

THE ODD CLAUSES



UNDERSTANDING *the* CONSTITUTION
THROUGH TEN *of* ITS
MOST CURIOUS PROVISIONS

JAY WEXLER

The Odd Clauses

Understanding the Constitution through
Ten of Its Most Curious Provisions



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THE ODD CLAUSES

For my father and Mary

Introduction

The Constitution of the United States contains some of the most powerful and well-known legal provisions in the history of the world. The First Amendment, for example, gives us the right to speak our minds without government interference. The equal protection clause of the Fourteenth Amendment stops the state from discriminating against us because of our race or gender. And the Fourth Amendment, as our television crime dramas continually remind us, prevents the police from searching our homes without a warrant. I would bet that in the past twenty years, several hundred books have been written about these important clauses, and for good reason. This book, however, is not one of them.

Instead, this book will shine a much-deserved light on some of the Constitution's lesser-known clauses—its benchwarmers, its understudies, its unsung heroes, its crazy uncles. To put it another way, if the Constitution were a zoo, and the First, Fourth, and Fourteenth amendments were a lion, a giraffe, and a panda bear, respectively, then this book is about the Constitution's shrews, wombats, and bat-eared foxes. And believe me, if you've never laid eyes on a bat-eared fox before, you are in for a treat.



The idea for *The Odd Clauses* descended upon me about a decade ago. I was working as a lawyer in a small office in the United States Department of Justice called the Office of Legal Counsel. The OLC, as it's known, is the office that is primarily responsible for advising parts of the executive branch—from the various administrative agencies to the attorney general to the White House itself—on issues of constitutional law. You may recall how the OLC made headlines when (long, *long* after I left) it issued the so-called torture memo to justify some of George W. Bush's more extreme foreign policy strategies. When I was at the office, a lot of our work involved reviewing bills to see if they raised any constitutional problems. Sometimes we provided informal advice to an agency head or White House bigwig. Other times, we would write more formal legal opinions on issues that came up in the day-to-day life of the executive branch: Can the president withhold information about a pardon decision from curious members of Congress? Can the president designate a national monument in the middle of the ocean? When (if ever) can presidents refuse to enforce a law that they genuinely believe is unconstitutional?

Like most lawyers, I had taken my share of constitutional law classes while in law school, which means that, for the most part, I had studied the big-time clauses—the constitutional lions, tigers, and bears. I had taken the obligatory Introduction to Constitutional Law course in my first year and learned about the due process and equal protection clauses. In my second year, I learned about freedom of speech and religion in a course on the First Amendment. The Fourth, Fifth, and Sixth amendments were the topics of a third-year course in criminal procedure. Because I had a special interest in constitutional law and had heard great things about the professor, I also took a course in voting rights, which in-

volved studying a few obscure parts of the Constitution, like the clause in Article IV which says that “the United States shall guarantee to Every State in this Union a Republican Form of Government,” but which does not, thank goodness, have anything to do with the Republican Party.

In other words, even though I studied a good deal of constitutional law during my three years in law school, I graduated without knowing anything about most of our founding document. The Constitution, including its twenty-seven amendments, has thousands of words in it, but the well-known parts, even if we generously assume that these include its general provisions establishing the government’s three branches, make up only a small percentage of it. The rest of the text is a smorgasbord of clauses that hardly anybody ever talks about in law school, much less anyplace where normal people congregate.

As I quickly learned when I started working at OLC, however, some of these constitutional shrews are incredibly important. Although we worked on plenty of due process and free speech issues, we spent at least as much of our time on parts of the Constitution that I had never run into before. Who knew how much effort an office could exert thinking about the “recommendations clause” of Article II, Section 3—specifically, whether its mandate that the president recommend to members of Congress “such Measures *as he shall judge necessary*” (emphasis mine) renders unconstitutional laws that *require* the president to make policy recommendations to Congress? Who knew how high tensions could flare over the question of what makes someone an “inferior officer” under the “exceptions clause” to Article II’s “appointments clause,” such that he or she might be appointed by someone other than the president? Part of the reason nobody studies these things in law school is that law professors tend to use judicial decisions to teach the law. For a variety of procedural and other reasons, however, many of the

Constitution's odd clauses—particularly those that allocate power between the branches—never make it to any court. No court means no judicial opinion means nobody in law school thinks about it. But that doesn't mean the clauses do not play extremely significant roles in shaping the nation's constitutional democracy.

It was about a year after I started working at OLC that the idea for the book hit me. I remember the exact day. Bill Clinton was on a trip in Africa, and a village wanted to make him an honorary something or other. The president wondered whether this would violate the "title of nobility clauses," which prohibit officers of the United States from accepting any "office" or "title" from any "King, Prince, or foreign state." The question had to be figured out fairly quickly, so the question came to our office. One of my colleagues was assigned the issue, and in my head I can still see her running around from office to office frantically asking if anyone knew anything about what the title of nobility clauses did and did not prohibit. I had never heard of the title of nobility clauses, so I was no help to my friend. Indeed, I don't recall ever hearing what the answer to the question turned out to be, but I do remember formulating a vague plan that very afternoon to someday write a book about these odd constitutional creatures.

At first, I have to admit, my motivation for pursuing this project was mostly about the cool trivia aspect of learning about the odd clauses. There are title of nobility clauses in the Constitution? How strange! The Supreme Court has original jurisdiction to hold trials in cases where one state sues another state? That's wacky! I still find this trivia fascinating, and I hope you will, too, but as I started focusing more seriously on writing the book, I realized that there are more substantial reasons for studying and writing about the odd clauses.

For one thing, as you will see throughout this book, many of the Constitution's odd clauses raise issues that make

front-page news. Maybe you've heard of some of them: Was Hillary Clinton's appointment to be secretary of state unconstitutional because the position got a pay raise while she was still in the Senate? Was it constitutional for Norman Schwarzkopf to accept an honorary knighthood from the queen of England? Could the government use its "marque and reprisal" power to send private ships after Somali pirates? Who owns Ellis Island—New York or New Jersey? Why could George W. Bush appoint a radically conservative judge to an important court without getting Senate approval? Would Barack Obama's plan to tax banker bonuses at 90 percent have violated the Constitution's ban on legislative punishment? And while we're talking about Obama—what's up with the "birther" movement that (crazily) thinks our forty-fourth president was born overseas and is therefore ineligible to serve in the country's highest office?

Even the odd clauses that you don't run across in the papers play a huge role in structuring and limiting our government. Some clauses are so clear, and work so well, that they shape our everyday lives in profound ways without ever calling attention to themselves. They make up, in other words, the background conditions—the constitutional scenery—against which we go about our daily affairs. The Constitution, for instance, says that nobody under thirty-five years of age can become president. This never makes the news, because it's such a part of our culture that nobody ever questions it. But what if the Constitution did not contain such an age requirement? Might Macaulay Culkin have capitalized on the spectacular success of *Home Alone* and run for president back in the early 1990s? The Third Amendment prohibits the army from quartering its troops in private homes in most situations. This seems uncontroversial, but imagine if the clause didn't exist. Might the army try to save money (lots of money) by forcing citizens to open up part of their homes to put up members of the armed forces? Not inconceivable. And horrible to contemplate. Examples like this abound in

the Constitution. What if members of Congress *could* routinely be arrested on the way to and from work? What if the government *could* make someone take a religious oath before taking office?

Moreover, who knows when today's odd clause will end up being tomorrow's superstar? Constitutional law is dynamic. It may not always change quickly (though sometimes it does), but it does reliably change over time. Constitutional provisions rise and fall in importance. The First Amendment's "free exercise of religion clause," for instance, was really important for about twenty-five years before the Court took away much of its force in a 1990 case. Just a few years ago, the Court suddenly breathed new life into the Second Amendment when it held that there are limits on how the government may regulate gun ownership. The Court similarly reinvigorated the long-forgotten "privileges and immunities clause" of the Fourteenth Amendment in 1999, when it held that a California statute limiting the welfare benefits of new citizens of the state violated the clause's inherent "right to travel" component. Who knew? Just as a new discovery might catapult a previously unsung animal to the limelight—think here of the armadillo's sudden fame when it was discovered that studying it could give doctors insight into treating leprosy in humans—a change in jurisprudential trends or court personnel might just make today's Third Amendment into tomorrow's, well, Fourth Amendment.

Finally, all the clauses of the Constitution, regardless of their current or future significance, are important for understanding the historical meaning and purpose of the document as a whole. We simply cannot comprehend fully what the framers were up to simply by reading a select few phrases and clauses of the Constitution, some of which (like the First Amendment) didn't even achieve prominence until at least a hundred years after they were written. No matter how odd some of the Constitution's clauses may seem to us now, the

fact is that for the framers, *none* of them were odd. Everything had a purpose. Nothing was just thrown in there for fun. If we want to understand the meaning of the Constitution as a whole, then, we need to study all its parts. Just as we can't understand the animal kingdom by studying just a few animals, so too we cannot understand the Constitution (to say nothing of our constitutional democracy that we spend so much time bragging about to the rest of the world) by focusing only on its most prominent features and ignoring its many fascinating odd parts.



But which clauses to write about? The Constitution has a lot of seemingly odd clauses in it, and I didn't want to write an encyclopedia of the entire thing, so I had to winnow the clauses down to some manageable number. I ended up writing about ten, but in the course of thinking about the book, I considered close to twenty. I talked to a lot of people about a lot of clauses and presented the idea to the faculties of several law schools. Inevitably in these discussions, the question of what makes a clause "odd" would come up. It turned out that people had a lot of different theories of "oddness." For some, it's the historically anachronistic clauses—like the one about how slaves would count as three-fifths of a person for determining a state's population (incidentally, this was included to *decrease* the influence of the slaveholding states in the national legislature)—that are particularly odd. For others, the real odd clauses are those where it's hard to understand *why* the framers would have included them. Still others suggested that the truly odd clauses are the ones that deal with relatively insignificant matters (creating post roads, for example) that seem to be beneath the dignity of the Constitution.

In the course of all these discussions, I thought a lot about oddness, and so I figure I should say a few words about what

makes me think a clause is “odd.” For me, it’s the specificity of the clauses I’ve chosen to discuss that make them so intriguing.

The Constitution performs a set of incredibly important functions in establishing and structuring our democracy. It sets up the three branches of government, allocates powers among them, and keeps the branches separate. It lays out the division of power between the federal government and the states, provides the framework for our international relations, and sets out minimum qualifications for the nation’s most important officers. It protects our privacy, our liberty, and our right to be treated by the government as equals.

To perform each of these critical functions, the Constitution uses two types of provisions. Some clauses are broad and exceptionally vague. With these clauses, it is almost impossible to know what they mean without seeing how courts actually apply them in specific cases. These tend to be the lions and tigers of constitutional law, like the First Amendment, which says that “Congress shall make no law . . . abridging the freedom of speech” or parts of Article I, Section 8, where the Constitution grants to the Congress such general powers as “regulat[ing] Commerce . . . among the several states” or making laws which are “necessary and proper” to carry out its functions.

In addition to these liony clauses, however, the framers of the Constitution also included a bunch of extremely narrow bat-eared-fox-like clauses to handle very specific issues and problems that related to their broad goals. Thus, while the Constitution protects equality generally through the Fourteenth Amendment’s equal protection clause, it also protects equality through the title of nobility clauses, which prohibit the government from making anybody a duke or duchess. While the Constitution governs our foreign affairs by making the president the commander in chief and giving Congress the authority to declare war, it also authorizes the

granting of letters of marque and reprisal to private ships as a way of combating piracy. And while the Constitution allocates power between the federal government and the states through a complicated combination of general clauses, it also, through Section 2 of the Twenty-first Amendment, arguably gives states the authority to make laws governing intoxicating liquors that would otherwise violate a variety of constitutional commands.

It is worth noting one other important thing about these odd clauses. Because the clauses are so narrow, they can be understood fairly quickly without reading hundreds of complicated cases and five legal treatises to get a handle on them. This, in turn, makes these clauses much more convenient for talking and thinking about broad constitutional themes than some of the document's more nebulous clauses. To draw one last analogy to the animal kingdom, then, these odd clauses, in addition to being like shrews and wombats, are also like the *drosophila* fruit flies of the constitutional kingdom. They are funny little creatures that are uniquely suited to help us understand the larger kingdom of which they are a part. To that end, each of the book's ten chapters introduces one of the Constitution's odd clauses—its history, its stories, its controversies, its possible future—and then links the odd clause to some general principle or function of constitutional law (protecting privacy, separating powers, governing foreign affairs), so that you will come away from the book not *just* with a bunch of cool constitutional trivia, and not *just* with a lot of additional knowledge about some really important specific constitutional provisions, but also with a thorough understanding of our constitutional system generally.



Okay, step inside. The constitutional zoo is now open for business. Please don't feed the animals.

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CHAPTER I

The Incompatibility Clause

Separation of Powers

No Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office.

Article I, Section 6

When presidents take office and are looking around to fill their most important posts, they often turn to former members of Congress as possible appointees. This is hardly surprising. Former members of Congress know their way around Washington and can jump right in to help achieve a president's policy goals. In the past few administrations, quite a few prominent former members of Congress have held high government office, from Jack Kemp to Al Gore to Dick Cheney to Hillary Clinton.

But have you ever noticed that nobody is ever both a bigwig official in the administration and an acting member of Congress *at the same time*? Have you ever wondered why that is? It's not because nobody would gain from such an arrangement—presidents would be able to gain support for their programs by promising members of Congress plum positions; members of Congress would gain power and