

# Lesson 18

## PROCEDURAL RIGHTS: AMENDMENTS VI, VII, AND VIII

### Lesson Objectives

*When you complete Lesson 18, you will be able to:*

- Describe the purpose of the Speedy Trial Clause, the Public Trial Clause, and the Jury Trial Clause of the Sixth Amendment and explain how they protect the rights of accused persons.
- Understand how the interpretation of the Jury Trial Clause has changed since the Framing.
- Outline the requirements of the Arraignment Clause and understand how they have been internalized in general legal procedure.
- Describe the purpose of the Confrontation Clause and the Right-to-Counsel Clause.
- Outline the requirements of the Compulsory Process Clause and understand how it helps a defendant build a defense.
- Outline the history and debate surrounding the Right to Jury in Civil Cases Clause and understand how the clause is applied today.
- Explain how courts may review jury verdicts according to the Reexamination Clause and explain how recent Supreme Court decisions have undermined the Clause.
- Outline the meaning of the Cruel and Unusual Punishment Clause of the Eighth Amendment and understand how the Supreme Court has departed from the clause's original meaning.

*Unit 6*

## Part 1: Amendment VI

### Speedy Trial Clause

Amendment VI

### Public Trial

Amendment VI

### Jury Trial

Amendment VI

### Arraignment Clause

Amendment VI

### Confrontation Clause

Amendment VI

### Compulsory Process Clause

Amendment VI

### Right-to-Counsel Clause

Amendment VI

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## Speedy Trial Clause — Amendment VI

### *Essay by George Thomas (pp. 345–347)*

The Speedy Trial Clause of the Sixth Amendment states that the “accused shall enjoy the right to a speedy...trial.” The right to a speedy trial dates back to the Assize of Clarendon of 1166 and the Magna Carta, developed in 1215, and its purpose was to prevent the monarch from imprisoning someone for a lengthy period. Because it was essential and related to rights of habeas corpus and non-excessive bail, the Founders included the right to a speedy trial in the Bill of Rights without debate.

The Framers understood the rights to habeas corpus, non-excessive bail, and a speedy trial to be interrelated. Under common law, if the accused was detained for a lengthy period before trial, the judge would typically grant the habeas petition and dismiss the indictment. As long as the statute of limitations had not expired, the state could indict the defendant at a later date. Thus, in early American cases, judges would decide the issue of pretrial detention through habeas laws rather than through the Speedy Trial Clause.

Today, the Speedy Trial Clause applies both to the states and to the federal government. It protects defendants not only from lengthy incarceration before trial, but also from the harm to the defense that can result from long delays. The right to a speedy trial begins once an arrest is made or an indictment is granted rather than when the investigation begins. The Federal Speedy Trial Act establishes time limits within which indictments must be made and trials must commence.

The remedy for most constitutional violations is a new trial, but the remedy for a violation of the Speedy Trial Clause is normally dismissal of the indictment or vacating of the conviction without possibility of retrial. The Supreme Court gives lower courts significant discretion to decide speedy trial claims, but courts should consider (1) whether and how the defendant asserts his right to a speedy trial, (2) the length of delay, (3) the reason for delay, and (4) the prejudice the defendant suffers.



**Before You Read**

*Ask: Why do you think a speedy trial is important?* (Answers will vary. Sample answers: The accused may be in prison for an indeterminate period, witness’s memories may fade, victims of crimes do not have closure, and defendants cannot redress wrongs in a timely way.)



**Make a Real-Life Connection**

Tell students that some international judicial bodies, such as the International Criminal Court (ICC), do not protect the liberties that are enshrined in the Constitution. For instance, the ICC does not grant accused defendants the right to a speedy trial. Based on what students know about the United States Constitution and the Speedy Trial Clause, have them explain why American involvement in the ICC might be problematic. (American involvement in the ICC might lend legitimacy to a body with fundamentally wrong principles. Additionally, if the United States became involved, it might risk having its own citizens hauled into the international court and denied their constitutionally protected rights.)

**Public Trial** – Amendment VI

*Essay by Richard W. Garnett (pp. 347–348)*

The Public Trial Clause reflects the Founders’ disdain for private legal proceedings of the sort that were common in England’s infamous Star Chamber. The Founders agreed that trials were almost by definition open and public. The Public Trial Clause applies to all criminal prosecutions.

The Supreme Court has held that, like most other protections in the Bill of Rights, the Public Trial Clause applies to both the state and federal governments. The public trial right is not absolute. In some instances, a defendant may waive his right to a public trial (but First Amendment considerations prevent a completely private trial). The Public Trial Clause does not require that every part of a trial be public: Jury deliberations, for example, are private, and judges can occasionally make certain portions of a trial private.

The public trial requirement prevents the courts from persecuting defendants; encourages judges, lawyers, and jurors to perform their duties properly and responsibly; discourages untruthful testimony; safeguards citizens' First Amendment rights; and promotes confidence in America's legal system.



### Before You Read

The Star Chamber was a British special court that held power directly from the king. The concept of a Star Chamber dates to the medieval period, with the earliest known reference to a Star Chamber occurring in 1398. Originally created by Henry VII (r. 1457–1509) to hear cases appealed up from the common law courts, the Star Chamber was restructured by Henry VIII (r. 1509–1547) and his ministers to hear cases directly, particularly during the administration of Lord Chancellor Thomas Wolsey between 1514 and 1529. The court was a supplement to common law and not bound by common law. It was made up of councilors appointed by and answerable to the king. These councilors heard cases in secret and acted as both judge and jury. As a result, the potential for abuse was tremendous. It was finally abolished by the Long Parliament in 1641 through the Habeas Corpus Act of 1640, after James I (r. 1603–1625) and Charles I (r. 1625–1649) both attempted to keep Parliament in recess and give parliamentary power to the Star Chamber instead.



### Check Understanding

Read aloud the following quote by Sir William Blackstone on page 347 (first full paragraph of the right-hand column): “[A] witness may frequently depose that in private which he will be ashamed to testify in a public and solemn tribunal.” *Ask: What do you think Blackstone meant by this?* (Witnesses might give different testimony privately compared to the testimony they would provide during a public trial. A witness would be hesitant to say certain things publicly that he might be willing to say in private.)

## Jury Trial – Amendment VI

*Essay by Albert W. Alschuler (pp. 348–352)*

The Jury Trial Clause upholds the right to a trial by an impartial jury in criminal cases. Members of the jury are composed of individuals from the area where the crime was committed. Juries were the most democratic institutions in the colonies, and the right to trial by jury was crucial. In colonial America, juries were typically composed of 12 members who had to reach a unanimous verdict.

Since the Framing, the interpretation of the Jury Trial Clause has changed in several significant respects. The Supreme Court ruled in 1968 that the clause applied to both federal and state proceedings. The requirements concerning who may serve on a jury have also changed. Federal courts initially looked to state laws to determine who could serve on a jury. All states limited jury service to men, and all states except Vermont required jurors to be property owners or taxpayers. A few states prohibited blacks from serving on juries. The Sixth Amendment did not require states to expand the right to serve on a jury; nor was the Equal Protection Clause of the Fourteenth Amendment thought to grant political rights such as the right to serve on a jury. However, the Supreme Court has ruled that both the Sixth Amendment and the Equal Protection Clause of the Fourteenth Amendment prohibit the jury qualifications of the Founding era. Race and sex are no longer grounds for preventing individuals from serving as jury members.

The Supreme Court has altered the rules regarding the size of a jury and the requirement of unanimity. For hundreds of years, juries consisted of 12 individuals. In 1970, however, the Supreme Court ruled that juries could consist of as few as six members instead of 12. Unanimous decisions are required in federal cases, but non-unanimous verdicts (e.g., votes of 11–1, 10–2, and 9–3) are permissible for 12-person juries in state courts. Six-person juries must reach a unanimous decision.

Historically, juries could decide questions of fact, and some colonies allowed juries to decide questions of law. In 1895, the Supreme Court declared that federal juries may not decide questions of law. Though some in the 1960s and 1970s tried to revive the practice of juries deciding questions of law, a federal court of appeals ruled in 1997 that juries may not disregard instructions regarding the law, and courts have denied juries the ability to acquit a defendant because they disagree with the law.

Jurors are required to be impartial, but impartiality does not require jurors to be unaware of the circumstances of a case. Jurors may have some knowledge of a case before they enter the courtroom, but they are expected to consider only the evidence presented in reaching a verdict.

Few criminal cases today go to trial. Nearly half of felony convictions are achieved without juries. Guilty pleas and plea bargains account for the vast majority of felony cases. Guilty pleas were rare and discouraged during the Founding era, when jury trials were routine. Though these individuals are sentenced without jury trials, the Supreme Court recently concluded that certain federal sentencing guidelines violate the right to trial by jury.



## Active Reading

How has the interpretation of the Jury Trial Clause changed since the Founding? (The number of people for a jury, the unanimity requirements, the requirements for jurors, and what juries can decide have changed. For hundreds of years, juries consisted of 12 individuals. Now they can consist of as few as six members. Non-unanimous verdicts (e.g., votes of 11–1, 10–2, and 9–3) are permissible for 12-person but not for six-person juries. The Supreme Court has ruled that the Sixth Amendment and the Equal Protection Clause of the Fourteenth Amendment prohibit the jury qualifications of the Founding era. Race and sex are no longer grounds for preventing individuals from serving as jury members. Historically, juries could decide both questions of law and questions of fact, but now juries may not decide questions of law.)



## Write About It

Have students read passages from Alexis de Tocqueville's *Democracy in America* praising the jury system (Volume One, Part Two, Chapter Eight). What is the role of juries according to Tocqueville? Why does he praise them?



## Discussion Question

Many cases are discussed extensively in the media before they are brought to trial. How does extensive media coverage affect the requirement that jurors be impartial? (Answers will vary. Sample answer: Jurors must be able to evaluate the case based on the evidence presented. It is possible that a juror may have heard something about the accused through media coverage, but that does not mean that he or she will not be able to evaluate the evidence. Jurors are responsible for separating the facts they see from outside speculation and opinions.)

## Arraignment Clause — Amendment VI

*Essay by Paul Rosenzweig (pp. 352–353)*

The Arraignment Clause requires that individuals charged with a crime “be informed of the nature and cause of the accusation.” This right was part of early English common law and is deeply embedded in the American legal system.

The accused’s right to be informed of charges dates back to 12th century England. There were two court systems: the common law and ecclesiastical courts. Common law courts required that the accused be informed of the accusations, but ecclesiastical courts practiced the inquisitorial system in which the accused was not informed of the nature of the charges against him. In 1164, King Henry II began to reform

ecclesiastical courts' procedure to match the common law courts' accusatorial system. The Magna Carta also incorporated this trend. These efforts floundered in the 16th century when the inquisitorial system of justice became common once again, most notoriously in the Star Chamber.

America's legal system was based on the common law accusatorial system, and the right to be informed of the nature of the crime was included in many state constitutions. Therefore, the Arraignment Clause was an uncontroversial inclusion in the Bill of Rights.

When first introduced, the Arraignment Clause was intended to give an accused adequate time to prepare a strong defense. As the concept of double jeopardy developed, the notice requirement allowed the accused to notify the court of a prior acquittal. The notice requirement also informed the court of the nature of the charges and allowed it to decide whether the charges were legally sufficient.

Currently, the Arraignment Clause has been internalized in the general legal procedure. Indictments must include the statute the accused allegedly violated, the date of the alleged offense, and the name of the accused. If that information is present, defendants are generally unable to challenge an indictment by claiming that it violates the Arraignment Clause.



### Active Reading

**Ask:** What three main purposes does the Arraignment Clause serve? (It gives the accused a chance to construct a strong defense; it gives the defendant an opportunity to claim a prior acquittal and prevent the court from trying the same offense twice in violation of the Double Jeopardy Clause; and it informs the court of the charges and enables it to decide whether the charges are legally justified.)



### Check Understanding

First, ask each student to construct a brief scenario in which an individual commits some type of crime. Next, ask students to trade their scenarios with a classmate. Finally, ask students to create a sample indictment that meets the criteria outlined at the top of page 353 (the section that begins with "Generally, a charging instrument..."). Ask students to share the scenario and their corresponding indictment. Then elicit opinions about whether the indictment contains all of the necessary elements outlined on page 353.

## Confrontation Clause – Amendment VI

*Essay by John G. Douglass (pp. 354–355)*

The Confrontation Clause states that an accused has the “right to be confronted with the witnesses against him.” The clause suggests some basic limits: Witnesses for the prosecution must testify in open court, in the presence of the accused, and are subject to cross-examination by the defense. There are some ambiguities, though. For example, must confrontation always be face-to-face? Are there limits to cross-examination? Is hearsay permissible? The clause does not support the 17th century practice of “state trials,” wherein magistrates would obtain affidavits and depositions in private and use them as evidence in lieu of personal testimony.

Under current law, the accused has the right to be present in court when witnesses for the prosecution testify and to have an opportunity to cross-examine those witnesses. Applying these principles has proved difficult in two areas: hearsay and child witnesses. Hearsay is a statement made out of court by someone else (the declarant). The difficulty with hearsay is that it is impossible to confront the declarant if he is dead, is otherwise unavailable, or refuses to testify. Courts have traditionally allowed some hearsay testimony. In general, testimonial hearsay cannot be used against a defendant who has no opportunity to confront witnesses, but some hearsay issues remain unsettled. In exceptional circumstances—such as when a prosecution witness is a child—the Supreme Court has allowed testimony via closed-circuit television rather than face-to-face.



### Work in Groups

Divide students into groups of six or eight. Assign three to four students to argue against the statement and three to four to argue in favor of it. Write the following statement on the board: Be it resolved that no witness for the prosecution will be granted an exception from physically appearing in court. Give students adequate time to prepare their arguments. Then give each group a chance to hold their debate in front of the class. (Suggested format: Three minutes for opening arguments, three two-minute rounds of rebuttals, and two minutes for closing statements for each side.) Encourage students to consult the section on the Confrontation Clause on pages 354 and 355 and also come up with their own arguments based on the original meaning of the clause.

## Compulsory Process Clause – Amendment VI

*Essay by Stephen Saltzburg (pp. 355–357)*

The Compulsory Process Clause states that the accused has the right to the processes necessary to obtain “witnesses in his favor.” An essential part of the accused’s right to present a defense, the Compulsory Process Clause guarantees the accused



the right to call witnesses and a process by which to obtain witnesses. Both common law and several state constitutions following the Revolution protected the right of a defendant to call witnesses on his behalf. Subsequently, the right was included in the Sixth Amendment without controversy.

The Supreme Court had little opportunity to address the Compulsory Process Clause until 1967, when it decided that the clause applied to the states in addition to the federal government. In the same case (*Washington v. Texas*), the Court also declared that a Texas law permitting the prosecution to call a witness but prohibiting the defense from calling the same one (except under certain conditions) violated the Compulsory Process Clause. Unlike other rights, the right to call witnesses is at the defense's initiative. A defendant's rights under the Compulsory Process Clause are not unlimited; there are procedural limitations, such as complying with certain rules of evidence.



### Make an Inference

After reading the section on the Compulsory Process Clause, ask: How might America's legal system be different without the Compulsory Process Clause? (Answers will vary. Students may suggest that there would be many more convictions because the accused would be less able to create a strong defense. It would be difficult for jurors to evaluate the truthfulness of testimony because there would be no cross-examination to challenge statements. Another possible outcome is that cases would be resolved much more rapidly. Defendants might be more willing to plea bargain rather than go to trial.)

## Right-to-Counsel Clause – Amendment VI

*Essay by Donald Dripps (pp. 357–358)*

The Right-to-Counsel Clause gives those who are accused of a crime the right to defend themselves against the charges with the assistance of an attorney. Under early English law, defendants in felony cases did not have the right to an attorney but could employ counsel for treason charges. In crafting the Right-to-Counsel Clause, the Founders wanted to enable individuals to have the right to retain counsel for felony and treason charges. The purpose of the Sixth Amendment was to remove legal obstacles preventing defendants from privately retaining lawyers.

It is not clear that the right to counsel meant a right to have the public pay for the counsel if a defendant cannot afford to hire an attorney. During the Founding era, many defendants represented themselves in court. Representation of defendants by professional attorneys became more common during the 19th century. Sometimes, lawyers—motivated by public-spiritedness, the desire for courtroom experience, or public exposure—would volunteer to defend poor defendants. Some places paid for this representation with public funds.

In 1938, the Supreme Court ruled that the Sixth Amendment required federal courts to provide legal counsel if a defendant could not afford to hire an attorney. Alternatively, a defendant could waive his right to an attorney. As late as 1963, several poorer states, all in the South, would not provide legal counsel for poor defendants (many of whom were black).

In the 1963 case of *Gideon v. Wainwright*, the Supreme Court ruled that the Right-to-Counsel Clause applied to state courts as well as federal courts. Prior to 1963, the Supreme Court addressed the right to counsel for indigent defendants under the Due Process Clause of the Fourteenth Amendment. For instance, in *Powell v. State of Alabama* (1932), the Court ruled that the Due Process Clause required states to provide counsel for poor defendants charged in capital cases or certain felony cases that presented the need for legal advice. But *Gideon* left open three issues: (1) when does the right-to-counsel arise, (2) are there cases where counsel is unnecessary, and (3) how competent does counsel need to be to satisfy the Sixth Amendment?

The Supreme Court has decided that the right to counsel arises under the clause when formal proceedings begin and end when a final judgment is delivered. Although petty offenses (meaning misdemeanors punishable with less than six months jail time) traditionally were adjudicated without counsel, the Court has ruled that the accused is entitled to counsel whenever an offense may result in incarceration. The Court has developed a two-part test to evaluate claims of ineffective counsel: The defendant must establish (1) that the lawyer's conduct was professionally incompetent and (2) that, with better representation, the outcome of the case would likely have been different.



### Before You Read

Ask students to think about an occasion on which they heard a suspect being read his or her rights. Ask: Can you recall the officer saying anything about legal representation or attorneys? (Some students may recall the following statement: If you cannot afford an attorney, one will be appointed to you.)



### Make a Real-Life Connection

Take students on a field trip to watch an arraignment and trial. Have them write a report on which clauses of the Constitution they see in action. (Answers will vary but could include the the right to trial by jury, the right not to incriminate oneself, the right to a speedy and public trial, the right to be informed of the crime, the right to call witnesses, and the right to counsel.)



## Discussion Question

What was the original purpose of the Right-to-Counsel Clause? (In crafting the Right-to-Counsel Clause, the Founders wanted to ensure that individuals would have the right to retain counsel for felony and treason charges. They wanted to remove legal obstacles preventing defendants from privately retaining lawyers)



## Check Understanding

Have students complete the following assessment to check their understanding of Lesson 18, Part 1. Review any material for questions they have missed.

### Multiple Choice: Circle the correct response.

- Which right is not protected under the Sixth Amendment?
  - the right to a speedy trial
  - the right to a jury trial
  - the right to a grand jury**
  - the right to a public trial
- The Arraignment Clause enables a defendant to know
  - legal sufficiency analysis.
  - trial by jury.
  - the charges against him.**
  - the prosecution's witnesses.
- According to Sixth Amendment jurisprudence, an individual has the right to legal counsel
  - once an indictment is issued.**
  - once an investigation begins.
  - once a trial date is set.
  - once a jury is selected.
- The right to obtain counsel is assured by the
  - Second Amendment.
  - Sixth Amendment.**
  - Seventh Amendment.
  - Ninth Amendment.

### Fill in the blank: Write the correct word or words in each blank.

- Closing a criminal trial may violate a defendant's Sixth Amendment rights as well as the freedom of the press, which is protected by the \_\_\_\_\_ Amendment. **(First)**

2. In the vast majority of felony convictions, the defendant waives the right to a jury trial by pleading \_\_\_\_\_. (**guilty**)
3. In 12th century England, the accusatorial system had to specify charges against a defendant, but the \_\_\_\_\_ system did not. (**ecclesiastical**)
4. Under the Confrontation Clause, any testimony provided by prosecution witnesses in court is subject to \_\_\_\_\_. (**cross-examination**)
5. With respect to the Right-to-Counsel Clause, the Supreme Court has ruled that no charges that may result in \_\_\_\_\_ may be considered petty. (**incarceration**)
6. The right of the accused to be informed of the charges against him traces its origin at least as far back as \_\_\_\_\_ century England. (**12th**)
7. In 1938, the Supreme Court held that the Sixth Amendment required court-appointed counsel for defendants who are too poor to afford \_\_\_\_\_. (**private counsel**) The Sixth Amendment, however, applied only in \_\_\_\_\_ cases. (**federal**)

**Short Answer: Write out your answer to each question.**

1. In the Confrontation Clause, the verb “confront” has been understood to mean what? (**the right to challenge the witness and to test the witness’s credibility through cross-examination**)
2. Applying the basic principles of confrontation and cross-examination has proven to be especially difficult in which two circumstances?
  - Hearsay
  - Child witnesses
3. By guaranteeing the right to counsel, the Founders specifically rejected what English practice? (**the practice of prohibiting felony defendants from appearing through counsel except upon debatable points of law that arose during trial**)

**True / False: Indicate whether each statement is true or false.**

1. The public-trial right in the Sixth Amendment is deeply rooted in Anglo-American history and tradition. (**True**)
2. The Supreme Court has ruled that non-unanimous verdicts are permissible in federal courts but not in state courts. (**False. Non-unanimous verdicts are permissible in state courts but not in federal courts.**)

3. The constitutional requirement that anyone accused of a crime must be “informed of the nature and cause of the accusation” has become internalized by the judicial system and is interwoven into the fabric of daily procedure. **(True)**
4. Today, nearly half of the convictions in felony cases tried are the products of trials before judges sitting without juries. **(True)**
5. The Compulsory Process Clause was an essential part of the right of an accused to present a defense. **(True)**
6. Petty offenses have always been adjudicated with counsel from the time of the Founding to this day. **(False. Petty offenses have been adjudicated without counsel from the time of the Founding to this day, although the modern Supreme Court has held that no offense can be deemed petty for purposes of the exception to the right to counsel if the accused does in fact receive a sentence that includes incarceration, however brief.)**

## Part 2: Amendment VII

### Right to Jury in Civil Cases

Amendment VII

### Reexamination Clause

Amendment VII

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## Right to Jury in Civil Cases – Amendment VII

*Essay by Eric Grant (pp. 358–361)*

The Right to Jury in Civil Cases Clause upheld the right to trial by jury in common law cases. At the Constitutional Convention, Hugh Williamson argued that the right to jury in civil trials should be included in the Constitution. Two delegates moved to insert the sentence “And a trial by jury shall be preserved as usual in civil cases,” but the Convention rejected this wording and did not include it in the Constitution.

The absence of a right to trial by jury in civil cases accounted for the greatest opposition to the Constitution. The Anti-Federalists suggested that the failure to protect the right to trial by jury in civil cases meant that these juries would be abolished for these cases. The Federalists defended the omission, stating that Congress, not the Constitution, should determine the rules for civil cases. This was a weak argument for two reasons. First, most states’ constitutions protected the right to trial by jury in civil cases. Second, during the American Revolution, the colonists objected that Parliament had deprived them of their right to trial by jury.

The Seventh Amendment guaranteeing the right to trial by jury in civil cases was passed by Congress without debate. Justice Joseph Story argued that the right to trial by jury in civil cases applied to all suits except suits of equity and admiralty. The Supreme Court articulated a more limited interpretation. The Court argued that the clause applies to the kinds of cases that existed under English common law when the amendment was adopted.

The Seventh Amendment does not apply to civil cases that are “suits at common law,” especially when “public” or governmental rights are at issue and there are no analogous historical cases with juries. Personal and property claims against the United States by Congress do not require juries.

In contrast to broad support for the right to trial by jury in the 18th century, modern jurists do not see the right to jury in civil trials as fundamental to the U.S. legal system. Therefore, the Right to Jury in Civil Cases Clause is not incorporated against the states; it applies only in federal courts. The only other clauses not incorporated against the states are the Second Amendment and the Grand Jury Clause. In federal court, parties can waive the right to a jury in civil trials. Unlike in 1791, jury trials for civil cases no longer require a unanimous verdict from a 12-person jury.



### Check Understanding

Remind students that they learned about juries and trials in previous lessons. Ask students to make a list of what they know about both juries and trials from Article III and from the amendments. Compile their answers on the board. (Some items that should be included in the list of responses are the following: Those accused of crimes have the right to a speedy trial. Defendants have the right to a public trial, although in very rare circumstances portions of a trial can be closed. Both the amendments and Article III guarantee defendants facing criminal charges a right to a trial by jury. Juries are made up of members from the community. They are expected to be impartial and to consider only the facts when making their decision. Juries typically have between six and 12 members. Unanimous decisions are required in federal cases and when a jury has only six members.) Point out that none of the clauses covered in the last lesson mentions civil or common law cases.



### Active Reading

**Ask:** How did Anti-Federalists interpret the absence of a guarantee for jury trials in civil cases? (Because the Constitution specifically protected jury trials for criminal cases but did not mention civil cases, the Anti-Federalists argued that juries in civil cases would be abolished.) **What was the Federalists' argument for not including a provision for juries in civil cases, and what was the problem with this argument?** (The Federalists thought that Congress should determine the circumstances in which juries should be used in civil trials. They thought the matter was too complex to address in the Constitution. The problem with this argument was that several individual state constitutions had provisions for trial by jury in civil cases, and the colonists had condemned Parliament for depriving them of the right to trial by jury. Of the six ratifying conventions that proposed amendments to the Constitution, five recommended a provision for juries in civil cases.) **According to the Supreme Court, when does the Right to Jury in Civil Cases Clause apply today?** (The modern-day case must be similar to one that would have existed when the clause was written, or the rights in question in the modern case must be analogous to the ones that citizens enjoyed when the clause was developed. The right is not incorporated against the states.)



## Active Reading

Point out the use of the word “analogized” in the final paragraph on page 359. Read the sentence containing the word. **Ask:** *What other words does this sound like?* (analogy, analogous) What do you think the word “analogized” means? (compared through the use of an analogy, used as a comparison to show parallels and similarities)

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## Reexamination Clause – Amendment VII

*Essay by David F. Forte (pp. 361–363)*

The Seventh Amendment’s Reexamination Clause prohibits reviewing courts from reexamining any fact tried by a jury in any manner other than according to the common law. Under common law, appellate courts could review judgments only on writ of error, which limited review to questions of law.

Because Article III, Section 2 granted the Supreme Court jurisdiction to review questions of law and of fact, and because there was no independent protection of the right to trial by jury in civil cases, some objected that the Constitution meant to eliminate juries for civil cases. The Reexamination Clause of the Seventh Amendment addressed those concerns.

Justice Joseph Story encapsulated the traditional understanding of the Reexamination Clause in *Parsons v. Bedford* (1830). He argued that reviewing courts may not grant a new trial based on a reexamination of facts that a jury had already considered at trial. Courts may order a new trial because of errors in the application of the law.

The interpretation of the Reexamination Clause has changed since it was first introduced. Modern legal procedures such as summary judgments and directed verdicts have raised questions about whether or not appellate courts should be permitted to review questions of fact and questions of law. For instance, the Supreme Court has reclassified punitive damages as a question of law as opposed to a question of fact, essentially giving reviewing courts more power when reexamining cases.

The purpose of the Reexamination Clause was to insulate jury findings from judicial reexamination. A string of recent cases has eroded the amendment’s protection. Decisions on cases involving damages classified as ordinary or compensable have also undermined the Reexamination Clause. In *Gasperini v. Center for Humanities* (1996), the Court rejected the common law standard and ruled that the reviewing court could reexamine an award granted by a jury to determine whether it was excessive. Though the Court has classified the examination of such jury verdicts as questions of law, Justice Antonin Scalia argued that it was a question of fact. Court decisions since *Gasperini* have given reviewing courts additional powers. For instance, in a 2000 case, the Court decided that a reviewing court could reexamine a case if there was no longer enough evidence for a jury’s verdict after certain flawed testimony was removed.





## Before You Read

Explain to students the difference between questions of law and questions of fact. Questions of law involve interpreting what the law means: For instance, what kinds of behavior are considered legally negligent? Questions of fact involve determining what actually happened: For example, exactly when did a plaintiff arrive at his or her home to witness a crime?



## Check Understanding

Under the Appellate Jurisdiction Clause in Article III, Section 2, the Supreme Court has appellate jurisdiction over questions of law and fact. **Ask: Why did the Anti-Federalists object to this provision?** (Because Article III, Section 2 granted the Supreme Court jurisdiction to review questions of law and of fact, and because there was no independent protection of the right to trial by jury in civil cases, some objected that the Constitution meant to eliminate juries for civil cases.) **How did the Reexamination Clause of the Seventh Amendment address the Anti-Federalists' concerns?** (The Reexamination Clause insulates jury findings from judicial reexamination. Reviewing courts may not grant a new trial based on a reexamination of facts that a jury has already considered at trial, but courts may order a new trial because of errors in the application of the law.)



## Check Understanding

Have students complete the following assessment to check their understanding of Lesson 18, Part 2. Review any material for questions they have missed.

### Multiple Choice: Circle the correct response.

- As the Constitutional Convention was drawing to a close, \_\_\_\_\_ noted that no provision had been made for the right to trial by jury in civil cases.
  - Hugh Williamson**
  - Nathanial Gorham
  - George Mason
  - Alexander Hamilton
- The right to a trial by jury is not normally granted in cases that fall under \_\_\_\_\_ jurisdiction.
  - federal
  - civil
  - admiralty**
  - state

3. The Reexamination Clause states that appellate courts can only review
  - a. **questions of law.**
  - b. presented evidence.
  - c. questions of fact.
  - d. provided testimony.

**Fill in the blank: Write the correct word or words in each blank.**

1. In current legal doctrine, juries decide questions of \_\_\_\_\_. (**fact**) Judges decide questions of \_\_\_\_\_. (**law**)
2. One of the purposes of the Seventh Amendment was to ensure that rulings made by juries were not subject to \_\_\_\_\_. (**reexamination**)
3. George Mason and \_\_\_\_\_ from Virginia thought that the Constitution would lead to the abolishment of the use of juries in civil cases. (**Richard Henry Lee**)

**Short Answer: Write out your answer to each question.**

1. The Seventh Amendment cured what omission from the text of the original Constitution? (**The Seventh Amendment grants the right to a trial by jury in civil cases.**)
2. The Seventh Amendment's Reexamination Clause prohibits reviewing courts from reexamining what? (**any fact tried by a jury in any manner other than according to the common law**)

**True / False: Indicate whether each statement is true or false.**

1. The omission of a guarantee of civil juries occasioned the greatest opposition to the Constitution in the ratifying conventions. (**True**)
2. In addition to the fact that the Constitution did not mention the right to trial by jury in civil cases, Anti-Federalists were also concerned about the Appellate Jurisdiction Clause in Article III. (**True**)

## Part 3: Amendment VIII

### **Cruel and Unusual Punishment** – Amendment VIII

*Essay by David F. Forte (pp. 363–366)*

The Eighth Amendment protects against excessive bail, excessive fines, and the infliction of cruel and unusual punishment. The text of the amendment derives from the 1689 English Bill of Rights.

The purpose of the Excessive Bail Clause of the English Bill of Rights was to prevent judges from setting high bails to avoid releasing defendants. When the Framers adopted this clause, they changed the wording slightly to ensure that it would be legally enforceable. The purpose of bail is to ensure a defendant’s appearance at trial; therefore, the appropriate amount of bail would be determined on a case-by-case basis. To determine bail, the court would consider the nature of the offense and the past actions of the defendant. According to the Supreme Court, an excessive bail is bail “higher than is reasonably calculated” to ensure that the defendant appears at trial.

The Eighth Amendment suggests that bail is a right. American courts have recognized that a defendant has a right to bail in most situations but have deferred to legislative exceptions. In Britain, serious offenses did not qualify for bail. Colonial charters, the constitutions of individual states, the Northwest Ordinance of 1787, and the Judiciary Act of 1789 guaranteed a right to bail except in capital cases. The Supreme Court has ruled that certain individuals can be held without bail before trial according to the Bail Reform Act of 1984, including individuals arrested for serious crimes who could pose a danger to the community if released and those with alleged terrorist connections.

It is unclear whether the restrictions in the Eighth Amendment apply to Congress in addition to the judiciary. For instance, it is unresolved whether Congress can specify who qualifies for bail. The Supreme Court has not formally declared that the Eighth Amendment applies to the states, but it has stated that it assumes that the states’ legal systems already prohibit excessive bail.

The Eighth Amendment’s prohibition of excessive fines is also rooted in the English Bill of Rights of 1689, which included a provision to prevent judges from issuing large fines against enemies of the king and jailing the person for nonpayment. When the Eighth Amendment was drafted, most states already had protections against excessive fines in their constitutions. The Supreme Court found that neither the history of the clause nor the clause itself provided guidelines for determining what would constitute an “excessive” fine. Therefore, within the context of judicial deference to the legislature, the Court decided that an excessive fine was one “grossly disproportional to the gravity of a defendant’s offense.” The Court held that the clause forbids excessive civil forfeiture penalties but evaluates civil punitive damages under the Due Process Clause of the Fourteenth Amendment.

*Unit 6*

The types of punishments that violate the Cruel and Unusual Punishment Clause of the Eighth Amendment are a subject of significant debate. The categories of punishment subject to debate are punishments not proscribed by the legislature, torturous punishments, and disproportionate or excessive punishments. Many scholars argue that the ban on “cruel and unusual” punishment in the 1689 English Bill of Rights applied to punishments not authorized by Parliament. In colonial America, the clause was understood to apply to torturous punishments such as decapitation, drawing and quartering, and pillorying. Such punishments were unthinkable in America, as Justice Joseph Story opined.

Early Supreme Court rulings held torturous punishment, as defined at the time of the amendment’s ratification, to be prohibited. In 1954, though, Chief Justice Earl Warren rejected the original understanding of the clause and articulated a new standard for determining violations of the Eighth Amendment: “evolving standards of decency that mark the progress of a maturing society.” Since then, the Court’s jurisprudence on the Eighth Amendment has been inconsistent and incoherent.

In *Furman v. Georgia* (1972), the Court ruled that the death penalty could not be inflicted arbitrarily; consequently, states rewrote their laws to articulate standards for imposing the death penalty. Chief Justice Warren E. Burger rejected the argument that the clause banned arbitrary punishments, arguing that the Founders designed it to ban torturous punishments and punishments not prescribed by law. Though the Court ruled in *Gregg v. Georgia* (1976) that the death penalty itself did not violate the Eighth Amendment, it evaluated the penalty using Warren’s “evolving standard of decency” rather than the original meaning of the clause. The debate over the meaning and purpose of the amendment continues as the Court has evaluated a range of punishments and their potential violation of the Cruel and Unusual Punishment Clause.

## Unit 6



### Active Reading

Point out the use of the word “hortatory” in the first paragraph of the section on the Cruel and Unusual Punishment Clause. Read the sentence containing the word to students. **Ask:** What do you think the word “hortatory” means? (encouraging a certain action, urging a certain course)



### Active Reading

**Ask:** What is the primary purpose of bail? (to ensure that a defendant will show up at trial after being released from custody) **What two factors do courts typically consider when determining an appropriate amount for bail?** (the nature of the crime and the past actions of the accused) **What are the three types of punishments that may be covered by the Cruel and Unusual Punishment Clause of the Eighth Amendment?** (punishments that are not advocated by the legislature, punishments that may be classified as torturous, and punishments that can be described as disproportionate or excessive)



## Discussion Question

Chief Justice Earl Warren articulated a new standard for evaluating the Eighth Amendment by looking to “evolving standards of decency.” Ask: *Is it the job of judges to determine the standards of decency for a society, or is that more appropriately a function for the legislature?* (Judges cannot make general rules of action; they resolve specific conflicts between particular parties in cases with a unique set of facts. The legislature does make general rules of action; it is not limited to a particular case. Moreover, the legislature is the branch of government closest to the people. Its members are directly accountable to the people and are closest to public opinion. Judges, by contrast, are far removed from the people.)



## Check Understanding

Have students complete the following assessment to check their understanding of Lesson 18, Part 3. Review any material for questions they have missed.

### Multiple Choice: Circle the correct response.

- In the American legal system, the primary purpose of bail is to ensure that a defendant
  - does not commit more crimes.
  - appears at trial.**
  - receives a just punishment.
  - retains his freedom.
- When drafting the Excessive Bail Clause, the word “shall” was substituted for the word “ought” to ensure that the clause would be
  - enforceable.**
  - hortatory.
  - unequivocal.
  - original.
- In both English and American practice, the level of bail is determined on what basis?
  - how much money the courts need
  - a preset amount determined by income
  - the salaries of the jurors
  - case by case**
- The Eighth Amendment does not protect against
  - being tried twice for the same crime.**
  - excessive fines.
  - excessive bail.
  - cruel and unusual punishment.

**Short Answer: Write out your answer to each question.**

1. When determining bail, the court often takes what factors into account?  
**(the character of the charged offense and the previous behavior of the defendant)**
2. What are some possible categories at issue under the Cruel and Unusual Punishment Clause as detailed in *The Heritage Guide to the Constitution* on page 364?
  - **Punishments not prescribed by the legislature**
  - **Torturous punishments**
  - **Disproportionate and excessive punishments**
3. What was the standard that Earl Warren articulated for determining violations of the Eighth Amendment? ("**evolving standards of decency that mark the progress of a maturing society**")
4. The text of the Eighth Amendment derives from what 1689 document?  
**(the English Bill of Rights)**

# Unit 7

## SLAVERY, VOTING, AND THE CONSTITUTION

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Unit 7

*Unit 7*



# Lesson 19

## SLAVERY AND THE CONSTITUTION

### Lesson Objectives:

*When you complete Lesson 19, you will be able to:*

- Understand that the term “slave” or “slavery” is not in the Constitution.
- Explain the purpose of the Three-fifths Clause.
- Explain how counting slaves as full persons for the purpose of representation would benefit the South.
- Describe the limitations on Congress’s power in both the first and final drafts of the Slave Trade Clause.
- Explain how and why the Framers took great care in constructing the language of the Fugitive Slave Act.
- Explain the significance of the Prohibition on Amendment: Slave Trade Clause.
- Explain the meaning of the Thirteenth Amendment: Abolition of Slavery.
- Explain the significance of Section 2 of the Thirteenth Amendment.

Since America’s genesis, there has been intense debate about the existence of slavery in American history, precisely because it raises questions about this nation’s dedication to liberty and human equality. At the time of the American Founding, there were about half a million slaves in the United States, mostly in the five southernmost states where these individuals made up 40 percent of the population. Many of the American Founders—most notably, Thomas Jefferson, George Washington, and James Madison—owned slaves. However, many others—such as John Jay, Benjamin Franklin, Benjamin Rush, Alexander Hamilton, and John Adams—did not.

In its final form, the Constitution contains three key compromises on enumeration, the slave trade, and fugitive slaves. It is important to note that the word “slave” or “slavery” never appears in the Constitution. Indeed, the escaped slave turned abolitionist, Frederick Douglass, once commented, “Abolish slavery tomorrow, and not a sentence or syllable of the Constitution need be altered.” In the following lesson, you will see why Douglass steadfastly believed that the government created by the Constitution “was never, in its essence, anything but an anti-slavery government.”

*Unit 7*

**Three-fifths Clause** — Article I, Section 2, Clause 3*Essay by Erik M. Jensen (pp. 54–56)*

The Three-fifths Clause is one of the most misunderstood clauses in the Constitution. The clause does not deny that blacks are full persons (in fact, *free* blacks were counted on par with whites for purposes of apportionment). Rather, it addresses whether and how slaves should be counted for the purpose of determining the number of representatives in Congress.

Though Southern slave owners asserted that slaves were held as property, Southern delegates at the Constitutional Convention wanted slaves to count as full persons for purposes of determining representation in Congress. Including slaves as part of the Southern population would give the South disproportionately greater representation in Congress and therefore more influence in forming the country's laws. By contrast, Northern delegates favored omitting slaves entirely when determining representation and therefore denying Southern states the advantage in the national legislature. The compromise allowed three-fifths of the slave population to count toward determining representation.

However, a compromise for apportionment did not satisfy the South. To break the Convention deadlock, Gouverneur Morris suggested tying taxes to apportionment as a solution. While it was not in the South's interest to count only a portion of the slave population toward apportionment of representatives, it was in the region's best interest to count only a portion of the slave population towards a state's tax liability.

Thus, even though slaves were property under the laws of the Southern states, the Constitution itself acknowledged that they were persons. By tying both representation and direct taxation to apportionment, the Framers removed any sectional benefit, and thus any proslavery taint, from the special counting rule. This compromise also protected the integrity of the census, since inflating the population numbers to gain more seats in Congress would increase a state's tax liability.

**Before You Read**

**Ask:** What is a census? (counting of the people in the population for purposes of representation) **Ask:** Suppose government officials wanted to estimate the number of people living in a country. What are some ways that they could do this? (Answers will vary. Students may say that they could look at birth records, death records, or Social Security numbers or require people to complete a survey asking the number of persons in their household.) **Ask:** What is a compromise? (an agreement that involves both giving and taking concessions)



## Before You Read

Explain that the Three-fifths Clause was originally called the Three-fifths Compromise. *Ask: In what way was the Three-fifths Clause a compromise?* (The clause was a compromise between the North and the South on apportionment of representatives and taxation. The North did not want slaves counted as full persons for purposes of representation because the South would have more representatives in the national legislature. While it was not in the South's interest to count only a portion of the slave population toward apportionment of representatives, it was in the region's best interest to count a portion of the slave population toward a state's tax liability.)



## Active Reading

*Say: It is often asserted that the Three-fifths Clause is proof that the Founders did not consider blacks to be full persons. Applying what you read about the history of the Three-fifths Clause, explain why this assertion is incorrect.* (The clause does not deny that blacks are people. Free blacks counted the same as free whites for purposes of representation. Even though slaves were property under the laws of the Southern states, the Constitution itself acknowledged that they were persons. The Three-fifths Clause addressed how the slave population would be counted for purposes of representation. The final compromise tied both representation and direct taxation to apportionment, thus removing any sectional benefit and any proslavery taint from the special counting rule.)

## Slave Trade — Article I, Section 9, Clause 1

### *Essay by Matthew Spalding (pp. 150–152)*

While the first debate at the Constitutional Convention concerning slavery focused on representation, the second debate focused on Congress's power to regulate or ban the slave trade. The Slave Trade Clause was the first independent restraint on Congress's powers. The first draft from the Committee of Detail permanently prohibited Congress from taxing exports, outlawing or taxing the slave trade, and passing navigational laws without a two-thirds majority in both houses of Congress. This draft divided the Southern delegates: Gouverneur Morris of Virginia denounced the slave trade as a nefarious institution; Georgia and South Carolina refused to support the Constitution without a safeguard for slavery.

The issue was referred to the Committee of Eleven. The committee recognized a congressional power over the slave trade but recommended that this power be restricted for 12 years. It also recommended a tax on slave importation. Southern delegates agreed to these recommendations, with the exception that Congress's

power over the slave trade be restricted for 20 years until 1808. Thus, the final draft of the Slave Trade Clause temporarily restricted Congress's commerce power.

Although protecting the slave trade was a major concession demanded by proslavery delegates, the final clause was not a permanent element of the constitutional structure. It was a temporary restriction of a delegated federal power. The restriction applied only to states existing at the time, not to new states or territories, and did not prevent individual states from outlawing slavery on their own.



### Before You Read

Tell students that a Committee of Eleven consisted of one member from each state represented at the Constitutional Convention. Explain that a Committee of Eleven was consulted to settle disagreements, such as the disagreement caused by the Slave Trade Clause.



### Work in Pairs

Read aloud this sentence on page 150: "George Mason of Virginia condemned the 'infernal traffic' and Luther Martin of Maryland saw the restriction of Congress's power over the slave trade as 'inconsistent with the principles of the Revolution and dishonorable.'" Pair up students and have them summarize both Mason's and Martin's position on the issue. (They both opposed slavery. Mason condemned it, and Martin saw limiting Congress's power over slavery as dishonorable.)



### Active Reading

Assign students to read the *Dred Scott v. Sanford* (1857) decision. Have them write 1–2 paragraphs summarizing the case. **Ask: What did Chief Justice Roger B. Taney say about the Slave Trade Clause in *Dred Scott v. Sanford* in 1857?** (Chief Justice Roger B. Taney pointed to the Slave Trade Clause and the Fugitive Slave Clause as evidence that slaves were not citizens but property under the Constitution.) **How would a drafter of the Constitution who opposed slavery respond to Taney's argument?** (He would say that the Slave Trade Clause does not address citizenship and that the Constitution neither sanctions the institution of slavery nor considers slaves to be mere property.)



### Active Reading

Point out the last two paragraphs of Spalding's commentary. Note that the Constitution of 1787 does not use the words *slave* or *slavery*. Also note that the Framers used the word *person* rather than *property*. **Ask: When did the slave trade officially end?** (January 1, 1808, the first day that the Slave Trade Clause allowed such a law to go into effect)