**Supreme Court Decisions on Right to Privacy**

**I. BACKGROUND ON CONSTITUTIONAL INTERPRETATION:**

At the core of the “right to privacy” controversy is a fundamental difference of opinion over what federal judges should or should not do, but also, how the Constitution should be interpreted and analyzed. We talked about this at the beginning of the semester, but it’s worth going over and applying it to the issue of the “right of privacy.”

**Originalists or “conservatives” tend to believe the following:**



1. The Constitution creates a democracy, where the people, through their representatives, make laws for the common good. This is the fundamental source of all decisions and all power in the United States. As a result, federal judges should be wary of striking down laws and making a “power grab” in areas where they have no business.
2. The Constitution has survived all these years because the document itself is soundly written. Judges should be wary of becoming too “creative” with the text of the document. Otherwise, any federal judge can read in pretty much any new “right” wherever they see fit. This would make the Constitution a “rubber document” that can be molded and shaped according to the political leanings of judges, and that is inappropriate.
3. When looking to interpret the Constitution, it’s important to understand what the framers who wrote the document had in mind, or what was accepted at the time. Understanding their thoughts helps us understand what the document means and how it should be interpreted.

**Non-originalists or “liberals” tend to believe the following:**

1. The Constitution, though it creates a democracy, sets aside certain rights in the Bill of Rights and the other amendments of the Constitution that are beyond the reach of voting. These rights apply both to the federal government and the state governments.
2. Thought the Constitution is soundly written and has lasted all of these years, the job of federal judges is, as Chief Justice John Marshall said in *Marbury v. Madison*, “to say what the law (the Constitution) is.” This power of judicial review established in *Marbury* gives judges the right to interpret how far certain rights go, what they mean as the country changes and modernizes, and what the rights mean given certain controversies that come up. They are free to do this, without worrying about running for election (they are appointed for life), having their salaries cut, or being impeached for their political views (neither of which can happen). This is why there is an independent judiciary.
3. When looking to interpret the Constitution, the intent of the framers, though important, is not the sole determinant of what is or is not constitutional. Times change, and one of the jobs of federal judges is to apply the rights guaranteed by the Constitution to modern times and modern disputes.

**II. ORIGINS OF THE “RIGHT OF PRIVACY”:**

Historically, the concept (right of privacy) first appeared in 1890 in a Harvard Law Review article by Samuel Warren and Louis Brandeis. They used the term in proposing a new tort -- the invasion of privacy -- in their complaint about how the press was printing lurid accounts of the social activities of the Warrens, a prominent Boston family. They distinguished it from injury to reputation on grounds that invasion of privacy was a deeper harm, one that damaged a person's sense of their own *uniqueness*, *independence*, *integrity*, and *dignity*, making the astonishing claim (for 1890) that privacy was a personal, not a property, right.

Forty years later, Louis Brandeis, as a Supreme Court justice, expressed opinions that reflected the ideas in his 1890 article with Samuel Warren. For example, Justice Brandeis wrote a vigorous dissent in the case of *Olmstead v. U.S.* 277 U.S. 438 (1928) which upheld the right of Elliot Ness and his untouchables to wiretap the telephone lines of bootleggers as long as it was done at a point between the defendant's homes and their offices. Let's take a look at some of the passages (paraphrased) in this famous dissent:

"The makers of our Constitution understood the need to secure conditions favorable to the pursuit of happiness, and the protections guaranteed by this are much broader in scope, and include the right to life and an inviolate personality -- the right to be left alone -- the most comprehensive of rights and the right most valued by civilized men. The principle underlying the Fourth[[1]](#footnote-1) and Fifth[[2]](#footnote-2) Amendments is protection against invasions of the sanctities of a man's home and privacies of life. This is a recognition of the significance of man's spiritual nature, his feelings, and his intellect. Every violation of the right to privacy must be deemed a violation of the Fourth Amendment. Now, as time works, subtler and more far-reaching means of invading privacy will become available to the government. The progress of science in furnishing the government with the means of espionage is not likely to stop with wiretapping. Advances in the psychic and related sciences may bring means of exploring beliefs, thoughts and emotions. It does not matter if the target of government intrusion is a confirmed criminal. If the government becomes a lawbreaker, it breeds contempt for law. It is also immaterial where the physical connection of the wiretap takes place. No federal official is authorized to commit a crime on behalf of the government." (Justices HOLMES and STONE also dissenting, agreeing with Justice BRANDEIS)

**NOTE**: Soon after Justice Brandeis mentioned the “right of privacy” in his dissent from *Olmstead*, the Supreme Court began adopting the idea of the “right of privacy” using, not the Fourth and Fifth Amendments, as Justice Brandeis had, but by using the Due Process Clause of the Fourteenth Amendment of the Constitution. That Amendment reads:

“nor shall any State deprive any person of life, liberty, or property, without due process of law.”

This amendment, passed in the wake of the Civil War, makes sure that the states (including the uppity South) guarantees certain rights to its citizens (most importantly the slaves freed after the war). The Due Process Clause has been interpreted in two different ways:

1. **Procedural Due Process**: This means that if a state wants to take away your life, liberty or property, you need “due process” a fair procedure (a trial) that allows you to defend yourself fairly.
2. **Substantive Due Process**: Some justices, instead of focusing on the words “due process” have focused on the word “liberty” in this amendment. They asked themselves, “A state can’t take away a person’s liberty without due process. . .but the liberty to do what? What liberties do people have that a state can’t take away?” Using this one word, “liberty,” justices have crafted certain rights that don’t seem to exist in the text of the Constitution. Some think this is a creative use of the words of the Constitution. . .while others think it’s an example of a judicial “power grab” that is inappropriate. As you look at the following cases, ask yourself if you think Americans have a fundamental right to the following things, using the Due Process Clause as their basis.

**III. Due Process**

1. **Gideon v. Wainwright (1962):** Clarence Earl Gideon was charged in Florida state court with a felony: having broken into and entered a poolroom with the intent to commit a misdemeanor offense. When he appeared in court without a lawyer, Gideon requested that the court appoint one for him. According to Florida state law, however, an attorney may only be appointed to an indigent defendant in capital cases, so the trial court did not appoint one. Gideon represented himself in trial. He was found guilty and sentenced to five years in prison. Gideon filed a habeas corpus petition in the Florida Supreme Court and argued that the trial court’s decision violated his constitutional right to be represented by counsel.

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1. **Miranda v. Arizona (1966):** Suspects were questioned by police officers, detectives, or prosecuting attorneys in rooms that cut them off from the outside world. In none of the cases were suspects given warnings of their rights at the outset of their interrogation.

Does the police practice of interrogating individuals without notifiying them of their right to counsel and their protection against self-incrimination violate the Fifth Amendment?

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1. **Mapp v. Ohio (1961):** Dollree Mapp was convicted of possessing obscene materials after an admittedly illegal police search of her home for a fugitive. She appealed her conviction on the basis of freedom of expression.

Were the confiscated materials protected by the First Amendment? (May evidence obtained through a search in violation of the Fourth Amendment be admitted in a state criminal proceeding?)

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**4. Riley v. California (2014):** David Leon Riley belonged to the Lincoln Park gang of San Diego, California. On August 2, 2009, he and others opened fire on a rival gang member driving past them. The shooters then got into Riley’s Oldsmobile and drove away. On August 22, 2009, the police pulled Riley over driving a different car; he was driving on expired license registration tags. Because Riley’s driver’s license was suspended, police policy required that the car be impounded. Before a car is impounded, police are required to perform an inventory search to confirm that the vehicle has all its components at the time of seizure, to protect against liability claims in the future, and to discover hidden contraband. During the search, police located two guns and subsequently arrested Riley for possession of the firearms. Riley had his cell phone in his pocket when he was arrested, so a gang unit detective analyzed videos and photographs of Riley making gang signs that were stored on the phone to determine whether Riley was gang affiliated. Riley was subsequently tied to the shooting on August 2 via ballistics tests, and separate charges were brought to include shooting at an occupied vehicle, attempted murder, and assault with a semi-automatic firearm.

Before trial, Riley moved to suppress the evidence regarding his gang affiliation that had been acquired through his cell phone. His motion was denied. At trial, a gang expert testified to Riley’s membership in the Lincoln Park gang, the rivalry between the gangs involved, and why the shooting could have been gang-related. The jury convicted Riley on all three counts and sentenced to fifteen years to life in prison.

Was the evidence admitted at trial from Riley’s cell phone discovered through a search that violated his Fourth Amendment right to be free from unreasonable searches?

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**III. Birth Control and Reproduction**



**1. Buck v. Bell (1927**): Carrie Buck was a feeble minded woman who was committed to a state mental institution. Her condition had been present in her family for the last three generations. A Virginia law allowed for the sexual sterilization of inmates of institutions to promote the "health of the patient and the welfare of society." Before the procedure could be performed, however, a hearing was required to determine whether or not the operation was a wise thing to do. Did the Virginia statute, which authorized sterilization, deny Buck the right to due process of the law and the equal protection of the laws as protected by the Fourteenth Amendment?

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**2. Skinner v. Oklahoma (1942):** Oklahoma's Criminal Sterilization Act allowed the state to sterilize a person who had been convicted three or more times of crimes "amounting to felonies involving moral turpitude."

Did the Act violate the Due Process and Equal Protection Clauses of the Fourteenth Amendment?

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**3. Griswold v. Connecticut (1965):** Griswold was the Executive Director of the Planned Parenthood League of Connecticut. Both she and the Medical Director for the League gave information, instruction, and other medical advice to married couples concerning birth control. Griswold and her colleague were convicted under a Connecticut law which criminalized the provision of counseling, and other medical treatment, to married persons for purposes of preventing conception. Does the Constitution protect the right of marital privacy against state restrictions on a couple's ability to be counseled in the use of contraceptives?



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**4. Eisenstadt v. Baird (1972):** William Baird gave away Emko Vaginal Foam to a woman following his Boston University lecture on birth control and over-population. Massachusetts charged Baird with a felony, to distribute contraceptives to unmarried men or women. Under the law, only married couples could obtain contraceptives; only registered doctors or pharmacists could provide them. Baird was not an authorized distributor of contraceptives. Did the Massachusetts law violate the right to privacy acknowledged in Griswold v. Connecticut and protected from state intrusion by the Fourteenth Amendment?



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**IV. Family relations, parenting and education:**

**1. Meyer v. Nebraska (1923):** Nebraska, along with other states, prohibited the teaching of modern foreign languages to grade school children. Meyer, who taught German in a Lutheran school, was convicted under this law. Does the Nebraska statute violate the Fourteenth Amendment's Due Process clause?

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**2. Pierce v. Society of Sisters (1925):** The Compulsory Education Act of 1922 required parents or guardians to send children between the ages of eight and sixteen to public school in the district where the children resided. The Society of Sisters was an Oregon corporation which facilitated care for orphans, educated youths, and established and maintained academies or schools. This case was decided together with Society of Sisters v. Hill Military Academy. Did the Act violate the liberty of parents to direct the education of their children?



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**3. Wisconsin v. Yoder (1972)**: Jonas Yoder and Wallace Miller, both members of the Old Order Amish religion, and Adin Yutzy, a member of the Conservative Amish Mennonite Church, were prosecuted under a Wisconsin law that required all children to attend public or private schools until age 16. The three parents refused to send their children to such schools after the eighth grade, arguing that high school attendance was contrary to their religious beliefs. Did Wisconsin's requirement that all parents send their children to school at least until age 16 violate the First Amendment by criminalizing the conduct of parents who refused to send their children to school for religious reasons?



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4**. Moore v. East Cleveland (1977)**: East Cleveland's housing ordinance limited occupancy of a dwelling unit to members of a single family. Part of the ordinance was a strict definition of "family" which excluded Mrs. Inez Moore who lived with her son and two grandsons. Did the housing ordinance violate the Due Process Clause of the Fourteenth Amendment?

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5. **Troxel v. Granville (2000):** During Tommie Granville and Brad Troxel's relationship, which ended in 1991, they had two daughters. Until Brad's suicide in 1993, Brad's parents Jenifer and Gary Troxel, the paternal grandparents, had regularly seen their granddaughters on weekends. However, after Brad's suicide, Granville informed the Troxels that she wished to reduce their visitation time to one short visit per month. The Troxels filed suit for the right to visit their grandchildren, under section 26.10.160(3) of the Revised Code of Washington, which permits "any person" to petition for visitation rights "at any time" and authorizes state superior courts to grant such rights whenever visitation may serve a child's best interest. Granville did not oppose the petition outright but did oppose the amount of visitation time sought by the Troxels. Subsequently, a Washington Superior Court ordered more visitation than Granville desired. On appeal, the Washington Court of Appeals reversed that decision, holding that non-parents lacked standing to sue under the statute. In affirming, the Washington Supreme Court ruled that the statute unconstitutionally interfered with parents' right to rear their children. Does the Washington statute, which allows any person to petition for a court-ordered right to see a child over a custodial parent's objection if such visitation is found to be in the child's best interest, unconstitutionally interfere with the fundamental right of parents to rear their children?

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**V. Marriage Issues:**



**1. Loving v. Virginia (1967)**: In 1958, two residents of Virginia, Mildred Jeter, a black woman, and Richard Loving, a white man, were married in the District of Columbia. The Lovings returned to Virginia shortly thereafter. The couple was then charged with violating the state's antimiscegenation statute, which banned inter-racial marriages. The Lovings were found guilty and sentenced to a year in jail (the trial judge agreed to suspend the sentence if the Lovings would leave Virginia and not return for 25 years). Did Virginia's antimiscegenation law violate the Equal Protection Clause of the Fourteenth Amendment?

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**2. Zablocki v Redhail (1978)**: In this case, the plaintiff attacked a Wisconsin law which required that any parent who was under court order to support a minor not in his custody meet two requirements before being permitted to marry: (1) payment of all court ordered support; (2) a demonstration that the child was not currently, and was not likely to become, a public charge (i.e., supported by welfare). The plaintiff attacked the statute on both equal protection and substantive due process grounds. Does this statute violate the plaintiff’s right to marry?

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**3. Turner v Safley (1987)**: A regulation in the state of Missouri prevented prison inmates from marrying only with the permission of the superintendent of the prison, and provides that such approval should be given only "when there are compelling reasons to do so." Is this a violation of inmates’ right to marry?

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**VI. Gay Rights**

**1. Lawrence v. Texas (2003):** Responding to a reported weapons disturbance in a private residence, Houston police entered John Lawrence's apartment and saw him and another adult man, Tyron Garner, engaging in a private, consensual sexual act. Lawrence and Garner were arrested and convicted of deviate sexual intercourse in violation of a Texas statute forbidding two persons of the same sex to engage in certain intimate sexual conduct. In affirming, the State Court of Appeals held that the statute was not unconstitutional under the Due Process Clause of the Fourteenth Amendment, with Bowers v. Hardwick, 478 U.S. 186 (1986), controlling. Do the criminal convictions of John Lawrence and Tyron Garner under the Texas "Homosexual Conduct" law, which criminalizes sexual intimacy by same-sex couples, but not identical behavior by different-sex couples, violate the Fourteenth Amendment guarantee of equal protection of laws? Do their criminal convictions for adult consensual sexual intimacy in the home violate their vital interests in liberty and privacy protected by the Due Process Clause of the Fourteenth Amendment?

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2. **Baker v State of Vermont (Supreme Court of Vermont, 1999):** In 1999, the Vermont Supreme Court in *Baker v State* considered a closely-watched challenge to that state's laws denying same-sex partners the benefits of marriage.  In this case, a gay couple sued the state, alleging that the denial of state benefits to homosexual couples violated the state constitution’s equal protection clause. Is denying gay couples the benefits of marriage a violation of equal protection?

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**NOTE: Massachusetts' Supreme Judicial Court Okays Gay Marriage:** The Supreme Judicial Court of Massachusetts, on November 19, 2003, ruled that the state "failed to identify any constitutionally adequate reason" to deny gay persons the right to marry and that the state's ban on same-sex marriage violated the state's constitution.  The Court, in its fifty-page 4 to 3 ruling, gave the state legislature 180 days to "take such action as it may deem appropriate in light of this opinion."  Because the case, Goodridge v Department of Public Health, was decided on state constitutional grounds, there is no federal issue for appeal to the U. S. Supreme Court.

**NOTE II**: Since the Vermont and Massachusetts court decisions, there has been a flurry of activity regarding same sex marriage in the United States.

**NOTE III**: All of these are state cases. . .but what about **a federal right to marry**? Currently there is no such thing as a constitutional right for same sex couples to marry (a la Loving). In fact, there is a federal law, the **Defense of Marriage Act**, passed in 1996, that states the following:

* No state (or other political subdivision within the United States) needs to treat a relationship between persons of the same sex as a marriage, even if the relationship is considered a marriage in another state.
* The federal government defines marriage as a legal union exclusively between one man and one woman.

Because of this law, same sex couples, even if they are married legally in a state like Iowa, cannot (1) move to another state and have their marriages automatically recognized, and (2) get federal marriage benefits that male/female married couples are granted when they marry. Currently there are two lawsuits that have been filed to challenge the constitutionality of DOMA: *Smelt v. US* (filed 3/09 in California) and *Commonwealth v. US Dept. of Health and Human Services* (filed by the Attorney General of Massachusetts, July 2009). Another suit, Gill et al. v. Office of Personnel Management et al., was filed in March of 2009 specifically over the denial of federal benefits to spouses under DOMA.

**NOTE IV**: The USSC has addressed the issue of same sex marriage. . .somewhat. In 1972, the Court received a petition for certiorari (a request for a hearing) in the case of ***Baker v. Nelson***, a Minnesota case involving same sex marriage. In that case, the Minnesota SC ruled that Minnesota’s definition of marriage as male/female only did not violate the US Constitution and that *Loving*’s “right to marry” did not apply to same sex marriages. When the US Supreme Court received the petition, it dismissed the case "for want of a substantial federal question." Unlike a denial of certiorari, a dismissal for want of a substantial federal question constitutes a decision on the merits of the case, and as such, is binding precedent on all lower Federal Courts. Baker is binding precedent and unless overruled by the United States Supreme Court, it remains that way. As such *Baker* establishes that a State's decision regarding the permissibility of same-sex marriage does not offend the United States Constitution.

1. **United States v. Windsor (2013**): The Defense of Marriage Act (DOMA), enacted in 1996, states that, for the purposes of federal law, the words “marriage” and “spouse” refer to legal unions between one man and one woman. Since that time, some states have authorized same-sex marriage. In other cases regarding the DOMA, federal courts have ruled it unconstitutional under the Fifth Amendment, but the courts have disagreed on the rationale.

Edith Windsor is the widow and sole executor of the estate of her late spouse, Thea Clara Spyer, who died in 2009. The two were married in Toronto, Canada, in 2007, and their marriage was recognized by New York state law. Thea Syper left her estate to her spouse, and because their marriage was not recognized by federal law, the government imposed $363,000 in taxes. Had their marriage been recognized, the estate would have qualified for a marital exemption, and no taxes would have been imposed.

On November 9, 2010 Windsor filed suit in district court seeking a declaration that the Defense of Marriage Act was unconstitutional. At the time the suit was filed, the government’s position was that DOMA must be defended. On February 23, 2011, the President and the Attorney General announced that they would not defend DOMA. On April 18, 2011, the Bipartisan Legal Advisory Group of the House of Representatives filed a petition to intervene in defense of DOMA and motioned to dismiss the case. The district court denied the motion, and later held that DOMA was unconstitutional. The U.S. Court of Appeals for the Second Circuit affirmed.

Obergefell v. Hodges

Facts of the Case

Groups of same-sex couples sued their relevant state agencies in Ohio, Michigan, Kentucky, and Tennessee to challenge the constitutionality of those states’ bans on same-sex marriage or refusal to recognize legal same-sex marriages that occurred in jurisdictions that provided for such marriages. The plaintiffs in each case argued that the states’ statutes violated the Equal Protection Clause and Due Process Clause of the Fourteenth Amendment, and one group of plaintiffs also brought claims under the Civil Rights Act. In all the cases, the trial court found in favor of the plaintiffs. The U.S. Court of Appeals for the Sixth Circuit reversed and held that the states’ bans on same-sex marriage and refusal to recognize marriages performed in other states did not violate the couples’ Fourteenth Amendment rights to equal protection and due process.

Question

(1) Does the Fourteenth Amendment require a state to license a marriage between two people of the same sex?

(2) Does the Fourteenth Amendment require a state to recognize a marriage between two people of the same sex that was legally licensed and performed in another state?

**VII. The right to die:**

**1. Cruzan v. Missouri Department of Health (1990):** In 1983, Nancy Beth Cruzan was involved in an automobile accident which left her in a "persistent vegetative state." She was sustained for several weeks by artificial feedings through an implanted gastronomy tube. When Cruzan's parents attempted to terminate the life-support system, state hospital officials refused to do so without court approval. The Missouri Supreme Court ruled in favor of the state's policy over Cruzan's right to refuse treatment. Did the Due Process Clause of the Fourteenth Amendment permit Cruzan's parents to refuse life-sustaining treatment on their vegetated daughter's behalf?



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**2. Quill v. Vacco (1997**): Dr. Timothy E. Quill, along with other physicians and three seriously ill patients who have since died, challenged the constitutionality of the New York State's ban on physician-assisted suicide. New York's ban, while permitting patients to refuse lifesaving treatment on their own, has historically made it a crime for doctors to help patients commit or attempt suicide, even if patients are terminally ill or in great pain. Following a District Court ruling favoring the State of New York, the Second Circuit reversed and the Supreme Court granted New York certiorari. Did New York's ban on physician-assisted suicide violate the Fourteenth Amendment's Equal Protection Clause by allowing competent terminally ill adults to withdraw their own lifesaving treatment, but denying the same right to patients who could not withdraw their own treatment and could only hope that a physician would do so for them?

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**3. Washington v. Glucksburg (1997):** Dr. Harold Glucksberg -- along with four other physicians, three terminally ill patients who have since died, and a nonprofit organization that counsels individuals contemplating physician assisted-suicide -- brought this suit challenging the state of Washington's ban on physician assisted-suicide. The State of Washington has historically criminalized the promotion of suicide attempts by those who "knowingly cause or aid another person to attempt suicide." Glucksberg alleged that Washington's ban was unconstitutional. Following a District Court ruling favoring Glucksberg and his fellow petitioners, the Ninth Circuit affirmed and the Supreme Court granted Washington certiorari. Did Washington's ban on physician assisted-suicide violate the Fourteenth Amendment's Due Process Clause by denying competent terminally ill adults the liberty to choose death over life?

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1. **Amendment IV**: “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.” [↑](#footnote-ref-1)
2. **Amendment V**: “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.” [↑](#footnote-ref-2)