In Search of the Supreme Flaw of the Land:

The Bill of Rights

by

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caveat lector

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Language, Construction, and Other Arcana

Many people talk about the Constitution, but few of them know as much about it as they think they do. One common deficiency is the failure to recognize the Constitution as a contract. However, it is a contract and it must be understood as such.[1] Understanding a contract requires (at least) an understanding of the rules of language and construction. Also necessary is the concept of parties. As to parties, Bouvier offers a lot of material. Here's an excerpt.

> **Contract**.... *Parties*. There is no contract unless the *parties* assent thereto; and where such assent is impossible from the want, immaturity, or incapacity of mind of one of the parties, there can be no perfect contract....
>
> —*Bouvier's Law Dictionary*, 1889

Construction. The process, or the art, of determining the sense, real meaning, or proper explanation of obscure or ambiguous terms or provisions in a statute, written instrument, or oral agreement, or the application of such subject to the case in question....

—*Black's Law Dictionary*, 1979

Contract....

Construction and interpretation in reference to contracts. The intention of the parties is the pole-star of construction; but their intention must be found expressed in the contract and be consistent with rules of law. The court will not make a new contract for the parties, nor will words be forced from their real signification.

The subject-matter of the contract and the situation of the parties are to be fully considered with regard to the sense in which language is used.... Words are to be taken, if possible, in their comprehensive and common sense.

The whole contract is to be considered with relation to the meaning of any of its parts....

—*Bouvier's Law Dictionary*, 1889

That's an important difference between a citizen and a slave. That is, there isn't any obligation for someone who participates under duress. Such a person isn't even a party. Governments would like to ignore that distinction but it's more difficult for them to do so when people understand the laws of contracts, the nature of constitutions, and the principles of obligations.

1 See my essay *The Long And Winding Doctrine: Social Contract*.

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Bills of Rights

Bills of rights are not understood any better than are constitutions. Even *Black's Law Dictionary* is in error in that regard, as you can see in the accompanying definition. That is, a bill of rights doesn't address privileges. It addresses rights.

> **Bill**….
> *Bill of rights.* A formal and emphatic legislative assertion and declaration of popular rights and liberties usually promulgated upon a change of government; *e.g.* the famous Bill of Rights in English history. Also the summary of the rights and liberties of the people, or of the principles of constitutional law deemed essential and fundamental, contained in many of the American state constitutions…. That portion of Constitution guaranteeing **rights** and **privileges** to the individual; *i.e.* first ten Amendments of U.S. Constitution….
> —*Black's Law Dictionary*, 1979
> <emphasis added>

A right is something

1. that is within your ability,
2. for which permission isn't required, and
3. that is generally or customarily accepted or at least tolerated.

That means that you don't need permission. If you have to ask for permission, or pay a fee, or get a license, then it isn't a right. It's a privilege. A privilege is something that you can do only when and as you are permitted. A privilege is what you get when a court "gives you the right" to do or to have something. Rights cannot be given. Only privileges can be given. The writers of *Black's Law Dictionary* (and, indeed, of every dictionary that I've examined) didn't make that distinction.

The first 10 amendments to the U.S. Constitution are considered to be a bill of rights. This essay addresses that U.S. Bill of Rights on two levels. On the surface, it's an examination of language, construction, and effect. On that level, it challenges much of the myth and misinformation generally associated with the U.S. Bill of Rights. More fundamentally, the essay offers a beginning of the understanding of government. Such understanding, when it occurs, eventually suggests the necessity of some alternative.

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Amendment 1

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

The First Flaw

The first flaw in the First Amendment ought to have been obvious. That flaw is that the amendment restricts **only** the legislative powers of the Congress. Other Congressional powers that might exist[2], powers of the other branches of the federal government, and powers of state and local governments are not restricted by the First Amendment.

That might not seem important. Yet, consider the current state of religious practice. When confronted by the word *religion,* most people think of churches and generally believe them to be free from government control. In fact, that's far from true. In spite of the Nazarene's admonition that "No man can serve two masters",[3] most churches are incorporated. That places them squarely under the authority of government, not of God, by the effect of the charter of incorporation. In addition to whatever other consequences there might be, they're subject to applicable tax laws and audits. Incorporated or not, they must comply with building codes, zoning codes, fire regulations, sanitary codes, and other regulations. The government even regulates the maximum size of congregations that are permitted within a building. Those statutes and regulations all operate respecting establishments of religion and regulate in one way or another the free exercise thereof. They avoid violating the First Amendment because they're not legislation made by the Congress but regulations issued by executive agencies or legislation made by other bodies besides the Congress. This deficiency is a good example of the danger of inadequate scope in a bill of rights.

An Establishment of Religion

The *Establishment of Religion* provision of the First Amendment has also been limited in another sense. It should encompass the general meaning of the word *religion*.

> RELIGION, ... *n*. the performance of our duties of love and obedience towards God: piety: any system of faith and worship....
> —*The American Dictionary of the English Language*, 1899

> **CONTRACT**....
> Words are to be taken, if possible, in their comprehensive and common sense.... —*Bouvier's Law Dictionary*, 1889

It therefore seems reasonable to presume that the provision ought to prevent the Congress from passing any legislation respecting any activity that embodies piety, faith, or worship. Yet, many practices that satisfy the definition have been prohibited. Consider polygamy among Mormons and the ceremonial use of peyote by natives of this continent. The piety and faith of cults and survivalist groups might satisfy the defini-

2 See my essay, *The Constitution, The Government, and The Doctrine of Social Contract*.
3 Sorry ladies, he said *man*. I suppose that he wasn't a feminist.

tion but they're often brutally repressed. Consider the Branch Davidians. Repression of religion today is due not entirely to deficiencies of the provision but also to a failure of the people to insist upon its legitimate scope.

Freedom of Speech and of the Press

In spite of the First Amendment, there are limitations on the freedoms of speech and of the press. A good example is with regard to sedition. Any movement tending toward unspecified "commotions", even though lacking any overt act, is punishable.[4] Meetings, speeches, or publications that attempt to disturb the tranquillity of the state are punishable. Since the First Amendment should have protected the people from the state, and not the other way around, the very concept of sedition is repugnant to the proper meaning of this provision of the First Amendment.

Sedition. Communication or agreement which has as its objective the stirring up of treason or certain lesser commotions, or the defammation (sic) of the government. Sedition is advocating, or with knowledge of its contents knowingly publishing, selling or distributing any document which advocates, or, with knowledge of its purpose, knowingly becoming a member of any organization which advocates the overthrow or reformation of the existing form of government of this state by violence or unlawful means. An insurrectionary movement tending towards treason, but wanting an overt act; attempts made by meetings or speeches, or by publications, to disturb the tranquillity of the state….
—*Black's Law Dictionary*, 1979

Smith Act. Federal law which punishes, among other activities, the advocacy of the overthrow of the government by force or violence. An anti-sedition law….
—*Black's Law Dictionary*, 1979

Agreement. A coming together of minds; a coming together in opinion or determination; the coming together in accord of two minds on a given proposition….
—*Black's Law Dictionary*, 1979

…. whenever any form of government becomes destructive of these ends, it is the right of the people to alter or to abolish it….
—from the *Declaration of Independence*

In recent years, the situation has deteriorated considerably. Nowadays, it's dangerous to be overheard even suggesting any unapproved behavior. It's routine for people to be arrested and prosecuted for merely planning or even discussing one scheme or another. I recall a group of adolescents who were prosecuted, some years ago, for merely planning to rob a McDonald's restaurant. They didn't actually steal anything. They only planned it. No actual harm was done but they were prosecuted anyway.

Indeed, conversations don't even have to include threats or plans at all. I know one man who answered a solicitation, by a woman, in the personals section of a newspaper. They subsequently discussed various sexual topics over the telephone, including fantasies regarding adolescents. After several such conversations, they arranged a meeting. When he arrived at the meeting, he was arrested. It turned out that the woman was working for the authorities and had intentionally engaged him in conversations that are illegal. The idea of an illegal conversation ought to be outrageous in America. Nevertheless, the conversations had been recorded without his knowledge and he was prosecuted. Today, he's a convicted felon even though he didn't do anything except to talk on the telephone.

4 See the article *Criminal Procedure* on page 1 of the *Frontiersman* for March, 1995.

The inescapable conclusion is that the freedom of speech, the freedom of the press, and indeed the freedom of thought have been prohibited in this country. Rather, people can say, print, or think only those things that are permitted by the authorities. The situation is a consequence of the failure of the people to insist upon the inviolability of the First Amendment.

Assembly

There are problems with the language of the *Freedom of Assembly* provision of the First Amendment. A contract must be understood according to what it says, and not according to what somebody believes the writer meant to say. If the language of this provision is analyzed according to the punctuation as written, then that language becomes:

> **Language**…. The letter, or grammatical import, of a document or instrument, as distinguished from its spirit; as "the language of a statute."….
> —*Black's Law Dictionary*, 1979

> Congress shall make no law respecting an establishment of religion.
>
> [Congress shall make no law] prohibiting the free exercise of an establishment of religion.
>
> [Congress shall make no law] abridging the freedom of speech.
>
> [Congress shall make no law] abridging the freedom of the press.
>
> [Congress shall make no law] _____ the right of the people peaceably to assemble.
>
> [Congress shall make no law] _____ the right of the people to petition the Government for a redress of grievances.

In the fifth and sixth provisions, the language is incomplete. The writers used one word in the first provision, a different word in the second provision, and a different word in the third and fourth provisions. No one knows what word they might have intended for the fifth and sixth provisions. Perhaps they intended to say, "[Congress shall make no law] abridging the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." However, the grammar is equally valid as, "[Congress shall make no law] securing the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." Lacking proper language, an enforceable interpretation of these provisions is impossible.

> **CONTRACT**….
> …The intention of the parties is the pole-star of construction; but their intention must be found expressed in the contract and be consistent with rules of law. The court will not make a new contract for the parties….
> —*Bouvier's Law Dictionary*, 1889

Although the First Amendment doesn't make any enforceable statement regarding a right to assemble, the generally accepted myth is that it does. Addressing that myth as though it were fact, the First Amendment doesn't acknowledge a right to assemble, but only a right to peaceably assemble. That might seem at first like a reasonable restriction. However, consider a peaceable assembly to which the government objects. If the peaceable assembly is "disrupted", then it isn't a peaceable assembly anymore. After that, it doesn't have any protection. This restriction on assemblies is a gold-plated invitation to the government to deploy agents provocateurs.

> **Assembly, unlawful.** The congregating of people which results in antisocial behavior of the group….
> —*Black's Law Dictionary*, 1979

Any meeting that attempts to disturb the tranquillity of the state (sedition) lacks First Amendment protection. Any assembly that results in "antisocial" behavior of the group is deemed an unlawful assembly. In fact, people ought to have the right to use any method whatsoever to reform or overthrow their government. If they're limited to legal (that is, government approved) methods, then they're limited to methods that can be defined, regulated, and controlled by the government that they're trying to reform or overthrow. Any such attempted restriction of the people is, in and of itself, a sufficient reason to overthrow the government.

The "right" of assembly will today allow nothing more than a few unobtrusive individuals carrying inoffensive signs and being careful not to block the sidewalk. Otherwise a permit is required. The requirement of permits confirms that this provision doesn't provide any protection whatsoever for a right to assemble. A right can be regulated by custom, but never by statute. By allowing only peaceable assemblies the provision grants a veto power over them. The result is to establish a privilege to assemble by permit only.

Amendment 2

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.

> All people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness, and privacy.
>
> —from the *Constitution of the State of California*
> Article 1, Section 1

According to this amendment, the purpose of keeping and bearing arms is to defend the security of a "free State", whatever that is. That is a very different purpose than an individual defending himself, his property, or his liberty. In fact, governments generally regard armed citizens as a threat to the security of the state. Thus from the point of view of government, any construction of the Second Amendment that allows just anybody to keep and bear arms causes the amendment to be inherently self-contradictory.

The amendment also provides that the people who do keep and bear arms can be regulated as a militia. That's one of those words that has a long and checkered past. It has many meanings.

> **MILITIA.** The military force of the nation, consisting of citizens called forth to execute the laws of the Union, suppress insurrection, and repel invasion.... —*Bouvier's Law Dictionary*, 1889

> MILITIA,.... *n*. a body of men enrolled and drilled as soldiers, but only liable to home service....
> —*The American Dictionary of the English Language*, 1899

> **militia**.... 2. In the United States, the entire body of citizens liable to be called upon to do military duty....
> —*Webster's Universal Dictionary of the English Language*, 1910

According to the first definition, the militia is the entire military force of the nation. Most important, that military force can be used not just as a military force but also as a law enforcement agency. According to that definition, only citizens who are in such a military force have the right to keep and bear arms. If you use the second definition, then the only people who can keep and bear arms are men who are enrolled and drilled as soldiers. However, members of the army are excluded because they're liable to foreign service. If you use the third definition, then the only people who can keep and bear arms are draft-aged people who are citizens, who are in good health, who aren't homosexual, who don't have a drug problem, and who've registered for the draft. If women aren't subject to the draft, then only men can bear arms. Of course, if you use a different definition of *militia,* or of *citizens,* or of *military duty,* or of *called upon,* then you'll protect the right to bear arms of a different group of people. No wonder U.S. citizens have been disarmed. The Second Amendment is self-contradictory and so ambiguous that it's meaningless.

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Amendment 3

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.

In Time of Peace

In time of peace, all that's required to quarter soldiers in your house is the consent of the owner. That might not at first seem like a loop-hole, but it is. The consent of the mortgage company might be sufficient. Or you may be one of several joint owners who might consent over your objections. Does your wife agree with your politics? What if you don't consent but she does?

> **Community property.** Property owned in common by husband and wife each having an undivided one-half interest by reason of their marital status….
> —*Black's Law Dictionary*, 1979

The Third Amendment protects you only if you live in a house. What if you own and live in a recreational vehicle or a mobile home? In recent years, courts have ruled that recreational vehicles lack the same Third Amendment protections as houses but fall instead under the obligations associated with automobiles.

> **condominium…. 3 a:** individual ownership of a unit in a multiunit structure (as an apartment building) or on land owned in common (as a town house complex)….
> —*Webster's Ninth New Collegiate Dictionary*, 1987

> **house…. 1:** a building that serves as living quarters for one or a few families….
> —*Webster's Ninth New Collegiate Dictionary*, 1987

> The house of everyone is to him as his castle and fortress, as well for his defense against injury and violence as for his repose.
> —Semayne's Case. 5 Report 91
> Sir Edward Coke (1552-1634)

Even if you're the sole owner of your house, *voluntary* is a very slippery concept. Consider the situation in the light of the coercive nature of government. If the choices are arranged properly, then you might voluntarily do a lot of things you don't want to do. I voluntarily joined the Naval Reserve to avoid getting drafted. People will voluntarily jump from the top of a tall building, if the building happens to be burning under them. Before you consider this a facetious position, consider the many circumstances that can affect you, over which the government has much control, and over which you don't have any control at all. Changes in zoning laws can reduce the value of your property, and restrict your options when deciding how to use it. Consider how you might be affected by the selective enforcement of building codes and inspection requirements if the government should choose to use them against you. Consider the withholding of building permits. Can you defend yourself against eminent domain proceedings and the condemnation of your property? Then there's property tax assessment. Those people work for the government and it can be dangerous to annoy them. I believe that the *consent of the owner* provision is a loop-hole.

In Time of War

In time of war, the method of using your house to quarter soldiers need only be prescribed by legislation. Under Article 1, Section 8, Clause 18, the Congress can pass any legislation that it considers to be necessary and proper to execute any other power delegated in the Constitution, including quartering soldiers in your house. Thus, the Third Amendment can be accurately re-stated, without any change in meaning, as

> "Soldiers may be quartered in any house, in time of peace, with the consent of the owner, and in time of war, in whatever manner may be prescribed by law."

CONTRACT....
The whole contract is to be considered with relation to the meaning of any of its parts.... —*Bouvier's Law Dictionary*, 1889

[The Congress shall have power] to make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the Government of the United States, or in any department or officer thereof.
—Article 1, Section 8, Clause 18
U.S. Constitution

When viewed in combination with Article 1, Section 8, Clause 18, the Third Amendment is revealed as a grant of unlimited power falsely advertised as a limitation of powers.

Amendment 4

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 Fourth Amendment to the U.S. Constitution contains two provisions:

1. It states that people shall be secure from unreasonable searches and seizures, and
2. it describes a set of prerequisites for and characteristics of search warrants.

> **CONTRACT**….
> The intention of the parties is the pole-star of construction; but **their intention must be found expressed in the contract** and be consistent with rules of law. The court will not make a new contract for the parties, nor will words be forced from their real signification….
> —*Bouvier's Law Dictionary*, 1889
> <emphasis added>

The proximity of those two provisions in a single sentence creates the appearance of a relationship between them. However, there **isn't any language whatsoever** in this amendment that requires a search warrant as a prerequisite for a search and seizure. The amendment only says that people shall be safe from unreasonable searches and seizures and that if a warrant is obtained for a search and seizure, then it shall satisfy certain conditions. Those are two separate provisions each of which stands alone and neither of which requires the other. Suppose that I said, "Delta Burke will sleep well tonight, and so will I." Each statement may be true but their proximity in the same sentence doesn't necessarily mean that Delta Burke and I have anything at all to do with one another.

Here's a statement of the Fourth Amendment as people incorrectly imagine it to be:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated; 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; and no such search or seizure shall ever be conducted without such a warrant. —the Mythical Version of the Fourth Amendment

The writers of the Fourth Amendment may or may not have intended that a warrant is required as a prerequisite for a search and seizure, but they didn't put it in writing. Therefore, the Fourth Amendment doesn't require a search warrant.

Even if we accept the necessity of putting up with warrantless searches, the Fourth Amendment still doesn't provide much protection. It prohibits only **unreasonable** searches and seizures. It doesn't say what's unreasonable and it doesn't say who gets to decide. There aren't any guidelines at all. In practice, the cops and the courts decide. Since those are some of the main sources of abuse against which the amendment should have provided protection, the amendment is utterly worthless.

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Amendment 5

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

Grand Jury

The grand jury provision applies only to capital or infamous crimes. A capital crime is a crime that is punishable by death. An infamous crime is a crime that is punishable by death or by infamous punishment. Infamous punishment is imprisonment, usually in a penitentiary but sometimes at hard labor regardless of the place of imprisonment. The amendment doesn't apply to offenses punishable only by fines, penalties, deprivation of property, deprivation of some right or privilege, or by confinement at other than hard labor or other than in a penitentiary. That leaves out a lot of offenses and allows for a lot of punishment without the participation of a grand jury.

Even for a capital or infamous crime, there are exceptions. The amendment doesn't apply to cases arising in the army or in the navy. I don't see any reason why citizens in military service should be excluded from such protection. However, there's another even more puzzling exception, and that is the militia. Clearly, the writers of the Fifth Amendment considered the militia to be distinct from the military forces, since it received special mention. That is completely consistent with the definition given by the Encyclopædia Britannica, according to which the militia is distinguished from the draft, from the military, and from the National Guard. It is, rather, based on the "obligation of every man to serve his nation". Accordingly, men (but not women) are excluded from grand jury protection if they are in the militia and if the militia is in actual service in time of war or public danger. That makes it important to understand the meanings of *actual service* and *public danger*.

> **Militia**.... The militia system in the common understanding of the term must be distinguished from "draft"...and "compulsory military service".... The true militia system as a legal tradition is based upon the obligation of every man to serve his nation.... It has no relation basically to the National Guard in the United States or the Territorials in England, because these are volunteer units. It is distinguished from the military systems of most modern states in that they maintain substantial standing armies to which the citizen forces are only supplements, however numerous, and that the militia system, as in Switzerland, is presumed to comprise the whole of the armed force. It is definitely localized, with emphasis on personnel procurement by geographical unit rather than directly from the larger state to the individual. It is considered a defensive force....
>
> —*Encyclopædia Britannica*, 1948

What is a time of "public danger"? The United States was continuously in a state of national emergency from 1933 to 1976. Thirteen declarations of national emergency occurred between 1976 and 1992.[5] That should certainly satisfy the requirement to be legally considered a time of public danger.

5 *CRS Report for Congress, National Emergency Powers*, December 10, 1992

Does the widespread use of illegal drugs constitute a time of public danger? If so, can the government create a time of public danger just by making something illegal? If there are terrorists at large in the world, is that a time of public danger? If it's dangerous to go out at night, if people feel insecure, is that a time of public danger? Look at the definitions. The words must be taken in their comprehensive and common sense. If people in the community generally feel insecure, then it's a time of public danger.

> PUBLIC…of or belonging to the people: pertaining to a community or a nation: general: common to all: generally known….
> —*The American Dictionary of the English Language*, 1899
>
> DANGER…a hazzard (sic) or risk: insecurity….
> —*The American Dictionary of the English Language*, 1899
>
> **CONTRACT**….
> Words are to be taken, if possible, in their comprehensive and common sense…. —*Bouvier's Law Dictionary*, 1889

What does it mean to be in actual service? The amendment doesn't say the militia must be in military service. It says actual service. Remember the Britannica definition of militia. "The true militia system as a legal tradition is based upon the obligation of every man to serve his nation." Does actual service include the civil service? Does it include public officials? How about people who work for public utilities, police departments, or fire departments? How about Amtrak employees or postal workers? What about hospitals and air traffic controllers? If an industry is defined as a service industry, are workers in that industry in actual service? Just how should people interpret the rhetoric in recent years about the service economy? Just what does it mean for the militia (every man not in the military) to be in actual service (serving his nation)?

> ACTUAL…. real: existing in fact and now, as opp. to an imaginary or past state of things….
> —*The American Dictionary of the English Language*, 1899
>
> SERVICE…. a working for another: duty required in any office: military or naval duty: office of devotion:…labor, assistance, or kindness to another: benefit: profession of respect….
> —*The American Dictionary of the English Language*, 1899
>
> Germany, after the First World War, framed the Weimar Constitution, designed to secure her liberties in the Western tradition. However, the President of the Republic, without concurrence of the Reichstag, was empowered temporarily to suspend any or all individual rights if public safety and order were seriously disturbed or endangered. This proved a temptation to every government, whatever its shade of opinion, and in 13 years suspension of rights was invoked on more than 150 occasions. Finally, Hitler persuaded President Von Hindenburg to suspend all such rights, and they were never restored. —Justice Jackson
> in *Youngstown Sheet & Tube Co. et al. v. Sawyer (343 U.S. 579)*

If governments were always trustworthy and never prone to abuses of power, then such an ambiguous provision might provide some protection. However, if governments were always trustworthy and never prone to abuses of power, then such protection would never be necessary. I believe that the grand jury provision of the amendment is, more than anything else, a temptation for the government to define work as public service and to create times of public danger. If you look around carefully, then it'll be pretty hard for you to disagree with me.

Double Jeopardy

No comment.

Self-Incrimination

If a court grants immunity, then refusal of an accused individual to answer questions constitutes the additional and separate crime of criminal contempt. Furthermore, a grant of immunity isn't fool-proof. First, there's more than one kind, which ought to make you suspicious. Furthermore, the accused isn't entitled to protection from prosecution for everything arising from the illegal transaction that his testimony addresses. Thus answers can be compelled in a criminal case even though they may be in some way damaging or embarrassing to the individual providing them.

Furthermore, protection against self-incrimination exists only in criminal cases. Although in many states the trial court is a court of general jurisdiction, the distinction between civil and criminal cases remains and this amendment doesn't provide any protection in civil cases. Not all courts are criminal courts. Traffic courts are an example at the local level. There are also various federal courts that are not considered to be criminal courts. Prominent among them is the U.S. Tax Court, in which you can very easily lose your shirt and in which you don't have any protection against self-incrimination.[6]

Criminal....
Criminal contempt. A crime which consists in the obstruction of judicial duty generally resulting in an act done in the presence of the court; *e.g.* contumelious conduct directed to the judge or a refusal to answer questions after immunity has been granted.... —*Black's Law Dictionary*, 1979

Immunity....
Immunity from prosecution. By state and federal statutes, a witness may be granted immunity from prosecution for his or her testimony.... Protection from prosecution must be commensurate with privilege against self incrimination, but it need not be any greater and hence a person is entitled only to protection from prosecution based on the use and derivative use of his testimony; he is not constitutionally entitled to protection from prosecution for everything arising from the illegal transaction which his testimony concerns (transactional immunity).... —*Black's Law Dictionary*, 1979

All things considered, the Fifth Amendment protection against self-incrimination is mostly a plaything for lawyers, and serves little other purpose. That is partly due to the limited scope of the provision, that has provided the temptation to create crimes and jurisdictions that are not criminal. However, it's mostly due to the stupidity of the people. That is, because the U.S. Bill of Rights acknowledges due process rights only for criminal cases, people claim those rights only in criminal cases. However, the failure of the U.S. Bill of Rights to acknowledge certain rights doesn't operate to destroy those rights. Indeed, such failure to acknowledge rights has, in and of itself, no effect upon the rights at all. If U.S. citizens want (for example) the right to remain silent in a civil case, then they can have the right by insisting, consistently and en masse, upon that right. Recourse to constitutional authority is neither necessary nor desirable.

6 See the articles *Courts of the United States* and *Tax Court* in the glossary.
Also see my essay *In Search of the Supreme Flaw of the Land: Separation of Powers.*

Life, Liberty, or Property

The Fifth Amendment has been advertised as a protection against the taking of life, liberty, or property. Actually, it's a statement of the method by which they can be taken. That is, the Congress can pass any legislation that it considers to be necessary and proper (Article 1, Section 8, Clause 18) to take life, liberty, or property.

In support of this assertion, using property as an example, I offer a portion of the definition of eminent domain. Notice that the federal power of eminent domain exists because of the Fifth Amendment. If the so-called Bill of Rights had never been adopted, then private property might have been a lot safer from the government.

> **Eminent domain**.... The power to take private property for public use by the state, municipalities, and private persons or corporations authorized to exercise functions of public character....
>
> In the United States, the **power of eminent domain is founded in both the federal (Fifth Amend.)** and state constitutions....
>
> —*Black's Law Dictionary*, 1979
> <emphasis added>

This power to take private property was granted generally by the Fifth Amendment. It was granted specifically to the States by the Fourteenth Amendment, but without the just compensation restriction. Thus the states need not provide just compensation, but only provide by law how life, liberty, or property is to be taken.

> .... nor shall any State deprive any person of life, liberty, or property, without due process of law....
> —from the Fourteenth Amendment
> U.S. Constitution

Another seldom acknowledged failure of this provision is that the federal government must provide just compensation for the taking of private property only if the property is taken for public use. There isn't any restriction on the taking of private property for a non-public use. There are many government facilities from which the public is barred. Thus property might be taken (for example) for a secret military installation without just compensation. Property is being routinely taken by the drug enforcement gestapo without any compensation. Presumably, they keep it all for themselves and never allow the public to have any of it.

This provision of the amendment suffers from several flaws. As the source of the power of eminent domain, it actually does more harm than good. The limitations in the scope defeat much that the provision might have accomplished. Certain good that it might have provided was defeated by the Fourteenth Amendment. In general, I consider the provision to be of no value and of great harm.

Amendment 6

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 defense.

These protections are acknowledged only for criminal cases. Severe punishments can be imposed for offenses that are not criminal offenses. Also, if the trial is to be speedy, then the accused should have a right to be informed of the nature and cause of the accusation prior to the start of the trial. The amendment doesn't make any provision for that.

As with the Fifth Amendment, the failure of these protections is partly due to the limited scope of the amendment. However, it's mostly due to the stupidity of the people. That is, because the U.S. Bill of Rights acknowledges the protections only for criminal cases, then people claim those protections only in criminal cases. However, the failure of the U.S. Bill of Rights to acknowledge certain rights doesn't operate to destroy those rights. Indeed, such failure to acknowledge rights doesn't have, in and of itself, any effect upon the rights at all. If U.S. citizens want (for example) the right to trial by jury in civil cases, then they can have it by insisting upon it, consistently and en masse. Recourse to constitutional authority is neither necessary nor desirable.

Witnesses

No comment.

The Right of Counsel

The accused is guaranteed the right to assistance of counsel for his defense. However, he isn't guaranteed the right to counsel of his choice, but only the right to counsel. The government exercises great authority over that choice by restricting it to licensed attorneys whose primary duty is to the court (that is, to the government) rather than to the accused. That renders this provision of the amendment something of a farce.

> An attorney does not hold an office or public trust, in the constitutional or statutory sense of that term, and strictly speaking, he is not an officer of the state or of a governmental subdivision thereof. Rather, as held in many decisions, he is an officer of the court, before which he has been admitted to practice. An attorney is not the court or one of its ministerial officers, or a law enforcement officer. He is, however, in a sense an officer of the state, with an obligation to the courts and to the public no less significant than his obligation to his clients. Thus, an attorney occupies a dual position which imposes dual obligations. **His first duty is to the courts and the public, not to the client, and wherever the duties to his client conflict with those he owes as an officer of the court in the administration of justice, the former must yield to the latter.** —7 C.J.S. Attorney & Client § 4 <emphasis added>

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Amendment 7

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.

> **common law,** unwritten law based on custom and usage and confirmed by the decisions of judges, as distinct from statute law.
>
> —*Thorndike Century Senior Dictionary*, 1941

Everything is regulated by statute with the result that there is no longer any common law. Regardless of any theoretical designation, no court in the land acts as a court of common law. This amendment is a joke.

Amendment 8

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

Excessive Bail

Who gets to decide what's excessive?

Excessive Fines

Who gets to decide what's excessive?

Cruel and Unusual Punishments

The language of this provision is unfortunate. The provision doesn't prohibit cruel punishment nor does it prohibit unusual punishment. It prohibits only punishment that is both cruel and unusual. You just can't be too careful.

This Amendment is a joke.

Amendment 9

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

No comment.

Amendment 10

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.

No comment.

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One Example Should Be sufficient

> I hold it, that a little rebellion, now and then, is a good thing, and as necessary in the political world as storms in the physical. —Thomas Jefferson
> in a letter to James Madison
> [January 30, 1787]

Bills of rights have their uses, but not the ones generally attributed to them. For example, they don't prevent the encroachment of despotism to which government naturally inclines. They can, however, help people to understand what their rights ought to be and to recognize encroachments upon those rights. As a benchmark of political conditions, they can help people to know when the time has come to throw down yet another government.

The analysis in this essay has revealed two kinds of failures in the effect of the U.S. Bill of Rights. One kind is due to deficiencies in the amendments and the other is due to ignorance or inattention of the people.

There are lessons to be learned from these failures. It should not come as a surprise that the paper boundaries of the U.S. Bill of Rights failed to prevent the government's inevitable tendency toward despotism. James Madison warned of that many years ago. The limits on government must be inflexibly asserted in people's everyday lives. Freedom or slavery both begin within each individual, and each individual must choose one or the other. The lesson is that eternal vigilance is one of those things that cannot be delegated.

> The conclusion which I am warranted in drawing from these observations is that a mere demarcation on parchment of the constitutional limits of the several departments is not a sufficient guard against those encroachments which lead to a tyrannical concentration of all the powers of government in the same hands.
> —James Madison
> in *The Federalist Papers,* No. 48

> It is the common fate of the indolent to see their rights become a prey to the active. The condition upon which God hath given liberty to man is eternal vigilance; which condition if he break, servitude is at once the consequence of his crime and the punishment of his guilt.
> —John Philpot Curran, 1790

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Appendix

Summary of Provisions

Amendment	1	freedom of religion, freedom of speech, freedom of the press, the right to assemble to petition the government for a redress of grievances
Amendment	2	the right to keep and bear arms
Amendment	3	the quartering of soldiers
Amendment	4	searches and seizures, warrants
Amendment	5	grand jury, double jeopardy, self incrimination, deprivation of life, liberty, or property, the taking of private property for public use
Amendment	6	speedy and public trial, impartial jury, right of the accused to be informed and confronted by witnesses, compulsory process for obtaining witnesses, assistance of counsel
Amendment	7	right to trial by jury
Amendment	8	excessive bail, excessive fines, cruel and unusual punishments
Amendment	9	other rights reserved to the people
Amendment	10	other powers reserved to the States or to the people

Postmortem

Amendment	Provision	Failure due to the Amendment	Failure due to the People	Success
1	• freedom of religion	x	x	
	• freedom of speech, freedom of the press		x	
	• the right to assemble to petition the government	x		
2	• the right to keep and bear arms	x		
3	• the quartering of soldiers	x		
4	• searches and seizures, warrants	x		
5	• grand jury	x		
	• double jeopardy			√
	• self incrimination	x	x	
	• life, liberty, or property	x		
6	• speedy and public trial, impartial jury, right of the accused to be informed	x		
	• confronted by witnesses, compulsory process for obtaining witnesses			√
	• assistance of counsel	x		
7	• right to trial by jury	x		
8	• excessive bail, excessive fines, cruel and unusual punishments	x		
9	• other rights reserved to the people			√
10	• other powers reserved to the States or to the people			√

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Glossary

Bill…. *Bill of rights*. A formal and emphatic legislative assertion and declaration of popular rights and liberties usually promulgated upon a change of government; *e.g.* the famous Bill of Rights in English history. Also the summary of the rights and liberties of the people, or of the principles of constitutional law deemed essential and fundamental, contained in many of the American state constitutions. Hamill v. Hawks, C.C.A.Okl., 58 F.2d 41, 47. That portion of Constitution guaranteeing rights and privileges to the individual; *i.e.* first ten Amendments of U.S. Constitution….

—*Black's Law Dictionary*, 1979

COMMON LAW. That system of law or form of the science of jurisprudence which has prevailed in England and in the United States of America, in contradistinction to other great systems, such as the Roman or Civil Law.

Those principles, usages, and rules of action applicable to the government and security of persons and of property, which do not rest for their authority upon any express and positive declaration of the will of the legislature. 1 Kent, 492.

The body of rules and remedies administered by courts of law, technically so called, in contradistinction to those of equity and to the canon law.

The law of any country, to denote that which is common to the whole country, in contradistinction to laws and customs of local application.

The most prominent characteristic which marks this contrast, and perhaps the source of the distinction, lies in the fact that in the common law neither the stiff rule of a long antiquity, on the one hand, nor, on the other, the sudden changes of a present arbitrary power, are allowed ascendency, but, under the sanction of a constitutional government, each of these is set off against the other; so that the will of the people, as it is gathered both from long-established custom and from the expression of the legislative power, gradually forms a system—just, because it is the deliberate will of a free people—stable, because it is the growth of centuries—progressive, because it is amenable to the constant revision of the people. A full idea of the genius of the common law cannot be gathered without a survey of the philosophy of English and American history. Some of the elements will, however, appear in considering the various narrower senses in which the phrase "common law" is used.

Perhaps the most important of these narrower senses is that which it has when used in contradistinction to statute law, to designate unwritten as distinguished from written law. It is that law which derives its force and authority from the universal consent and immemorial practice of the people. It has never received the sanction of the legislature by an express act, which is the criterion by which it is distinguished from the statute law. When it is spoken of as the *lex non scripta,* it is meant that it is law not written by authority of law. The statutes are the expression of law in a written form, which form is essential to the statute. The decision of a court which established or declares a rule of law may be reduced to writing and published in the reports; but this report is not the law: it is but evidence of the law; it is but a written account of one application of a legal principle, which principle, in the theory of the common law, is still unwritten. However artificial this distinction may appear, it is nevertheless of the utmost importance, and bears continually the most wholesome results. It is only by the legislative power that law can be bound by phraseology and by forms of expression. The common law eludes such bondage: its principles are not limited nor hampered by the mere forms in which they may have been expressed, and the reported adjudications declaring such principles are but the instances in which they have been applied. The principles themselves are still unwritten, and ready, with all the adaptability of truth, to meet every new and unexpected case. Hence it is said that the rules of the common law are flexible; 1 Gray, 263; 1 Swan, 42; 5 Cow. 587, 628, 632.

It naturally results from the inflexible form of the statute or written law, which has no self-contained power of adaptation to cases not foreseen by legislators, that every statute of importance becomes, in course of time, supplemented, explained, enlarged, or limited by a series of adjudications upon it, so that at last it may appear to be merely the foundation of a larger superstructure of unwritten law. It naturally follows, too, from the less definite and precise forms in which the doctrine of the unwritten law stands, and from the proper hesitation of courts to modify recognized doctrines in new exigencies, that the legislative power frequently intervenes to declare, to qualify, or to abrogate the doctrines of the common law. Thus, the written and the unwritten law, the statutes of the present and the traditions of the past, interlace and react upon each other. Historical evidence supports the view which these facts suggest, that many of the doctrines of the common law are but the common-law form of antique statutes, long since overgrown and imbedded in judicial decision. While this process is doubtless continually going on in some degree, the contrary process is also continually going on; and to a very considerable extent, particularly in the United States, the doctrines of the common law are being reduced to the statutory form, with such modifications, of course, as the legislature will choose to make. This subject is more fully considered under the title Code, which see.

In a still narrower sense, the expression "common law" is used to distinguish the body of rules and of remedies administered by courts of law, technically so called, in contradistinction to those of equity administered by courts of chancery, and to the canon law, administered by the ecclesiastical courts.

In England the phrase is more commonly used at the present day in the second of the three senses above mentioned.

In this country the common law of England has been adopted as the basis of our jurisprudence in all the states except Louisiana. Many of the most valued principles of the common law have been embodied in the constitution of the United States and the constitutions of the several states; and in many of the states the common law and the statutes of England in force in the colony at the time of our independence are by the state constitution declared to be the law of the state until repealed. See 1 Bishop, Crim. Law, § 15, note 4, §45, where the rules adopted by the several states in this respect are stated. Hence, where a question in the courts of one state turns upon the laws of a sister state, if no proof of such laws is offered, it is, in general, presumed that the common law as it existed at the time of the separation of this country from England prevails in such state; 4 Denio, 305; 29 Ind. 458; 11 Mich. 181; *contra,* in Pennsylvania, in cases where that state has changed from the common law; the presumption being that the law of the sister state has made the same change, if there is no proof to the contrary. The term common law as thus used may be deemed to include the doctrine of equity; 8 N.Y. 535; but the term is also used in the amendments to the constitution of the United States (art. 7) in contradistinction to equity, in the provision that "In suits at common law where the value in controversy shall not exceed twenty dollars, the right of trial by jury shall be preserved." The "common law" here mentioned is the common law of England, and not of any particular state; 1 Gall. 20; 1 Baldw. 554, 558; 3 Wheat. 223; 3 Pet. 446. The term is used in contradistinction to equity, admiralty, and maritime law; 3 Pet. 446; 1 Baldw. 554.

The common law of England is not in all respects to be taken as that of the United States or of the several states: its general principles are adopted only so far as they are applicable to our situation; 2 Pet. 144; 8 *id*. 659; 9 Cra. 333; 9 S. & R. 330; 1 Kirb. 117; 5 H. & J. 356; 2 Aik. 187; T. U. P. Charlt. 172; 1 Ohio, 243. See 5 Cow. 628; 5 Pet. 241; 8 *id*. 658; 7 Cra. 32; 1 Wheat. 415; 3 *id*. 223; 1 Dall. 67; 2 *id*. 297, 384; 1 Mass. 61; 9 Pick. 532; 3 Me. 162; 6 *id*. 55; 3 G. & J. 62; Sampson's Discourse before the N. Y. Hist. Soc.; 1 Gall. 489; 3 Conn. 114; 33 *id*. 260; 28 Ind. 220; 5 W. Va. 1; 24 Miss. 343; 1 Nev. 40; 37 Barb. 15; 15 Cal. 226; 28 Ala.

704. In general, too, the statutes of England are not understood to be included, except so far as they have been recognized by colonial legislation, but the course pursued has been rather to re-enact such English statutes as were deemed applicable to our case. Especially not those passed since the settlement of the colony; if these were suitable to the condition of the colony they were usually accepted; Quincy, 72; 5 Pet. 280; 2 Gratt. 579. By reason of the modifications arising out of our different condition, and those established by American statutes and by the course of American adjudication, the common law of America differs widely in many details from the common law of England; but the fact that this difference has not been introduced by violent changes, but has grown up from the native vigor of the system, identifies the whole as one jurisprudence.

See works of Franklin, by Sparks, vol. 4, p. 271, as to the adoption of the common law in America; see also Cooley, Const. Lim. 28 *et seq*. —*Bouvier's Law Dictionary*, 1889

Construction. The process, or the art, of determining the sense, real meaning, or proper explanation of obscure or ambiguous terms or provisions in a statute, written instrument, or oral agreement, or the application of such subject to the case in question, by reasoning in the light derived from extraneous connected circumstances or laws or writings bearing upon the same or a connected matter, or by seeking and applying the probable aim and purpose of the provision. Drawing conclusions respecting subjects that lie beyond the direct expression of the term.

The process of bringing together and correlating a number of independent entities, so as to form a definite entity.

The creation of something new, as distinguished from the repair or improvement of something already existing. The act of fitting an object for use or occupation in the usual way, and for some distinct purpose. See **Construct**.

See also Broad interpretation; Comparative interpretation; Four corners rule; Interpretation; Last antecedent rule; Literal construction; Statutory construction; Strict consideration.

Equitable construction. A construction of a law, rule, or remedy which has regard more to the equities of the particular transaction or state of affairs involved than to the strict application of the rule or remedy; that is, a liberal and extensive construction, as opposed to a literal and restrictive. See also *Liberal construction* below.

Strict and liberal construction. Strict (or literal) construction is construction of a statute or other instrument according to its letter, which recognizes nothing that is not expressed, takes the language used in its exact and technical meaning, and admits no equitable considerations or implications.

Liberal (or equitable) construction, on the other hand, expands the meaning of the statute to meet cases which are clearly within the spirit or reason of the law, or within the evil which it was designed to remedy, provided such an interpretation is not inconsistent with the language used. It resolves all reasonable doubts in favor of the applicability of the statute to the particular case. It means, not that the words should be forced out of their natural meaning, but simply that they should receive a fair and reasonable interpretation with respect to the objects and purposes of the instrument. See also *Equitable construction* above.

—*Black's Law Dictionary*, 1979

CONTRACT.... An agreement between two or more parties to do or not to do a particular thing. Taney, C. J., 11 Pet. 420, 572. An agreement in which a party undertakes to do or not to do a particular thing. Marshall, C. J., 4 Wheat. 197. An agreement between two or more parties for the doing or not doing of some specified thing. 1 Pars. Com. 5.

It has been variously defined, as follows: A compact between two or more parties. 6 Cranch, 87, 136. An agreement or covenant between two or more persons, in which each party binds himself to do or forbear some act, and each acquires a right to what the other promises. Encyc. Amer.; Webster. A contract or agreement is where a

promise is made on one side and assented to on the other; or where two or more persons enter into an engagement with each other by a promise on either side. 2 Steph. Com. 108, 109.

An agreement upon sufficient consideration to do or not to do a particular thing. 2 Bla. Com. 446; 2 Kent, 449.

A covenant or agreement between two parties with a lawful consideration or cause. West, Symbol, Lib. 1, § 10; Cowel: Blount.

A deliberate engagement between competent parties upon a legal consideration to do or to abstain from doing some act. Story, Contr. § 1.

A mutual promise upon lawful consideration or cause which binds the parties to a performance. The writing which contains the agreement of parties with the terms and conditions, and which serves as a proof of the obligation. The last is a distinct signification. 2 Hill, N. Y. 551.

A voluntary and lawful agreement by competent parties, for a good consideration, to do or not to do a specified thing. 9 Cal. 83.

An agreement enforceable at law, made between two or more persons, by which rights are acquired by one or both to acts or forbearances on the part of the other. Anson, Contr. 9.

The consideration is not properly included in the definition of contract, because it does not seem to be essential to a contract, although it may be necessary to its enforcement. See CONSIDERATION. 1 Pars. Contr. 7. Mr. Stephen, whose definition of contract is given above, thus criticizes the definition of Blackstone, which has been adopted by Chancellor Kent and other high authorities. *First*, that the word *agreement* itself requires definition as much as contract. *Second*, that the existence of a consideration, though essential to the validity of a parol contract, forms properly no part of the idea. *Third*, that the definition takes no sufficient notice of the mutuality which properly distinguishes a contract from a promise. 2 Steph. Com. 109.

The use of the word *agreement* (*aggregatio mentium*) seems to have the authority of the best writers in ancient and modern times (see above) as a part of the definition of contract. It is probably a translation of the civil-law *conventio* (*con* and *venio*), a coming together, to which (being derived from *ad* and *grex*) it seems nearly equivalent. We do not think the objection that it is a synonym (or nearly so) a valid one. Some word of the kind is necessary as a basis of the definition. No two synonyms convey precisely the same idea. "Most of them have minute distinctions," says Reid. If two are entirely equivalent, it will soon be determined by accident which shall remain in use and which become obsolete. To one who has no knowledge of a language, it is impossible to define any abstract idea. But to one who understands a language, an abstraction is defined by a synonym properly qualified. By pointing out distinctions and the mutual relations between synonyms, the object of definition is answered. Hence we do not think Blackstone's definition open to the first objection.

As to the idea of consideration, Mr. Stephen seems correct and to have the authority of some of the first legal minds of modern times. Consideration, however, may be necessary to enforce a contract, though not essential to the idea. Even in that class of contracts (by specialty) in which no consideration is in fact required, one is always presumed by law, - the form of the instrument being held to import a consideration. 2 Kent, 450, note.

A contract without consideration is called a *nudum pactum* (nude pact), but it is still a *pactum;* and this implies that consideration is not an essential. The third objection of Mr. Stephen to the definition of Blackstone does not seem one to which it is fairly open.

There is an idea of mutuality in *con* and *traho*, to draw together, but we think that mutuality is implied in agreement as well. An *aggregatio mentium* seems impossible without mutuality. Blackstone in his analysis appears to have regarded agreement as implying mutuality; for he defines it (2 Bla. Com. 442) "a mutual bargain or convention." In the above definition, however, all ambiguity is avoided by the use of the words "be-

tween two or more parties" following agreement.

In its widest sense, "contract" includes records and specialties; but this use as a general term for all sorts of obligations, though of too great authority to be now doubted, seems to be an undue extension of the proper meaning of the term, which is much more nearly equivalent to "agreement," which is never applied to specialties. Mutuality is of the very essence of both, - not only mutuality of assent, but of act. As expressed by Lord Coke, *Actus contra actum;* 2 Co. 15; 7 M. & G. 998, argum. and note.

This is illustrated in contracts of sale, bailment, hire, as well as partnership and marriage; and no other engagements but those with this kind of mutuality would seem properly to come under the head of contracts. In a bond there is none of this mutuality, - no act to be done by the obligee to make the instrument binding. In a judgment there is no mutuality either of act or of assent. It is *judicium redditum in invitum*. It may properly be denied to be a contract, though Blackstone insists that one is implied. *Per Mansfield*, 3 Burr. 1545; 1 Cow. 316; *per Story*, J., 1 Mas. 288. Chitty uses "obligation" as an alternative word of description when speaking of bonds and judgments. Chit. Con. 2, 4. An act of legislature may be a contract; so may a legislative grant with exemption from taxes. 5 Ohio St. 361. So a charter is a contract between a state and a corporation within the meaning of the constitution of the United States, art. 1, § 10, clause 1. 27 Miss. 417. See IMPAIRING THE OBLIGATION OF CONTRACTS.

At common law, contracts have been divided ordinarily into contracts of record, contracts by specialty, and simple or parol contracts. The latter may be either written (not sealed) or verbal; and they may also be express or implied. Implied contracts may be either implied in law or implied in fact. "The only difference between an express contract and one implied in fact is in the mode of substantiating it. An express agreement is proved by express words, written or spoken * * * ; an implied agreement is proved by circumstantial evidence showing that the parties intended to contract;" Leake, Contr. 11; 1 B. & Ad. 415; 1 Aust. Jur. 356, 377

Accessory contracts are those made for assuring the performance of a prior contract, either by the same parties or by others, such as suretyship, mortgage, and pledges. Louis. Code, art. 1764; Poth. Obl. pt. 1, c. 1, s. 1, art. 2, n. 14.

Contracts of beneficence are those by which only one of the contracting parties is benefited: as, loans, deposit, and mandate. Louis. Code, art. 1767.

Certain Contracts are those in which the thing to be done is supposed to depend on the will of the party, or when, in the usual course of events, it must happen in the manner stipulated.

Commutative contracts are those in which what is done, given, or promised by one party is considered as an equivalent to or in consideration of what is done, given, or promised by the other. Louis. Code, art. 1761.

Consensual contracts were contracts of agency, partnership, sale, and hiring in the Roman law, in which a contract arose from the mere consensus of the parties, without other formalities; Maine, Anc. Law, 243.

Entire contracts are those the consideration of which is entire on both sides.

Executed contracts are those in which nothing remains to be done by either party, and where the transaction has been completed, or was completed at the time the contract or agreement was made: as, where an article is sold and delivered and payment therefore is made on the spot.

Executory contracts are those in which some act remains to be done: as, when an agreement is made to build a house in six months; to do an act before some future day; to lend money upon a certain interest payable at a future time; 6 Cranch, 87, 136.

A contract *executed* (which differs in nothing from a grant) conveys a chose in possession; a contract *executory* conveys a chose in action. 2 Bla. Com. 443. As to the importance of grants considered as contracts, see IM-

PAIRING THE OBLIGATION OF CONTRACTS.

Express contracts are those in which the terms of the contract or agreement are openly and fully uttered and avowed at the time of making: as, to pay a stated price for certain specified goods; to deliver an ox, etc. 2 Bla. Com. 443.

Gratuitous contracts are those of which the object is the benefit of the person with whom it is made, without any profit or advantage received or promised as a consideration for it. It is not, however, the less gratuitous if it proceed either from gratitude for a benefit before received or from the hope of receiving one hereafter, although such benefit be of a pecuniary nature. Louis. Code, 1766. Gratuitous promises are not binding at common law unless executed with certain formalities, vis., by execution under seal.

Hazardous contracts are those in which the performance of that which is one of its objects depends on an uncertain event. Louis. Code, art. 1769.

Implied contracts may be either implied *in law* or *in fact*. A contract implied *in law* arises where some pecuniary inequality exists in one party relatively to the other which justice requires should be compensated, and upon which the law operates by creating a debt to the amount of the required compensation; Leake, Contr. 38. See 2 Burr. 1005; 11 L. J. C. P. 99; 8 C. B. 541. The case of the defendant obtaining the plaintiff's money or goods by fraud, or duress, shows an implied contract to pay the money or the value of the goods.

A contract implied *in fact* arises where there was not an express contract, but there is circumstantial evidence showing that the parties did intend to make a contract; for instance, if one orders goods of a tradesman or employs a man to work for him, without stipulating the price or wages, the law raises an implied contract (*in fact*) to pay the real value of the goods or services. In the former class, the implied contract is a pure fiction, having no real existence; in the latter, it is inferred as an actual fact. See Leake, Contr.

Independent contracts are those in which the mutual acts or promises have no relation to each other either as equivalents or as considerations. Louis. Code, art. 1762.

Mixed contracts are those by which one of the parties confers a benefit on the other, receiving something of inferior value in return, such as a donation subject to a charge.

Contracts of mutual interest are such as are entered into for the reciprocal interest and utility of each of the parties: as sales, exchange, partnership, and the like.

Onerous contracts are those in which something is given or promised as a consideration for the engagement or gift, or some service, interest, or condition is imposed on what is given or promised, although unequal to it in value.

Oral Contracts are simple contracts.

Principal contracts are those entered into by both parties on their own accounts, or in the several qualities or characters they assume.

Real contracts are those in which it is necessary that there should be something more than mere consent, such as a loan of money, deposit, or pledge, which, from their nature, require a delivery of the thing (*res*).

Reciprocal contracts are those by which the parties expressly enter into mutual engagements, such as sale, hire, and the like.

Contracts of record are those which are evidenced by matter of record, such as judgments, recognizances, and statutes staple.

These are the highest class of contracts. Statutes merchant and staple, and other securities of the like nature, are confined to England. They are contracts entered into by the intervention of some public authority, and are witnessed by the highest kind of evidence, viz., matter of record. 4 Bla. Com. 465.

Severable (or separable) contracts are those the considerations of which are by their terms susceptible of apportionment or division on either side, so as to correspond to the several parts or portions of the consideration on the other side.

A contract to pay a person the worth of his services as long as he will do certain work, or so much per week as long as he shall work, or to give a certain price per bushel for every bushel of so much corn as corresponds to a sample, would be a severable contract. If the part to be performed by one party consists of several distinct and separate items, and the price to be paid by the other is apportioned to each item to be performed, or is left to be implied by law, such a contract will generally be held to be severable. So when the price to be paid is clearly and distinctly apportioned to different parts of what is to be performed, although the latter is in its nature single and entire. But the mere fact of sale by weight or measure - *i.e.* so much per pound or bushel - does not make a contract severable.

Simple contracts are those not of specialty or record.

They are the lowest class of express contracts, and answer most nearly to our general definition of contract.

To constitute a sufficient parol agreement to be binding in law, there must be that reciprocal and mutual assent which is necessary to all contracts. They are by parol (which includes both oral and written). The only distinction between oral and written contracts is in their mode of proof. And it is inaccurate to distinguish *verbal* from *written*; for contracts are equally *verbal* whether the words are *written* or spoken, - the meaning of verbal being - *expressed in words*. See 3 Burr. 1670; 7 Term, 350, note; 11 Mass. 27, 30; 5 *id* . 299, 301; 7 Conn. 57; 1 Caines, 386.

Specialties are those which are under seal: as, deeds and bonds.

Specialties are sometimes said to include also contracts of record, 1 Pars. Con. 7; in which case there would be but two classes at common law, viz., specialties and simple contracts. The term specialty is always used substantively.

They are the second kind of express contracts under the ordinary common-law division. They are not merely written, but *signed*, *sealed*, and *delivered* by the party bound. The solemnities connected with these acts, and the formalities of witnessing, gave in early times an importance and character to this class of contracts which implied so much caution and deliberation (consideration) that it was unnecessary to prove the consideration even in a court of equity. Plowd. 305; 7 Term, 477; 4 B. & Ad. 652; 3 Bingh. 111; 1 Fonb. Eq. 342, note. Though little of real solemnity now remains, and a scroll is substituted in most of the states for the seal, the distinction with regard to specialties has still been preserved intact except when abolished by statute. In 13 Cal. 33, it is said that the distinction is now unmeaning and not sustained by reason. See CONSIDERATION.

When a contract by specialty is changed by a parol agreement, the whole contract becomes parol. 2 Watts, 451; 9 Pick. 298; 13 Wend. 71.

Unilateral contracts are those in which the party to whom the engagement is made makes no express agreement on his part.

They are so called even in cases where the law attaches certain obligations to his acceptance. Louis. Code, art. 1758. A loan for use and a loan of money are of this kind. Poth. Obl. pt. 1, c. 1, s. 1, art. 2.

Verbal contracts are simple contracts.

Written contracts are those evidenced by writing.

Pothier's treatise on Obligations, taken in connection with the Civil Code of Louisiana, gives an idea of the divisions of the civil law. Poth. Obl. pt. 1. c. 1, s. 1. art. 2, makes the five following classes: *reciprocal* and *unilateral*; *consensual* and *real*; *those of mutual interest, of beneficence* and *mixed*; *principal* and *accessory*; *those which* are subjected by the civil law to certain rules and forms, and *those which* are regulated by mere natural justice.

It is true that almost all the rights of personal property do in great measure depend upon contracts of one kind or other, or at least might be reduced under some of them; which is the method taken by the civil law; it has referred the greatest part of the du-

ties and rights of which it treats to the head of obligations *ex contractu* or *quasi ex contractu*. Inst. 3. 14. 2; 2 Bla. Com. 443.

Qualities of. Every agreement should be so complete as to give either party his action upon it; both parties must assent to all its terms; Peak. 227; 3 Term, 653; 1 B. & Ald. 681; 1 Pick. 278. To the rule that the contract must be obligatory on both parties there are some exceptions: as the case of an infant, who may sue, though he cannot be sued, on his contract; Stra. 937. See other instances, 6 East, 307; 3 Taunt. 169; 5 *id*. 788; 3 B. & C. 232. There must be a good and valid consideration (*q.v.*), which must be proved though the contract be in writing; 7 Term, 350, note (a); 2 Bla. Com. 444; Fonb. Eq. 335, n. (a); Chitty, Bills, 68. There is an exception to this rule in the case of bills and notes, which are of themselves *primâ facie* evidence of consideration. And in other contracts (written) when consideration is acknowledged, it is *primâ facie* evidence thereof, but open to contradiction by parol testimony. There must be a thing to be done which is not forbidden by law, or one to be omitted which is not enjoined by law. Fraudulent, immoral, or forbidden contracts are void. A contract is also void if against public policy or the statutes, even though the statute be not prohibitory but merely affixes a penalty. Chitty, Com. L. 215, 217, 222, 228, 250; 1 Binn. 110, 118; 4 Dall. 269, 298; 4 Yeates, 24, 84; 28 Ala. 514; 7 Ind. 132; 4 Minn. 278; 30 N.H. 540; 2 Sandf. 146. But see 5 Ala. 250. As to contracts which cannot be enforced from non-compliance with the statute of frauds, see FRAUDS, STATUTE OF.

Construction and interpretation in reference to contracts. The intention of the parties is the pole-star of construction; but their intention must be found expressed in the contract and be consistent with rules of law. The court will not make a new contract for the parties, nor will words be forced from their real signification.

The subject-matter of the contract and the situation of the parties are to be fully considered with regard to the sense in which language is used.

The legality of the contract is presumed and is favored by construction.

Words are to be taken, if possible, in their comprehensive and common sense.

The whole contract is to be considered with relation to the meaning of any of its parts.

The contract will be supported rather than defeated: *ut res magis valeat quam pereat*.

All parts will be construed, if possible, so as to have effect.

Construction is generally against the grantor - *contra proferentem* - except in the case of the sovereign.

This rule of construction is not of great importance, except in the analogous case of penal statutes; for the law favors and supposes innocence.

Construction is against claims or contracts which are in themselves against common right or common law.

Neither false English nor bad Latin invalidates a contract ("which perhaps a classical critic may think no unnecessary caution"). 2 Bla. Com. 379; 6 Co. 59.

Parties. There is no contract unless the *parties* assent thereto; and where such assent is impossible from the want, immaturity, or incapacity of mind of one of the parties, there can be no perfect contract. See PARTIES.

Remedy. The foundation of the common law of contracts may be said to be the giving of damages for the breach of contracts. When the thing to be done is the payment of money, damages paid in money are entirely adequate. When, however, the contract is for any thing else than the payment of money, the common law knows no other than a money remedy: it has no power to enforce a specific performance of the contract.

The injustice of measuring all rights and wrongs by a money standard, which as a remedy is often inadequate, led to the establishment of the equity power of decreeing specific performance when the remedy has failed at law. For example: contracts for the sale of real estate will be specifically

enforced in equity; performance will be decreed, and conveyances compelled.

See, generally, as to contracts, Bouv. Inst. Index; Parson, Chitty, Comyns, Leake, Anson, and Story, on Contracts; Com. Dig. *Abatement* (E,12) (F,8), *Admiralty* (E.10, 11), *Action on Case on Assumpsit, Agreement, Bargain and Sale, Baron et Feme* (2), *Condition, Debt* (A, 8, 9), *Enfant* (B, 5), *Idiot* (D, 1), *Merchant* (E, 1), *Pleader* (2 W, 11, 43), *Trade* (D, 3), *War* (B, 2); Bac. Abr. *Agreement, Assumpsit, Condition, Obligation;* Vin. Abr. *Condition, Contract and Agreements, Covenant, Vendor, Vendee;* 2 Belt, Sup. Ves. 260, 295, 376, 441; Yelv. 47; 4 Ves. 497, 671: Arch. Civ. Pl. 22; La. Civ. Code, 3, tit. 3-18; Poth. Obl.; Maine, Anc. Law; Austin, Jurisp.; Sugd. Ven. & P.; Long, Sales (Rand. ed.), and Benj. Sales; Jones, Story, and Edwards, on Bailment; Toull. *Dr. Civ*. tom. 6, 7; Hamm. Part. c. 1; Calv. Par.; Chitty, Prac, Index.

Each subject included in the law of contracts will be found discussed in the separate articles of this Dictionary. See AGREEMENT; APPORTIONMENT; APPROPRIATION; ASSENT; ASSIGNMENT; ASSUMPSIT; ATTESTATION; BAILMENT; BARGAIN AND SALE; BIDDER; BILATERAL CONTRACT; BILL OF EXCHANGE; BUYER; COMMODATE; CONDITION; CONSENSUAL; CONJUNCTIVE; CONSUMMATION; CONSTRUCTION; COVENANT; DEBT; DEED; DELEGATION; DELIVERY; DISCHARGE OF A CONTRACT; DISJUNCTIVE; EQUITY OF REDEMPTION; EXCHANGE; GUARANTY; IMPAIRING THE OBLIGATION OF CONTRACTS; INSURANCE; INTEREST; INTERESTED CONTRACTS; ITEM; MISREPRESENTATION; MORTGAGE; NEGOCIORUM GESTOR; NOVATION; OBLIGATION; PACTUM CONSTITUTÆ PECUNIÆ; PARTIES; PARTNERS; PARTNERSHIP; PAYMENT; PLEDGE; PROMISE; PURCHASER; QUASI CONTRACTUS; REPRESENTATION; SALE; SELLER; SETTLEMENT; SUBROGATION; TITLE.

—*Bouvier's Law Dictionary*, 1889

Courts of the United States. "Court of the United States" means any of the following courts: the Supreme Court of the United States, a United States court of appeals, a United States district court, the District of Columbia Court of Appeals, the Superior Court of the District of Columbia, the District Court of Guam, the District Court of the Virgin Islands, the United States Court of Claims, the United States Court of Customs and Patent Appeals, The Tax Court of the United States, the Customs Court, bankruptcy courts, and the Court of Military Appeals. 28 U.S.C.A. § 451. Also, the senate sitting as a court of impeachment.

—*Black's Law Dictionary*, 1979

Criminal …. *Criminal contempt.* A crime which consists in the obstruction of judicial duty generally resulting in an act done in the presence of the court; *e.g.* contumelious conduct directed to the judge or a refusal to answer questions after immunity has been granted. Conduct directed against the majesty of the law or the dignity and authority of the court or judge acting judiciously, whereas a "civil contempt" ordinarily consists in failing to do something ordered to be done by a court in a civil action for the benefit of an imposing party therein. Sullivan v. Sullivan, 16 Ill. App.3d 549, 306 N.E.2d 604, 605. See also **Contempt**….

—*Black's Law Dictionary*, 1979

Defamation. Holding up of a person to ridicule, scorn or contempt in a respectable and considerable part of the community; may be criminal as well as civil. Includes both libel and slander.

Defamation is that which tends to injure reputation; to diminish the esteem, respect, goodwill or confidence in which the plaintiff is held, or to excite adverse, derogatory or unpleasant feelings or opinions against him. Statement which exposes person to contempt, hatred, ridicule or obloquy. McGowen v. Prentice, La.App., 341 So.2d 55, 57. The unprivileged publication of false statements which naturally and proximately result in injury to another. Wolfson v. Kirk, Fla.App., 273 So.2d 774, 776.

A communication is defamatory if it tends so to harm the reputation of another as to

lower him in the estimation of the community or to deter third persons from associating or dealing with him. The meaning of a communication is that which the recipient correctly, or mistakenly but reasonably, understands that it was intended to express. Restatement, Second, Torts §§ 559, 563.

See also Actionable per quod; Actionable per se; Journalist's privilege; Libel; Slander.

—*Black's Law Dictionary*, 1979

Immunity …. *Immunity from prosecution.* By state and federal statutes, a witness may be granted immunity from prosecution for his or her testimony (*e.g.* before grand jury). States either adopt the "use" or the "transactional" immunity approach. The federal government replaced the later with the former approach in 1970. The distinction between the two is as follows: "Use immunity" prohibits witness' compelled testimony and its fruits from being used in any manner in connection with criminal prosecution of the witness; on the other hand, "transactional immunity" affords immunity to the witness from prosecution for offense to which his compelled testimony relates.

Protection from prosecution must be commensurate with privilege against self incrimination, but it need not be any greater and hence a person is entitled only to protection from prosecution based on the use and derivative use of his testimony; he is not constitutionally entitled to protection from prosecution for everything arising from the illegal transaction which his testimony concerns (transactional immunity). Kastigar v. U.S., 406 U.S. 441, 92 S.Ct. 1653, 32 L.Ed.2d 212….

—*Black's Law Dictionary*, 1979

infamous …. *Infamous crime;* in law, a crime or offense which renders the offender liable to infamous punishment, such as capital punishment or incarceration in the penitentiary….

—*Webster's Universal Dictionary of the English Language*, 1910

Language. Any means of conveying or communicating ideas; specifically, human speech, or the expression of ideas by written characters or by means of sign language. The letter, or grammatical import, of a document or instrument, as distinguished from its spirit; as "the language of a statute." As to "offensive language," see **Offensive language.**

—*Black's Law Dictionary*, 1979

MILITIA. The military force of the nation, consisting of citizens called forth to execute the laws of the Union, suppress insurrection, and repel invasion....

—*Bouvier's Law Dictionary*, 1889

Militia…. The militia system in the common understanding of the term must be distinguished from "draft" (which is now usually understood as an occasional conscription for special emergencies; like the French *milice* from 1688 to 1789) and "compulsory military service" (which is peacetime conscription for extended training, somewhat similar to the militia idea). The true militia system as a legal tradition is based upon the obligation of every man to serve his nation. Froissart tells even of the duty of a man to train himself and his children to effective use of the long bow. It has no relation basically to the National Guard in the United States or the Territorials in England, because these are volunteer units. It is distinguished from the military systems of most modern states in that they maintain substantial standing armies to which the citizen forces are only supplements, however numerous, and that the militia system, as in Switzerland, is presumed to comprise the whole of the armed force. It is definitely localized, with emphasis on personnel procurement by geographical unit rather than directly from the larger state to the individual. It is considered a defensive force…."

—*Encyclopædia Britannica*, 1948

Punishment. Any fine, penalty, or confinement inflicted upon a person by the authority of the law and the judgment and sentence of a court, for some crime or offense committed by him, or for his omission of a duty enjoined by law. A deprivation of property or some right. But does not include a civil penalty redounding to the benefit of an individual, such as a forfeiture of interest. People v. Vanderpool, 20 Cal.2d 746, 128 P.2d 513, 515. See also **Sentence.**

Cumulative punishment. An increased punishment inflicted for a second or third conviction of the same offense, under the statutes relating to habitual criminals. To be distinguished from a "cumulative sentence," as to which see **Sentence.**

Cruel and unusual punishment. Such punishment as would amount to torture or barbarity, and any cruel and degrading punishment not known to the common law, and also any punishment so disproportionate to the offense as to shock the moral sense of the community. In re Kemmler, 136 U.S. 436, 10 S.Ct. 930, 34 L.Ed. 519. Punishment which is excessive for the crime committed is cruel and unusual. Coker v. Georgia, 433 U.S 584, 97 S.Ct. 2861, 53 L.Ed.2d 982. The death penalty is not per se cruel and unusual punishment within the prohibition of the 8th Amendment, U.S. Const., but states must follow strict safeguards in the sentencing of one to death. Gregg v. Georgia, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859. See also **Capital** *(Capital punishment);* **Corporal punishment; Excessive punishment; Hard labor.**

Infamous punishment. Punishment by imprisonment, particularly in a penitentiary. Sometimes, imprisonment at hard labor regardless of the place of imprisonment. U.S. v. Moreland, 258 U.S. 433, 42 S.Ct. 368, 66 L.Ed. 700. —*Black's Law Dictionary*, 1979

Sedition. Communication or agreement which has as its objective the stirring up of treason or certain lesser commotions, or the defammation (sic) of the government. Sedition is advocating, or with knowledge of its contents knowingly publishing, selling or distributing any document which advocates, or, with knowledge of its purpose, knowingly becoming a member of any organization which advocates the overthrow or reformation of the existing form of government of this state by violence or unlawful means. An insurrectionary movement tending towards treason, but wanting an overt act; attempts made by meetings or speeches, or by publications, to disturb the tranquillity of the state. See 18 U.S.C.A. § 2383 *et seq.;* see also **Alien and sedition laws; Smith Act.** —*Black's Law Dictionary*, 1979

Smith Act. Federal law which punishes, among other activities, the advocacy of the overthrow of the government by force or violence. An anti-sedition law. 18 U.S.C.A. § 2385. —*Black's Law Dictionary*, 1979

Tax court. The United States Tax Court is a court of record under Article I of the Constitution of the United States (*see* I.R.C. § 7441). The Court was created originally as the United States Board of Tax Appeals by the Revenue Act of 1924 (43 Stat. 336), an independent agency in the executive branch, and continued by the Revenue Act of 1926 (44 Stat. 105), the Internal Revenue Code of 1939, and the Internal Revenue Code of 1954. A change in name to the Tax Court of the United States was made by the Revenue Act of 1942 (56 Stat. 957), and the Article I status and change in name to United States Tax Court was made by the Tax Reform Act of 1969 (83 Stat. 730).

The Tax Court tries and adjudicates controversies involving the existence of deficiencies or overpayments in income, estate, gift, and personal holding company surtaxes in cases where deficiencies have been determined by the Commissioner of Internal Revenue.

The U.S. Tax Court is one of three trial courts of original jurisdiction which decides litigation involving Federal income, death, or gift taxes. It is the only trial court where the taxpayer must not first pay the deficiency assessed by the IRS. The Tax Court will not have jurisdiction over a case unless the statutory notice of deficiency (*i.e.,* "90-day letter") has been issued by the IRS and the taxpayer files the petition for hearing within the time prescribed.

State tax courts. Such courts exist in certain states, *e.g.* Maryland, New Jersey, Oklahoma, Oregon. Generally, court has jurisdiction to hear appeals in all tax cases and has power to modify or change any valuation, assessment, classification, tax or final order appealed from. Certain of these tax courts (*e.g.* Minnesota) have small claims sessions at which citizens can argue their own cases without attorneys.

—*Black's Law Dictionary*, 1979

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