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The American Bill of Rights: the genesis of the modern constitutionalism

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1 Introduction

The history of mankind is earlier and larger than the constitutional history. In a chronological approach, it is possible to affirm that the first appeared the people, and then the community and the law. Later, the society appeared and, finally, an official and superior order was structured in the benefit of civilized society. The latter performs part of the people's power, due to the impossibility of an individualistic exercise of this power, vested in a political entity named modern state.

According to François Ost, in the beginning it was the law, it was the judge, it was the individual and the common sense and individual rights.[1] In the beginning, it was not the institutional state, it was not the Judiciary Power and it was not the legal system.

The power originally belonged to the people, but the people understood that was impossible for them to exercise it. No other possibility existed than to vest a political entity to exercise the power according to the expectations of the people, because only the state can institutionalize the power.

Nevertheless, along the human history, this simple political equation had never been easily understood by neither party: the people and those who exercise the power in the name of the people. In fact, the original power always

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1 François Ost, "Raconter la Loi – Aux Sources de l'Imaginaire Juridique". Odile Jacob, 2004.

existed, but sometimes, it was illegitimately appropriated by individuals that legitimately ascended to the power. And sometimes the power was simply usurped by someone or by some group that declared themselves as the defenders of the people's power.

But, even sometimes illegitimately exercised, the power could not be simply recovered in their integrity by the people. The alternative was to renegotiate this political relation, in terms of limits and ways of exercise. According to this renegotiation, the state could only exercise the powers that were expressly given by the people. In this way, in the modern societies, a partial delegation of powers is expressly defined in a formal written document, which kings and revolutionists or even democratic elected governments cannot ignore.

This document, according to Konrad Hesse,[2] is not only political, but juridical, as well. In such terms, this document cannot be viewed just as a simple piece of paper (*ein stuck papier*) or as an ordinary law, but as a superior law created from the political accordance that subordinates all other laws.

This superior rule must be expressed in a formal legal document (political and juridical) which requires a different nomination, considering its different nature from the ordinary legal statutes. In these terms, this political legal document could not be identified by the ordinary name given for juridical documents, i.e. "Act", but by a proper name taken from the Roman law: "Constitution".[3]

Admitting the idea that the law and the individual rights were prior to the creation of the state,[4] we must wonder why mankind decided to create this political entity called "state": The state is necessary because people have to institutionalize the power in order to coordinate laws and rights.

But the purpose of the state is not limited to institutionalize the power. Mankind also expects from the state the respect of welfare conditions of living. This second goal is incompatible with an autocratic state or with a revolutionary state. In such terms, there is an inseparable relation between constitutional order and welfare society. In a constitutional document people delegate powers and, at the same time, define limits that a state may operate in order to respect their welfare conditions of living.

Furthermore, concerning a third goal, the modern societies also expect from the constitutional order in a welfare society, the necessary actions to be taken by the state in order to respect the rights and the guarantees that are incorporated in the document, in the form of affirmative actions.

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2 Konrad Hesse, "A Força Normativa da Constituição". Sergio Fabris Editora, p 5, 1991.

3 In Rome the term *constitutione* was used to identify the laws promulgated by the emperor without the consent of the Roman Senate.

4 Luiz Inácio Vigil Neto and l, Eric Hickel, "Petite Histoire du Droit du Peuple Français – Evolution et Perspectives", p. 327 – Ed Revista da Ajuris n.º 112, 2008.

At the end of this introduction we can reach a very logical conclusion: a constitutional order in a welfare society cannot be successfully implemented by autocratic or revolutionary governments, only by democratically elected governments.

Unfortunately, the Nazi Germany demonstrated that this conclusion is not so obvious. The Nazi party won the elections for the German Parliament (*Reichstag*) in 1933 and, according to the German Constitution of Weimar, it could indicate the Chancellor.[5] One year later, with the death of President Hindenburg, instead of determining new presidential elections, Hitler got the power absorbing both functions: chief of state and chief of government, nominating himself the *fuhrer* (the chief). After that, without the revocation of the constitutional document, he simply ignored the constitutional order and implemented a dictatorial state.

The Weimar Constitution (1919) was a truly democratic constitution that contained an extensive catalogue of basic rights, but they were rather guiding principles than rights enforceable in courts. As they did not enjoy any specific protection, they could be easily suppressed in the Third Reich.[6]

The present German constitution contains a significant catalogue of rights, providing the human dignity as an essential element that any government must uphold. The basic rights are binding on the legislature, the executive and the judiciary power as enforceable law. They are established as binding duties under the constitution. This represents for German constitutional law that the basic rights are not just a catalogue of good intentions to be conveniently ignored by government. This is the guarantee for understanding that the state system serves the people, not vice-versa.[7]

At this point it is clear that neither an institutionalized state nor a democratic elected government represent a real guarantee for a welfare society, but only a strong constitutional order, in a constitutionalist basis, fully respected by governments and public institutions.

In 1791, the founding generation of the United States realized that even democratically elected governments in an institutionalized state were capable of violating individual rights. For this reason, the founding generation insisted that the original text of the Constitution could be expanded to include a catalogue of immutable rights that no government could ignore. The founding generation called this catalogue of immutable rights as the Bill of Rights.

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5 For historical reasons concerning the first pre-unification era (1862-1871), the Prime Minister in Germany is called the Chancellor.

6 Nigel Foster and Satish Sule,. “German Legal System and Laws”. Oxford Press, p. 204, 2003.

7 Nigel Foster and Satish Sule, above ,p 204.

2 Historical Backgrounds

2.1 The American Independence and the Articles of Confederation

The Declaration of Independence, authored by Thomas Jefferson, was signed in 1776. After the revolutionary war ended in 1781, the thirteen colonies ratified the Articles of Confederation of the United States of America.

The Articles of Confederation were the first constitution of the United States. Nevertheless, the national government created by it was very weak due to the political compromise that permitted the state governments to retain their sovereignty. Indeed, in its text it was claimed that each state retained its sovereignty, freedom, and independence. Similarly, any power recognized by the national government represented an express delegation by assembled Confederation Congress. Under the Articles of Confederation there was no federal judiciary and no federal executive. The Confederation Congress had limited powers such as to declare war, to coin money, to establish post offices, and to deal with Indian tribes.

The main problem of the American Confederation was the lack of power that the national legislature had. The autonomy of the confederated states transformed them in competitors instead of allies. The stronger states used their competitive advantages against the less developed ones. The less developed states, in retaliation, adopted laws that discriminated goods and services, or erected barriers against products from the competitor states. The Confederation Congress was powerless to obstruct these protective actions. There were no national laws against it, but only laws promulgated by states applied by local courts which made their interpretations according to the protective state commerce principles.

2.2 The Constitutional Convention

In 1787, from May 25 to September 17, in Philadelphia, a Constitutional Convention was held to propose changes to the Articles of Confederation. According to the original provisions of the Articles of Confederation, an unanimous consent was required for revisions in its text.

On the other hand, Article VII specified that *"[t]he Ratification of the Conventions of nine States shall be sufficient for the establishment of a Constitution between the states"*.

In a very direct form: it was easier for the delegates to create a new constitution rather than to amend the Articles of Confederation. Thus, the delegates immediately agreed on abandoning the Articles of Confederation, rather than amending it, and initiated the creation of a new constitution.

The first vote at the Convention was the adoption of a national government consisting of a federal legislative (House of Representatives and Senate), federal judiciary (Supreme Court and Federal Lower Courts) and a federal executive power held by the President of the United Sates of America.

After passing the resolutions concerning the major aspects of the new government, the Convention formed a Committee to place the resolutions into a coherent document. Later, the Committee presented its revised draft of the document to be debated. On September 17, 1787, the members of the Convention approved the document, signed it, and returned home to obtain its ratification.

2.3 The Ratification Process

The new Constitution of the United States of America that created the first federal nation in the modern world was not easily accepted in the beginning by the American states. There was a very strongly organized antifederalist movement in many states.[8]

The antifederalists argued that the ratification of the new constitution would create a strong national government able to relegate state governments to a secondary and unimportant role. According to their point of view, the new constitution had another serious problem: if the national government was able to relegate the states to a secondary role, it could easily disrespect basic rights of the individuals of the states in the name of a "national" interest. It could be possible, since there was no enumeration of individual rights in the Constitution.

Pennsylvania ratified convention on November 20, 1787 and on December 12. Delaware ratified the Constitution on December 7. Later, New Jersey, Georgia, Massachusetts, Maryland and South Carolina also ratified it. By June 1788, ten states had ratified the Constitution, one more than nine, which was what Article VII required.

2.4 The Bill of Rights

One of the arguments used by antifederalists against the ratification of the Federal Constitution was the inexistence of a catalogue of individual rights. Some states conditioned their formal ratification to the addition of enumerated individual rights to the constitutional document.

[8] Initially, states like North Carolina, Rhode Island, Massachusetts, New Hampshire, New York and Virginia offered a strong opposition to ratify the Constitution. The federalist movement represented in the political scenario by Alexander Hamilton, James Madison and John Jay.

As it would represent a real possibility of another constitutional convention, in order to prevent it, James Madison proposed a group of amendments to the Constitution. This group originally contained twelve amendments, but only ten were ratified by the requisite of three/fourths of state legislature. These ten amendments were called the Bill of Rights.[9]

3 The Bill of Rights (1791)

3.1 Historical Justifications and Political Goals

The [first] Bill of Rights was structured in ten amendments, First to Tenth. It was designed to guarantee the religious liberty, free speech, personal privacy, private property, and procedural fairness against the power of democratic majority for individuals.

After the American Civil War (1861-1865), the former slaves were not, in fact, integrated to the American society as equal free citizens. Thus, part of the American society comprehended the necessity of additional amendments to the Constitution. These were called the "integration amendments", and represent a [second] Bill of Rights.[10] It was designed to protect equality by outlawing slavery, guaranteeing equal protection, and assuring the right to vote to members of racial minorities. This [second] Bill of Rights was structured in three amendments: the thirteenth (1865), the fourteenth (1868) and the fifteenth (1870).

The Bill of Rights does not protect individuals against the misuse of private powers. With the exception of the prohibition against slavery in the 13th, the provisions of the Bill protect individuals against the government, not against other individuals. The document concentrates on preserving the personal and political rights needed for the proper functioning of a tolerant political democracy.

3.2 The Incorporation Doctrine

The Bill of Rights was originally added to the federal constitution of the United States. In such terms, it is possible to affirm that, unless the state constitutions admit similar restrictions, citizens would be deprived of individual liberties at the state and local level.

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9 New Jersey was the first state to approve the Bill of Rights on November 20, 1789, and Virginia was the last state on December 15, 1791.

10 Burt Neuborne, "An Overview on the Bill of Rights", p. 83, Oxford Press, 1997

In *Barron v. Mayor & City Council of Baltimore (1833),*[11] the Supreme Court held that the Bill of Rights was a restriction of federal actions, not against state and local conduct. Barron sued the City for taking his property without just compensation in violation of the Fifth Amendment. The issue was whether the takings clause of the Fifth Amendment applied to the local level. Justice John Marshall explained that the Bill of Rights was clearly intended to apply to the federal government, because the States have their own constitutions that could provide the same limitations and restrictions.

This precedent consolidated along the years the idea that the restrictions of the Fifth Amendment: "…nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation" did not apply against state actions.

In such terms, the Fifth Amendment was not the paved way to enlarge the Bill of Rights restrictions to the states. This way was paved through the Fourteenth Amendment; thereby almost all provisions of the Bill of Rights come to be incorporated against the states.

With the Integration Amendments, besides the abolition of slavery through the Thirteenth Amendment, there was the necessity to provide the access of that part of the American population to the basic civil rights guaranteed for all American citizens through the [first] Bill of Rights.

As noted above, the Bill of Rights by its own force applies only to action by the federal government. However, most of the provisions of the Bill of Rights have been absorbed into the Due Process Clause of the Fourteenth Amendment.

The process of absorption began in the late nineteenth century, when the Court held that the taking of private property for public use without just compensation violates the "*due process of law required by the Fourteenth Amendment"*.

The adoption of the Fourteenth Amendment in 1868, radically changed both the Constitution's and the national government's role in the protection of the civil rights. It established the federal supremacy within the realm of civil rights. Through a process of incorporation, the Fourteenth Amendment became a constitutional vehicle through which courts now apply most provisions of the Bill of Rights to the states.

This was the essence of the decision in *Chicago Burlington & Quincy Railroad Co. v. City of Chicago (1897)*. The Supreme Court ruled that the *due process clause* of the Fourteenth Amendment prevents states from taking property without just compensation. Although it did not explicated, the incorporating taking clause was the practical effect of the decision.

[11] Holding: State governments are not bound by the Fifth Amendment's requirement for just compensation in cases of eminent domain.

After the *Chicago Burlington and Quincy Road* case, State and local governments were to be constrained if at all, by the Bill of Rights. In 1925, the Supreme Court began to read that the due process clause of the Fourteenth Amendment as "incorporating" provisions of the Bill of Rights thus making them directly applicable against the states *(Gitlow v. New York –1925)***.**[12] The Supreme Court declared that free speech of the First Amendment was applicable against states through the Fourteenth Amendment due process clause.

The result of the Gitlow case was that the incorporation process was enlarged to almost every provision of the Bill of Rights against the states. If the Bill of Rights would be applicable only to the federal government, the obvious concern was that the state and local governments would be free to infringe even the most fundamental liberties.

The incorporation doctrine reached to the following amendments:

- The First Amendment's establishment clause, free exercise clause, protection of speech, press, assembly and petition – **entirely**;
- The Fourth Amendment's protection against unreasonable searches and seizures and the requirement for a warrant based on a probable clause; also the exclusionary rule, which prevents the government from using evidence obtained in violation of the Fourth Amendment – **entirely**;
- The Fifth Amendment's prohibition of double jeopardy, protection against self-incrimination, and requirement that government pay just compensation when it takes private property for public use – **but not for the requirement of a grand jury indictment for criminal prosecutions**;
- The Sixth Amendment's requirement for speedy and public trial by impartial jury with notice of charges, the chance to confront witnesses and the right to have the assistance of counsel if the sentence involves possible imprisonment – **entirely**;
- The Eighth Amendment's prohibition against excessive bail and cruel and unusual punishment, **partially**.

The Supreme Court also held that neither the Second Amendment right to bear arms nor the Seventh Amendment right to be judged by a jury trial in criminal cases, are incorporated into the Fourteenth Amendment. The Supreme Court has not ruled on the incorporation of the Third Amendment's proscription against quartering of soldiers or the Eighth Amendment's proscription against excessive bails and excessive fines.

[12] Holding: Though the Fourteenth Amendment prohibits states from infringing free speech, the defendant was properly convicted under New York's criminal anarchy law for advocating the violent overthrow of the government, through the dissemination of Communist pamphlets.

4 Civil Rights

4.1 The First Amendment: "*Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the government for a redress of grievances"*

The basic goal of the First Amendment is to unite the essential pre-conditions to a welfare democratic society. It is structured on three basic guarantees: the freedom to believe, the freedom of speech and the right of an active participation.

4.1.1 The Freedom to Believe

It represents a guarantee on the religious belief for the American citizens against the misuse of the power by the state to impose a dominant religion. It is composed by two clauses: the free exercise clause and the free establishment clause. By these clauses, the American society built a constitutional "wall" between Church and State.[13]

The one side of the "wall" codified in the "free exercise clause", prevents the government from penalizing individual exercises of religious conscience. The other side is codified in the "establishment clause", which prevents the government's tolerance or support to the advance of religious doctrine. Thus, the religion clauses assure both freedom of and freedom from religion.

4.1.1.1 The Free Exercise Clause - It is designed to protect the freedom of religion. In this sense, the Supreme Court has stated that the government may not compel or punish an individual for acting according with his/her religious beliefs. The free exercise clause embraces two concepts: the freedom to believe and the freedom to act according to their beliefs. The first is absolute, the second may not be.

In *Reynolds v. United States (1878)*[14] the Supreme Court upheld the constitutionality of a criminal law to forbid polygamy by Mormons, despite arguments that consensual polygamy was a dogma of the Mormon faith. The Supreme Court established a clear distinction between beliefs and actions according to beliefs, and affirmed that the constitutional guarantee is absolute only to the first idea.

[13] Burt Neuborne, *above, p. 86.*

[14] Holding: **Religious duty was not a suitable defense to a criminal indictment**.

In the twentieth century, mainly after *Sherbert v. Verner (1963)*,[15] the Supreme Court required a compelling interest in order to allow the state to deny unemployment compensation to someone who was fired because her job conflicted with her religion, considering that this guarantee is affirmed in the free exercise clause. In *Sherbert*, the Supreme Court stated that it would violate the free exercise clause to deny a Seventh Day Adventist unemployment benefits because they refused to work for religious reasons.

But in *Employment Division v. Smith (1990)*,[16] the Supreme Court rejected the claim that free exercise of religion required an exemption from a valid law. In that case, the discussion was about the use, according to their religious beliefs, of a hallucinogenic substance prohibited by a valid law. Justice Scalia declared that the right of free exercise does not relieve an individual of the obligation to comply with valid and neutral law of general application on the ground that the law proscribes conduct that an individual's religion prescribes.

Finally, the *Religious Freedom Act of 1993* restored the burden to demonstrate a compelling interest to infringe the clause, but, in 1997, part of this act was overturned by the United States Supreme Court in *City of Boerne v. Flores (1997)*,[17] because it overstepped Congress's power to enforce the Fourteenth Amendment.

4.1.1.2. The Establishment Clause – The Establishment Clause provides that, "Congress shall make no law respecting an establishment of religion". This clause prohibits the establishment of a national religion, or the preference of one religion over another or religion over non-religion. It is an effort to protect freedom from religion.

This clause limits two types of governmental action:

– the discrimination between different religions;

– the promotion of one specific religion.

In these terms, it guarantees to the citizens the right to have their own religion, not an official religion, and also the right to not have a religion. The government violates the establishment clause in any action that has the purpose of advancing or aiding religion.

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[15] Holding: **The Free Exercise Clause mandates strict scrutiny for unemployment compensation claims.**

[16] Holding "The Free Exercise Clause permits the State to prohibit sacramental peyote use and thus to deny unemployment benefits to persons discharged for such use." Neutral laws of general applicability do not violate the **Free Exercise Clause** of the **First Amendment**.

[17] Holding: **Enactment of the Religious Freedom Restoration Act of 1993 exceeded congressional power under section 5 of the Fourteenth Amendment**.

Two competing theories emerge from the debate about this clause: the separationism and the nonpreferentialism. The first theory is referred to as the separation of church and state, based on the idea that religion and government do not mix well. For the nonpreferentialist theory, there is no wall of separation and admits any sort of governmental aid to religious orders but in a nonpreferentialist basis.

In *Everson v. Board of Education (1947),*[18] the Supreme Court upheld a New Jersey law that provided free bus transportation to all schools, including religious schools, did not violate the establishment clause because it was a part of a free school bus plan open to all, not only for religious schools. The Supreme Court declared that the First Amendment had erected a wall between church and state and that wall had to be kept high and impregnable. In such way, the government could not create an official religion, could not prefer one over another, could not provide specific aid to one or all religions, could not support or finance any religious order.

The *Everson* case was the beginning of the separationist drive by the Court, during which many programs and practices given government sanction were found to have religious purposes or effects and thus invalidated.

In *Torcaso v. Watkins (1961),*[19] the Court invalidated a law requiring office holders to believe in God. The *Torcaso* case involved a challenge to Maryland state refusal to allow a man be a notary public because he would not declare that he believed in God. In the Maryland Constitution was required a declaration of belief in the existence of God[20] in order for a person to hold any office of profit or trust in this State.

Roy Torcaso was an atheist and refused to make such a statement. For this reason his appointment was consequently revoked. Torcaso, filed a suit against the clerk (Watkins) claiming his constitutional rights to freedom of religious (the right to not believe).

The Supreme Court declared: "We repeat and again reaffirm that neither a State nor the Federal Government can constitutionally force a person to profess a belief or a disbelief in any religion".

The current thought of the Supreme Court is based on the application of a three-pronged test in all establishment clause cases that was initially proposed in *Lemon v. Kurtzman (1971)*[21] in which the decision of the Pennsylvania

[18] Holding: **The Establishment Clause of the First Amendment is incorporated against the states. However, the Supreme Court found that the New Jersey law was not in violation of the Establishment Clause**.

[19] Holding: **Government cannot require a religious test for public office.**

[20] *Maryland Declaration of Rights, Article 37.*

[21] Holding: **For a law to be considered constitutional under the Establishment Clause of the First Amendment, the law must have a legitimate secular purpose, must not have the primary effect of either advancing or inhibiting religion, and must not result in an excessive entanglement of government and religion.**

Superintendent of Public Instruction, David Kurtzman, to reimburse nonpublic schools (most of which were Catholic) for teachers' salaries who taught secular material in these nonpublic schools, secular textbooks and secular instructional materials, was considered a violation of the Establishment Clause of the First Amendment.

The Court's decision established the *Lemon Test* which details the requirements for legislation concerning religion:

(1) has a secular purpose;

(2) has not the effect of unduly advancing religion; or,

(3) must not result in excessive entanglement of church and state.

A violation to any of these requirements, dooms the government practice under the establishment clause.

In *Engel v. Vitale (1962),*[22] the Supreme Court decided that holding prayers in public schools violates the constitutional guarantee of the free establishment. In that case the Court affirmed that even a non-official prayer of any religion represented a violation of that clause. According to this position, in *Abington Township v. Schempp (1963),*[23] the Supreme Court prohibited the official reading by the students, even without comment, according to a Pennsylvania State law, of any verse of the Bible and the reciting of the Lord's Prayer as part of public school ceremonies, in *Lee v. Weisman (1992),*[24] the Supreme Court ruled that beginning a high school graduation ceremony with an official prayer violated the establishment clause, and, finally, in *County of Allegheny v. ACLU (1989)* it was considered that the County of Allegheny violated the Establishment Clause by displaying a crèche in the county courthouse, because the "principal or primary effect" of the display was to advance religion within the meaning of *Lemon v. Kurtzman*. In the Supreme Court's view it constitutes government coercion over the people. In these four cases the arguments of the separationism theory had prevailed.

In the last years, though, several Justices in the current Court have argued that the *Lemon* test should be abandoned in favor of a test that permits greater efforts by government to "accommodate" the religious desires of the majority. In this thought, if the government, based on a secular purpose, aids, both religious and non-religious groups, the establishment clause is not violated. The non-preferential benefit on religion, incidentally conferred in a neutral basis of

[22] Holding: **Government-directed prayer in public schools, even if it is denominationally neutral and non-mandatory, violates the Establishment Clause of the First Amendment**.

[23] Holding: **The Court decided in favor of the respondent, Edward Schempp, and declared sanctioned organized Bible reading in public schools in the United States to be unconstitutional**.

[24] Holding: **Including a clergy-led prayer within the events of a public high school graduation violates the Establishment Clause of the First Amendment.**

political action that does not violate the First Amendment, unless it intends to create an official religion or coerces religious participation. Even though, the *Lemon Test* is still applicable.[25]

4.1.2 The Free Speech and Press Clauses

The First Amendment preserves the freedom of speech and press in the following expression: "Congress shall make no law… abridging the freedom of speech and press…".

It protects any mean of expression or conduct, not only spoken and printed or written words. However, it does not imply that the American Constitutional Law sees an absolute and unlimited protection. In a very objective asseveration: the First Amendment protects just some forms of human expressions, not all. Certain categories of speech are not protected under the First Amendment such as violence and hate. As well, in *Roth v. United States -1957 the Court affirmed* that obscenity was not protected by the First Amendment.

In *New York Times v. Sullivan (1964)*[26] the Court affirmed that the actual malice standard requires that the plaintiff in a defamation or libel case prove that the publisher of the statement in question knew that the statement was false or acted in reckless disregard of its truth or falsity.

Besides, the speech that is protected under the First Amendment cannot be regulated based on its content, because, government has no power to restrict expressions just for its inconvenience or contrariety (*Police Department of Chicago v. Mosley- 1972).*[27]

Historically, the free speech clause has suffered a lot of restrictions along the American history. Early political struggles were marked by censorship and intolerance, culminating in the Alien and Sedition Act of 1918. Before and after the promulgation of this statute, in many opportunities, this guarantee was disrespected such as: the imprisonment of dissenting newspaper editors during the Civil War, the imprisonment of workers organized during the 19th and 20th centuries during the "Red Scare" of the 20s and during the McCarthy era of the 1950s are in the history of the United States.

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[25] *Santa Fe Independent School District v. Doe* – 530 U.S. 290 – Holding **Student-led, student-initiated prayer at football games violates the Establishment Clause.**

[26] Holding: **The First Amendment, as applied through the Fourteenth, protected a newspaper from being sued for libel in state court for making false defamatory statements about the official conduct of a public official, because the statements were not made with knowing or reckless disregard for the truth.**

[27] Holding: **City ordinance prohibiting all picketing within 150 feet of a school, except peaceful picketing of any school involved in a labor dispute, found by the Court of Appeals to be unconstitutional because overbroad held violative of the Equal Protection Clause of the Fourteenth Amendment since it makes an impermissible distinction between peaceful labor picketing and other peaceful picketing**.

The first state criminal conviction was reversed in 1927 by the Supreme Court on free speech grounds *(Fiske v. Kansas)*, that reversed conviction of political radicals for advocating workers revolution. Similarly, it was not until 1965 that an act of Congress was invalidated under the First Amendment (*Lamont v. Postmaster General),*[28] which created pressure against material classified as communist political propaganda. A federal statute instructed the postal service to identify communist propaganda and deliver it only to those who requested in writing. In a unanimous decision, the Supreme Court struck down a statute authorizing the Post Office to detain mail, if considered as "communist political propaganda" and to forward it to the addressee only if he notified the Post Office he wanted to receive it. The statute inhibited the right of the persons to receive any information that they wished to receive.

Some discussion still exists concerning why people care about protecting speech. It is not a political debate, mainly because not every speech has a political content. But, in situations as flag burning, the political motivation of the act that does not have any offensive purpose on the manifestation is an essential element to guarantee the protection under the First Amendment. But this guarantee goes over the politics; free speech is the base of the modern democracy in a welfare society.

In *Street v. New York (1969),*[29] the Supreme Court overturned convictions for burning the American Flag as an act of protest because the government was unable to articulate a sufficiently "compelling" government interest. In this case, it clearly affirmed that the American flag belongs to the people of the United States, and any expression of critics does not represent a disrespect to the national symbol.

In *Cohen v. California (1971),*[30] the Supreme Court invalidated a conviction of a youth for displaying a "Fuck Draft" slogan in his jacket because a hearer's anger, hurt feelings, or sensibilities do not generate a sufficient strong governmental interest to warrant censorship. The prosecution's argument was that the words on the jacket constituted fighting because of the possible violent response from people who saw and were angered by the message. The Supreme Court held that the state cannot censor

[28] Holding: **The Postal Service and Federal Employees Salary Act is unconstitutional, since it imposes on the addressee an affirmative obligation which amounts to an unconstitutional limitation of his rights under the First Amendment.**

[29] Holding: **Defendant was convicted of both burning and speaking against the American flag. However, it is unconstitutional for a state to make it a crime to utter words in contempt of the flag; because the conviction was potentially based in part on the defendant's words, the conviction was reversed, and the case remanded to the state courts for further proceedings.**

[30] Holding: **The First Amendment, as applied through the Fourteenth, prohibits states from making the public display of a single four-letter expletive a criminal offense, without a more specific and compelling reason than a general tendency to disturb the peace.**

the citizens in order to make a civil society. In addition, the people may express their political feelings in a different manner. Passion and vulgarity may not be desired, but is not prohibited under the First Amendment. Fighting words occur only if the speech is directed to a specific person and is likely to provoke violent response. The inscriptions did not represent any direct personal insult.

Some opinions about the government restrictions on the free speech require specific conditions to authorize the action on a governmental basis. According to Holmes and Brandeis' Opinion:[31] (a) the truth or falsity of an idea is a matter for the individual judgment of free people, not the government, (b) government must demonstrate an interest that transcends ordinary day-to- day concerns before resorting to censorship. (3) there must be an extremely close casual connection between speech and the harm that it allegedly causes before government can suppress it, in these terms, mere speculation, or plausible fear, cannot justify censorship, (d) government may not resort to censorship if alternative forms of regulation exist.

Other view of the Free Speech Doctrine is the Interest Balancing. The balancing doctrine states that judges ought to weigh the government's asserted interest in censorship against society's profound commitment to free speech. In the absence of a truly "compelling" governmental interest that counterbalances the nation's commitment to free speech, censorship is forbidden. Balancing is a subjective doctrine that invites a judge to establish a hierarchy of values with little or no external guidance.

Another modern argument is the Clear and Present Danger doctrine. In its terms, the government should prove and demonstrate the relationship between the speech and the harm it allegedly causes. The clear and present danger test requires that the government prove causal relationship between the speech in question and the feared evil. Mere speculation or even reasonable apprehension will not suffice.

But in *Dennis v. United States (1951)*[32] the Supreme Court upheld the convictions of leaders of a communist party for conspiracy to teach and advocate the overthrow of the government, despite the government's failure to demonstrate that the defendants' political activities had actually created an imminent danger of lawless action. Eugene Davis and other members of the

[31] Holmes and Brandeis: Libertarian and Republican Justifications for Free Speech; Lahav, Pnina4 J.L. & Pol. 451 (1987-1988).

[32] Holding: **Defendants' convictions for conspiring to overthrow the U.S. government by force through their participation in the Communist Party were not in violation of the First Amendment. Second Circuit Court of Appeals.**

communist party were indicted for violating a provision of the Smith Act.[33] They were found guilty and the Supreme Court ruled that the conviction for conspiring and organizing for the overthrow and destruction of the United States government by force and violence under provisions of the Smith Act does not violate the guarantee of the First Amendment. In affirming the conviction, the Court adopted the formulation of the clear and present danger test: In each case [courts] must ask whether the gravity of the "evil", discounted by its improbability, justifies such invasion of free spreech as necessary to avoid the danger.

During the so called "McCarthyism" years, the mere suspicion of relations with the communist party or communist ideas was enough to cause a person to lose a job and be in a blacklist. Some persons were convicted and sentenced to prison for teaching books written by communist leaders as Stalin, Lenin, Marx and Engels. According to Chief Justice Vinson: "The real and the present danger doctrine does not mean that the government must wait until the putsch is about to be executed, the plans have been laid and the signal is awaited…". By this approach the Supreme Court admitted the potentiality of the danger instead of its probability.

Finally, but in a different subject matter, in *Tinker v. Des Moines Independent Community School District (1969)*[34] the Supreme Court affirmed constitutional rights of the students declaring that the First Amendment applies to public schools which could not restrict symbolic speech which did not cause undue interruptions of school activities. According to the Court: "the schools may not be enclaves of totalitarianism." School officials do not possess absolute authority over their students. Students are possessed of fundamental rights which the State must respect, just as they themselves must respect their obligations to the State". In this case, the students were punished for wearing black-arm bands to protest against the Vietnam War.

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[33] The Smith Act of 1940 – Whoever, with intent to cause the overthrow or destruction of any such government, prints, publishes, edits, issues, circulates, sells, distributes, or publicly displays any written or printed matter advocating, advising, or teaching the duty, necessity, desirability, or propriety of overthrowing or destroying any government in the United States by force or violence, or attempts to do so; or Whoever organizes or helps or attempts to organize any society, group, or assembly of persons who teach, advocate, or encourage the overthrow or destruction of any such government by force or violence; or becomes or is a member of, or affiliates with, any such society, group, or assembly of persons

[34] Holding: **The First Amendment, as applied through the Fourteenth, did not permit a public school to punish a student for wearing a black armband as an anti-war protest, absent any evidence that the rule was necessary to avoid substantial interference with school discipline or the rights of others.**

4.1.3 Collective Action: Assembly, Association and Petition

The First Amendment text closes with two ideas designed to protect the right to collective action designed to transform personal belief into political reality: free assembly and petition.

The free association guaranteed under the First Amendment concerns the right to participate in non-family groups that protects the right of privacy and personal autonomy.

In *Roberts v. United States Jaycees (1984)*,[35] the Jaycees argued that a Minnesota state antidiscrimination law, which authorized the admission of women in their club, violated their right of freedom of intimate association. The Court held that the application of the Minnesota Human Rights Act to compel the Jaycees to accept women as regular members did not abridge either male members' freedom of intimate association or their freedom of expressive association, and the Act was not unconstitutionally vague and overbroad.

The Supreme Court admits the freedom of association implicates in some discrimination in limited circumstances. In this sense, associations as KuKlux Klan and the Nazi Party are allowed to express among their members their ideas of discrimination on the basis that they are conceptual for their ideological messages. In this sense, the Supreme Court affirmed that the freedom of association is a fundamental right and agreed that: "There can be no example of an intrusion into the internal structure or affairs of an association than a regulation that forces the group to accept members that they not desire". Even though the free association is not an absolute right, the state action cannot suppress ideas.

The right to petition has been understood as extending petitions to the three government branches. In such terms, it is possible for any one to request the government to exercise its powers to furtherance the public good and interest.

5 Military and Arms

5.1 The Second Amendment: *"A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed".*

[35] Holding: **Upheld Minnesota's state antidiscrimination law, prohibiting a private organization from excluding a person from membership based on sex, because the state had a compelling interest in prohibiting discrimination which outweighed the First Amendment right of freedom of association.**

It reflects two different, but connected ideas: (a) the necessity of maintenance of the state militias; (b) the right to bear arms.

Historically, the militia clause and the right to bear arms have their origins in England when the kings obligated free men to bear arms for public defense. There was no regular army, neither police, and the soldiers had to buy and keep their weapons, while the citizens had the obligation to watch and capture any suspicious person. In 1686, King James II, from the House of Stuart, promulgated an act that banned the right of Protestants to bear arms, because he feared a military resistance against the despotic order that was established.

As well, after the Seven Year's War in 1756, England was decided to disarm the American militias in order to avoid any insurgency from the thirteen colonies.

In the American Confederation of 1781 there was not a federal force. During the Philadelphia Convention in 1787, the Anti-Federalists feared that the creation of a permanent army, not under the civilian control, could endanger democracy and civil liberties. The ratification was conditioned also by this second amendment that guaranteed to the states the maintenance of local forces not entirely in devotion to the federal government. In these terms, the Amendment did not allow the Congress to enact laws prohibiting the states from arming their citizens, and thus, the national government could overwhelm the states. Presently the militias are substituted by the National Guard.

These two clauses pre-existed to the American constitutional order established in 1787 and were maintained by the Second Amendment. However, this right is premised in specific purposes of using the American citizens such as hunting and self-defense.

In 1968, the Gun Control Act was promulgated in response to the assassination of John Fitzgerald Kennedy, Martin Luther King and Robert Fitzgerald Kennedy. According to this statute, dealers could not sell to those convicted of felonies, mentally incompetent, and drug users, and outlawed mail order of rifles and shotguns for those who are not licensee under the Federal Firearms License.

In *Presser v. Illinois (1886)*[36] the Supreme Court held that the Second Amendment clause: "the right to bear arms" is not incorporated, and therefore it frequently upholds state and local gun control laws because the Second Amendment does not apply. According to this decision the Second Amendment to the United States Constitution limits only the power of Congress and the national government to control firearms, not that of the state.

[36] Holding: **The Second Amendment limits only the power of Congress and the national government, not that of the State.**

In *United States v. Miller (1939)*[37] the Supreme Court affirmed the right of the individual use of arms could be restricted. In that case Jack Miller was indicted under the National Firearms Act, but the United States District Court for the Western District of Arkansas agreed with the defense's claim that the NFA was intended to restrict the individual ownership and possession of arms, in conflict with the Second Amendment to the United States Constitution. The Supreme Court heard the case, and in a unanimous opinion, reversed and remanded the District Court decision. The Supreme Court declared that no conflict between the NFA and the Second Amendment had been established, affirming that: "in the absence of any evidence tending to show that possession or use of a 'shotgun having a barrel of less than eighteen inches in length' at this time has some reasonable relationship to the preservation or efficiency of a well regulated militia, we cannot say that the Second Amendment guarantees the right to keep and bear such an instrument".

For the Supreme Court the Second Amendment did not guarantee a citizen's right to possess a sawed off shotgun because that weapon had not been shown to be "ordinary military equipment" that could "contribute to the common defense."

5.2. The Third Amendment: *"No Soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner prescribed by law".*

The quartering clause integrates the idea of individual protection against the threat of the possibility of a military dominance over the civil society. This clause intends to avoid the abolition of the civil liberties by maintaining an active army in time of peace. In such terms, the Third Amendment forbids Congress to conscript civilians as involuntary innkeepers in times of peace. It may happen only in wartime according to law.

6 Criminal Investigation

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

[37] Holding: **The National Firearms Act – as applied to transporting in interstate commerce a 12-gauge shotgun with a barrel less than 18 inches long, without having registered it and without having in his possession a stamp-affixed written order for it – was not unconstitutional as an invasion of the reserved powers of the States and did not violate the Second Amendment of the United States Constitution**.

The Fourth Amendment regulates the criminal law investigative phase. In its terms, it prevents the police from intruding on personal privacy and guards the individual against unreasonable searches and seizures, in the absence of probable cause.

Like almost all of the provisions of the Bill of Rights, the Fourth Amendment applies to the states as the result of the "incorporation" process *(Mapp v. Ohio-1961).*[38] Also, in this case it was ruled that evidence obtained in violation of the Fourth Amendment, which protects against unreasonable searches and seizures, may not be used in criminal prosecutions.

Pursuant to the "exclusionary rule" imposed by the Supreme Court in *Weeks v. United States (1914)*[39] any evidence obtained by the police in violation of this clause may not be used in any criminal prosecution. The Court held that the warrantless seizure of items from a private residence constitutes a violation of the Fourth Amendment. It also set forth the exclusionary rule that prohibits admission of illegally obtained evidence in federal courts. The rationale in *Weeks* is that evidences to convict someone for a crime can only be obtained in respect of the Fourth Amendment, unless the person voluntarily waives his/her Fourth Amendment guarantees, since the consent is not obtained through coercion or false information *(Bumper v. North Carolina – 1968).*[40]

The Fourth Amendment applies only to "unreasonable searches or measures", thus, many police investigatory techniques that do not involve physical interference with person or property (such as visual surveillance, seizure of evidence in plain view, and non-coercive interrogation) are not limited by this restriction.

However, once investigatory activity represents an intrusion upon the individual's privacy or property represents a restraint of his freedom of movement, then, the Fourth Amendment protections come into play. In these situations, any warrant must be judicially sanctioned for a search or an arrest in a probable cause basis.

There is some conceptual discussion of what constitutes a search or seizure that violates the Fourth Amendment. The Supreme Court considers that wiretaps

[38] Holding: **The Fourth Amendment prohibition against unreasonable searches and seizures, as applied to the states through the Fourteenth, excludes unconstitutionally obtained evidence from use in criminal prosecutions.**

[39] Holding: **The warrantless seizure of documents from a private home violated the Fourth Amendment prohibition against unreasonable searches and seizures, and evidence obtained in this manner is excluded from use in federal criminal prosecutions.**

[40] Holding: **A search cannot be justified as lawful on the basis of consent when that "consent" has been given only after the official conducting the search has asserted that he possesses a warrant; there is no consent under such circumstances.**

or listening devices constitute a search, photographs taken from an airplane flying over a suspect's home do not, according to the idea that the aero space cannot be considered a private property. Similarly, randomly-sited roadblocks *(Carroll v. United States – 1925)*[41] do not constitute a restraint on freedom of movement.

Under the Fourth Amendment, law enforcement activity that rises to the level of a "search or seizure" must be predicated on "probable cause" that evidence of criminal activity will be uncovered or that the target is guilty of a crime. Probable cause connotes a level of reasonable belief that is greater than a mere suspicion, but less than certainty. Whenever possible, therefore, law enforcement officials are under a duty to seek a judicial warrant before carrying out a search or seizure. A search or a seizure tends to be considered unconstitutional if conducted without a valid warrant when it was possible for the police to obtain it.

The Fourth Amendment is not applicable when the arrest is conducted by private citizens because this action does not come from the government. The arrest of an individual conducted by a police officer is possible when he is committing a felony in his presence or if the police officer has a probable cause to believe that someone has committed a felony. In this second situation, the police have to apply to a judge for a warrant.

The probable cause in this situation is different from the one that is required for a search. There is the probable cause if this knowledge is based on trustful information that leads a common person to reasonably believe that the felony was committed. For this reason the probable cause must exist prior to the arrest.

7 Formal Accusation, Double Jeopardy Self-Incrimination and Due Process

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

[41] Holding: **The warrantless search of a car does not violate the Constitution. The mobility of the automobile makes it impracticable to get a search warrant.**

7.1.1 Formal Accusation

The first clause of the Fifth Amendment rules the formal accusation phase. Once investigation has defined its focus to a particular target, the prosecution has to persuade a grand jury to indict the defendant to the criminal case. The grand jury clause intends to avoid a prosecutorial abuse by malicious or unfounded accusation by requiring demonstrating a probable guilt before formal charges could be brought. The grand jury is a group of twenty-three private citizens that, by a majority of vote in a closed deliberation, recognizes that there is a probable cause to believe that the defendant may have committed a crime. The grand jury hears only the prosecution's evidences and the defendant or his counselor has no right to participate.

Since the grand jury clause of the Fifth Amendment is one of the few provisions of the Bill of Rights that is not binding on the states, several states have replaced the grand jury with a preliminary hearing process conducted by a judge that, unlikely in the Grand Jury, permits both parties to participate. For this reason, this clause is applicable basically to the federal level.

7.1.2 Double Jeopardy

The double jeopardy clause of the Fifth Amendment prevents the government from prosecuting a defendant more than once for the same offense. Once acquitted or punished, a defendant may not be retried for the same offense. A defendant is generally deemed "in jeopardy" once a jury has been selected and the taking of evidence begins. Thus, once a criminal trial begins, the prosecution may not terminate in order to begin it again.

The double jeopardy clause bars multiple prosecution punishments for the same offense, even though additional evidence of guilt has been discovered. However, it allows the use of evidence used in an earlier case in a new prosecution for a different offense.

There are, however, some exceptions to the ban on multiple prosecutions. If the jury hangs (is unable to reach a verdict), a subsequent re-trial does not violate the double jeopardy clause, because the proceedings are considered as a continuation of the first trial. Moreover, if a defendant succeeds in overturning a conviction on appeal, or if the trial court declares a mistrial at the defendant's arguments, double jeopardy does not bar a re-trial since the defendant is deemed to have waived his objection to a second trial.

Also, the clause impedes the same sovereign from re-prosecuting for all lesser-included offenses and for the offenses that he had been charged. Nevertheless, sequential prosecutions by state and federal governments for the same offenses of the same criminal episode are not obstructed by double

jeopardy. Thus, despite the double jeopardy, in the dual sovereignty rule, according to the American federalism, each sovereign (state or federal) may prosecute a defendant on the same facts, if the sovereign can demonstrate a unique interest that was not adequately present in the initial prosecution. Thus, a defendant acquitted in a state court for murder may be re-tried, for example, in a federal court for violating federal civil rights laws, despite the ban on double jeopardy.

In *Health v. Alabama (1985)*[42] the defendant has kidnapped the victim in Alabama and killed her in Georgia. The Supreme Court held that the double indictment (felony murder in Alabama and ordinary murder in Georgia) in each state court did not violate the double jeopardy rule.

7.1.3 Self-Incrimination

This clause is an obstacle on compulsory self-incrimination, empowering an individual to refuse to answer any question or provide any information to the government that creates for him a risk of criminal prosecution. In such terms, no illation of criminal guilt may be drawn from an individual's decision to invoke the right to remain silent.

In *Miranda v. Arizona (1966),*[43] the Supreme Court ruled that a confession is coerced and unlawful if It was obtained after an accused has indicated a desire to remain silent, or if the police fail to inform a suspect of his right to remain silent and his right to court-appointed counsel. As with the Fourth Amendment "exclusionary rule", statements taken in violation of the Fifth Amendment cannot be used as evidence in any criminal prosecution.

Based on the *Miranda rule* the Supreme Court affirmed the unconstitutionality of the involuntary confessions. In such terms, physical brutality, food or water depriving, and threats of violence constitute coercive actions that invalidate the confessions on the basis that it is not a voluntary confession, as well as false information given by the police.

According to this decision, statements made in a police interrogation are admissible at a trial only if the prosecution demonstrate that the defendant was informed about his constitutional rights to consult with an attorney (before and during questioning) to remain silent and to be advised that all things he says may be used against him.

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[42] Holding: **The Fifth Amendment rule against double jeopardy does not prohibit two different states from separately prosecuting and convicting the same individual for the same illegal act.**

[43] Holding: **The Fifth Amendment privilege against self-incrimination requires law enforcement officials to advise a suspect interrogated in custody of his rights to remain silent and to obtain an attorney**.

Finally, the *Miranda rule* is applicable only in situations that involve, at least, the potentially privation of freedom. In such terms, the warnings are not necessary when government agents interrogate a person that is not under the possibility of being arrested.

7.1.4 Due Process of Law

The Fifth Amendment also prevents individuals from being punished without a due process of law, including non-United States Citizens and legal entities. In *Barron v. Mayor & City Council of Baltimore (1833)*, the Supreme Court affirmed that this rule is applicable only to the federal level, and in the Fifth Amendment content there is no application of the equal protection clause.

8 Criminal and Civil Adjudication

8.1 The Sixth Amendment: *"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses against him; and to have the assistance of counsel of his defense"*.

The Sixth Amendment regulates the trial phase. Once the government has lodged formal charges against an accused, by a grand jury or by the preliminary hearing, the accused has a constitutional guarantee for a fair hearing and a speedy and impartial trial.

The Sixth Amendment, which concerns the notice and the right to a fair hearing has provided the principal model for procedural due process of law in general and not only in the criminal cases.

8.1.1 Right to a Speedy Trial

In *Smith v. Hooey (1969)* the Supreme Court affirmed three guarantees from the speedy trial clause: (1) to prevent undue and oppressive incarceration prior to trial; (2) to minimize anxiety and concern accompanying public accusation; and (3) to limit possibilities that long delay will impair the ability of an accused to defend himself.

There is a balance doctrine in the interpretation of this right. The prosecution cannot delay the trial for its own advantage, but a trial may delay it to secure the presence of an absent witness or other practical considerations or if the delay is caused by the defendant. In both situations, the rule is not violated.

8.1.2 Right to Public Trial

This right extends to all criminal prosecutions and all their phases, from jury selection to the final verdict. The public trial requirement is attended so long as the public has free access to the trial, but the right is not violated if in the court there is no sufficient space to accommodate all attendance in the room. The violation is not demonstrated by the prejudice of the defendant, just by an unjustified exclusion of the public.

8.1.3 Right to a Jury Trial

The Sixth Amendment guarantees the right to a trial by jury in all federal criminal prosecutions. This right assures that no defendant can be found guilty of a crime unless a jury agrees that the government has proved the charges beyond a reasonable doubt. But, the failure to reach a verdict for conviction or acquittal results in a hung jury, and often results in another trial. But if the crime is punishable by imprisonment for no more than six months, the defendant does not have this right.

Historically the number of jurors was 12, but the Supreme Court affirmed that states can create jury trial courts with less than twelve jurors. Even in some states the unanimous decision is required. In *Apodaca v. Oregon (1972)*[44] the Supreme Court held that it is not a constitutional requirement for states, unless the state jury trial court is formed by six jurors. According to this decision there is such a constitutional right in the Sixth Amendment, but that the Fourteenth Amendment's Due Process Clause does not incorporate that right as applied to the states.

8.1.4 Right to Impartial Jury

The defendant has the right to be tried by a jury in the State and in the district where the crime shall have been committed. It intends to avoid an unfair manipulation in the making of the jury.

The jury is chosen from a body of citizens, in a selection process called *voir dire*. Lawyers of both parties and the judge, can interview the citizens in order to select the final jury. The members of the venue who express some bias or prejudices may be challenged for cause. Moreover, the parties have the right of a peremptory fixed number of challenges. However, if peremptory challenges are used to exclude jurors in grounds of race, national heritage or gender it may be considered an unconstitutional action *(Batson v. Kentucky – 1986).*[45]

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[44] Holding: **There is no constitutional right to a unanimous jury verdict in criminal cases. Thus Oregon's law did not violate due process.**

[45] Holding: **Prosecutors may not use race as a factor in making** peremptory challenges**; defendants must only make a prima facie showing on the evidence from their case to mount a challenge to race-based use of peremptories.**

8.1.5 Right to a Notice of Accusation

In a criminal indictment, the defendant has the right to be informed of the nature and the cause of accusation against him. This notice of accusation cannot contain uncertainties, vagueness or ambiguities.

8.1.6 Right to Confront

Under the Sixth Amendment, the defense has the right to confront and cross-examine witnesses. In such terms, the defense has the right to challenge the credibility of the prosecution's witnesses. If this right is not respected, the rule is violated and the judgment may be considered unconstitutional, unless it is under the admitted exceptions: in admissions by the defendant or in extreme situations (when the witness is dying).

8.1.7 Right to a Counsel at Trial

In *Argesinger v. Hamlin (1972)* the Supreme Court affirmed the obligation of federal and state governments to appoint counsel for the defendant charged to a felony or a misdemeanor who has no conditions to afford a lawyer. Similarly, the *Miranda Rule* requires the police to inform a suspect of the right to have a free lawyer before any effort at interrogation. The Supreme Court has not, however, extended the absolute right to a free lawyer to civil or administrative proceedings governed by the due process clause. In these proceedings, an individual must take a preliminary showing that a free lawyer will be of real help before one is appointed.

Nevertheless, the defendant has the right to waive the counsel assistance and represent himself at the trial court (*Faretta v. California – 1975).*[46]The Supreme Court Courts held that criminal defendants have a constitutional right to refuse counsel and represent themselves in state criminal proceedings.

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

The Seventh Amendment guarantees trial by jury is most civil cases when the controversy is superior to twenty dollars in federal jurisdiction. This rule is not applicable in the state jurisdiction because the Supreme Court declared that this amendment is not incorporated to the state level. Nevertheless, most states have similar constitutional previsions.

[46] Holding: **A criminal defendant in a state proceeding has a constitutional right to knowingly refuse the aid of an attorney.**

9 Punishment

9.1 The Eighth Amendment: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted".

The Eighth Amendment relates to the punishment phase, banning excessive fines, cruel and unusual punishments, and unreasonably high bails. In terms of a rationale, it could be explained in a simple argument that the punishment cannot be excessive when compared to the crime.

The ban on cruel and unusual punishment was originally intended to prevent physical mutilation and torture. A matter of intense controversy concerns the death penalty. A majority of the Supreme Court has refused to hold that death penalty constitutes cruel and unusual punishment. However, the Court has imposed a series of procedural rules designed to assure the fair application of the death penalty.

The Supreme Court has affirmed the necessary proportionality between the crime committed by the individual and the punishment inflicted by the State. In *Robinson v. California (1962)*[47] the Supreme Court held that a California law that authorized a 90-day jail sentence for being addicted to drugs violated the Eighth Amendment on the basis that narcotic addiction is apparently an illness. For the Court, the statute was an attempt to punish people based on the state of illness, rather than crime practice.

Furthermore, the Supreme Court declared in *Atkins v. Virginia (2002)*[48] that the execution of a mentally handicapped violates the Eighth Amendment.

In *Ropper v. Simmons (2005)*[49] the Supreme Court of the United States held that it is unconstitutional to impose capital punishment for crimes committed while under the age of 18. The decision overruled the Court's prior ruling upholding sentences on offenders above or at the age of 16 overturning statutes in 25 states that had the penalty set lower.

10 The Political Agreement

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

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47 Holding: **Punishing a person for a medical condition is a violation of the Eighth Amendment ban on cruel and unusual punishment.**

48 Holding: **A Virginia law allowing the execution of mentally handicapped individuals violated the Eighth Amendment's prohibition of cruel and unusual punishments.**

49 Holding: **The Eighth and Fourteenth Amendments forbid imposition of the death penalty on offenders who were under the age of 18 when their crimes were committed.**

The Ninth Amendment provides an enumeration of certain rights that shall not be construed to deny or disparage others retained by the people. It is the so-called "unenumerated rights", i.e., rights deemed essential to the idea of liberty that are not explicitly described in the text of the Bill of Rights. It is often mentioned in discussions of fundamental rights.[50] This clause expressly represents that not only the enumerated rights in the Constitution or in the Bill of Rights have a constitutional status and protection.

In Griswold v. Connecticut (1963)[51] the Supreme Court ruled that the Constitution protects a right to privacy, strucking down a Connecticut statute that prohibited the use of contraceptives by married persons, holding that it violated the constitutional right to privacy located in the opened language of the Ninth Amendment that is the guardian of unenumerated rights.

The Supreme Court's reproductive autonomy opinions culminated in its historic abortion decisions in *Roe v. Wade (1973)*[52] and *Doe v. Bolton (1973)*[53] holding the constutional right for privacy was broad enough to encompass a woman's decision whether or not to terminate her pregnancy. The Court held that a woamn may abort her pregnancy for any reason, up until the "point at which the fetus becomes viable". The Court said that after viability, abortion must be availble when needed to protect a woman's health, as defined in the companion case *Doe v. Bolton*. The Court rested these conclusions on a constitutional right to privacy emanating from the Due Process Clause of the Fourteenth Amendment, also known as substantive process.

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

There was a similar provision in the articles of confederation of 1781. It clearly defines that the federal government is limited only to the powers expressly granted in the Constitution. Besides the concurrent powers among federal government and states, some have argued that the Tenth Amendment should be read as a broad protection of federalism, placing judicially-enforceable limits on the central government's power to impose rules on the states.

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[50] Erwin Chemerinski, "Constitutional Law – Principles and Policies", p. 640. Aspen Law and Business, 1997.

[51] Holding: **A Connecticut law criminalizing the use of contraceptives violated the right to marital privacy.**

[52] Holding: **Texas law making it a crime to assist a woman to get an abortion violated her due process rights.**

[53] Holding: **The three procedural conditions in 26-1202 (b) of Georgia Criminal Code violate the Fourteenth Amendment.**

The Tenth Amendment protects state sovereignty from federal intrusion. It represents a protection of the state's right and federalism, reserving a private area for the state activity. The federal law that invades this restricted area should be considered as unconstitutional.

10.3 The Commerce Clause among the States

It is a specific power delegated by the states to the federal government and in these situations the federal government can limit rights previously reserved to the states and to the people. In such situations the Congress can enact laws to regulate these economic actions when they affect interests of different states.

In *Gibbons v. Ogden (1824)*[54] the Supreme Court concluded that a federal law could preempt a state law that granted a privilege of monopoly, because monopoly was an impermissible restriction of interstate commerce.

This has been the position of the Court along the years, but in *United States v. Lopez (1995)* the Supreme Court considered unconstitutional a federal law that prohibited a person from having a firearm within 1,000 feet of a school, because it did not represent an action of interstate commerce. The Supreme Court set limits to Congress's power under the Commerce Clause of the United States Constitution.

11 Racial Integration

Until the Civil War (1861-1865) the Constitution of the United States had adopted only twelve amendments. The first ten, ratified in 1791, are called the Bill of Rights. Later, the Eleventh (1795) and the Twelfth (1804) amendments were passed.

The original Bill of Rights, as we have seen and discussed before, provided historic protection in three specific axes: (1) citizenship and civil rights; (2) fair procedure (3) political agreement and the delegation of powers. It remains the bulwark of individual freedom at the core of the American Law that is a system created under a constitutional order. It was, however, radically incomplete, since these guarantees, in practice, were not extended to the former slave population in most cases, because the nation in 1787 accepted the moral blights of slavery and the subordination of women. For this reason the original Bill of Rights was silent on the issue of equality. The protections of

[54] Holding: **The New York license was found invalid because the Commerce Clause of the Constitution designated power to Congress to regulate interstate commerce and that the broad definition of commerce included navigation.**

equality were limited, since they protected the weak from strong. The lack of an explicit racial equality guarantee in the Bill of Rights was a fundamental flaw. Only after the Civil War, the American constitutionalism became universal.

With the Union's victory in 1865, the so-called "Reconstruction Congress" proposed three amendments to the Constitution designed to fulfill the promise of equality to the newly freed slaves: the Thirteenth (1865), the Fourteenth (1868) and the Fifteenth Amendments (1870).

11.1 The Thirteenth Amendment

Section 1 – "*Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.*"
Section 2 – "*Congress shall have power to enforce this article by appropriate legislation.*"

It expressly abolishes the slavery and involuntary servitude within the United States, except as a punishment for a crime. The abolition is self-executing, and unlike the Fourteenth Amendment, its force applies to both state and private action. Thus, all forms of slavery or involuntary servitude, both private and public were banned.

Initially, the Supreme Court declared that the Thirteenth Amendment only prohibited slavery but it did not represent a racial protective amendment *(Hodges v. United States – 1906).* In this case, the issue of fact was that black laborers had agreed to work for a lumber firm. Hodges and the other white defendants, all private citizens, ordered the blacks to stop working, assaulted them, and violently drove them from their workplace. The defendants were indicted for violating federal *Civil Rights Law*. The Supreme Court decided that the federal prosecution could not be supported under the Fourteenth or Fifteenth Amendments because they restrict only State action. The Thirteenth Amendment did not support a federal prosecution because group violence against blacks was not the equivalent of reducing them to slavery.

In addition, in *Hurd v. Hodge (1948)* the Supreme Court held that the federal laws could not prohibit racial restrictive covenants. In that case, it was dealt in a neighborhood that no one would sell their property to black people or Jewish. The Court only recognized the power to prohibit people from being or owning slaves, in the Thirteenth Amendment. The Supreme Court said that Congress's power was limited to ensure an end to slavery, but not to eliminate discrimination. The Congress could not use its power, under the Thirteenth Amendment to adjust the social rights of men and races in the community.

But later, since *Jones v. Alfred H. Mayer Co. (1968)*[55] the Supreme Court declared the constitutionality of a federal law that prohibited private discrimination in selling or leasing property. In this case, the Supreme Court affirmed that Congress could regulate the sale of private property in order to prevent racial discrimination: and such statute represents a valid exercise power of Congress to enforce the Thirteenth Amendment

11.2 The Fourteenth Amendment

Section 1 – *"All Persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws".*

Section 2 – *"Representatives shall be apportioned among the Several States according to their respective numbers, counting the whole number of persons in each state, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislative thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or any way abridged, except for the participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of male citizens twenty-one years of age in such state".*

Section 3 – *No person shall be a Senator or Representative in Congress or elector of President and Vice President of the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability".*

Section 4 – *"The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion shall not be questioned. But*

[55] Holding: **The Court held that Congress could regulate the sale of private property in order to prevent racial discrimination.**

neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void".
Section 5 – *"The Congress shall have power to enforce, by appropriate legislation, the provisions of this article".*

The Fourteenth Amendment's scope was to secure equal rights for former slaves. The core of the Second Bill of Rights was the equal protection and due process clause of the Fourteenth Amendment, prohibiting states from denying any person equal protection of the laws, or depriving any person life, liberty or property without due process clause. It includes all persons, born or naturalized in the United States and those who are subject to its jurisdiction.

11.2.1 The Equal Protection Clause – Unfortunately, the Court took a long time to affirm a broad extension of this clause. In the period after the Civil War, the Supreme Court declared that there were some restrictions in the application of this clause to the state and local level. In such terms, the federal government was not authorized to prosecute racial discrimination by individuals or private organizations.

In *Plessy v. Fergusson (1896)*,[56] the Supreme Court held that the states could impose segregation so long as they provided equal facilities. This was the genesis of the "Equal but Separate" doctrine. In this case, the Supreme Court affirmed the constitutionality of a state law that separated black students from white students in public schools, thus denying equal educational opportunities for black children.

The Supreme Court had ruled, in the *Civil Rights Cases*, the Fourteenth Amendment applied only to the actions of government, not to those of private individuals, and consequently did not protect persons against individuals or private entities who violated their civil rights. In particular, the Court invalidated most of the Civil Rights Act of 1875, a law passed by the United States Congress to protect blacks from private acts of discrimination.

This doctrine was maintained by the Supreme Court for almost the whole twentieth century. The result was the persistence of a regime of state that enforced racial apartheid in much of the United States well into the twentieth century, as follows:

[56] Holding: **The "separate but equal" provision of public accommodations by state governments is constitutional under the Equal Protection Clause.**

(1) in the WW II, black and white troops were prevented by law from fighting side by side;
(2) In Arkansas, white and black voters could not enter a polling place in each other's company;
(3) In Alabama, a white female nurse was forbidden to care for a black male patient;
(4) Some states required separate bathroom facilities for black and white employees;
(5) some states forbade white prisoners to be chained to blacks;
(6) some states, in all forms of public recreation – parks, playgrounds, swimming pools, beaches, fishing ponds, boating facilities, athletic fields, amusement parks, racetracks, circuses, theaters and auditoriums – were racially segregated by law;
(7) some states required segregating waiting rooms for all public transportation;
(8) some states prohibited interracial marriage and imposed harsh penalties on interracial sexual relations;
(9) some states ordered black passengers to ride in the rear of the bus and to give up their seats to whites;
(10) some states and the District of Columbia operated public schools that were segregated by race as a matter of law.

This history started changing in the Supreme Court in *Brown v. Board of Education of Topeka (1954).*[57] In *Brown*, the Supreme Court rejected the idea that "separate" can be "equal" declaring that state laws establishing separate public schools for black and white students denied black children equal educational opportunities. The decision overturned earlier rulings going back to *Plessy v. Ferguson* in 1896.

The decision stated that "separate educational facilities are inherently unequal." As a result, de jure racial segregation was ruled a violation of the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution. This victory paved the way for integration and the civil rights movement.

At that time, 17 states and the District of Columbia legally practiced the segregation in public schools. Chief Justice Warren declared that this sort of segregation imposed a badge of inferiority on members of excluded groups and deprived them of the equal protection of the laws. The Court affirmed that separate educational facilities bring inequality, violating the Equal Protection clause under the Fourteenth Amendment.

[57] Holding: Segregation of students in **public schools** violates the **Equal Protection Clause** of the **Fourteenth Amendment**, because separate facilities are inherently unequal.

Brown was followed by a burst of Supreme Court activity that eliminated government imposed racial segregation from every aspect of the American life. Laws mandating racial segregation on municipal golf courses were invalidated in 1954 and in 1955, and on the public bathes and beaches (1955). Laws requiring blacks to sit in the back of the bus were struck down in 1956. In 1958, the Court invalidated laws mandating the segregation of parks and playgrounds. In 1962, the segregation in public restaurants and airports was overturned by the Supreme Court. In 1966, segregation in public libraries was outlawed. In 1967, laws banning interracial marriage and miscegenation were struck down – 60 years after their initial validation by the Supreme Court. In 1968, prison segregations were outlawed.

But in the 1960's, only 2.14 percent of black children residing in the South attended integrated schools. In 1968, the Supreme Court abandoned the "all deliberate speed" approach in favor of a command to take affirmative actions and the system of racial quotas to transform the American constitutionalism in a universal system, distant from racial discrimination.

11.2.2. Due Process Clause – It plays different roles in the American Law. Firstly, it extends the guarantee of procedural fairness enforceable against the federal government. Similarly, it can be seen as a source of substantive rights against governmental intrusions into economic markets and personal autonomy. In its initial manifestation, the idea of substantive due process was used to invalidate efforts to regulate the manchesterian economic thought in the early years of the twentieth century.

In this view, State and federal laws regulating prices, wages, or hours of work were often deemed unconstitutional under the Fourteenth Amendment based on the fact that these statutes deprive person liberty or property without due process of law, even though these statutes tried to guarantee basic rights of common.

In *Lochner v. New York (1905)*[58] the Supreme court invalidated a law that defined a maximum work week for bakers, and in *Adkins v. Children's Hospital (1923)*[59] the Supreme Court invalidated a statute that regulated a minimum wage for workers. In both cases, the Supreme Court understood that a "liberty of contract" was implicit in the due process clause of the Fourteenth amendment.

[58] Holding; **New York's regulation of the working hours of bakers was not a justifiable restriction of the right to contract freely under the 14th Amendment's guarantee of liberty.**

[59] Holding: **Minimum wage law for women violated the due process right to contract freely.**

Nevertheless, Holmes' ideas triumphed in *West Coast v. Parrish (1937),*[60] confronted with the economic realities of the Great Depression (1929-1939). This case represented the end of Lochnerism in the United States.[61] The Supreme Court upheld a state law that required a minimum wage for women employees, declaring that the Court was abandoning the principles of Lochner decision. The Supreme Court affirmed: "The Constitution does not speak of freedom of contract... it speaks of liberty and prohibits the deprivation of liberty without due process of law...".

11.2.3 Discrimination on the Basis other than Race

Even being the most odious form of discrimination, the fight against racism is not the only protection under this clause. Presently the equal treatment goes beyond toward women, allies, illegitimates and others. As with the rest of the Bill of Rights, its protections run only against the government. Private acts of discrimination must be dealt with, if at all, by legislation at the federal, state or local level.

The Warren Court's egalitarian revolution was not confined to race. In *Hernandez v. Texas (1954)*[62] the Supreme Court ruled that the Fourteenth Amendment outlawed discrimination on the basis of national origin as well as race.

11.3 The Fifteenth Amendment-

Section 1 – *"The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any state on account of race, color, or previous condition of servitude".*
Section 2 – *"The Congress shall have power to enforce this article by appropriate legislation".*

The Fifteenth Amendment prohibits federal or state government to deny to a citizen of the United States the right to vote based on race, color, or social condition.

Its original idea was to guarantee the right to vote to members of racial minorities, especially newly-freed slaves. But the rights emanated from the Amendment were only fully respected after the 1960s within

[60] Holding: **Washington's minimum wage law for women was a valid regulation of the right to contract freely because of the state's special interest in protecting their health and ability to support themselves.**
[61] Erwin Chemerinski, a*bove,* p 489.
[62] Holding: **The Court decided that Mexican Americans and all other racial groups in the United States had equal protection under the 14th Amendment to the U.S. Constitution.**

the Civil Rights movement led by Martin Luther King. And, even then, the Supreme Court adopted a narrow construction of the Amendment to ban intentional discrimination, leaving rules that have the effect (if not the intent) of disenfranchising racial minorities in effect. It was not until the passage by Congress of the Voting Rights Act of 1965, and its expansion in 1982, that the promise of broad political participation regardless of race became a reality.

12 Conclusion

The western civilization has still not solved its fundamental contradictions. Our notorious incapacity to stop practicing the exact same mistakes along the history is leading us to a new era: the era of revisionism. It is time to revise our deeds, but not to destroy them. It is time to [re]construct a true society in which people have the clear notion of their power. A power that must belong to every man and woman and must be exercised according to moral and ethic principles under the empire of the Law and structured based on a justice model. This [re]constructed society must give one first step: to recognize the same rights, exactly the same rights, to all persons, disregarding their personal conditions as race, gender, religious belief, political preferences or social ranks. This [re]constructed society must give one second step: to [re]create true welfare conditions of living apart from any totalitarist temptation and discriminatory values. According to the ideas developed above, the feasibility of this new [re]created welfare society is conditioned to the formation of a constitutionalist order of living, supported on the political and juridical document, named Constitution.

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