

THE MIRACLE AT PHILADELPHIA

Topic 4

The U.S. Constitution
Articles IV through VII
Amendments

George Washington's Farewell Address to the People of the United States, September 17, 1796

20 ...Let me now take a more comprehensive view, and warn you in the most solemn manner against the baneful effects of the spirit of party, generally.

21 This spirit, unfortunately, is inseparable from our nature, having its root in the strongest passions of the human mind. It exists under different shapes in all governments, more or less stifled, controlled, or repressed; but, in those of the popular form, it is seen in its greatest rankness, and is truly their worst enemy.

22 **The alternate domination of one faction over another, sharpened by the spirit of revenge, natural to party dissension, which in different ages and countries has perpetrated the most horrid enormities, is itself a frightful despotism. But this leads at length to a more formal and permanent despotism. The disorders and miseries, which result, gradually incline the minds of men to seek security and repose in the absolute power of an individual; and sooner or later the chief of some prevailing faction, more able or more fortunate than his competitors, turns this disposition to the purposes of his own elevation, on the ruins of Public Liberty.**

26 **It is important, likewise, that the habits of thinking in a free country should inspire caution, in those intrusted with its administration, to confine themselves within their respective constitutional spheres, avoiding in the exercise of the powers of one department to encroach upon another.** The spirit of encroachment tends to consolidate the powers of all the departments in one, and thus to create, whatever the form of government, a real despotism. A just estimate of that love of power, and proneness to abuse it, which predominates in the human heart, is sufficient to satisfy us of the truth of this position. The necessity of reciprocal checks in the exercise of political power, by dividing and distributing it into different depositories, and constituting each the Guardian of the Public Weal against invasions by the others, has been evinced by experiments ancient and modern; some of them in our country and under our own eyes. To preserve them must be as necessary as to institute them. If, in the opinion of the people, the distribution or modification of the constitutional powers be in any particular wrong, let it be corrected by an amendment in the way, which the constitution designates. But let there be no change by usurpation; for, though this, in one instance, may be the instrument of good, it is the customary weapon by which free governments are destroyed. The precedent must always greatly overbalance in permanent evil any partial or transient benefit, which the use can at any time yield.

Article IV

Section 1

Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.

Article IV

Section 2

- The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.
- A Person charged in any State with Treason, Felony, or other Crime, who shall flee from Justice, and be found in another State, shall on Demand of the executive Authority of the State from which he fled, be delivered up, to be removed to the State having Jurisdiction of the Crime.
- [No Person held to Service or Labour in one State, under the Laws thereof, escaping into another, shall, in Consequence of any Law or Regulation therein, be discharged from such Service or Labour, but shall be delivered up on Claim of the Party to whom such Service or Labour may be due.]
- **Amendment XIII: 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. (1864; Ratified 1865)**

Article IV

Section 3

- New States may be admitted by the Congress into this Union; but no new State shall be formed or erected within the Jurisdiction of any other State; nor any State be formed by the Junction of two or more States, or Parts of States, without the Consent of the Legislatures of the States concerned as well as of the Congress.
- The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State.

Article IV

Section 4

The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened), against domestic Violence.

Article V

The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose **Amendments to this Constitution**, or, on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress; Provided that no Amendment which may be made prior to the Year One thousand eight hundred and eight shall in any Manner affect the first and fourth Clauses in the Ninth Section of the first Article [*International slave trade and direct taxes permitted only in proportion to population determined by the Census*]; and that no State, without its Consent, shall be deprived of its equal Suffrage in the Senate.

Article VI

- All Debts contracted and Engagements entered into, before the Adoption of this Constitution, shall be as valid against the United States under this Constitution, as under the Confederation.
- This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the **supreme Law of the Land**; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding. [*Emergency Medical Treatment and Labor Act, EMTALA, which may require abortion care in certain emergency situations vs. state law (Idaho) banning abortion*]
- The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, **shall be bound by Oath or Affirmation, to support this Constitution; but no religious Test shall ever be required** as a Qualification to any Office or public Trust under the United States.

Article VII

- The Ratification of the Conventions of nine States, shall be sufficient for the Establishment of this Constitution between the States so ratifying the Same.
- The Word, "the," being interlined between the seventh and eighth Lines of the first Page, The Word "Thirty" being partly written on an Erasure in the fifteenth Line of the first Page, The Words "is tried" being interlined between the thirty second and thirty third Lines of the first Page and the Word "the" being interlined between the forty third and forty fourth Lines of the second Page.

Attest William Jackson Secretary

done in Convention by the Unanimous Consent of the States
present the Seventeenth Day of September in the Year of our Lord
one thousand seven hundred and Eighty seven and of the
Independance of the United States of America the Twelfth. In
witness whereof We have hereunto subscribed our Names,

G^o. Washington

Presidt and deputy from Virginia

Transcription of the 1789 Joint Resolution of Congress Proposing 12 Amendments to the U.S. Constitution

Congress of the United States begun and held at the City of New York, on Wednesday, the fourth of March, one thousand seven hundred and eighty nine.

THE Conventions of a number of the States, having at the time of their adopting the Constitution, expressed a desire, in order to prevent misconstruction or abuse of its powers, that further declaratory and restrictive clauses should be added: And as extending the ground of public confidence in the Government, will best ensure the beneficent ends of its institution.

RESOLVED by the Senate and House of Representatives of the United States of America, in Congress assembled, two thirds of both Houses concurring, that the following Articles be proposed to the Legislatures of the several States, as amendments to the Constitution of the United States, all, or any of which Articles, when ratified by three fourths of the said Legislatures, to be valid to all intents and purposes, as part of the said Constitution; viz. **ARTICLES** in addition to, and Amendment of the Constitution of the United States of America, proposed by Congress, and ratified by the Legislatures of the several States, pursuant to the fifth Article of the original Constitution.

Article the first... After the first enumeration required by the first article of the Constitution, there shall be one Representative for every thirty thousand, until the number shall amount to one hundred, after which the proportion shall be so regulated by Congress, that there shall be not less than one hundred Representatives, nor less than one Representative for every forty thousand persons, until the number of Representatives shall amount to two hundred; after which the proportion shall be so regulated by Congress, that there shall not be less than two hundred Representatives, nor more than one Representative for every fifty thousand persons.

Article the second... No law, varying the compensation for the services of the Senators and Representatives, shall take effect, until an election of Representatives shall have intervened.*

*Ratified in 1994 as the 27th Amendment.

Amendments 1 – 10: Bill Of Rights (1791)

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 [abridging] the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.**

The Seditious Act of 1789

Sec 2:

“...That if any person shall write, print, utter or publish, or shall cause to procure to be written, printed, uttered or published, or shall knowingly and willingly assist or aid in writing, printing, uttering or publishing any false, scandalous and malicious writing or writings against the government of the United States, or either house of the Congress..., or the President..., with intent to defame the said government...[or branch of the government] or to bring them...into contempt or disrepute; or to excite against them... the hatred of the good people of the United States...or to resist, oppose, or defeat any... law or act [of the Government]... then such person...shall be punished by a fine not exceeding two thousand dollars and by imprisonment not exceeding two years.”

Schenck v. United States (March, 1919)

- Charles Schenck and Elizabeth Baer were members of the Executive Committee of the Socialist Party in Philadelphia. The executive committee authorized, and Schenck oversaw, printing and mailing more than 15,000 fliers to men slated for conscription during World War I. The fliers urged men not to submit to the draft, saying "Do not submit to intimidation", "Assert your rights", "If you do not assert and support your rights, you are helping to deny or disparage rights which it is the solemn duty of all citizens and residents of the United States to retain," and urged men not to comply with the draft on the grounds that military conscription constituted involuntary servitude, prohibited by the Thirteenth Amendment.
- Schenck and Baer were convicted of violating the Espionage Act of 1917. Both defendants appealed to the U.S. Supreme Court, arguing that their conviction, and the statute which purported to authorize it, were contrary to the First Amendment. They claimed that the Espionage Act had what today one would call a "chilling effect" on free discussion of the war effort.

The Court, in a unanimous opinion written by Justice Oliver Wendell Holmes Jr., held that Schenck's criminal conviction was constitutional.

Schenck v. United States (1919)

Opinion of the Court, Justice Holmes

“[T]he character of every act depends upon the circumstances in which it is done.... The most stringent protection of free speech would not protect a man in **falsely shouting fire in a theatre and causing a panic**.... The question in every case is whether the words used are used in such circumstances and are of such a nature as to create **a clear and present danger** that they will bring about the substantive evils that Congress has a right to prevent.”

Abrams v. United States (November, 1919)

Later in 1919, the Supreme Court upheld the criminal arrests of several defendants under the Sedition Act of 1918, an amendment to the Espionage Act of 1917. The law made it a criminal offense to criticize the production of war materiel with intent to hinder the progress of American military efforts.

The defendants had been arrested in 1919 for printing and distributing anti-war leaflets in New York City. After their conviction under the Sedition Act, they appealed on First Amendment free speech grounds. The Supreme Court upheld the convictions under the clear and present danger standard, which allowed the suppression of certain types of speech in the public interest.

The *Abrams* case is remembered today largely because of the dissent by Justice Holmes, who advocated a new view on criticism of the government that in turn led to a gradual change in the American judiciary's views on First Amendment jurisprudence. The clear and present danger standard, used in this ruling to uphold the criminal convictions, fell out of favor and was largely overturned by the Supreme Court in 1969.

Abrams v. United States (1919)

Dissent by Justice Holmes

“I wholly disagree with the argument of the Government that the First Amendment left the common law as to seditious libel in force. History seems to me against the notion. I had conceived that the United States through many years had shown its repentance for the Sedition Act of 1798, by repaying fines that it imposed. **Only the emergency that makes it immediately dangerous to leave the correction of evil counsels to time warrants making any exception to the sweeping command, ‘Congress shall make no law ... abridging the freedom of speech.’** ... I regret that I cannot put into more impressive words my belief that in their conviction upon this indictment the defendants were deprived of their rights under the Constitution of the United States.”

United States v. Carolene Products Co. (1938)

Justice Stone

Opinion of the Court:

“[T]he existence of facts supporting the legislative judgment is to be presumed, for regulatory legislation affecting ordinary commercial transactions is not to be pronounced unconstitutional unless in the light of the facts made known or generally assumed it is of such a character as to preclude the assumption that it rests upon some rational basis within the knowledge and experience of the legislators.⁴”

Footnote 4 (in part): “There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments...”

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.

Warren Burger on MacNeil Lehrer in 1991 (reported on NPR March 5, 2018)

Former Chief Justice Warren Burger, a conservative, said the idea that there was an individual right to bear arms was "a fraud." If he were writing the Bill of Rights now, he said in 1991, "There wouldn't be any such thing as the Second Amendment." He declared on PBS that the Second Amendment "has been the subject of one of the greatest pieces of fraud, I repeat the word fraud, on the American public by special interest groups that I have ever seen in my lifetime."

In a speech in 1992, Burger opined that "the Second Amendment doesn't guarantee the right to have firearms at all. " In his view, the purpose of the Second Amendment was "to ensure that the 'state armies'--'the militia'--would be maintained for the defense of the state. "

Third Amendment

No Soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law.

Fourth Amendment

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

THE PENUMBRA –THE RIGHT TO PRIVACY

- *Griswold v. Connecticut* (USSC, 1978)
 - Griswold was executive director of Planned Parenthood (CT) which gave information, instruction and medical advice to married persons concerning means of preventing conception
 - Found guilty of violating a criminal statute prohibiting contraception and prohibiting assisting, abetting, counselling, etc. commission of the primary offense
 - “The Fourth and Fifth Amendments [have been]... described as protection against all governmental invasions ‘of the sanctity of a man’s home and the privacies of life.’ We recently referred ... to the Fourth Amendment as creating a ‘right to privacy, no less important than any other right carefully and particularly reserved to the people’... We have had many controversies over these penumbral rights of ‘privacy and repose’. ... These cases bear witness that the right of privacy which presses for recognition here is a legitimate one.” Mr. Justice Goldberg for the Court, Justices Warren and Brennan concurring.

Fifth Amendment

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

Sixth Amendment

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

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.

Eighth Amendment

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

Ninth Amendment

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

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.

Amendments not discussed Previously

Thirteenth Amendment (1865)

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.

Fourteenth Amendment (1868)

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.

Fourteenth Amendment

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. *[3/5 Rule Deleted – of course there are no enslaved persons after adoption of 13th Amendment]* 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 Legislature 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 in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State. *[First shot at voting rights for former slaves]*

Fourteenth Amendment

Section 3.

No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under 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.

Fourteenth Amendment

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 neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion 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.

Fifteenth Amendment (1870)

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.

Sixteenth Amendment (1913)

The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration.

[Income Tax]

[Concern with Article I4 Section 9 Clause 4: “No Capitation, or other direct, Tax shall be laid, unless in Proportion to the Census or enumeration herein before directed to be taken.”]

Eighteenth Amendment (1919)

Section 1

After one year from the ratification of this article the manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof for beverage purposes is hereby prohibited.

Section 2

The Congress and the several States shall have concurrent power to enforce this article by appropriate legislation.

Section 3

This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of the several States, as provided in the Constitution, within seven years from the date of the submission hereof to the States by the Congress.

Twenty-First Amendment (1933)

Section 1.

The eighteenth article of amendment to the Constitution of the United States is hereby repealed.

Section 2.

The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.

Twenty-Third Amendment (1961)

The District constituting the seat of government of the United States shall appoint in such manner as the Congress may direct:

A number of electors of President and Vice President equal to the whole number of Senators and Representatives in Congress to which the District would be entitled if it were a state, but in no event more than the least populous state; they shall be in addition to those appointed by the states, but they shall be considered, for the purposes of the election of President and Vice President, to be electors appointed by a state; and they shall meet in the District and perform such duties as provided by the twelfth article of amendment.

Supreme Court – October 2023 Term

Select Decisions

**Case Descriptions are based on Opinion Analyses by Amy Howe for
SCOTUSBLOG**

Curtailing Power of Federal Agencies

Relentless v. Department of Commerce
Loper Bright Enterprises v. Raimondo

In a major ruling, the Supreme Court on Friday cut back sharply on the power of federal agencies to interpret the laws they administer and ruled that courts should rely on their own interpretation of ambiguous laws. The decision will likely have far-reaching effects across the country, from environmental regulation, food safety, consumer protection, drug safety, occupational safety, clean water, commercial flight safety, railroads, healthcare, etc. By a vote of 6-3, the justices overruled their landmark 1984 decision, **Chevron v. Natural Resources Defense Council**, which gave rise to the doctrine known as the ***Chevron*** doctrine. Under that doctrine, if Congress has not directly addressed the question at the center of a dispute, a court was required to uphold the agency’s interpretation of the statute as long as it was reasonable. But in a 35-page ruling by Chief Justice John Roberts, the justices rejected that doctrine, calling it “fundamentally misguided.”

Roberts rejected any suggestion that agencies, rather than courts, are better suited to determine what ambiguities in a federal law might mean. Even when those ambiguities involve technical or scientific questions that fall within an agency’s area of expertise, Roberts emphasized, “Congress expects courts to handle technical statutory questions” – and courts also have the benefit of briefing from the parties and “friends of the court.”

Kagan, who read a summary of her dissent (which was joined by Justices Sotomayor and Jackson) from the bench, was sharply critical of the decision to overrule the *Chevron* doctrine. Congress often enacts regulatory laws that contain ambiguities and gaps, she observed, which agencies must then interpret. The question, as she framed it, is “[w]ho decides which of the possible readings” of those laws should prevail?

For 40 years, she stressed, the answer to that question has generally been “the agency’s,” with good reason: Agencies are more likely to have the technical and scientific expertise to make such decisions. She emphasized the deep roots that *Chevron* has had in the U.S. legal system for decades. “It has been applied in thousands of judicial decisions. It has become part of the warp and woof of modern government, supporting regulatory efforts of all kinds — to name a few, keeping air and water clean, food and drugs safe, and financial markets honest.”

By overruling the *Chevron* doctrine, Kagan concluded, the court has created a “jolt to the legal system.”

Kagan also pushed back against the majority’s suggestion that overruling the *Chevron* doctrine would introduce clarity into judicial review of agency interpretations. Noting the majority’s assurances that agency interpretations may be entitled to “respect” going forward, she observed that “[i]f the majority thinks that the same judges who argue today about where ‘ambiguity’ resides are not going to argue tomorrow about what ‘respect’ requires, I fear it will be gravely disappointed.”

Similarly, she questioned the majority’s assertion that Friday’s decision would not call into question decisions that relied on the *Chevron* doctrine to uphold agency action. “Courts motivated to overrule an old *Chevron*-based decision can always come up with something to label a ‘special justification,’” she posited. “All a court need do is look to today’s opinion to see how it is done.”

But more broadly, Kagan rebuked her colleagues in the majority for what she characterized as a judicial power grab. She lamented that, by overruling *Chevron*, the court had, in “one fell swoop,” given “itself exclusive power over every open issue — no matter how expertise-driven or policy-laden — involving the meaning of regulatory law.”

Securities and Exchange Commission v. Jarkesy

The court ruled on Thursday that the Securities and Exchange Commission's routine practice of imposing fines in its administrative proceedings, used to penalize securities fraud, violates the Seventh Amendment "right of trial by jury" in all "suits at common law." Chief Justice John Roberts wrote for a 6-3 majority in *Securities and Exchange Commission v. Jarkesy* that the SEC cannot continue to handle these cases in-house without a jury. The decision will have a far-reaching impact on dozens of federal administrative agencies that use similar processes.

Justice Sonia Sotomayor, joined by Justices Elena Kagan and Ketanji Brown Jackson, dissented. Reading from the bench on Thursday, Sotomayor called the majority's decision "a devastating blow to the manner in which our government functions."

Criminalizing Homelessness

City of Grant's Pass v Johnson 6-3, Opinion of the Court by Justice Gorsuch

A city ordinance carrying criminal penalties banned sleeping out of doors with any “bedding item” was challenged as violating the 8th Amendment’s ban on cruel and unusual punishment. The Court in an opinion by Justice Gorsuch ruled that enforcement of generally applicable laws regulating camping on public property does not constitute “cruel and unusual punishment.” He contended that the Eighth Amendment “serves many important functions, but it does not authorize federal judges” to “dictate this Nation’s homelessness policy.” Instead, he suggested, such a task should fall to the American people. He continued, the challengers point to the Supreme Court’s 1962 decision in *Robinson v. California*, holding that the Eighth Amendment bars a state from making it a crime simply to be a drug addict. But the kinds of public camping ordinances at issue in this case bear no resemblance to the state law in *Robinson*, Gorsuch wrote, because they criminalize camping on public property rather than a person’s status. The majority declined to extend *Robinson* to prohibit the enforcement of laws that (like the ordinances at issue in this case) do not criminalize an individual’s status but instead prohibit acts that the defendant “cannot help but undertake.” The challengers had suggested that because unhoused people had no other choice, the city was effectively punishing them for their status anyway.

Justice Clarence Thomas filed a brief concurring opinion in which he voiced his belief that *Robinson* (and much of the court’s Eighth Amendment case law more broadly) was wrongly decided. Instead of considering the text and original meaning of the Eighth Amendment, he asserted, the court in *Robinson* looked at public opinion – which “is not an appropriate metric for interpreting the Cruel and Unusual Punishments Clause.”

Justice Sotomayor dissented: After acknowledging the complexity of the homelessness problem in the entire country, she concluded that “The only question” before the Supreme Court in this case “is whether the Constitution permits punishing homeless people with no access to shelter for sleeping in public with as little as a blanket to keep warm.” The answer to that question, in her view, is “no.” The only people prosecuted were those who had no other place to sleep. [Criminal punishment for status vs action.]

Obstruction of an Official Proceeding, January 6 Indictments

Fisher v U.S. 6-3 split (but note Barrett and Jackson)

The Court threw out charges against a former Pennsylvania police officer who entered the U.S. Capitol during the Jan. 6, 2021, attacks. By a vote of 6-3, the justices ruled that the law that Joseph Fischer was charged with violating, which bars obstruction of an official proceeding, applies only to evidence tampering, such as destruction of records or documents, in official proceedings. The Ruling could affect charges against more than 300 other Jan. 6 defendants. The same law is also at the center of two of the four charges brought by Special Counsel Jack Smith against former President Donald Trump in Washington, D.C.

The challenged law, 18 USC Section 1512 (b)2, is part of Sarbanes Oxley legislation, passed in 2002, in connection with the Enron case. Section 1512(c)(1), bars tampering with evidence “with the intent to impair the object’s integrity or availability for use in an official proceeding.” Section 1512(c)(2), makes it a crime to “otherwise obstruct[], influence[], or impede[] any official proceeding.” Overruling the DC Circuit, in an opinion by Chief Justice Roberts, the Court held that Section (c)(2) only applies to situations involving evidence tampering. He wrote that the government’s expansive construction of Section (c)(2) “would criminalize a broad swath of prosaic conduct, exposing activists and lobbyists alike to decades in prison.” Courts must look at context, notwithstanding the express language of the statute making it a crime to interfere with obstruct or influence an official proceeding.

Justice Ketanji Brown Jackson joined the Roberts opinion but also filed a concurring opinion in which she emphasized that despite “the shocking circumstances involved in this case or the Government’s determination that they warrant prosecution, today, this Court’s task is to determine what conduct is proscribed by the criminal statute that has been invoked as the basis for the obstruction charge at issue here.” Jackson suggested that it “beggars belief that Congress would have inserted a breathtakingly broad, first-of-its kind criminal obstruction statute (accompanied by a substantial 20-year maximum penalty) in the midst of a significantly more granular series of obstruction prohibitions without clarifying its intent to do so.”

Justice Jackson also made clear that, at least in her view, the charges against Fischer could still go forward. He was charged, she stressed, with “corruptly obstructing a proceeding before Congress, specifically, Congress’s certification of the Electoral College vote,” which used records and documents. If, Jackson posited, the conduct at the center of the charges against Fischer “involved the impairment (or the attempted impairment) of the availability or integrity of things used during the January 6 proceeding,” then the charges against him can go forward.

Justice Amy Coney Barrett dissented, in an opinion joined by Justices Sonia Sotomayor and Elena Kagan. Although “events like January 6th” may not have been the target of subsection (c)(2), she acknowledged (noting in a parenthetical, “Who could blame Congress for that failure of imagination?”), she argued that the court should “stick to the text” when statutes “go further than the problem that inspired them.” Instead, she contended, the court “does textual backflips to find some way — *any* way — to narrow the reach of subsection (c)(2).”

For Justice Barrett, the text of subsection (c)(2) clearly supports the government’s broader interpretation. Subsection (c)(2), she asserted, “covers all sorts of actions that affect or interfere with official proceedings,” and the word “otherwise” does not limit its scope.

Justice Barrett also rejected the majority’s contention that the government’s interpretation could lead to lengthy criminal sentences against activists and lobbyists. First, she noted, a defendant can only be convicted under subsection (c)(2) if the government can show that he acted “corruptly.” Second, she added, although the law calls for a maximum sentence of 20 years, it does not specify a minimum sentence – suggesting that Congress believed that conduct covered by the law “may run the gamut from major to minor.”

Presidential Immunity

U.S. V. Donald J. Trump

In 2023, Trump was indicted on four counts arising from the January 6, 2021, attack on the U.S. Capitol. The case was filed in the District Court for the District of Columbia before Judge Chutkan. Trump asked that charges be dismissed, arguing that he is immune to prosecution as former President. Judge Chutkan turned down the motion in December explaining that the presidency does not “confer a lifelong ‘get-out-of-jail-free’ pass.”

DC Circuit Decision, February 8, 2024, on appeal:

- Per curium: “former President Trump has become citizen Trump, with all of the defenses of any other criminal defendant”.
- Acknowledged that there may be temporary immunity during time a President is in office, ordering the trial to recommence unless Cert granted.

Trump applied for stay of DC Circuit Court’s mandate. Court granted one week for Prosecution to respond. Trump asked the Supreme Court to block decision from the DC Circuit handed down last week that rejected his claims of immunity from the election subversion charges. “Without immunity from criminal prosecution, the presidency as we know it will cease to exist” Trump told the Supreme Court.

Two days later – ahead of deadline – Smith argued in his own brief that Trump had not met the standard to pause proceedings in his case. It generally takes support from five justices to secure such a pause. “The charged crimes strike at the heart of our democracy,” Smith wrote in his filing. “The public interest in a prompt trial is at its zenith where, as here, a former president is charged with conspiring to subvert the electoral process so that he could remain in office.”

The case was argued before SCOTUS in April and the decision was released on the last day of the 2023 term.

U.S. v. Donald J. Trump, Chief Justice Roberts for the Court

In a historic decision, a divided Supreme Court on Monday ruled that former presidents can never be prosecuted for actions relating to the core powers of their office, and that there is at least a presumption that they have immunity for their official acts more broadly.

The decision left open the possibility that the charges brought against former President Donald Trump by Special Counsel Jack Smith – alleging that Trump conspired to overturn the results of the 2020 election – can still go forward to the extent that the charges are based on his private conduct, rather than his official acts.

The case now returns to the lower courts for them to determine whether the conduct at the center of the charges against Trump was official or unofficial – an inquiry that, even if it leads to the conclusion that the charges can proceed, will almost certainly further delay any trial in the case, which had originally been scheduled to begin on March 4, 2024 but is currently on hold.

Writing for the majority, Chief Justice John Roberts emphasized that the president “is not above the law.” But Justice Sonia Sotomayor, in a dissent joined by Justices Elena Kagan and Ketanji Brown Jackson, countered that if a future president “misuses official power for personal gain, the criminal law that the rest of us must abide will not provide a backstop.”

As an initial matter, Roberts explained that presidents have absolute immunity for their official acts when those acts relate to the core powers granted to them by the Constitution – for example, the power to issue pardons, veto legislation, recognize ambassadors, and make appointments.... That absolute immunity does not extend to the president’s other official acts, however. In those cases, Roberts reasoned, a president cannot be charged unless, at the very least, prosecutors can show that bringing such charges would not threaten the power and functioning of the executive branch. And there is no immunity for a president’s unofficial acts.

Determining which acts are official and which are unofficial “can be difficult,” Roberts conceded. He emphasized that the immunity that the court recognizes in its ruling on Monday takes a broad view of what constitutes a president’s “official responsibilities,” “covering actions so long as they are not manifestly or palpably beyond his authority.” In conducting the official/unofficial inquiry, Roberts added, courts cannot consider the president’s motives, nor can they designate an act as unofficial simply because it allegedly violates the law.

Turning to some of the specific allegations against Trump, the majority ruled that Trump cannot be prosecuted for his alleged efforts to “leverage the Justice Department’s power and authority to convince certain States to replace their legitimate electors with Trump’s fraudulent slates of electors.”

With regard to the allegation that Trump attempted to pressure his former vice president, Mike Pence, in his role as president of the senate, to reject the states’ electoral votes or send them back to state legislatures, the court deemed Trump “presumptively immune” from prosecution on the theory that the president and vice president are acting officially when they discuss their official responsibilities. On the other hand, Roberts observed, the vice president’s role as president of the senate is not an executive branch role. The court therefore left it for the district court to decide whether prosecuting Trump for this conduct would intrude on the power and operation of the executive branch.

The court did the same for the allegations in the indictment regarding Trump’s interactions with private individuals and state officials, attempting to convince them to change electoral votes in his favor, as well as Trump’s tweets leading up to the Jan. 6 attacks and his speech on the Ellipse that day. Making this determination, Roberts wrote, will require “a close analysis of the indictment’s extensive and interrelated allegations.”

Dissent, Justice Soyomayor, joined by Justices Kagen and Jackson

Today's decision to grant former Presidents criminal immunity reshapes the institution of the Presidency. It makes a mockery of the principle, foundational to our Constitution and system of Government, that no man is above the law. Relying on little more than its own misguided wisdom about the need for "bold and unhesitating action" by the President,... the Court gives former President Trump all the immunity he asked for and more. Because our Constitution does not shield a former President from answering for criminal and treasonous acts, I dissent.

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The majority's single-minded fixation on the President's need for boldness and dispatch ignores the countervailing need for accountability and restraint. The Framers were not so single-minded. In the Federalist Papers, after "endeavor[ing] to show" that the Executive designed by the Constitution "combines . . . all the requisites to energy," Alexander Hamilton asked a separate, equally important question: "Does it also combine the requisites to safety, in a republican sense, a due dependence on the people, a due responsibility?" The Federalist No. 77.... The answer then was yes, based in part upon the President's vulnerability to "prosecution in the common course of law."... The answer after today is no.

Never in the history of our Republic has a President had reason to believe that he would be immune from criminal prosecution if he used the trappings of his office to violate the criminal law. Moving forward, however, all former Presidents will be cloaked in such immunity. If the occupant of that office misuses official power for personal gain, the criminal law that the rest of us must abide will not provide a backstop.

With fear for our democracy, I dissent.

Dissent Justice Jackson., joined by Justices Soyomayor and Kagen

The majority displays no such caution or humility now. Instead, the Court today transfers from the political branches to itself the power to decide when the President can be held accountable. What is left in its wake is a greatly weakened Congress, which must stand idly by as the President disregards its criminal prohibitions and uses the powers of his office to push the envelope, while choosing to follow (or not) existing laws, as he sees fit. We also now have a greatly empowered Court, which can opt to allow Congress's policy judgments criminalizing conduct to stand (or not) with respect to a former President, as a matter of its own prerogative.

In short, America has traditionally relied on the law to keep its Presidents in line. Starting today, however, Americans must rely on the courts to determine when (if at all) the criminal laws that their representatives have enacted to promote individual and collective security will operate as speedbumps to Presidential action or reaction. Once selfregulating, the Rule of Law now becomes the rule of judges, with courts pronouncing which crimes committed by a President have to be let go and which can be redressed as impermissible. So, ultimately, this Court itself will decide whether the law will be any barrier to whatever course of criminality emanates from the Oval Office in the future. The potential for great harm to American institutions and Americans themselves is obvious. * * *

The majority of my colleagues seems to have put their trust in our Court's ability to prevent Presidents from becoming Kings through case-by-case application of the indeterminate standards of their new Presidential accountability paradigm. I fear that they are wrong. But, for all our dissenting sakes, I hope that they are right.

In the meantime, because the risks (and power) the Court has now assumed are intolerable, unwarranted, and plainly antithetical to bedrock constitutional norms, I dissent.

Federalist # 77, Alexander Hamilton

We have now completed a survey of the structure and powers of the executive department which, I have endeavored to show, combines, as far as republican principles will admit, all the requisites to energy. The remaining inquiry is: Does it also combine the requisites to safety, in the republican sense – a due dependence on the people, a due responsibility? The answer to this question has been anticipated in the investigation of its other characteristics, and is satisfactorily deducible from these circumstances; the election of the President once in four years by persons immediately chosen by the people for that purpose, **and his being at all times liable to impeachment, trial, dismissal from office, incapacity to serve in any other, and to the forfeiture of life and estate by subsequent prosecution in the common course of law.** But these precautions, great as they are, are not the only ones which the plan of the convention has provided in favor of the public security. In the only instances in which the abuse of the executive authority was materially to be feared, the Chief magistrate of the United States, would, by that plan, be subjected to the control of a branch of the legislative body. What more can an enlightened and reasonable people desire?