Act for the Punishment of certain Crimes against the United States. Act of April 30, 1790, 2 Stat., ch. 9, (1790). (italics retained.) (emphasis added.) Again, Rights of Individuals supersede Powers of the Sovereign. From a case involving the charge of High Treason in the Commonwealth of Pennsylvania, heard in the Supreme Court of Pennsylvania, and where the defendant was exonerated since the laws of the commonwealth were suspended for a period of time. "Locke says, that when the Executive is totally dissolved, there can be no treason; for laws are a mere nullity, unless there is a power to execute them." RESPUBLICA v. CHAPMAN, 1 U.S. (1 Dall.) 53, 57 (1781). An indictment of treason against the State of New York. THE PEOPLE v LYNCH, 11 Johns. 549 (1814). Of special importance are the cases ("the Dorr cases") that rule on or refer to the conviction of Thomas Wilson Dorr for treason against the state of Rhode Island. Thomas Wilson Dorr served as the Governor of Rhode Island. EX PARTE DORR, 44 U.S. (3 How.) 103 (1844). LUTHER v. BORDEN, 48 U.S. (7 How.) 1 (1849). ATTORNEY GENERAL ex rel. BASHFORD v. BARSTOW, 4 Wis. 567 (1855). TAYLOR v. PLACE, 4 R.I. 324 (1856). From a case involving the charge of High Treason in the Commonwealth of Pennsylvania, and where the defendant was exonerated since the laws of the commonwealth were suspended for a period of time. "Locke says, that when the Executive is totally dissolved, there can be no treason; for laws are a mere nullity, unless there is a power to execute them." RESPUBLICA v. CHAPMAN, 1 U.S. 53, 57 (1781). An indictment of treason against the State of New York. THE PEOPLE v LYNCH, 11 Johns. 549 (1814).
the criminal proceedings, to include Treason, in Article III\(^{261}\), that are connected with additional explicit provisions regarding Treason in Article I, Article II, Article III, and Article IV\(^{262}\) and further restrictions for the punishment for Treason are later provided by Amendment VIII, which is binding against the State judges by the mechanism of Article VI Incorporation.\(^{263}\) The States and the federal government are restricted in their dealings with Treason. Among the restraints placed upon the Judges is that, "Congress shall have the Power to declare the Punishment for Treason" in any case.\(^{264}\) Thereby further restricting all judges, both State and national, from any power of imposing the remedy and punishments for Treason. Article III continues, "The Congress shall have Power to declare the Punishment of Treason, but no Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person attainted."\(^{265}\)

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\(^{263}\) U.S. CONST. amend. VIII, U.S. CONST. art. VI, § 1, cl. 2.

\(^{264}\) U.S. CONST. art. III, § 3, cl. 2.

\(^{265}\) Id. art. III, § 3, cl. 2.
Congress reserves control over the remedy for punishing Treason, and the punishment is explicitly limited by the Constitution. Here, an "Attainder of Treason" is explicitly mentioned, and earlier in the Constitution an explicit prohibition of Bills of Attainder is placed upon the States. All types of Bills of Attainder are prohibited to the States, and this of course would prevent any "Attainder of Treason" from being passed by a State, so that too is forbidden to the States. This prohibition of Article I, section 10 provides, "No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or any Law impairing the Obligation of Contracts, or grant any Title of Nobility." States were in fact contemplated as forums for Treason proceedings, Judges were highlighted within the traditional English elements of Treason, and the punishments for Treason were of the highest order during the Colonial period, here, Amendment VIII reveals its fullest meaning with regards to prohibitions upon punishments applying to all Judges, both national and State. Up to now, the basis of protections has stemmed from formal proceedings

266 Id. art. III, § 3, cl. 2.
267 U.S. CONST. art. III, § 3, cl. 2. U.S. CONST. art. I, § 10, cl. 1. A Treason ejectment action related to John Jacob Astor of New York. From the syllabus of Carver v. Jackson, “On the 22d of October 1779, the legislature of the state of New York, by ‘an act for the forfeiture and sale of the estate of persons who have adhered to the enemies of the state, &c.’ declared Roger Morris and his wife to be convicted and attainted of adhering to the enemy; and all their estate, real and personal, severally and respectively, in possession, reversion, or remainder, was forfeited and vested in the people of the state.” From the opinion of Justice STORY, “[80] “The action is ejectment, brought upon several demises; and among others, upon the demise of John Jacob Astor. …[90] “consequently, the remainder to the children was a contingent remainder during the life of their parents; and as such it was destroyed by the proceedings and sale under the act of attainder and banishment of 1779. The circuit court was of a different opinion; and held, that the remainder to the children was contingent until the birth of a child, and then vested in such child, and opened to let in after born children; and that there being a vested remainder in the children at the time of the act of 1779, it stands unaffected by that act.” CARVER v. JACKSON, 29 US 1, 80, 90 (1830). (emphasis added.)
269 U.S. CONST. art. I, § 10, cl. 1.
270 Id. art. I, § 10, cl. 1. (emphasis added.)
271 U.S. CONST. amend. VIII. From a case involving the charge of High Treason in the Commonwealth of Pennsylvania, heard in the Supreme Court of Pennsylvania, and where the defendant was exonerated since the laws
in a courtroom, but the administration of justice involves much out of courtroom activity also, and the Framers made provisions in those areas as well, which follow below.


The Framers also addressed proceedings prior to an actual courtroom proceeding, or executed completely without a courtroom proceeding, or the government actually coming in direct contact with an individual's property or person, which were all developed through the Colonial experience. Amendments III, IV, and V will be examined as they provide protections when the government comes in direct contact with the individual.272 Since the government can come in contact with the general population much more frequently outside of a courtroom setting than during instances requiring a courtroom proceeding, it was important to bind all judges to the Constitution and the Bill of Rights in the event a violation took place.273 In such instance, an individual, or even a State attorney on behalf of an individual, could protect or enforce these provisions by proceeding with a cause of action as a plaintiff in a legal proceeding against the government or a government agent, whether State or federal, by the mechanism of Article VI Incorporation.274 Amendment IV275 provides protections from searches and seizures, which were

of the commonwealth were suspended for a period of time. "Locke says, that when the Executive is totally dissolved, there can be no treason; for laws are a mere nullity, unless there is a power to execute them." RESPUBLICA v. CHAPMAN, 1 U.S. (1 Dall.) 53, 57 (1781). An indictment of treason against the State of New York. THE PEOPLE v LYNCH, 11 Johns. 549 (1814). Of special importance are the cases ("the Dorr cases") that rule on or refer to the conviction of Thomas Wilson Dorr for Treason against the state of Rhode Island. Thomas Wilson Dorr served as the Governor of Rhode Island. Justice McLEAN for the Court: "Thomas W. Dorr was convicted before the Supreme Court of Rhode Island, at March term, 1844, of treason against the state of Rhode Island, and sentenced to the state’s prison for life."… “Neither this nor any other court of the United States, or judge thereof, can issue a habeas corpus to bring up a prisoner, who is in custody under a sentence or execution of a state court, for any other purpose than to be used as a witness." EX PARTE DORR, 44 U.S. (3 How.) 103, 104, 105 (1844). LUTHER v. BORDEN, 48 U.S. (7 How.) 1 (1849). ATTORNEY GENERAL ex rel. BASHFORD v. BARSTOW, 4 Wis. 567 (1855). TAYLOR v. PLACE, 4 R.I. 324 (1856).

272 U.S. CONST. amends. III, IV, V.
273 U.S. CONST. amends. III, IV, V. U.S. CONST. art. VI, § 1, cl. 2.
a long-term problem and concern for the Colonists. Amendment IV\textsuperscript{276} brings us to administration of justice activities that occur outside the courtroom, and here Amendment IV is procedurally and textually linked to other Amendments.\textsuperscript{277} For instance, the "houses" portion of Amendment IV repeats the term "house" as it relates to an "Owner" as used in Amendment III.\textsuperscript{278} Moreover it is probable for the Amendment V prohibition requiring "due process of law"\textsuperscript{279} to require Amendment IV procedures be followed, and thereby creates standing for each member of the community to seek redress in the event of a violation.\textsuperscript{280} Amendment IV uses the term "unreasonable," which points to the tort remedy of a civil action with a trial by jury to determine reasonableness, and provides a link between Amendment IV and Amendment VII.\textsuperscript{282} Amendment III addresses the quartering of soldiers in private houses, which is linked to

\textsuperscript{275} U.S. CONST. amend. IV.
\textsuperscript{276} Id. amend. IV.
\textsuperscript{277} U.S. CONST. amends. III, IV, V.
\textsuperscript{278} U.S. CONST. amends. III, IV.
\textsuperscript{279} An important phrase in Amendment V is "due process of law," which appeared in similar form in 1628 as, "nor taken, nor imprisoned, nor disinherited nor put to death without being brought to answer by due process of law." U.S. CONST. amend. V. PETITION OF RIGHT § IV (Eng. 1628). Later in 1774, it reappears as, "That the respective colonies are entitled to the common law of England, according to the course of that law." DECLARATION AND RESOLVES OF THE FIRST CONTINENTAL CONGRESS para. 11 (U.S. 1774). The 1774 Declaration did not use exactly the same language, but the modified terms do express the same legal concepts. We may read "due process of law" to be a value of the utmost importance, because it encompassed the idea of fairness and endured over such a long period of time. PETITION OF RIGHT § IV (Eng. 1628). DECLARATION AND RESOLVES OF THE FIRST CONTINENTAL CONGRESS para. 11 (U.S. 1774). U.S. CONST. amend. V.
\textsuperscript{280} U.S. CONST. amends. IV, V.
\textsuperscript{281} The Fourth Amendment responds to "reasonable suspicion", which appeared in the Navigation Act of 1696, with the higher standard of "probable cause." “The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularity describing the place to be searched, and the persons or things to be seized.” U.S. CONST. amend. IV. (emphasis added.) “Therefore it is further enacted that when governors or customs officers in the colonies have reasonable suspicion that certificates of having given security in England are false, they shall require sufficient security for discharge in England or Wales.” THE NAVIGATION ACT para. 10 (Eng. 1696). (emphasis added.)
\textsuperscript{282} U.S. CONST. amends. IV, VII. BIVENS v. SIX UNKNOWN NAMED AGENTS OF THE FED. BUREAU OF NARCOTICS, 403 U.S. 388 (1971). “And this statute which was made in favor of personal liberty, is to be construed liberally.” HALL v. HALL, 1 Root 120, 121 (1789). DENISON v. RAYMOND, 1 Kirby 274 (1787). "he (the Marshal) must be answerable to the party injured, and look for indemnity to those under whose usurped authority he has acted." BERGEN v. CLARKSON, 6 N.J.L. 352, 366 (1796). Recently from Judge VAUGHN R. WALKER, “After deliberating, the jury returned a unanimous verdict awarding Buritica a total of $451,002.00 in compensatory and punitive damages against four of the five Customs inspectors. Implicit in this verdict was the jury’s finding that all of the inspectors save defendant Leslie Bianchi had violated Buritica’s constitutional rights.” BURITICA v. UNITED STATES OF AMERICA, 8 F. Supp. 2d 1188, 1190 (1998).
Amendment V as a 'taking' of property, which requires just compensation in addition to "due process of law." These linked aspects of Amendments III, IV, and V all deal with the government, coming in direct contact with individual members of the community, and create provisions so as to restrain government action upon individuals.

Seizures of one sort or another are expressed in The Petition of Right of 1628, which provides: "that no freemen may be taken or imprisoned or be disseized of his freehold or liberties, …, but by the lawful judgment of his peers…" The Petition of Right of 1628, also states, "…soldiers and mariners have been dispersed into divers counties of the realm, and the inhabitants against their wills have been compelled to receive them into their houses, and there to suffer them…" Here, both seizing and occupying one's property is explicitly stated in one early document that shows the displeasure of the people for government actions which invade their lives, (i.e. specifically "freehold" and "houses.") Surrendering one's property, especially one's house for another to use, is a most invasive act by the government. The Quartering Act of 1765 permitted the lawful housing of soldiers in America in the "publick houses and barracks," but in the event they were insufficient, then officers and soldiers were to be quartered "in inns, livery stables, ale-houses, victuallings-houses,…and all houses of persons selling rum, brandy, strong water, (etc.)…" And if those facilities were not provided for, "any two or more of his Majesty's justices of the peace…are required to take, hire, and make fit for the reception of his Majesty's forces, such and so many uninhabited houses, outhouses, barns or other buildings, as shall be necessary, to quarter therein…" The Quartering Act of 1774 reaffirmed these powers

283 U.S. CONST. amends. III, V.
284 PETITION OF RIGHT § III (Eng. 1628).
285 Id. § VI.
286 Id. § III, VI.
287 THE QUARTERING ACT § I (Eng. 1765).
288 Id. § I. (emphasis added.)
by stating that if "any officers or soldiers" remained without quarters for twenty-four hours, "it shall and may be lawful for the governor of the province to order and direct such and so many uninhabited houses, out-houses, barns or other buildings, as he shall think necessary to be taken (making a reasonable allowance for the same), and make fit for the reception of such officers and soldiers…" These involuntary takings of one's property and property rights, by quartering military personnel in private buildings are clearly unwelcome intrusions of the government on the individual. Shortly after the first Quartering Act of 1765, The Townshend Act of 1767 created a list of duties that were to be applied to the commercial markets of the Colonies. The Townshend Act of 1767 also granted broad search powers to Customs officials and provided that, "such writs of assistance, to authorize and impower the officer of his Majesty's customs to enter and go into any house, warehouse, shop, cellar, or other place, in the British colonies of plantations in America, to search for and seize prohibited or uncustomed goods,…" Later, in the Declaration of Arms of 1775, the Continental Congress cited the "quartering of soldiers upon the colonists in time of profound peace," as one of many causes listed in support of taking up arms. One year later in 1776, in the Declaration of Independence, the Congress charged, "Quartering large bodies of armed troops among us." The authorities granted by the Quartering Acts and the Townshend Act were broad powers given to both the military and civil servants of the Crown. These powers, which permit government action to be exercised at the

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289 THE QUARTERING ACT § II (Eng. 1774). (emphasis added.)
290 THE QUARTERING ACT (Eng. 1765). THE TOWNSHEND ACT § I (Eng. 1767).
291 THE TOWNSHEND ACT § X (Eng. 1767).
292 DECLARATION OF THE CAUSES AND NECESSITY OF TAKING UP ARMS para. 3 (U.S. 1775).
293 THE DECLARATION OF INDEPENDENCE para. 16 (U.S. 1776).
discretion of relatively low level officials with no procedural mechanisms, weighed heavily in
the minds of the Framers when they created protections to prevent these type activities, which
are discussed below.

Amendment IV, begins: "The right of the people to be secure in their persons, houses,
papers, and effects, against unreasonable searches and seizures, shall not be violated,…"

The Amendment explicitly provides a right that belongs to the people, and it is clearly a
community right, that may be enforced by the community in the event of a violation to another


Note the use of the term "unreasonable" which specifically addresses the remedy for improper searches, that of a
tort remedy in a civil cause of action with right of trial by jury, as the provision was designed for a jury to determine
reasonableness. Here the Fourth Amendment is linked to the Seventh Amendment right to a civil jury trial. U.S.
CONST. amends. IV, VII. BIVENS v. SIX UNKNOWN NAMED AGENTS OF THE FED. BUREAU OF
NARCOTICS, 403 U.S. 388 (1971). HALL v. HALL, 1 Root 120 (1789). DENISON v. RAYMOND, 1 Kirby 274
(1787). BERGEN v. CLARKSON, 6 N.J.L. 352 (1796). Recently from Judge VAUGHN R. WALKER, "After
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the inspectors save defendant Leslie Bianchi had violated Buritica's constitutional rights." BURITICA v. UNITED
STATES OF AMERICA, 8 F. Supp. 2d 1188, 1190 (1998). The Fourth Amendment responds to "reasonable
suspicion", which appeared in the Navigation Act of 1696, with the higher standard of "probable cause." "The right
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shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and
particularity describing the place to be searched, and the persons or things to be seized." U.S. CONST. amend. IV.
(emphasis added.) "Therefore it is further enacted that when governors or customs officers in the colonies have
reasonable suspicion that certificates of having given security in England are false, they shall require sufficient
security for discharge in England or Wales." THE NAVIGATION ACT para. 10 (Eng. 1696). (emphasis added.)

The private attorney general doctrine existed early on when the attorneys for the State or Commonwealth were
expected to be advocates for the people and would proceed with an action on behalf of the people (Res publica),
even if against an agent of the State. The plaintiff in such a case might be "Commonwealth" or "Res publica." "The
purpose of the Act was to protect the public interest....Congress gave the right of appeal to persons 'aggrieved or
whose interests are adversely affected' by Commission action...But these private litigants have standing only as
representatives of the public interest...That a court is called upon to enforce public rights and not the interests of
private property does not diminish its power to protect such rights....Unless Congress explicitly discloses such an
intention we should not lightly attribute to it a desire to withhold from a reviewing court the power to save the public
interest from injury or destruction while an appeal is being heard. To do so would stultify the purpose of Congress to
utilize the courts as a means for vindicating the public interest....Courts are no less than administrative bodies are
agencies of government. Both are instruments for realizing public purposes." SCRIPPS-HOWARD RADIO, INC. v.
FEDERAL COMMUNICATIONS COMMN, 316 U.S. 4, 14-15 (1942). "we suggested that those who come within
the class of persons who may seek review, under provisions like that here, may be considered "private Attorney
Generals."" W. R. GRACE & CO. v. CIVIL AERONAUTICS BOARD, 154 F.2d 271, 286 n.2 (1946). "...as the
controversies were merely between the claimants under the orders of council and the public, the attorney general
was to attend on behalf of the commonwealth." Hamilton v. Maze, 8 Va. 196, 206 (1791). (emphasis added). An
early example of a cause of action taken on behalf of the people (Res publica), where the State, or the Commonwealth,
acting on behalf of the public, pursued a cause of action against an official, such as the sheriff, for improperly
The exact manner in which 'persons' (which might include one's thoughts) and in which 'papers' (which might include modern communication documents) will be defined is for the future to reveal. However, whatever the right turns out to be, the right was retained by and belongs to the people, and thereby a third party should have standing to seek redress and remedy for any such violation.

Amendment IV does not entirely prohibit seizures, it provides for requirements prior to a search or seizure. In the event something is seized, or someone is seized, (that is arrested), and if the person is seized without meeting the procedural requirements, this then links the provisions of Amendment IV to Amendment V, which states, "no person shall…be deprived of life, liberty, or property, without due process of law." By Amendment V there is added assurance provided to the individual as they are entitled to "due process of law", to include proceedings outside of the courtroom, and the administration of justice outside the courtroom must also comply with the due process of law, and Amendment IV makes specific provisions that address experiential concerns of the Colonists outside the courtroom. Similar relationships are eluded to in Justice executing authority. Respublica v. Gaoler in the city and county of Philadelphia, 2 Yeates 263 (1798). A cause of action for exercising unauthorized power, for example by an alleged judge or alleged sheriff assuming unauthorized office and powers. Commonwealth v. Fowler, Esq., 10 Mass. 290 (1813). Commonwealth v. Jonathan Smith, Jun. 9 Mass. 531, 532 (1813). The right of the individual is further protected by the duty of the community to preserve the right. "A duty or a legal obligation is that which one ought or ought not to do. ‘Duty and ‘right’ are correlative terms. When a right is invaded, a duty is violated." Lake Shore & Mich. S. Ry. Co. v. Kurtz, 37 N.E. 303, 304 (1894). (emphasis added.) “Jural Correlatives… right duty… privilege no-right… power liability… immunity disability… Rights and Duties.” Wesley Newcomb Hohfeld, Fundamental Legal Conceptions 35-64 (Walter Wheeler Cook ed., 1946) (1919). (emphasis added.)

298 U.S. CONST. amend. IV.

299 An example of a case of an alleged Fourth Amendment violation, which involved the search of a third party and where the plaintiff's standing was found wanting. UNITED STATES v. PAYNER, 447 US 727 (1980). The right of the individual is further protected by the duty of the community to preserve the right. “A duty or a legal obligation is that which one ought or ought not to do. ‘Duty and ‘right’ are correlative terms. When a right is invaded, a duty is violated.” Lake Shore & Mich. S. Ry. Co. v. Kurtz, 37 N.E. 303, 304 (1894). (emphasis added.) “Jural Correlatives… right duty… privilege no-right… power liability… immunity disability… Rights and Duties.” Wesley Newcomb Hohfeld, Fundamental Legal Conceptions 35-64 (Walter Wheeler Cook ed., 1946) (1919). (emphasis added.)

300 U.S. CONST. amend. IV.

301 U.S. CONST. amends. IV, V.

302 U.S. CONST. amends. IV, V.
Holmes dissent in *Olmstead v. United States*, 277 U.S. 438. Amendment IV is textually and procedurally linked to Amendment V, and by now, the connection between Amendment V and Amendment III is apparent.

Amendment III is brief and reads as follows: "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." This is a direct response to those behaviors recounted above to include events documented in The Petition of Right of 1628, and the express authority granted in the Quartering Acts. The Quartering Acts quoted above both refer to other buildings, that is, "or other buildings, as shall be necessary…” and "or other buildings, as he shall think necessary to be taken…” In Amendment III, we can see the Framers concerns regarding possible future misinterpretations by judges. The Framers create a specific protection to guard against a Constitutional misinterpretation that could define the terms of Article I, section 8, clause 17, which includes, "…Magazines, Arsenals, dock-Yards, and other needful Buildings;” as their personal property or houses. Perhaps this potential misinterpretation would begin with the term "needful Buildings" and transform itself via jurisprudence into personal real property for quartering soldiers. Again, Amendment III, is written as a strict restraint on a type of behavior. Amendment III begins, "No soldier shall …", (and although it provides for prior procedural requirements that do permit quartering), and as a strict restraint upon military

303 "While I do not deny it I am not prepared to say that the *penumbra* of the Fourth and Fifth Amendments covers the defendants, although I fully agree that courts are apt to err by sticking too closely to the words where these words import a policy that goes beyond them." Dissent by Justice HOLMES, OLMSTEAD v. UNITED STATES, 277 U.S. 438, 469 (1928), (emphasis added.)

304 U.S. CONST. amends. III, IV, V.

305 U.S. CONST. amend. III.


308 U.S. CONST. amend. III.

309 U.S. CONST. art. I, § 8, cl. 17.

310 Id. art. I, § 8, cl. 17.

311 U.S. CONST. amend. III.
personnel, any member of the community should have standing as a plaintiff to require remedy, redress, and compensation of any echelon of government in the event of a violation.\textsuperscript{312}

Amendment III also uses the term "Owner" which explicitly provides the right to an individual.\textsuperscript{313} The protections provided by Amendment III are designed to restrain military actions and infringements on the public.\textsuperscript{314} As a prohibition on government action (the military), the right belongs to both the individual and to the community, and remedy may be sought by either. Moreover, the closing phrase of Amendment III, "in a manner to be prescribed by law," once again links us to the "due process of law" phrase within Amendment V.\textsuperscript{315} The phrase "in a manner prescribed by law" invokes the concepts of "due process of law\textsuperscript{316}," and Amendment III and V are thereby linked, and any member of the community should have standing as a plaintiff to seek remedy and ensure that the government does not deny due process to any member of the community.\textsuperscript{317} An additional link to Amendment V is that "just compensation" shall be provided

\begin{footnotesize}
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\item[\textsuperscript{312}] U.S. Const. amends. III, V.
\item[\textsuperscript{313}] U.S. Const. amend. III.
\item[\textsuperscript{314}] U.S. Const. amend. III. The State of Massachusetts claims jurisdiction of Militia activities that impose (trespass) on the public, and acknowledges that Militia use of land is property taken for public use, and therefore subject to just compensation. "Since the first organization of the militia of this commonwealth under the [State] Constitution..." Brigham v. Edmands, 73 Mass. 359, 362 (1856). "But it is claim to an exclusive appropriation, to a specific public use, of the property of an individual, for a distinct period of time, depriving the owner of its actual possession and enjoyment, and exposing it to necessary and essential damage. Such a right cannot be exercised except under the authority of the legislature, expressed in clear distinct terms, or by necessary implication, and with suitable provisions for compensation to the persons whose property may be so appropriated or injured." Brigham v. Edmands, 73 Mass. 359, 363 (1856).
\item[\textsuperscript{315}] U.S. Const. amends. III, V.
\item[\textsuperscript{316}] "Per Legem Terrae. By the law of the land; by due process of law." BLACK'S LAW DICTIONARY 1293 (4th ed. 1951). "Coke says, the words, 'per legem terrae' in magna carta, and the words 'due process of law'...in the statute of...mean the same thing... And we have no doubt that the phrase by the law of the land in our constitution [New Hampshire], means the same thing as by due process of law." MAYO v. WILSON, 1 N.H. 53, 55 (1817). (emphasis retained.)
\item[\textsuperscript{317}] U.S. Const. amends. III, V. The right of the individual is further protected by the duty of the community to preserve the right. "A duty or a legal obligation is that which one ought or ought not to do. 'Duty' and 'right' are correlative terms. When a right is invaded, a duty is violated." Lake Shore & Mich. S. Ry. Co. v. Kurtz, 37 N.E. 303, 304 (1894). (emphasis added.) "Jural Correlatives... right duty... privilege no-right... power liability... immunity disability... Rights and Duties." Wesley Newcomb Hohfeld, Fundamental Legal Conceptions 35-64 (Walter Wheeler Cook ed., 1946) (1919). (emphasis added.)
\end{itemize}
\end{footnotesize}
in the event property is "taken" for quartering soldiers. Statutory experience taught the Colonists takings were possible under the Quartering Acts, with respect to property rights. In the event the term "Soldier" would mean only a member of the national government's army, then binding the Judges of the States would probably not actually come into play, since redress for a violation would occur in federal courts, but there would be no conflict with Article VI Incorporation. However, if the term "Soldier" included Militia men within a particular State, then it would be applicable to bind the Judges of the States, in either case, the individual's protections persist.

vi. The Balance of the Bill of Rights

   a. First Amendment

One of the most compelling arguments for Article VI Incorporation comes from the Constitution's text in the First Amendment. Only Amendment I directs itself as a prohibition to Congress. Not one of the other Amendments limit themselves to be applied as limits only to Congress. Although it appears the first words of the Bill of Rights are "Congress shall make no law..." these were not the first words of all of the proposed Amendments that Congress sent to the States for possible ratification. So this phrase in Amendment I, which was not the first phrase in the list of proposed Amendments sent to the States, should not be read as a phrase

318 Just compensation was required to be paid for land taken for public use, even when it was not actually put to public use. "but Mr. Turpin is entitled to be paid for it,..." The Attorney-General (in Behalf of the Commonwealth) v. Turpin, 13 Va. 548, 561 (1809).
320 THE QUARTERING ACT § I (Eng. 1765). THE QUARTERING ACT § II (Eng. 1774).
321 U.S. CONST. amend. III. U.S. CONST. art. VI, § 1, cl. 2.
322 U.S. CONST. amend. III.
323 U.S. CONST. amend. I. U.S. CONST. art. VI, § 1, cl. 2.
324 U.S. CONST. amend. I.
325 U.S. CONST. amends. I-X.
applying to all of the Amendments that follow as showing intent to restrict the application of the Amendments to only federal actions.\textsuperscript{327} In fact, the original proposed Bill of Rights that was sent to the States for ratification had our First Amendment as its third amendment of its original twelve proposed amendments.\textsuperscript{328} The first two proposed amendments were not ratified by the several States, and that's how the original Bill's third amendment became our First Amendment; (the original Bill's second amendment was eventually ratified and became the twenty-seventh amendment.)\textsuperscript{329} Each Amendment was examined by the several States, and was ratified or not, independently of the other Amendments, unlike the passing of a complete bill of legislation by a legislature, the States had to act positively to ratify each of the Amendments, and the States chose which ones to ratify. Amendment I provides that, "Congress\textsuperscript{330} shall make no law…" and this is a limiting prohibition on Congressional powers.\textsuperscript{331} This provides a specific restraint on the powers granted to Congress, and prevents the creation of broader powers in the named specific areas, which might be forced upon the people by a misinterpretation\textsuperscript{332} of the power "To make all Laws which shall be necessary and proper…"\textsuperscript{333} This provision acts as insurance against "necessary and proper" becoming the conduit with which intolerable transgressions would take

\textsuperscript{327} U.S. CONST. amend. I. Resolution of the First Congress Submitting Twelve Amendments to the Constitution (U.S. 1789).
\textsuperscript{329} Id. at 8, 17.
\textsuperscript{330} The language specifically restrains only Congress, which respected the State power to establish religion as preserved and exercised by Maryland and South Carolina in their own State constitutions. Freedom of religious expression and or practice is addressed in constitutions of nine of the States, to include a provision for State establishment of religion in two State constitutions, (Maryland and South Carolina.) DEL. CONST. of 1776. GA. CONST. of 1777. MD. CONST. of 1776. N.J. CONST. of 1776. N.C. CONST. of 1776. PA. CONST. of 1776. S.C. CONST. of 1776. VT. CONST. of 1786. VA. CONST. of 1776. See also CITIZENS UNITED v. FEDERAL ELECTION COMMISSION, 130 S. Ct. 876 (2010).
\textsuperscript{331} U.S. CONST. amend. I.
\textsuperscript{332} "THE Conventions of a number of the States, having at the time of their adopting the Constitution, expressed a desire, in order to prevent misconstruction or abuse of its powers, that further declaratory and restrictive clauses should be added: And as extending the ground of public confidence in the Government, will best ensure the beneficent ends of its institution:" Resolution of the First Congress Submitting Twelve Amendments to the Constitution (U.S. 1789). (emphasis added.)
\textsuperscript{333} U.S. CONST. amend. I. U.S. CONST. art. I, § 8, cl. 18.
Amendment I, which acts as a prohibition explicitly directed at Congress, by the thesis of Article VI Incorporation against the Judges of the States, holds no authority to bind the Judges in every State to the Amendment I provisions.  

b. Ninth Amendment

Amendment IX was adopted by the same people, at the same time in history, and approved by the same Congress in 1789 as the other Amendments which explicitly address the administration of justice.  

Amendment IX places all unenumerated and residual rights with the people. Amendment IX provides, "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." Just as the common law provides a backdrop to fill in possible gaps that may be left by legislation, Amendment IX serves as a gap filler to provide all residual rights with the people. There could not be a broader or clearer expression that there are other rights held by the people that are not explicitly announced in the Constitution. In light of the fact that the Amendments examined above are linked to Articles of the Constitution as well as to other Amendments, at the least in the ways described herein, Amendment IX is an explicit statement recognizing and declaring more protections do in fact exist, are Constitutionally grounded, and this would indicate rights are to

335 U.S. CONST. amend. I. U.S. CONST. art. VI, § 1, cl. 2.
336 U.S. CONST. amend. IX. U.S. CONST. amends. III, IV, V, VI, VII, VIII.
337 U.S. CONST. amend. IX. The right of the individual is further protected by the duty of the community to preserve the right. "A duty or a legal obligation is that which one ought or ought not to do. 'Duty and right are correlative terms. When a right is invaded, a duty is violated.' Lake Shore & Mich. S. Ry. Co. v. Kurtz, 37 N.E. 303, 304 (1894). (emphasis added.) "Jural Correlatives… right duty… privilege no-right… power liability… immunity disability… Rights and Duties." Wesley Newcomb Hohfeld, Fundamental Legal Conceptions 35-64 (Walter Wheeler Cook ed., 1946) (1919). (emphasis added.)
338 Id. amend. IX.
339 U.S. CONST. amends. III, IV, V, VI, VII, VIII.
340 U.S. CONST. arts. I, III, IV, VI.
341 U.S. CONST. amends. III, IV, V, VI, VII, VIII.
342 U.S. CONST. amend. IX.
be interpreted broadly rather than narrowly.\textsuperscript{343} The complete breadth of rights that Amendment IX preserves for the people is only to be revealed in the future.\textsuperscript{344} Amendment IX provides direction that other rights are known to exist and indicates those specifically articulated in the Bill of Rights should be interpreted broadly, and by the mechanism of Article VI Incorporation, directs broad interpretations of protections as binding upon the judges of the States.\textsuperscript{345} Moreover, Amendment IX could serve as an additional basis for the people as a community to have plaintiff standing\textsuperscript{346} to enforce rights' violations through its, "shall not be construed to deny or disparage others retained by the people," language, which directs the recognition and interpretation of all rights and protections broadly, to include interpretations by State judges.\textsuperscript{347} Just as with Justice Holmes comment concerning the \textit{penumbra} of the Fourth and Fifth Amendments in \textit{Olmstead v. United States}, 277 U.S. 438\textsuperscript{348} above, it echoes in \textit{Griswold v. Connecticut}, 381 U.S. 479 at 484, when Justice DOUGLAS opined, "The foregoing cases suggest that specific guarantees in the Bill of Rights have \textit{penumbras}, formed by emanations from those guarantees that help give them life and substance."

\begin{flushleft}
c. Tenth Amendment
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\textsuperscript{343} "The Ninth Amendment...was proffered to quiet expressed fears that a bill of specifically enumerated rights could not be sufficiently broad to cover all essential rights and that the specific mention of certain rights would be interpreted as a denial that others were protected." \textit{GRISWOLD v. CONNECTICUT}, 381 U.S. 479, 488-89 (1965). "While this Court has had little occasion to interpret the Ninth Amendment, (i)t cannot be presumed that any clause in the constitution is intended to be without effect. In interpreting the Constitution, real effect should be given to all the words it uses. The Ninth Amendment to the Constitution may be regarded by some as a recent discovery and may be forgotten by others, but since 1791 it has been a basic part of the Constitution which we are sworn to uphold. To hold that a right so basic and fundamental and so deeprooted in our society...may be infringed because that right is not guaranteed in so many words by the first eight amendments to the Constitution is to ignore the Ninth Amendment and to give it no effect whatsoever." \textit{GRISWOLD v. CONNECTICUT}, 381 U.S. 479, 490-91 (1965).
\textsuperscript{344} U.S. CONST. amend. IX.
\textsuperscript{345} U.S. CONST. amend. IX. U.S. CONST. art. IV, § 2, cl. 1. U.S. CONST. amends. III-VIII. U.S. CONST. art. VI, § 1, cl. 2.
\textsuperscript{346} SCRIPPS-HOWARD RADIO, INC. v. FEDERAL COMMUNICATIONS COMM’N, 316 U.S. 4 (1942).
\textsuperscript{347} U.S. CONST. amend. IX.
\textsuperscript{348} U.S. CONST. amends. IV. V. \textit{OLMSTEAD v. UNITED STATES}, 277 U.S. 438, 469 (1928).
\textsuperscript{349} GRISWOLD v. CONNECTICUT, 381 U.S. 479, 484 (1965). (emphasis added.)
Amendment X provides, "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 Amendment preserves all residual power with the people or the several States.

The expression "are reserved to the States," is important and is normally the focus of the Amendment, and stands as an expression of pure federalism. However, there is more to the Amendment. Immediately prior is the phrase, "nor prohibited by it to the States." Here within the Bill of Rights, as in Article I, section 10, which contains State prohibitions, and as in Article VI, which binds the Judges in every State, we see a statement that recognizes and acknowledges there are Constitutional limitations placed upon the States, and the Constitution itself has elements that are to be incorporated against the States, and this limiting language within Amendment X is in fact within the Bill of Rights. The Constitutional prohibition acknowledgement in Amendment X is reflected in the Constitutional exception of the Judiciary Act of 1789, which was approved by Congress one day prior to approval of the Bill of Rights. The Act provides, "Section 34. And be it further enacted, That the laws of the several States, except where the Constitution, treaties, or statutes of the United States shall otherwise require or provide, shall be regarded as rules of decision in trials at common law in the courts of the United States in cases where they apply." Although the statute is written to control the actions of federal courts ("courts of the United States"), it explicitly provides that even when State law is to provide the rule of decision, the State law must yield to the federal Constitution, treaties or

350 U.S. CONST. amend. X.
351 Id. amend. X.
352 Id. amend. X.
353 Id. amend. X.
356 An Act to establish the Judicial Courts of the United States, 1 Stat. 73 § 34 (1789). (emphasis added.)
This is a contemporaneous piece of Congressional legislation, that as with Amendment X, reflects the binding provision of State judges in Article VI.\textsuperscript{358}

The reference in Amendment X above to prohibitions upon the States, includes some which are enumerated in Article I, section 10.\textsuperscript{359} There is one State prohibition worth highlighting, “No State shall pass any Bill of Attainder, ex post facto Law, or any Law impairing the Obligation\textsuperscript{360} of Contracts…”\textsuperscript{361} With respect to a law regarding the obligation of contracts, who better to enforce the law than (businessmen themselves and if needed) the Judges in the States, since these routine commercial controversies are best handled at the lowest levels.\textsuperscript{362} This demonstrates the practicality of wanting to incorporate the U.S. Constitution against the State Judges, as is directed in Article VI, not to mention the much greater number of State Judges that Congress expected to exist in comparison to the number of federal Judges at the outset.\textsuperscript{363}

d. Second Amendment:

The last amendment left is Amendment II.\textsuperscript{364} Amendment II is brief and provides, "A well regulated Militia, being necessary to the security of a free State, the right of the people to

\begin{footnotesize}
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\item \textit{Id.} § 34.
\item An Act to establish the Judicial Courts of the United States, 1 Stat. 73 § 34 (1789). U.S. CONST. amend. X. U.S. CONST. art. VI, § 1, cl. 2.
\item U.S. CONST. amend. X. U.S. CONST. art. I, § 10.
\item "If the legislature mean to claim such an authority, it must be reserved in the grant. The charter of Dartmouth College contains no such reservation; and I am, therefore, bound to declare, that the acts of the legislature of New-Hampshire, now in question, do impair the obligations of that charter, and are consequently, unconstitutional and void." The TRUSTEES OF DARTMOUTH COLLEGE v. WOODWARD, 17 U.S. 518, 712 (1819). "In pronouncing this judgment, it has not for one moment escaped me how delicate, difficult, and ungracious is the task devolved upon us. The predicament in which this Court stands in relation to the nation at large, is full of perplexities and embarrassments. It is called to decide on causes between citizens of different States, between a State and its citizens, and between different States. It stands, therefore, in the midst of jealousies and rivalries of conflicting parties, with the most momentous interests confided to its care. Under such circumstances, it never can have a motive to do more than its duty; and, I trust, it will always be found to possess firmness enough to do that.” TRUSTEES OF DARTMOUTH COLLEGE v. WOODWARD, 17 U.S. 518, 712-13 (1819).
\item U.S. CONST. art. I, § 10, cl. 1.
\item U.S. CONST. art. I, § 10, cl. 1. U.S. CONST. art. VI, § 1, cl. 2.
\item U.S. CONST. art. VI, § 1, cl. 2.
\item U.S. CONST. amend. II.
\end{enumerate}
\end{footnotesize}
keep and bear arms, shall not be infringed.” In order to examine Amendment II properly, we should return to Article I, which provides Congress with military and arms powers. The arms powers are granted to Congress in the Constitution in Article I, section 8, clauses 11 through 17. However, Article I, section 8, clause 12, although it grants power, it also places a serious limit on Congressional Arms powers. Article I, section 8, clause 12 expressly limits Congress’s power to raise and support Armies, directing, "no Appropriation of Money to that Use shall be for a longer Term than two Years;" which controls defense spending, and thus restricts the strength of the military in the community. Amendments II and III act to explicitly provide further limits, beyond the limits in clause 12 above, that fit in snugly with Article I, section 8, so as to clearly define and limit the arms powers which have been granted to Congress. As Amendment III provides protections from misinterpretations that might stem from phrases like "needful Buildings" as a place to quarter soldiers; Amendment II preserves and asserts, "the right of the people to keep and bear arms, shall not be infringed," and provides protections from misinterpretations that might stem from phrases such as "Magazines, Arsenals, dock-Yards…” as being the only proper repositories for arms. The Colonists had significant experience with attempts at controlling arms possession, and understood that the right to bear arms was the last line of defense that protected self-rule.

Amendment II uses the phrase "the right of the people" and thereby explicitly provides at the minimum a right that belongs to the community, and should be enforceable by any member of the community (i.e. a third party should have standing to proceed with a cause of action) in the

365 Id. amend. II.
366 U.S. CONST. amend. II. U.S. CONST. art. I, § 8, cls. 11, 12, 13, 14, 15, 16, 17.
367 U.S. CONST. art. I, § 8, cls. 11, 12, 13, 14, 15, 16, 17.
368 U.S. CONST. art. I, § 8, cl. 12.
369 Id. art. I, § 8, cl. 12.
event of a violation.\textsuperscript{372} Now, turning to Article I, section 10, we discover explicit prohibitions to be held against the States, which in itself is a form of incorporating the Constitution against the States.\textsuperscript{373} One of these prohibitions is Article I, section 10, clause 3, which provides that, "No State shall, without the Consent of Congress, …keep Troops, or Ships of War in time of Peace…"\textsuperscript{374} which explicitly places a severe and strict limitation directly upon the States. The States are thereby prohibited from being the exclusive place that arms are to be kept on an ongoing basis. This is a Constitutional restraint upon the States, which coexists with "the right of the people to keep and bear arms."\textsuperscript{375} Therefore, we must read Amendment II, as providing the people as a community and as individuals, as having the right (and in some sense a duty) of keeping arms.\textsuperscript{376} The right must belong to individuals in some capacity, since the States are...
strictly prohibited from keeping Troops on an ongoing basis. In examining Amendment II, we have discovered linkages with at least Article I, section 8, as well as Article I, section 10.  

Under the strict prohibition upon the government idea of creating a community right of redress and remedy for any violation, the phrase "shall not be infringed" are the key words to rely on.  

shall be, and hereby is laid upon the United States, and apportioned to the states respectively, in the manner following: -  
To the state of New Hampshire, seventy-seven thousand seven hundred and five dollars, thirty-six cents and two mills. To the state of Massachusetts, two hundred and sixty thousand four hundred and thirty-five dollars, thirty-one cents and two mills. To the state of Rhode Island ....  

The said tax shall be collected by the supervisors, inspectors and collectors of the internal revenues of the United States, under the direction of the Secretary of the Treasury, and pursuant to such regulations as he shall establish; and shall be assessed upon dwelling-houses, lands and slaves, according to the valuations and enumerations to be made pursuant to the act, intituled ‘An Act to provide for the valuation of lands and dwelling-houses, and the enumeration of slaves within the United States,’ and in the following manner: -  

And be it further enacted, That the said tax shall be, and hereby is laid upon the United States, and apportioned to the states respectively, in the manner following: - To the state of New Hampshire, seventy-seven thousand seven hundred and five dollars, thirty-six cents and two mills. To the state of Massachusetts, two hundred and sixty thousand four hundred and thirty-five dollars, thirty-one cents and two mills. To the state of Rhode Island ....  

That each of the said collectors shall, immediately after receiving his collection list, advertise, by notifications, to be posted up in at least four public places in each collection district, that the said tax has become due and payable and the times and places at which he will attend to receive the same; and, in respect to persons who shall not attend, according to such notifications, it shall be the duty of each collector to apply once at their respective dwellings, within such district, and there demand the taxes payable by such persons; and if the said taxes shall not be then paid, or within twenty days thereafter, it shall be lawful for such collector to proceed to collect the said taxes, by distress and sale of the goods, chattels or effects of the persons delinquent as aforesaid, with a commission of eight per centum upon the said taxes, to and for the use of such collector: Provided, that it shall not be lawful to make distress of the tools or implements of a trade or profession, beasts of burden, arms, household utensils, or apparel necessary for a family.  

An Act to lay and collect a direct tax within the United States. Act of July 14, 1798, 2 Stat., ch. 75 (1798). (italics retained.) (emphasis added.) Comment: Take note that tools of the trade, beasts of burden, arms, household utensils, and clothing are all placed together in one clause of necessary personal property that even the United States tax collector is prohibited from using to satisfy overdue and delinquent taxes. “The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.” U.S. CONST. amend. IX. Here, in the Direct Tax Act of 1798 is an explicit example that the term “the people” clearly confers individual rights in addition to any rights retained by the people as a community. “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.” U.S. CONST. amend. II. In the Act, Congress has made clear that the right to keep and bear arms is explicitly provided for as an individual right, (in addition to the right of the people as a community, acting as a Militia, which is a duty as well), within the Direct Tax Act of 1798, and shall not be infringed to the extent that even the absolute Power to Tax must yield to the individual’s rights. The Direct Tax Act is an explicit expression enacted by the Congress which demonstrates that Rights supersede Powers, and that Rights (of individuals and the people as a community) are to be construed broadly, while Powers (granted to the government by the people) are to be construed narrowly, and that even great Sovereign Powers, such as Taxation, must yield to an Individual’s Rights. “A duty or a legal obligation is that which one ought or ought not to do. ‘Duty’ and ‘right’ are correlative terms. When a right is invaded, a duty is violated.” Lake Shore & Mich. S. Ry. Co. v. Kurtz, 37 N.E. 303, 304 (1894). (emphasis added.) “Jural Correlatives... right... duty... privilege no-right... power liability... immunity disability... Rights and Duties.” Wesley Newcomb Hohfeld, Fundamental Legal Conceptions 35-64 (Walter Wheeler Cook ed., 1946) (1919). (emphasis added.)  

378 U.S. CONST. amend. II.
The "shall not be infringed" prohibition aspect creates even more strength with respect to the community right to seek remedy in the event of violation.\textsuperscript{379}

It is possible to read Amendment II rights as not being purely individual rights if the focus falls on the "Militia."\textsuperscript{380} However, there is evidence to the contrary, such as when Richard Henry Lee declared, "the militia are the people."\textsuperscript{381} Akhil Reed Amar writes, "…the Constitution's explicit invocation of 'the Militia' in clause 16, in contradistinction to its use of 'Armies' in clause 12, makes clear that each word is used in its ordinary-language sense: army means enlisted soldiers, and militia means citizen conscripts."\textsuperscript{382} Additionally, Professor Amar explains, "…the right to bear arms had long been viewed as a political right, a right of First-Class Citizens.\textsuperscript{383} Thus the 'people' at the core of the Second Amendment were the same 'We the People' who in conventions had 'ordained and established' the Constitution and whose right to reassemble in convention was at the core of the First Amendment."\textsuperscript{384} The result is that the right belongs to the people as a community, and is prohibited to be exclusively exercised \textit{on an ongoing basis} by the States\textsuperscript{385}, and therefore must be exercised by both \textit{the people} collectively, and at a minimum \textit{by individuals} at some points in time, and possibly even continually.\textsuperscript{386}

\textsuperscript{379} \textit{Id.} amend. II.
\textsuperscript{380} \textit{Id.} amend. II.
\textsuperscript{381} \textsc{Forrest McDonald, Novus Ordo Seclorum: The Intellectual Origins of the Constitution} 267 (1985).
\textsuperscript{382} \textsc{Akhil Reed Amar, The Bill of Rights: Creation and Reconstruction} 54 (1998). U.S. Const. art. I, § 8, cls. 12, 16.
\textsuperscript{383} "There is some fuzziness at the edges, but arms bearing and suffrage were intimately linked two hundred years ago and have remained so." \textsc{Akhil Reed Amar, The Bill of Rights: Creation and Reconstruction} 48, 49 (1998).

\textsuperscript{384} \textsc{Akhil Reed Amar, The Bill of Rights: Creation and Reconstruction} 48, 49 (1998).
\textsuperscript{385} U.S. Const. art. I, § 10, cl. 3. U.S. Const. amend. II.
\textsuperscript{386} Although \textit{Presser v. Illinois}, 116 U.S. 252, is cited as stating the Second Amendment is not a right that may be incorporated against the States, the actual findings differ somewhat with this portrayal. The Court does recognize the right to bear arms, adding that it permits State's to exercise powers that restrict the right of assembly. "It is undoubtedly true that all citizens capable of bearing arms constitute the reserved military force or reserved militia of the United States as well as of the states, and, in view of this prerogative of the general government, as well as of its general powers, the states cannot, even laying the constitutional provision in question out of view, prohibit the people from keeping and bearing arms, so as to deprive the United States of their rightful resource for maintaining the public security, and disable the people from performing their duty to the general government. But, as already stated, we think it clear that the sections under consideration do not have this effect." *** It cannot be successfully
Bearing this in mind, it is likely the "Militia" was not the State,\textsuperscript{387} and was in fact distinctly separate\textsuperscript{388} from the State.\textsuperscript{389} The right to keep and bear arms provides a right that dates back to the English Bill of Rights of 1689, and is one of the tools required for the people to preserve self-government.\textsuperscript{390} In practice the right to keep and bear arms can easily be enforced against the federal government, but is there any application against the States, or does it somehow belong to the Militia, which falls under State control via the "Appointment of the Officers, and the Authority of training the Militia…"\textsuperscript{391}

The "right to keep and bear arms" is explicitly provided for in the English Bill of Rights, 1689, which declares, "That the subjects which are Protestants may have arms for their defence suitable to their conditions and as allowed by law."\textsuperscript{392} The Bill also asserted violations, "By causing several good subjects being Protestants to be disarmed at the same time when papists were both armed and employed contrary to law."\textsuperscript{393} This pre-existing right was reaffirmed as a part of a claim entitling the Colonists to all the rights of Englishmen within the Colonial Bill of Rights.\textsuperscript{394}

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{387} U.S. CONST. amend. II.
\item \textsuperscript{388} "and all military questions and matters, by the officers and courts established from among the militia." LOOMIS v. SIMONS, 2 Root 454, 456 (1796). "The question is altogether of military cognizance, viz. to which of said companies the plaintiff belonged; and in which, by law, he ought to do duty; this is determinable by the officers of the militia." LOOMIS v. SIMONS, 2 Root 454, 456 (1796). The State courts disclaim jurisdiction of the Militia in military matters, (Circuit Court of CONNECTICUT). LOOMIS v. SIMONS, 2 Root 454 (1796).
\item \textsuperscript{389} A case of trespass by the militia upon lands of a private citizen, who is not a member of the militia. The State claims jurisdiction of the Militia. Brigham v. Edmands, 73 Mass. 359 (1856). "Since the first organization of the militia of this commonwealth under the Constitution…" Brigham v. Edmands, 73 Mass. 359, 362 (1856). Here the Militia is viewed as a State Constitutional entity. "But it is claim to an exclusive appropriation, to a specific public use, of the property of an individual, for a distinct period of time, depriving the owner of its actual possession and enjoyment, and exposing it to necessary and essential damage. Such a right cannot be exercised except under the authority of the legislature, expressed in clear distinct terms, or by necessary implication, and with suitable provisions for compensation to the persons whose property may be so appropriated or injured." Brigham v. Edmands, 73 Mass. 359, 363 (1856). The State claims jurisdiction of Militia activities that impose (trespass) on the public, and also acknowledges that Militia use of land is property taken for public use.
\item \textsuperscript{390} U.S. CONST. amend. II. ENGLISH BILL OF RIGHTS § I para. 25 (Eng. 1689).
\item \textsuperscript{391} U.S. CONST. art. I, § 8, cl. 16.
\item \textsuperscript{392} ENGLISH BILL OF RIGHTS § I para. 25 (Eng. 1689).
\item \textsuperscript{393} Id. § I para. 8.
\end{enumerate}
\end{footnotesize}
Rights of 1774. It resolved, "That our ancestors, who first settled these colonies, were at the time of their emigration from the mother-country, entitled to all the rights, liberties, and immunities of free and natural-born subjects, within the realm of England." At the same time that these resolves claim all the rights of Englishmen, they also express the Colonists still believed as late as 1774, that they were English subjects and wanted to reconcile with England, despite many years of intolerable acts. However, a year later in 1775, frustration with the situation in the Colonies caused the Colonists to formally declare, "The inhabitants of Boston…delivered up their arms,…but in defiance…the governor ordered the arms deposited…to be seized by a body of soldiers…”

The Declaration of Arms of 1775 spelled out eleven years of British infringements upon the rights of the Colonists and denials of their rights to participate in a government of self-rule. It lists several incidents in which the Colonists had shed blood at the hands of the British, and further declared the British had, "attempted to effect their cruel and impolitic purpose of enslaving these colonies by violence, and have thereby rendered it necessary for us to close with their last appeal from reason to arms." The Declaration of Arms of 1775 charged that the British were guilty of, "exempting the 'murderers' of colonists from legal trial;" and "sent over fleets and armies to enforce" oppressive measures; and had "on the 19th day of April, sent out from that place [Boston] a large detachment of his army, who made an unprovoked assault on the inhabitants" at Lexington, and "officers and soldiers of that detachment, murdered eight of the inhabitants, and wounded many others." The British are further charged as guilty of

394 Declaration and Resolves of the First Continental Congress paras. 6, 8 (U.S. 1774).
395 Id. para. 8.
396 Id. paras. 6, 8, 26.
397 Declaration of the Causes and Necessity of Taking Up Arms para. 7 (U.S. 1775).
398 Id. para. 3.
399 Id. para. 2.
400 Id. paras. 3, 4, 7.
proceeding to Concord and "killing several and wounding more."\(^{401}\) It continues to charge the British with, ""the use and exercise of the law martial.' His troops have butchered our countrymen, have wantonly burnt Charlestown,…and exerting his utmost power to spread destruction and devastation around him."\(^{402}\) Only after enduring all of these transgressions do the Colonists declare to take up arms, and yet at this point they were still seeking reconciliation and a resolution with Great Britain.\(^{403}\)

From the evidence presented above, the Colonists moved patiently, step by step, from making assertions as a community, to filing formal complaints within the English mechanisms that were in place at the time, and then slowly moving toward rebellious actions showing their genuine discontent with England and the Crown. The Colonies formally articulated charges that the Crown had violated their specific rights as Englishmen and had imposed Procedural injustices upon the Colonies. Nonetheless, there was no rush to a decision of separation by the Colonies. For quite a long period of time, they simply wanted to be recognized as a part of Great Britain entitled to their rights as Englishmen as well as their natural rights, to include self-government.\(^{404}\) Both the Declaration of Arms of 1775 and the Declaration of Independence of July 4, 1776, referred to natural law and natural rights, which were well known Lockean principles that were accepted by Colonial Americans.\(^{405}\) Their patience is evidenced by the many years they endured the rights' violations while using formal English channels to object. Over time they collectively sensed the Necessity to take that last desperate measure, Separation and

\(^{401}\) Id. para. 7.  
\(^{402}\) Id. para. 9.  
\(^{403}\) Id. para. 14.  
Independence. A transformation which they openly acknowledged would require great
Sacrifice, possibly of their own Lives and Fortunes, but it had become the only way left to assure
self-government.

The chronology of the Colonial pronouncements provides incite into Colonial values,
they began with the Colonial Bill of Rights in 1774, followed by the Declaration of Arms in
1775, and lastly The Declaration of Independence in 1776. They were not driven by senseless
greed and a hunger for power, they did not wish to take up arms, they sought a peaceful

Only after the application of force by the British, especially intrusions by military forces,
did the Colonists feel pressured to act to the point of declaring themselves as "Free and
Independent States." The charges related to arms were numerous and included the
impressments of (Colonial) seaman to bear arms against their fellow countrymen (the Colonial
Americans), the presence of Standing Armies in peacetime, the Quartering of Soldiers among the
Colonists, the hiring of foreign mercenaries (Germans), as well as encouraging slaves and
Indians to take up arms against the Colonists.

The Colonial Americans understood the need for sacrifice that accompanied this decision
to undertake Separation. Whether "Blood and Treasure" or "our Lives, our Fortunes,"
everything they had was at stake, and they openly acknowledged that. The Colonial Americans
made a commitment to the onerous task of separation, but it was one of last resort, it was not a
venture taken lightly. These were not people simply frustrated by denial of a few basic rights and

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406 THE DECLARATION OF INDEPENDENCE paras. 1, 2, 31, 32 (U.S. 1776).
407 Id. para. 32.
408 DECLARATION AND RESOLVES OF THE FIRST CONTINENTAL CONGRESS (U.S. 1774). DECLARATION OF THE
409 THE DECLARATION OF INDEPENDENCE para. 32 (U.S. 1776).
410 Id. paras. 25, 26, 27, 28, 29.
411 DECLARATION AND RESOLVES OF THE FIRST CONTINENTAL CONGRESS para. 2 (U.S. 1774).
412 THE DECLARATION OF INDEPENDENCE para. 32 (U.S. 1776).
who just went to war based on 'Principle', they were clearly averse to taking up arms, and were forced by Necessity to take the desperate measure of Separation.\textsuperscript{413} The Colonists were averse to violence and war, \textit{yet they retained the right to keep and bear arms}, so we may infer the right was well thought out and was valued.\textsuperscript{414}

After examining Amendment II and its history, there is no conflict with Article VI Incorporation and Amendment II.\textsuperscript{415} The right may be viewed as belonging to individuals and the people as a community and enforceable against the federal government. The right may be read as belonging to individuals who may enforce the right against the States, (in the event the State Militia's were to claim control of all the arms held by individuals.) Historically, the collection of arms was repeatedly cited as a violation of rights to Englishmen, and was preserved in the Bill of Rights.\textsuperscript{416} However, if the right to keep and bear arms actually belongs to the Militias that exist

\begin{itemize}
\item \textsuperscript{413} \textit{Id.} para. 32.
\item \textsuperscript{414} \textit{ENGLISH BILL OF RIGHTS} § I para. 25 (Eng. 1689). \textit{U.S. CONST.} amend. II. (emphasis added.)
\item \textsuperscript{415} \textit{U.S. CONST.} amend. II. \textit{U.S. CONST.} art. VI, § 1, cl. 2.
\item \textsuperscript{416} \textit{ENGLISH BILL OF RIGHTS} § I para. 8 (Eng. 1689). \textit{U.S. CONST.} amend. II. The Power of taxation is extensive and absolute to the sovereign, and yet, notwithstanding this vast power, it yields to the individual's rights, to include the right to keep and bear arms, which is explicitly stated in the Direct Tax Act of 1798 (see the Statute excerpts and select Amendments following the Opinion excerpts.) Chief Justice MARSHALL on taxation: "Although, among the enumerated powers of government, we do not find the word 'bank' or 'incorporation,' \textit{we find the great powers to lay and collect taxes}; to borrow money; to regulate commerce; to declare and conduct a war; and to raise and support armies and navies. \textit{The sword and the purse}, all the external relations, and no inconsiderable portion of the industry of the nation, are entrusted to its government. It can never be pretended [408] that these vast powers draw after them others of inferior importance, merely because they are inferior. Such an idea can never be advanced. But it may with great reason be contended, that a government, entrusted with such ample powers, on the due execution of which the happiness and prosperity of the nation so vitally depends, must also be entrusted with ample means for their execution. The power being given, it is the interest of the nation to facilitate its execution. It can never be their interest, and cannot be presumed to have been their intention, to clog and embarrass its execution by withholding the most appropriate means. Throughout this vast republic, from the St. Croix to the Gulph of Mexico, from the Atlantic to the Pacific, \textit{revenue is to be collected and expended, armies are to be marched and supported}. The exigencies of the nation may require that the treasure raised in the north should be transported to the south, that raised in the east conveyed to the west, or that this order should be reversed.” McCULLOCH v. MARYLAND, 17 U.S. (4 Wheat.) 316, 407-08 (1819). (\textit{emphasis added.}) “The power of creating a corporation, though appertaining to sovereignty, is not, like the power of making war, or levying taxes, or of regulating commerce, a great substantive and independent power, which cannot be implied as incidental to other powers, or used as a means of executing them.” McCULLOCH v. MARYLAND, 17 U.S. (4 Wheat.) 316, 411 (1819). (\textit{emphasis added.}) “\textit{That the power of taxation is one of vital importance; that it is retained by the States; that it is not abridged by the grant of a similar power to the government of the Union; that it is to be concurrently exercised by the two governments: are truths which have never been denied. But, such is the paramount character of the constitution, that its capacity to withdraw any subject from the action of even this power, is admitted.} The States are expressly forbidden to lay any
duties on imports or exports, except what may be absolutely necessary for executing their inspection laws.”
McCULLOCH v. MARYLAND, 17 U.S. (4 Wheat.) 316, 425 (1819). (emphasis added.) “That the power of taxing it by the States may be exercised so as to destroy it, is too obvious to be denied. But taxation is said to be an absolute power, which acknowledges no other limits than those expressly prescribed in the constitution, and like sovereign power of every other description, is trusted to the discretion of those who use it.” McCULLOCH v. MARYLAND, 17 U.S. (4 Wheat.) 316, 428 (1819). (emphasis added.) “It is admitted that the power of taxing the people and their property is essential to the very existence of government, and may be legitimately exercised on the objects to which it is applicable, to the utmost extent to which the government may chuse to carry it. The only security against the abuse of this power, is found in the structure of the government itself. In imposing a tax the legislature acts upon its constituents. This is in general a sufficient security against erroneous and oppressive taxation.” McCULLOCH v. MARYLAND, 17 U.S. (4 Wheat.) 316, 428 (1819). (emphasis added.) “The people of a State, therefore, give to their government a right of taxing themselves and their property, and as the exigencies of government cannot be limited, they prescribe no limits to the exercise of this right, resting confidently on the interest of the legislator, and on the influence of the constituents over their representative, to guard then against its abuse. *** Those means are not given by the people of a particular State, not given by the constituents of the legislature, which claim the right to tax them, but by the people of all the States. They are given by all, [429] for the benefit of all -- and upon theory, should be subjected to that government only which belongs to all. ... It may be objected to this definition, that the power of taxation is not confined to the people and property of a State. It may be exercised upon every object brought within its jurisdiction.” McCULLOCH v. MARYLAND, 17 U.S. (4 Wheat.) 316, 428-29 (1819). (emphasis added.) “All subjects over which the sovereign power of a State extends, are objects of taxation; but those over which it does not extend, are, upon the soundest principles, exempt from taxation.” McCULLOCH v. MARYLAND, 17 U.S. (4 Wheat.) 316, 429 (1819). (emphasis added.) “We are not driven to the perplexing inquiry, so unfit for the judicial department, what degree of taxation is the legitimate use, and what degree may amount to the abuse of the power.” McCULLOCH v. MARYLAND, 17 U.S. (4 Wheat.) 316, 430 (1819). (emphasis added.) “That the power to tax involves the power to destroy; that the power to destroy may defeat and render useless the power to create; that there is a plain repugnance, in conferring on one government a power to control the constitutional measures of another, which other, with respect to those very measures, is declared to be supreme over that which exerts the control, are propositions not to be denied. But all inconsistencies are to be reconciled by the magic of the word CONFIDENCE. Taxation, it is said, does not necessarily and unavoidably destroy. To carry it to the excess of destruction would be an abuse, to presume which, would banish that confidence which is essential to all government.” McCULLOCH v. MARYLAND, 17 U.S. (4 Wheat.) 316, 431 (1819). (emphasis added.) “The American people have declared their constitution, and the laws made in pursuance thereof, to be supreme; but this principle would transfer the supremacy, in fact, to the States.”
McCULLOCH v. MARYLAND, 17 U.S. (4 Wheat.) 316, 432 (1819). (emphasis added.) Note that the tax Act is laid upon and apportioned to the States, there existence of the collectors of the internal revenues of the United States, and especially what property the tax collector is prohibited from taking away from delinquent tax payers as provided in the Direct Tax Act of 1798. STATUTE excerpts: “An Act to lay and collect a direct tax within the United States. Section 1. Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled. That a direct tax of two millions of dollars shall be, and hereby is laid upon the United States, and apportioned to the states respectively, in the manner following: - To the state of New Hampshire, seventy-seven thousand seven hundred and five dollars, thirty-six cents and two mills. To the state of Massachusetts, two hundred and sixty thousand four hundred and thirty-five dollars, thirty-one cents and two mills. To the state of Rhode Island,...” ... “Sec. 2. And be it further enacted. That the said tax shall be collected by the supervisors, inspectors and collectors of the internal revenues of the United States, under the direction of the Secretary of the Treasury, and pursuant to such regulations as he shall establish; and shall be assessed upon dwelling-houses, lands and slaves, according to the valuations and enumerations to be made pursuant to the act, intituled [sic] ‘An Act to provide for the valuation of lands and dwelling-houses, and the enumeration of slaves within the United States,’ and in the following manner:” ... “Sec. 9. And be it further enacted. That each of the said collectors shall, immediately after receiving his collection list, advertise, by notifications, to be posted up in at least four public places in each collection district, that the said tax has become due and payable and the times and places at which he will attend to receive the same; and, in respect to persons who shall not attend, according to such notifications, it shall be the duty of each collector to apply once at their respective dwellings, within such district, and there demand the taxes payable by such persons; and if the said taxes shall not be then paid, or within twenty days thereafter, it shall be lawful for such collector to proceed to collect the said taxes, by distress and sale of the goods, chattels or effects of the persons delinquent as aforesaid, with a commission of
within the States, it would be enforceable against the federal government, and have no particular
use against the States, but this interpretation still would not conflict with Article VI
Incorporation, under this type interpretation it would simply not be applicable. Regardless of
the interpretation, Amendment II does not conflict with Article VI Incorporation. The
prohibitions placed upon collectors of the internal revenues of the United States from infringing
upon the individual’s right to keep and bear arms provides explicit statements enacted by
Congress that demonstrate these Rights are at a minimum Individual, and the Individual’s Rights
supersede Powers of the Sovereign, even the absolute Power of Taxation of the Sovereign, even
when the individual is delinquent and overdue in the payment of taxes.

eight per centum upon the said taxes, to and for the use of such collector: Provided, that it shall not be lawful to
make distress of the tools or implements of a trade or profession, beasts of the plough necessary for the
cultivation of improved lands, arms, or the household utensils, or apparel necessary for a family,” An Act to
lay and collect a direct tax within the United States. Act of July 14, 1798, 2 Stat., ch. 75 (1798). (italics retained.)
that tools of the trade, beasts of burden, arms, household utensils, and clothing are all placed together in one clause
of necessary personal property that even the United States tax collector is prohibited from using to satisfy overdue
and delinquent taxes. “The enumeration in the Constitution, of certain rights, shall not be construed to deny or
disparage others retained by the people.” U.S. CONST. amend. IX. Here, in the Direct Tax Act of 1798 is an explicit
element that the term “the people” clearly confers individual rights in addition to any rights retained by the people
as a community. “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” U.S. CONST. amend. II. In the Act, Congress has made clear that the
right to keep and bear arms is explicitly provided for as an individual right, (in addition to the right of the people as
a community, acting as a Militia), within the Direct Tax Act of 1798, and shall not be infringed to the extent that
even the absolute Power to Tax must yield to the individual’s rights. The Direct Tax Act is an explicit expression
enacted by the Congress which demonstrates that Rights supersede Powers, and that Rights (of individuals and the
people as a community) are to be construed broadly, while Powers (granted to the government by the people) are to
be construed narrowly, and that even great Sovereign Powers, such as Taxation, must yield to an Individual’s
Rights.

417 U.S. CONST. amend. II. U.S. CONST. art. VI, § 1, cl. 2.
418 U.S. CONST. amend. II. U.S. CONST. art. VI, § 1, cl. 2.
419 “Sec. 9. And be it further enacted, That each of the said collectors shall, immediately after receiving his
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to apply once at their respective dwellings, within such district, and there demand the taxes payable by such
persons; and if the said taxes shall not be then paid, or within twenty days thereafter, it shall be lawful for
such collector to proceed to collect the said taxes, by distress and sale of the goods, chattels or effects of the
persons delinquent as aforesaid, with a commission of eight per centum upon the said taxes, to and for the use of
such collector: Provided, that it shall not be lawful to make distress of the tools or implements of a trade or
profession, beasts of the plough necessary for the cultivation of improved lands, arms, or the household
utensils, or apparel necessary for a family.” An Act to lay and collect a direct tax within the United States. Act of
July 14, 1798, 2 Stat., ch. 75 (1798). (italics retained.) (emphasis added.) Comment: Take note that tools of the
V. Conclusion

This paper has examined reasons for adopting the administration of justice Amendments, their relationships with each other and the protections they provide the people.\textsuperscript{420} The administration of justice Amendments make provisions that serve to protect and articulate rights belonging to both the individual and the community. Moreover, the Amendments are linked to each other and Amendment IX serves as a Constitutionally grounded gap filler of all other unenumerated rights.\textsuperscript{421} The examination has shown how Amendment IV is linked with Amendment V by "the due process of law" provision, and how Amendment III is directly linked with Amendment V by the 'takings' and "just compensation" provision and "the due process of law provision."\textsuperscript{422} Of the ten Amendments in the Bill of Rights, only the First Amendment explicitly limits Congress' actions, which makes it all the more textually clear, Article VI Incorporation against the States was the intent of the Americans who wrote and amended the Constitution.\textsuperscript{423}

The impact of this thesis, if it had been accepted by the United States Supreme Court at the time of hearing \textit{Barron v. Baltimore}, 32 U.S. 243 (1833), would have meant enforcing against Baltimore (Maryland) the Fifth Amendment prohibition against "private property being trade, beasts of burden, arms, household utensils, and clothing are all placed together in one clause of necessary personal property that even the United States tax collector is prohibited from using to satisfy overdue and delinquent taxes. "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by \textit{the people}.” U.S. CONST. amend. IX. (\textit{emphasis added}.) Here, in the Direct Tax Act of 1798 is an explicit example that the term "the people" clearly confers individual rights in addition to any rights retained by the people as a community. “A well regulated Militia, being necessary to the security of a free State, \textit{the right of the people to keep and bear Arms, shall not be infringed}.” U.S. CONST. amend. II. (\textit{emphasis added}.)

\textsuperscript{420} U.S. CONST. amends. III, IV, V, VI, VII, VIII.
\textsuperscript{421} U.S. CONST. amends. III, IV, V, VI, VII, VIII. U.S. CONST. amend. IX.
\textsuperscript{422} U.S. CONST. amends. III, IV, V.
\textsuperscript{423} U.S. CONST. amends. I-X. U.S. CONST. amend. I. U.S. CONST. art. VI, § 1, cl. 2.
taken for public use, without just compensation.\footnote{424} The verdict of $4500 awarded at trial, would have been enforceable as just compensation for property taken for public use.\footnote{425} However, the Court wrote, "This court, therefore, has no jurisdiction\footnote{426} of the cause, and it is dismissed."\footnote{427} This careless\footnote{428} analysis by the Court, since it occurred early in American history has burdened the nation with its imprudence. Had the Court performed its duties properly, and discovered the force of Article VI, we might not have come to know \textit{Dred Scott v. Sandford}, 60 U.S. (19 How.) 393 (1857), as well as we have.\footnote{429}

\begin{footnotes}
\footnote{424} BARRON v. BALTIMORE, 32 U.S. 243 (1833). U.S. CONST. amend. V.
\footnote{425} BARRON v. BALTIMORE, 32 U.S. 243, 244 (1833).
\footnote{426} Here, the Court admits it looked to the Constitution for authority, and in its own words admits it did not look to Article VI or Article V, as it focused its rather inadequate search on Article I. Moreover, any analysis of Amendments that does not discuss Article V and the Amendment process as it involves the several States is blatantly inadequate. U.S. CONST. arts. I, V, VI. When deciding a lack of jurisdiction, the Court states, "The powers they conferred on this government were to be exercised by itself; and the limitations on power, if expressed in general terms, are naturally, and, we think, necessarily, applicable to the government created by the instrument. They are limitations of power granted in the instrument itself; not of distinct governments, framed by different persons and for different purposes. *** If the original constitution, in the ninth and tenth sections of the first article, draws this plain and marked line of discrimination between the limitations it imposes on the powers of the general government, and on those of the state; if, in every inhibition intended to act on state power, words are employed, which directly express that intent; some strong reason must be assigned for departing from this safe and judicious course, in framing the amendments, before that departure can be assumed. We search in vain for that reason." BARRON v. BALTIMORE, 32 U.S. 243, 247, 249 (1833). It might be inferred the Court intentionally overlooked portions of the Constitution in 1833, since years earlier, in 1805, the Article I, First Amendment and Third Amendment enumerated restrictions were all mentioned sequentially in one sentence of the lower court opinion by the Chief Judge. The lower court opinions from Judge CRANCH, Judge MARSHALL, and Chief Judge KILTY were written for the Circuit Court of the District of Columbia and are reprinted in the record prior to the Supreme Court opinion, (which was written by Chief Judge MARSHALL, who sat on the Circuit Court as well and held there was no jurisdiction for Supreme Court review). Chief Judge KILTY for the Circuit Court wrote, "Thus they [Congress] are restrained from suspending the writ of habeas corpus, unless in the cases allowed; from passing... (within and for the district) a bill of attainder, or ex post facto law; from laying therein a capitation tax; from granting therein any title of nobility; from making therein a law respecting the establishment of religion, or abridging the freedom of speech, or of the press; and from quartering soldiers therein, contrary to the third amendment." UNITED STATES v. MORE, 7 U.S. 159, 160 (1805). It is interesting that in \textit{Barron v. Baltimore}, 32 U.S. 159, the case involved a wharf and an allegation that the water was rendered so shallow that it ceased to be useful for vessels of an important burden, lost its income, and became of little or no value as a wharf, did not even fall within admiralty jurisdiction. BARRON v. BALTIMORE, 32 U.S. 243 (1833). Admiralty jurisdiction could have been attained and lies within the judicial power of the United States. "Those rivers must be regarded as public navigable rivers in law which are navigable in fact." THE DANIEL BALL, 77 U.S. (10 Wall.) 557, 563 (1871).
\footnote{427} BARRON v. BALTIMORE, 32 U.S. 243 at 251 (1833).
\footnote{428} "The question thus presented is, we think, of great importance, but not of much difficulty." BARRON v. BALTIMORE, 32 U.S. 243, 247 (1833). Few things of great importance are of "not much difficulty."
\footnote{429} U.S. CONST. art. VI, § 1, cl. 2. DRED SCOTT v. SANDFORD, 60 U.S. (19 How.) 393 (1857). It is interesting to examine the contrasts in an earlier slave-case brought by a petitioner-slave in an opinion by Chief Justice TANEY in 1842, "The case … came upon a petition for freedom. ‘Provided he shall not carry them out of the state of Maryland, or sell them to any one; in either of which events I will and devise the said negroes to be free for life,’ …
When put into actual practice, the State courts, State Judges, and State Justices shall be bound by the administration of justice Amendments continually and throughout the entire timeline of the legal process. Whenever a judge issues a warrant, it must conform with the Fourth Amendment to include at least the requirements of probable cause, supported by an oath or affirmation, and comply with requirements of particularity. Any and all searches, to include even those without warrants, which are not entirely prohibited, must not be unreasonable, and such reasonableness is to be determined by a jury.

When there is a criminal or civil trial, a jury shall be provided and selected from the prescribed locale. In a criminal case, indictment by a Grand Jury is a requirement to proceed. The accused shall be informed of the charges against him, and provided with opportunity for confrontation of witnesses against him, and provided the power for compulsorily obtaining witnesses in his favor, and no person shall be compelled to be a witness against himself, and the accused shall have the assistance of counsel for his defense. The accused shall also enjoy the right to a public trial, which may become an important issue in light of the current national security proceedings. These specifically articulated provisions could easily all fall within the provision prohibiting deprivation "of life, liberty, or property, without due process of law", but additional elements would be required so as to conform with due process.

Now a bequest of freedom to the slave upon the same principles with a bequest over to a third person. … there can be no reason for applying a different rule where the bequest over is freedom to the slave. … freedom to the petitioner, … affirmed.” WILLIAMS v. ASH, 42 U.S. 1, 12-14 (1842).

U.S. CONST. amends. III, IV, V, VI, VII, VIII.

U.S. CONST. amend. IV.


U.S. CONST. amend. V.

U.S. CONST. amends. V, VI.

U.S. CONST. amend. VI.

arraignment or sentencing, the Eighth Amendment would provide limits to the application of bail, fines, and punishments.\textsuperscript{438}

The taking of property for public use, to include the quartering of soldiers, would require compliance with the Third and Fifth Amendments and providing just compensation.\textsuperscript{439} Here, when taking property, the "due process" clause of the Fifth Amendment, and the Seventh Amendment provide for a jury trial in the determination of such "just compensation."\textsuperscript{440}

The future impact upon modern cases, if Article VI Incorporation is recognized and adopted, would hopefully be a positive one for the people of the United States, rather than for the government, which derives its power\textsuperscript{441} from the governed.\textsuperscript{442} However, recent applications of the present method of selective incorporation by way of the Fourteenth Amendment, have at times resulted in employing the protections to send more people to prison rather than protecting them from government interference, such as in the cases of \textit{Wyoming v. Houghton}, 526 U.S. 295 (1999), and \textit{New York v. Belton}, 453 U.S. 454 (1981).\textsuperscript{443} The power of incorporation, which even under Fourteenth Amendment mechanisms, was originally employed to further provide protections for a larger number of individuals within the body of the people. However, the inappropriate application of a legal principle, that of using a shield as a sword has resulted in an increasing number of exceptions and expansions of exceptions to the protections.\textsuperscript{444} This has resulted from jurisprudence discussions treating the constitutional protections as barriers that must be overcome, when in fact they were rights retained, preserved and articulated so as to

\begin{itemize}
\item \textsuperscript{438}U.S. \textsc{const.} amend. VIII.
\item \textsuperscript{439}U.S. \textsc{const.} amends. III, V.
\item \textsuperscript{440}U.S. \textsc{const.} amends. V, VII.
\item \textsuperscript{441}“Governments are instituted among Men, \textit{deriving their just powers from the consent of the governed,}…" \textsc{the declaration of independence} para. 2 (U.S. 1776). (emphasis added.)
\item \textsuperscript{442}U.S. \textsc{const.} art. VI, § 1, cl. 2.
\item \textsuperscript{443}U.S. \textsc{const.} amend. XIV. \textsc{wyoming v. houghton}, 526 U.S. 295 (1999). \textsc{new york v. belton}, 453 U.S. 454 (1981).
\item \textsuperscript{444}U.S. \textsc{const.} amend. XIV. U.S. \textsc{const.} amend. IV. \textsc{wyoming v. houghton}, 526 U.S. 295 (1999). \textsc{new york v. belton}, 453 U.S. 454 (1981).
\end{itemize}
prevent just such jurisprudence from producing misconstructions of the Constitution that would allow government to interfere with the people and individuals. When the Court fails to recognize that these protections were put in place to prevent the specific misbehavior of Judges and Justices\textsuperscript{445}, and the Constitutional constraints are provided specifically to control jurisprudence, the purpose of the administration of justice Amendments\textsuperscript{446} is lost, and the power of incorporation may be subverted. If the Court continues to make exceptions to Constitutional rights and protections, demonstrating a blatant failure to recognize these protections belong to the people, and not to any body of government, that is a course of behavior that the people cannot accept as "good."\textsuperscript{447} "No court of justice can be authorized so to construe any clause of the constitution as to defeat its obvious ends, when another construction, equally accordant with the words and sense thereof, will enforce and protect them."\textsuperscript{448}

\textsuperscript{445} "Governments are instituted among Men, deriving their \textit{just} powers from the consent of the governed,..." \textsc{The Declaration of Independence} para. 2 (U.S. 1776). (emphasis added.)
\textsuperscript{446} \textsc{U.S. Const.} amends. III-VIII. \textsc{U.S. Const.} amend. IX.
\textsuperscript{447} "all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution;" \textsc{U.S. Const.} art. VI, § 1, cl. 3. "The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour;" \textsc{U.S. Const.} art. III, § 1, cl. 1.